Bombay High Court Shirish Finance & Investment (P.) ... vs M. Sreenivasulu Reddy on 28 September, 2001 Equivalent citations: 2002 (1) BomCR 419 Author: Singh Bench: B Singh, S Radhakrishnan JUDGMENT Singh, C.J. 1. This batch of appeals has been preferred by the several defendants against the order passed by a learned Judge of this Court exercising original jurisdiction in Notices of Motion No. 3120 of 1997 and 3932 of 1998 in Suit No. 3910 of 1997 M. Sreenivasulu Reddy v. Kishore R. Chhabria [2001] 34 SCL 1. In the suit, the plaintiffs have challenged the substantial acquisitions of shares of defendant No. 12 by some of the defendants on the ground of the acquisitions being in breach of regulations framed by the Securities & Exchange Board of India (SEBI), which had come into force with effect from 7-11-1994. The learned Judge, by the impugned common order, made the notices of motion absolute in part. It was held that the plaintiffs do have a prima facie right to maintain the suit to seek a declaration that the acquisition of the disputed shares is void being in breach of the SEBI (Substantial Acquisition of Shares and Takeovers), Regulations, 1994 ('the 1994 Regulations'). It has also been held that the civil court does have jurisdiction to interpret the provisions of the statute and the 1994 Regulations so as to lay down the correct interpretation and the frontiers of jurisdiction of the statutory authorities concerned. It is, however, held that the exercise of jurisdiction by the court should not be extended to an extent so as to infringe the jurisdiction of the SEBI. That, prima facie, a suit was maintainable in common law for rectification of the company's membership register. The consequential decision on disinvestment, however, will have to be arrived after considering all aspects including a hearing by the SEBI in which case the actual order of disinvestment could be passed by the SEBI or the SEBI may pass any other order which it is entitled to pass, such as directing a post-facto public announcement which will include the disputed shares. The concerned shareholders, in the meantime, have been held to be entitled to all their rights, even if their names are ultimately removed from the register, but the right to vote on the basis of their shareholding could be restricted by this Court or by the SEBI. In view of these findings, it has been ordered that- (i) Defendant Nos. 1 to 11 and their power of attorney and proxy-holders be restrained from exercising voting rights directly or indirectly insofar as they pertain to shares detailed in paragraph 18(ii) and (III) of the plaint, the shares acquired by Imfa Holdings (P.) Ltd., Mahameru Trading (P.) Ltd., and Shirish Finance & Investments Ltd., Defendant Nos. 3, 4 and 5, respectively, with a rider that any policy decision to be taken by the board of directors on items such as sale of assets, amalgamation, merger, etc., if objected to by defendant Nos. 1 to 11 in writing shall not be implemented for a period of 8 weeks from the date on which the decision is communicated to the defendants. Any objection in this behalf shall be furnished to defendant No. 12 company within 4 days from the date of meeting. (ii) As stated by the counsel appearing on behalf of defendant No. 12, no general meeting shall be held except with the prior application to this court until SEBI decides the notices before it and/or until further orders. (III) As a consequence, votes which have been segregated, viz., those which pertain to the shares covered under paragraph 18(ii) of the plaint will have to be counted

as valid votes while deciding the disputed items on the agenda of the meeting of 30-12-1998. (iv) The votes of the shareholders who are covered under paragraph 18(i) to (iii) of the plaint will be excluded while arriving at the result. 2. As earlier observed, the aggrieved defendants have preferred these appeals. Defendant No. 1, Kishor R. Chhabria, is appellant in Appeal No. 8 of 2000. Defendant No. 5 is the appellant in Appeal No. 6 of 2000. Defendant No. 4 is the appellant in Appeal No. 7 of 2000. Defendant No. 11 is the appellant in Appeal No. 11 of 2000. Defendant Nos. 7 and 8 are appellants in Appeal No. 12 of 2000 and Defendant No. 3 is the appellant in Appeal No. 13 of 2000. 3. The main issue which arises for consideration in this batch of appeals is whether the acquisition of shares in defendant No. 12 company/ Herbertsons Ltd„ by defendant Nos. 3, 4, 5, 7 and 8 is not in breach of the 1994 Regulations, and further whether the conversion of debentures of defendant No. 12 into shares in favour of defendant No. 2 is in breach of the aforesaid Regulations. The plaintiffs contend that such conversion and acquisitions are void since they offend the provisions of the 1994 Regulations, and, therefore, the register of members of the company be suitably modified to exclude the names of the persons /companies who have so acquired the shares. 4. The defendants, who are the appellants before us, on the other hand, contend that the conversion of debentures into shares, and the acquisition of shares by the aforesaid defendants, do not in any manner breach the provisions of the 1994 Regulations or the Regulations framed in 1997. Moreover, the defendants have no right to claim rectification of register of members of the company by filing the suit before a civil court. 5. On a consideration of the material placed before the Court, the learned Judge has found a prima facie case in favour of the plaintiffs/respondents herein and has, therefore, passed the impugned order making the notices of motion absolute in part, inter alia, by freezing the voting rights only in respect of shares acquired by defendant Nos. 3, 4 and 5, namely, Imfa Holdings (P.) Ltd., Mahameru Trading (P.) Ltd., and Shirish Finance & Investments Ltd. 6. Suit No. 3910 of 1997 was filed on the original side of this Court on 27-10-1997. There are 11 plaintiffs in the suit and 12 defendants. The plaintiffs include 9 individuals and 2 private limited companies. They claim to be the shareholders of Herbertsons Ltd., defendant No. 12, holding 4,23,950 equity shares in defendant No. 12 Company representing 4.45 per cent of the subscribed capital of defendant No. 12 company. They have described themselves as 'Reddy Group' which has been associated with Herbertsons since prior to 1979. They were earlier distributing Herbertsons products in various parts of India including the States of Tamil Nadu, Andhra Pradesh and Kerala, and they claim to have expended several crores of rupees to establish the various brands of Herbertsons in these States and on setting up and/or purchasing various distilleries for the purposes of production and/or bottling of liquor exclusively for the United Breweries Group (the UB .Group), including defendant No. 12 company. Herbertsons Ltd., has been, for the past many decades, a constituent of the UB Group which was at one time controlled by late Vittal Mallya and his family, and after his demise by his son Vijay Mallya. The issued and paid-up capital of Herbertsons Ltd., is Rs. 9,52,23,230 divided into 95,22,323 equity shares of Rs. 10 each. The

principal business of UB Group is manufacture and sale of liquor. 7. Defendant Nos. 2 to 10 are companies owned and/or controlled by defendant No. 1, Kishore R. Chhabria. Defendant No. 11 is Mr. Madan D. Chhabria, an uncle of defendant No. 1, though not a 'relative' within the meaning of Section 6 of the Companies Act, 1956 ('the Act'). Sometime in December 1993, the aforesaid defendant No. 1 through defendant Nos. 2 and 6 to 10 acquired 22,15,800 equity shares in defendant No. 12company aggregating 26 per cent of the voting rights in respect of the paid-up share capital of Herbertsons Ltd., through negotiations. (These shares are not the subject-matter of dispute in the suit). Vijay Mallya (not party to the suit) owns 23,71,422 equity shares in defendant No. 12 company, representing 24.90 per cent of the subscribed capital as on 31 -3-1997 by himself and/or his companies and/or his nominees. The case of the plaintiffs is that between May 1995 and May 1997, defendant No. 1 through companies owned and/or controlled by him, viz., defendant Nos. 2 to 5 acquired in direct contravention of the law further shares in Herbertsons Ltd. Defendant No. 12 company. The various acquisitions have been detailed in the plaint as under: (a) On 14-12-1993, Airedale Investment & Trading (P.) Ltd., defendant No. 2 company, acting in concert with defendant Nos. 1 and 3 to 11, acquired through negotiations 75,000 fully convertible debentures which were purported to be converted into 3,75,000 equity shares on 11-8-1995. The conversion of the debentures into equity shares was done after the 1994 Regulations had come into force and this was done without making a public announcement. (The trial Judge has held that since the debentures were purchased before the 1994 Regulations came into force, no relief, at this stage, could be granted to the plaintiffs in respect of these shares.) (b) In December 1995, Imfa Holdings (P.) Ltd., defendant No. 3 company, acting in concert with defendant Nos. 1, 2 and 4 to 11, purported to acquire further 10,39,091 shares in defendant No. 12 company from the open market without making a public announcement of their intention to acquire further shares from the open market in accordance with the 1994 Regulations which had come into force on 7-11 -1994. These shares represent 10.91 per cent of the share capital of defendant No. 12 company, and though initially, the application for transfer of shares was rejected on 3-1-1996, later defendant No. 12 company registered the transfer on 30-5-1996. (c) Similarly, in or about September 1996, Mahameru Trading Co. (P.) Ltd., defendant No. 4 company, acting in concert with defendant Nos. 1 to 3 and 5 to 11, purported to acquire 4,72,250 equity shares in defendant No. 12 company from the open market without making a public announcement, and in breach of the 1994 Regulations. These shares represent 4.97 per cent of the share capital of defendant No. 12 company and the transfer of these shares was registered by defendant No. 12 company on 26-9-1996. (d) Similarly, in May 1997, Shirish Finance & Investment (P.) Ltd., defendant No. 5 company, acquired 3,64,750 equity shares representing 3.83 per cent of the share capital of defendant No. 12 company, and applied for registration of transfer. The application for transfer was, however, rejected by defendant No. 12 company on 17-7-1997. These shares were also acquired without making a public announcement as required by the 1997 Regulations which had come into force with effect from 20-2-1997. (e) After the filing

of the suit, the plaintiffs came to learn about Imfa Holdings (P.) Ltd., defendant No. 3 having acquired further shares in defendant No. 12 company and they, therefore, amended the plaint to incorporate and impugn these transactions as well. It was stated that defendant No. 3 had acquired further 54,000 equity shares representing 0.56 per cent of the paid-up share capital of defendant No. 12 company from the open market, acting in concert with defendant Nos. 1, 2 and 4 to 11 without making a public announcement as required by the 1997 Regulations. (f) Similarly, Beethoven Traders (P.) Ltd. and Darrel Traders (P.) Ltd. Defendant Nos. 7 and 8 respectively, purported to acquire further 1,25,000 and 25,800 shares, respectively, representing 1.31 per cent and 0.27 per cent of the paid-up capital of defendant No. 12 company. (The record discloses that defendant No. 7 acquired these shares between 10-9-1998and 19-9-1998 while defendant No. 8 acquired the shares on 16-12-1998). The additional shares acquired by defendant Nos. 3, 7 and 8 have not been registered in the register of members of defendant No. 12 company in favour of the aforesaid companies. 8. It is alleged that the aforesaid purported acquisitions were made by and/or for defendant Nos. 1 to 11 for a common objective and purpose of substantial acquisition of shares and voting rights in order to gain control over Herbertsons Ltd., defendant No. 12 company by co-operating on the basis of an understanding/agreement to gain such control. The plaintiffs, therefore, filed the suit for a declaration that the aforesaid acquisition of shares being contrary to the express provisions of law, conferred no rights directly or indirectly on the persons purporting to acquire the shares, and for consequential reliefs. 9. It is further averred that defendant Nos. 7 and 8 claim that they had lodged application for registration of transfer on 19-12-1998. Defendant Nos. 3, 7 and 8 have also filed Suit No. 297 of 1999 for a declaration that they are the beneficial owners of the shares so purchased by them from the open market. Defendant Nos. 7 and 8 also claim to have learnt that at the meeting of the board of directors of defendant No. 12 company held on 24-12-1998, Defendant No. 12 company has refused to register the said shares in the names of defendant Nos. 7 and 8 respectively. 10. In paragraph 6 of the plaint, it is averred that as a result of initial acquisition of 26 per cent and the subsequent purported conversion of fully convertible debentures and purported acquisition of the shares referred to above aggregating to a further 29.91 per cent of the subscribed capital of defendant No. 12 company, defendant No. 1 along with defendant Nos. 2 to 10 acting in concert with defendant No. 11 acquired 46.91 per cent of the voting rights in respect of the paid-up share capital of Herbertsons Ltd., Defendant No. 12 company and management thereof without following the legal process, by entering into clandestine transactions and constituting undesirable practices which negates the transparency, and fair and truthful disclosure in the interest of the public and contrary to public policy and the policy of the Government. 11. The plaintiffs have further claimed that over the years, they had invested vast sums of money, inter alia, on the distribution and marketing, and recently the production of the various products of Herbertsons. Furthermore, in the State of Tamil Nadu alone, the Reddy Group had expended in excess of Rs. 10 crores from 1985-86 onwards to promote and establish the products of Herbertsons in

the market. This was done in view of the faith and understanding the Reddy Group has in the UB Group and the existing management of Herbertsons Ltd. 12. It is further averred that in the annual general meeting of Herbertsons Ltd., held in the years 1995 and 1996. Defendant Nos. 2, 3 and 4 purporting to act as shareholders did not disturb the existing management of Herbertsons Ltd., which had continued over several years. But the plaintiffs apprehended that as a result of the proper rejection of the transfer of shares lodged by defendant No. 5, defendant No. 1 and the persons acting in concert with him, viz., defendant Nos. 2 to 11 intended to dislodge the existing management. The aforesaid defendants intended to dislodge three existing directors, resolutions for whose re-appointment had also been issued, by purporting to exercise voting rights in respect of the shares held by them as they intended to defeat the aforesaid Resolution by exercising their voting rights. The plaintiffs who hold shares aggregating 4.45 per cent in defendant Nos. 12 company were constrained to take appropriate steps to prevent defendant Nos. 2 to 5 from exercising voting rights in respect of the shares which have been acquired by them in clear contravention of the SEBI Regulations of 1994 and 1997. 13. In paragraph 12 of the plaint, the plaintiffs have averred that they came to know about acquisitions made by Kishore R. Chhabria, defendant No. 1 from an article which appeared in the Economic Times, Bombay Edition of 15-6-1997. Moreover, defendant Nos. 1 and 11, viz., Kishore R. Chhabria and Madan D. Chhabria have unequivocally claimed that they are persons having control over defendant Nos. 2 to 10 companies, and they are acting in concert with each other which is evident from the declaration dated 17-4-1997 filed by defendant No. 1 with Herbertsons Ltd., defendant No. 12 company, pursuant to the requirements of Regulation 3(3) of the 1997 Regulations. The plaintiffs believe that similar declaration has been filed by defendant No. 1 with Herbertsons Ltd., defendant No. 12 under Regulation 8(2) of the 1997 Regulations. Similarly, defendant No. 11 and other defendants have also filed similar declarations with Herbertsons Ltd., defendant No. 12. 14. The plaintiffs contend that without making a public announcement, defendant Nos. 3 to 5 acting in concert with defendant Nos. 1 and 11 purported to acquire further shares referred to in paragraph 4(b) and (c) of the plaint after the 1994 Regulations came into force with effect from 7-11-1994 as well as the shares referred to in paragraph 4(d) after the 1997 Regulations came into effect from 20-2-1997. Even the purported acquisition of voting rights by conversion of the 75,000 fully convertible debentures into 3,75,000 shares was without due compliance with the provisions, inter alia, of Regulation 9(3) of the 1994 Regulations. The contravention, inter alia, of any of the provisions of Regulation 9 or 10 of the 1994 Regulations and Regulation 11 of the 1997 Regulations has the necessary consequence of making the acquisition of further shares or voting rights in respect thereof void under Section 23 of the Indian Contract Act being contrary to law as well as on account of the penal provisions in the Securities and Exchange Board of India Act, 1992. Furthermore, the provisions of Regulation 12 of the 1997 Regulations prohibit defendant Nos. 1 to 11 from acquiring control over Herbertsons Ltd., defendant No. 12, in view of the failure of defendant Nos. 1 to 11 to follow the provisions of law

and Regulations made thereunder. The plaintiffs were, therefore, entitled to a declaration that defendant Nos. 2 to 5 are not entitled to exercise voting rights in respect of the shares referred to in paragraph 4(a) to (d) respectively being voting rights acquired upon subsequent conversion of the fully convertible debentures and being the further shares acquired in addition to the initial 26 per cent of the paid-up capital of Herbertsons Ltd., defendant No. 12, at the annual general meeting of Herbertsons Ltd., to be held on 27-10-1997 or any adjournment thereof. The plaintiffs claim that they are also entitled to a further declaration that defendant Nos. 2 to 5 are not entitled to exercise voting rights in respect of the aforesaid shares at any annual general meeting or extraordinary general meeting of Herbertsons Ltd., defendant No. 12. 15. The plaintiffs have averred that had such public announcement, as required by Jaw, been made by the concerned defendants, the plaintiffs would have made competitive bids for the acquisition of the shares involved. The plaintiffs continue to be ready and willing to do so. Apart from other legal submissions, the plaintiffs have also submitted that as shareholders, their valuable rights of property are being adversely affected by the breaches of law by defendant Nos. 1 to 11 and the plaintiffs are, therefore, entitled to bring these flagrant violations of law to the notice of the Court, and to seek the reliefs prayed for, by acquiring further shares and voting rights in defendant No. 12 company in breach of law. Defendant Nos. 1 to 11 are detrimentally affecting, and continuing to affect the rights and interests of the plaintiffs, the other shareholders and the public. 16. In the circumstances, the plaintiffs have submitted that the Court may be pleased to declare that the purported conversion of debentures into equity shares in favour of defendant No. 2 and the purported acquisition of the aforesaid shares by defendant Nos. 3 and 4 be declared to be illegal, null, void ab initio and of no legal effect whatsoever. Similar declarations may be made in respect of shares acquired by defendant Nos. 5, 6, 7 and 8. The plaintiffs have further submitted that the Court may be pleased to grant a permanent injunction restraining defendant No. 12 from registering the shares acquired by defendant No. 5, and that the register of members of Herbertsons Ltd., be rectified and the names of defendant Nos. 2 to 4 be accordingly removed from the register, and defendant Nos. 1 to 11, the power of attorney holders and proxies be permanently restrained from directly or indirectly exercising voting and other rights relating to the aforesaid shares. They also prayed for a permanent injunction restraining defendant No. 12 from registering the shares acquired by defendant Nos. 3, 7 and 8 as aforesaid. Pending the hearing and final disposal of the suit, the plaintiffs prayed for an order freezing the voting rights relating to all the shares detailed in paragraph 18(i) to (iii) of the plaint. (The shares in favour of defendant No. 2 upon conversion and the shares acquired by defendant Nos. 3, 4 and 5). They also prayed for grant of injunction restraining defendant Nos. 1 to 11 and their power of attorney and proxy holders from exercising any rights directly or indirectly including voting rights in respect of the aforesaid shares. They further prayed for an order restraining defendant No. 12 company from registering the shares in the names of defendant Nos. 3, 7 and 8. The plaintiffs finally prayed for the following reliefs : "(a) That this Hon'bie Court be pleased to declare that- (i)

the purported conversion of the said 75,000 F.C.Ds. into 3,75,000 equity shares of Herbertsons in favour of defendant No. 2 on 11th August, 1995 is illegal, null, void ab initio and of no legal effect whatsoever, (ii) the purported acquisition of the said 10,39,091 equity shares in Herbertsons by defendant No. 3 is illegal, null, void ab initio and of no legal effect whatsoever, (iii) the purported acquisition of 4,72,250 equity shares in Herbertsons by defendant No. 4 is illegal, null, void ab initio and of no legal effect whatsoever, (iv) the purported acquisition of 3,64,750 equity shares in Herbertsons by defendant No. 5 is illegal, null, void ab initio and of no legal effect whatsoever, (v) the refusal of Herbertsons to register the said 3,64,750 equity shares in favour of defendant No. 5 was justified as being for sufficient cause, (vi) that this Hon'bie Court be pleased to grant a permanent injunction restraining defendant No. 12 from registering the transfer of the said 3,64,750 shares in favour of defendant No. 5, (vii) [Red ink rider VI] that this Hon'bie Court be pleased to declare that the purported acquisition of 54,000 equity shares in Herbertsons by defendant No. 3 is illegal, null, void ab initio and of no legal effect whatsoever, (viii) [Red ink rider VII] that this Hon'ble Court be pleased to grant a permanent injunction restraining defendant No. 12 from registering the transfer of the said 54,000 shares in favour of defendant No. 3, (ix) [Green ink rider F] that this Hon'ble Court be pleased to grant a permanent injunction restraining defendant No. 12 from registering the transfer of the said 1,25,000 shares and 25,800 shares in favour of defendant Nos. 7 and 8 respectively. (x) [Green ink rider F] that this Hon'ble Court be pleased to grant a permanent injunction restraining defendant No. 12 from registering the transfer of the said 1,25,000 shares and 25,800 shares in favour of defendant Nos. 7 and 8 respectively, (b) that this Hon'ble Court be pleased to direct that the register of members of Herbertsons be rectified as per Clauses (i) and (ii) of para 8 hereinabove and the names of defendant Nos. 3 and 4 be accordingly removed from the said Register as well as the name of defendant No. 2 be removed from the register in so far as it pertains to the purported conversion of 3,75,000 shares, (c) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased:– (i) to freeze the voting rights relating to all the shares detailed in para 18(i) to (in) above, (ii) restrain the defendant Nos. 1 to 11 and their power of attorney and proxy holders from exercising any rights including voting rights directly or indirectly in so far as they pertain to shares detailed in para 18(i) to (iii), (iii) to restrain defendant No. 12from registering the said 3,64,750 shares in the name of defendant No. 5, (iv) [Green ink rider G] to restrain defendant No. 12 from registering the said 54,000 shares the said 1,25,000 shares and the said 25,800 shares in the names of defendant Nos. 3, 7 and 8 respectively, (d) for ad interim relief in terms of prayer (c)(i) to (c)(iii) above : for such further and other reliefs as the facts and circumstances warrant, (e) for costs of the suit." 17. In the suit, the defendants have not yet filed their written statement. However, notice of motion was taken out by the plaintiffs on 23-10-1997, being Notice of Motion No. 3120 of 1997, praying that the Court may be pleased to pass an order of injunction freezing the voting rights in respect of the shares detailed in paragraph 18(i) to (iii) of the plaint, and to restrain the defendant Nos. 1 to 11 from exercising any

rights including voting rights directly or indirectly so far as they pertain to the aforesaid shares. It was also prayed that defendant No. 12 be restrained from registering the shares acquired by defendant No. 5 in the name of defendant No. 5. Ad interim relief in terms of the aforesaid prayers was also asked for. A prayer was also made in the alternative that all the proceedings and decisions taken at the annual general meeting of defendant No. 12 company, scheduled to be held on 27-10-1997 be made subject to orders of this Court on the notice of motion. On 23-10-1997, an ad interim injunction in terms of prayer (b)(i) of the notice of motion was granted until 13-11-1997, and accordingly, it was ordered and directed that all the proceedings and decisions taken at the annual general meeting of defendant No. 12 scheduled to be held on 27-10-1997 will be subject to the orders of this Court on the notice of motion. Thereafter, the annual general meeting was held on 27-10-1997 which proceeded peacefully, and the resolutions moved were passed unanimously by show of hands. The existing management was not disturbed in any manner whatsoever. 18. The next annual general meeting of defendant No. 12 company was to be held on 30-12-1998. Again, the plaintiffs took out Notice of Motion No. 3932 of 1998 with substantially the same prayers. In the affidavit in support of the notice of motion, filed by plaintiff No. 1 on 14-12-1998, it was stated that the plaintiffs had become aware of the devices adopted by the defendants for the acquisition of the shares. It was stated that Royal Wines & Tracstar Investments (P.) Ltd., were proprietary concerns and/ or companies of defendant No. 11. They had advanced huge loans to defendant Nos. 3 to 5 to enable them to purchase the shares of defendant No. 12 company. Defendant No. 3 company with a paid-up capital of Rs. 4,00,200 was given a loan of Rs. 4.13 crores while defendant No. 4 company with a paid-up capital of Rs. 200 was given a loan of Rs. 1.12 crores. Similarly, defendant No. 5 company with a paid-up capital of Rs. 200 was given a loan of Rs. 1.35 crores. From the sums so advanced, the aforesaid defendants had purchased shares in defendant No. 12 company as detailed in the plaint. After purchasing shares in defendant No. 12 company, the aforesaid defendant Nos. 3 to 5 expressed their inability to repay the loans and, therefore, offered their entire paid-up capital in discharge of the loan. Defendant No. 11 is an uncle of defendant No. 1. The plaintiffs also relied upon an investigation report by the SEBI authorities annexed as Annexure 'O' to the affidavit. It was also stated in the affidavit in support of the notice of motion that BDA Ltd., a wholly owned subsidiary of defendant No. 12 company was under the control of defendant No. 1. From the report of the auditors, it appears that for the accounting years 1995-96 and 1996-97, the auditors had pointed out major infirmities. 19. In M. Sreenivasulu Reddy's case (supra) Notice of Motion No. 3932 of 1998 was disposed of by an agreed order dated 21-12-1998 in the following terms : "2. The parties are agreed that for passing ad interim order in following terms on this motion, no reasons are necessary to be recorded. (1) The 61st Annual General Meeting of Herbertsons Ltd. (Defendant No. 12) convened to be held on 30th December, 1998 shall be held and that the resolutions in respect of Item Nos. 2, 6 and 7 of the notice dated 30th November, 1998 convening the said Annual General Meeting (Exh. 'A' to the affidavit dated

14th December, 1998) in support of this motion, shall be passed unanimously by show of hands and without the requirement of taking any poll. Item No. 11 would not be opposed by defendant Nos. 1 to 11. (2) That all other items except those set out in Clause (1) above shall be taken up for consideration by the meeting. The poll, if any, on those items shall be taken. The votes cast by defendant Nos. 2 to 5, which are disputed as mentioned in para 18 of the plaint, shall be kept separately as also all the other votes shall be kept separately, but not counted. The votes shall be kept in separate covers under the seal of the company. The votes, if any, cast by the transferors or their proxies in respect of shares acquired by defendant No. 5 shall be kept in a separate cover. (3) The meeting shall be held and the voting shall be taken under the chairmanship of the person who is to preside over the meeting, but in the present of an officer of this Court, to be nominated by the Prothonotary and Senior Master of this Court. (4) The separate covers in which the votes are to be kept as indicated above shall be sealed by the chairman of the meeting as also the officer who is to be present at the meeting and at the voting as directed above. (5) The officer of the Court shall deposit the containers/envelops with the Prothonotary and Senior Master." (p. 21) 20. We may, at this stage, notice that Chamber Summons No. 1153 of 1998 was moved by the defendants seeking further particulars from the plaintiffs to enable them to file an appropriate reply to the notice of motion and the plaint. This was opposed by the plaintiffs. Later, when the Chamber Summons came up for orders along with the notices of motion, the defendants did not press for any order on the Chamber Summons till the notices of motion were decided. In fact, defendant No. 11 filed his affidavit in reply to the Notice of Motion No. 3120 of 1997 on 21-12-1998. The other defendants, viz., defendant Nos. 1 to 10 have, by and large, adopted the affidavit in reply filed by defendant No. 11. Defendant No. 12 in its reply to Notice of Motion No. 3120 of 1997 adopted its affidavit in reply filed in Notice of Motion No. 3932 of 1998 on 5-2-1999. 21. In this affidavit in reply to Notice of Motion No. 3120 of 1997 defendant No. 11 Madan D. Chhabria has raised several legal objections. He has alleged that the suit has been filed mala fide, and not in the interest of the shareholders of defendant No. 12 company. The suit has been filed to subserve the interests of Vijay Mallya who did not enjoy majority support of the shareholders of the company. The facts stated by the plaintiffs suffered from suppressio veri suggestio falsi Defendant Nos. 3 and 5 had filed appeals being Appeal Nos. 22 and 21 of 1998, respectively, before the CLB under Section 111A(2) of the Act, against the order of defendant No. 12 company refusing to register the shares purchased by them. It was submitted that the instant suit was not maintainable since the CLB a statutory authority, had exclusive jurisdiction to deal with the matter. The plaintiffs had no locus standi to maintain the suit, and not being a derivative action, the suit was not maintainable in law. The suit and the application for interim relief were vitiated by delay, laches, acquiescence and waiver. Further, this Court had no jurisdiction to try entertain and dispose of the suit. The prayer for grant of interim relief was opposed on the grounds that the suit itself was not maintainable, and that the plaintiffs who were set up by Vijay Mallya could not be granted equitable

relief. In any event, it was submitted that defendant Nos. 2 to 10 were the registered owners of 41,03,241 equity shares aggregating 43.09 per cent of the paid-up capital of defendant No. 12 company. They could not, therefore, be prevented from exercising voting rights in respect of the said shares. Moreover, defendant Nos. 2 to 10 held over 50 per cent of the equity capital of defendant No. 12 company out of which 43.09 per cent was registered in the names of some of them. No relief could, therefore, be granted affecting their voting rights violating all tenets of corporate democracy. It is also alleged that the plaintiffs were acting in collusion with Vijay Mallya who was supplying to the plaintiffs relevant material from the record of the company. This is further obvious from the fact that while the plaintiffs have challenged the acquisition of shares by defendant Nos. 1 to 11, they have not challenged the acquisition of 5.2 per cent of the equity shares by the said Vijay Mallya through the companies under his control. 22. Apart from the legal objections, defendant No. 11 has disclosed facts in his affidavit in reply relating to the acquisition of shares by defendant Nos. 2 to 8 companies. The affidavit in reply also reveals the manner in which the acquisition of shares took place through different companies, and how all those companies came under the control of defendant Nos. 1 and 11. It is stated that on 14-12-1993, on the basis of a negotiated arrangement, 22,15,800 equity shares of Herbertsons Ltd., representing 26 per cent of its total equity share capital were sold to defendant Nos. 2, 6, 7, 8, 9 and 10 companies. These shares were purchased under a negotiated arrangement from the companies under the control of Vijay Mallya. This acquisition, undoubtedly, took place before the 1994 Regulations came into effect. Defendant No. 2, Airedale Investment & Trading (P.) Ltd., also purchased 75,000 fully convertible debentures from Vittal Investments Ltd., another company under the control of the said Vijay Mallya. On 11-8-1995, the aforesaid 75,000 fully convertible debentures were converted into 3,75,000 equity shares of Herbertsons Ltd., defendant No. 12. Consequently, the shareholding of the aforesaid six companies increased from 26 per cent to 27.2 per cent of the equity share capital of Herbertsons Ltd. Since each of the aforesaid six companies acquired less than 5 per cent of the equity capital of Herbertsons Ltd., Clause 40A of the Listing Agreement of Herbertsons Ltd., with the Stock Exchange was not attracted. The acquisition of the shares by the aforesaid six companies is not the subject-matter of challenge in the suit. So far as shares acquired by conversion of debentures into shares is concerned, the trial Judge has not granted any relief to the plaintiffs in respect thereof. It is further stated that the aforesaid six companies were under the ultimate control of Galan Finvest (P.) Ltd., ('Galan'). At the relevant time, 80 per cent of the share capital of Galan was owned and controlled by defendant No. 1's nephew, ie., defendant No. 1, his wife and daughters, and the remaining 20 per cent was owned by him (defendant No. 11) and his wife. 23. So far as defendant Nos. 3, 4 and 5 are concerned, it is stated that diverse amounts had been advanced to these companies which had purchased shares of Herbertsons Ltd., defendant No. 12. In view of the inability of the said companies to repay these advances, the shareholding of the said companies was taken over by him (defendant No. 11), his wife and/or Seven Star Investment & Trading (P.) Ltd., a company owned

and controlled by him. 24. So far as the acquisition of Imfa. Defendant No. 3, is concerned, it is stated that defendant No. 11 along with his wife acquired the entire shareholding of Imfa through the purchase of its shares by Seven Star on 29-7-1996. The then directors of Imfa were not related to defendant No. 11 within the meaning of Section 6. On 29-7-1996, defendant No. 11 was also appointed as an Addl. Director of Imfa along with three others. On that day, Mr. Ram Raheja, husband of the sister of wife of Kishore R. Chhabria, defendant No. 1 (co-brother of defendant No. 1) and three other directors of Imfa had resigned. On that day, Imfa was the registered shareholder of 10,38,791 equity shares of Herbertsons Ltd., defendant No. 12, (about 10.91 per cent of Herbertsons share capital). It is stated that on 7-12-1995, Imfa had lodged for registration of transfer into its name the equity shares purchased by it between 27-10-1994 and 21-11-1995. On the same day, Imfa had also addressed to SEBI informing it of this fact and seeking other clarifications. On 21-5-1995, SEBI addressed a letter to Imfa alleging that the provisions of the 1994 Regulations were applicable to the aforesaid acquisition of shares by Imfa and directed Imfa to comply with the 1994 Regulations. On 30-5-1996, defendant No. 12 company registered the transfer of shares in the name of Imfa, though earlier it had refused to do so. A reference is made to the correspondence that ensued between SEBI and Imfa regarding the applicability of the 1994 Regulations. By a letter dated 7-12-1995, as earlier noticed, Imfa informed SEBI the fact of acquisition of 10,39,341 shares of Herbertsons Ltd., and seeking certain clarifications to which SEBI responded by a letter dated 21-5-1996, stating that 1994 Regulations were applicable to the acquisition in question. The said letter was forwarded by Imfa, defendant No. 3 to Herberlsons Ltd., defendant No. 12, seeking its comments. On 17-6-1996, Imfa, defendant No. 3, informed SEBI that it was examining its letter and would revert by 15-7-1996. Soon thereafter, pursuant to discussions with S.D. Lalla, Managing Director of Herbertsons Ltd., and its lawyers, a draft of the proposed reply was prepared and a copy of the draft was handed over to the then Company Secretary of Herbertsons Ltd. Ultimately, by its letter dated 2-8-1996, Herbertsons Ltd., defendant No. 12, informed that they had carefully reviewed the proposed draft reply with their lawyers and that they were in agreement with the same and suggested Imfa to send the reply as per the draft. By another letter dated 6-8-1996, the Company Secretary of Herbertsons Ltd., forwarded a fresh draft of the proposed letter to be sent by Imfa to SEBI and, accordingly, on 19-8-1998, Imfa addressed a letter to SEBI and forwarded a copy thereof to Herbertsons Ltd., defendant No. 12. On 22-11-1996, the wife of defendant No. 11 acquired 30 per cent holding of K.R. Chhabria, defendant No. 1 in the capital of Galan, the holding company of the aforesaid six companies. The Directors of Galan are defendant Nos. 11 and 1 and two others. 25. As regards the shareholding of Mahameru Trading Co. (P.) Ltd., defendant No. 4, it is stated that Seven Star (a company controlled by defendant No. 11) purchased the entire shareholding in Mahameru on 13-2-1997, and on that day, defendant No. 11 was appointed an Addl. Director of Mahameru, defendant No. 4. On that day, Mahameru was already the registered shareholder of 4,71,600 shares in Herbertsons Ltd., which it had purchased in 1995 and 1996 representing 4.97

per cent of the equity share capital of Herbertsons Ltd., through various Stock Exchanges. During this period, the Directors of Mahameru were one H.S.R. Sharma and S.P. Sawant. Thereafter, the board of directors was re-constituted but none of the Directors was related to defendant No. 11 within the meaning of the Act. On 26-9-1996, the board of directors of Herbertsons, defendant No. 12, app!r6ved registration of transfer of the said shares to Mahameru's name. 26. So far as Shirish Finance & Investments Ltd. defendant No. 5, is concerned, it has been stated by defendant No. 11 that on 18-2-1997,he and his wife purchased the entire shareholding of defendant No. 5 from one S.J. Chhabria, a cousin of defendant No. 1 and a nephew of defendant No. 11 and his wife. They were not related to defendant No. 11 within the meaning of the Act. On that day, he was also appointed as Director of defendant No. 5 company. By this time, defendant No. 5 company had already acquired 3,64,750 equity shares of Herbertsons Ltd., representing 3.893 per cent of its equity capital. It is stated that the board of directors of defendant No. 5 company had resolved on 22-8-1996 to purchase shares of Herbertsons Ltd., not exceeding 4 lakhs shares, and pursuant to the said resolution, the aforesaid shares were purchased between 27-8-1996 and 14-2-1997. The aforesaid shares were duly lodged with Herbertsons Ltd., defendant No. 12, together with the share transfer form and other documents, but the board of directors of Herbertsons Ltd., by its Resolution of 3-6-1997 decided to defer consideration of the application for transfer of the aforesaid shares as they were concerned about a possible violation of the SEBI Takeover Regulations. Ultimately, by a letter dated 21-7-1997, addressed to defendant No. 5 company, Herbertsons Ltd., intimated refusal to register the transfer of shares lodged by defendant No. 5 giving vague, specious and untenable reasons for doing so. Thereafter, defendant No. 5 company filed Appeal No. 21 of 1998 before the CLB under Section 111A which is pending before the CLB. 27. In the background of these facts, it is contended by defendant No. 11 that the acquisition of shares in Herbertsons Ltd., by the aforesaid companies and by defendant Nos. 3, 4 and 5 as well as the acquisition of the shareholding in these companies by defendant No. 11, his wife and/ or by companies under his control (Seven Star) did not violate any provision of law. It is contended that the 1997 Regulations came into force from 20-2-1997. The acquisition of shares of defendant No. 12 company by the aforesaid companies prior to coming into force of the 1994 Regulations did not attract the provisions of those Regulations. These acquisitions, also did not violate Clauses 40A and 40B of the Listing Agreement. Various legal grounds have been urged in relation to the SEBI Takeover Regulations. It is stated- (a) The 1994 Regulations do not govern the acquisition of the shares in defendant Nos. 3,4 and 5 and the aforesaid six companies by either Seven Star or by defendant No. 11 in view of Regulation 3(d). None of these companies is a company listed on any Stock Exchange. (b) The acquisition of shares in Herbertsons Ltd., by defendant Nos. 3, 4 and 5 do not violate the provisions of the 1994 Regulations, (particularly, Regulation 10 thereof) since none of these companies held shares in defendant No. 12 company at the time of acquisition. Defendant Nos. 3, 4 and 5 were not shareholders and, therefore, could not be said to "hold" any shares in Herbertsons Ltd., defendant

No. 12, at the time they acquired the aforesaid shares. This was supported by the view taken by the Securities Appellate Tribunal, Mumbai, in the context of Regulation 10 itself in its decision dated 5-8-1998 in Fascinating Leasing & Finance (P.) Ltd. v. SEB [1998] 17 SCL 204 (Mum.). (c) In any event, the acquisition by defendant Nos. 4 and 5 was of shares less than 5 per cent of Herbertsons Ltd.'s share capital and, therefore, Regulation 10 was not attracted. (d) Since defendant Nos. 3, 4 and 5 companies at the time of their acquisition by defendant No. 11 and/or his companies already held or had already acquired shares in Herbertsons Ltd., there was no violation of the 1994 Regulations since the concept of indirect acquisition of shares of a listed company by acquiring control of an unlisted company was not present in the 1994 Regulations. This concept was introduced later in 1997 based on the Bhagwati Committee Report. Even SEBI has recognised this position by its order dated 6-3-1997 in the case of Sesa Goa and the Appellate Authority by its judgment dated 20-11-1997 has upheld SEBI's order. The concept of indirect acquisition has been sought to be introduced only in the 1997 Regulations which have prospective application. (e) The aforesaid six companies, viz., defendant Nos. 2 and 6 to 10 as well as defendant Nos. 3,4 and 5 companies and he, (defendant No. 11) his wife and/or the Director/shareholders of these companies are not "persons acting in concert" under Regulation 2(d) of the 1994 Regulations. The shareholders and the Directors of these companies were not related within the meaning of Section 6 of the Companies Act, to each other or to his wife. No case had, therefore, been made out in the plaint to show that the 1994 Regulations apply. (f) Herbertsons Ltd., defendant No. 12, also accepted this position which is borne out by the fact that on 6-8-1996, Herbertsons Ltd., forwarded to Imfa the final draft of the proposed reply to be sent by Imfa to SEBI. 28. It would thus appear from the affidavit in reply filed on behalf of defendant No. 11 that defendant No. 2 and defendant Nos. 6 to 10 were companies under the ultimate control of Galan in which defendant No. 11 and his wife owned 20 per cent of the share capital while the remaining 80 per cent was held by defendant No. 1, his wife and daughters. On 22-2-1996, the wife of defendant No. 11 acquired holding of defendant No. 1 in the capital of Galan, the holding company of the aforesaid six companies. Defendant Nos. 1 and 11 continued to be the directors of the aforesaid Galan. So far as defendant Nos. 3, 4 and 5 companies are concerned, it is not disputed that diverse amounts had been advanced to them, and those companies had purchased shares in Herbertsons Ltd., defendant No. 12. Since they were unable to pay theloans advanced to them, the shareholding of the aforesaid companies was taken over by defendant No. 11, his wife and/or Seven Star, a company owned and controlled by defendant No. 11. In the affidavit filed in support of the notice of motion by plaintiff No. 1, it is stated that the amounts were advanced to defendant Nos. 3,4 and 5 by Royal Wines & Trackstar Investments (P.) Ltd., which were under the ownership/company controlled by defendant No. 11. 29. Defendant No. 11 in his affidavit in reply has also stated that he had addressed a letter to SEBI on 20-1-1998, offering (without prejudice to his rights and contentions) to make apublic offer jointly or severally through his companies under Regulations 10, 11 and 12 of the 1997 Regulations. A copy

of the said letter was furnished by SEBI to Herbertsons Ltd., defendant No. 12. In response thereto, Herbertsons Ltd., through its advocates addressed two letters to SEBI relying upon the present suit and sought particulars from SEBI in respect of SEBI's letter of 3-2-1998. By a letter dated 16-2-1998, Herbertsons Ltd., called upon SEBI to issue appropriate directions for disinvestments of the investment in Herbertsons' shares acquired by defendant Nos. 3, 4 and 5. 30. The affidavit in reply of defendant No. 11 has been adopted by defendant Nos. 1 to 10, but defendant No. 1 has added a few more facts. He has stated that though he was the Vice-Chairman and whole-time Director of Herbertsons Ltd., defendant No. 12 company, with effect from 1-4-1995, he did not control the board of directors. For the first time, he became a Director of the company in 1992 and participated in its management. He was regularly consulted as a Director of the company. He has made an allegation that the funds of defendant No. 12 company were syphoned off with the connivance of Balaji Group, the plaintiffs herein. 31. In its reply, defendant No. 12 adopted the reply filed by it earlier to Notice of Motion No. 3932 of 1998 on 5-2-1999. It denied the charge of collusion between the plaintiffs and Vijay Mallya. It substantially supported the case of the plaintiffs that defendant Nos. 3,4 and 5 companies were mere device to acquire the shares of Herbertsons Ltd., defendant No. 12, in a clandestine manner. It has further alleged that defendant No. 1 had siphoned off Rs. 120 crores of BDA. 32. In reply to the affidavit in support of Notice of Motion No. 3932 of 1998, defendant No. 11. has asserted that defendant Nos. 1 to 11 had in their names 43.09 per cent of the subscribed share capital of Herbertsons Ltd., defendant No. 12 company. Together with the unlisted shares and the proxies, they hold 50.4 per cent of the subscribed capital of defendant No. 12 company. It is further asserted that the transactions between defendant Nos. 11 and 3, 4 and 5 were based on the evaluation of the capacity of the Directors to repay the loans, and not on the basis of the share capital or net worth of the concerned companies. Promissory notes had been executed by the Directors and the loans were advanced after seeking expert advice of Mr. AT. Kukreja, Chartered Accountant. It is further alleged that the third notice issued by SEBI to defendant Nos. 1 to 11 was at the instance of Mr. Vijay Mallya. It is also asserted that SEBI had almost agreed to direct them to make a post-facto public offer but on account of interference of a high functionary, it did not ultimately pass such a direction. 33. We may, at this stage, notice that SEBI had issued notices in connection with the acquisition of the aforesaid shares of defendant No. 12 company. Initially, it issued a notice to Mr. Ram Raheja, a Director of Imfa, defendant No. 3, on 9-10-1996 in which it was alleged that between 27-10-1994 and 2-11-1995, he had acquired 10,39,091 equity shares of the target company, viz., Herbertsons Ltd., defendant No. 12, in concert with other Directors. The shares acquired represented 10.91 per cent of the voting capital of the target company. He was, therefore, called upon to show-cause for non-compliance of Regulations 6 and 10 of the 1994 Regulations. The notice mentions the earlier letter of Mr. Ram Raheja, dated 7-12-1995 in which he had contended that the 1994 Regulations had no application since he or Imfa did not hold any shares before acquiring the shares in question. The notice stated that this interpre-

tation of the Regulations was not correct, and that according to Regulation 6, any acquirer who holds 5 per cent or less shares and acquired more than 5 per cent by one or more Directors has to disclose the aggregate of the shareholding to the company and the Stock Exchanges. The expression 'less than 5 per cent shares in the company' in the context of the Regulations include Nit holding also. In terms of the Regulations, an acquirer need not be an existing shareholder of the company. Since the acquisitions were made without making a public announcement, the person concerned was guilty of breach of the Regulations. The notice called upon Mr. Ram Raheja to show-cause failing which SEBI would have to take further action in the matter. 34. It appears that since Mr. Ram Raheja had resigned as a Director of Imfa, defendant No. 3 company, the second show-cause notice was issued to defendant No. 3 company itself on 31 -3-1997. This notice also reiterated what was alleged in the earlier notice, and referring to Regulation 10, it was observed that an acquirer who makes outright acquisitions carrying voting rights of more than 10 per cent is required to make a public announcement. The notice called upon the Managing Director of defendant No. 3 company to show-cause as to why criminal prosecution should not be initiated under Section 24 of the Act for violation of Regulations 6 and 10. 35. The aforesaid two notices were issued by the SEBI before the filing of the suit. After the filing of the suit, notice was issued by SEBI to defendant Nos. 1 and 11 on 8-1-1999. The notice mentions that from the material available to SEBI, defendant Nos. 1 to 11 had acquired 47.48 per cent shares in Herbertsons Ltd., defendant No. 12 company between the years 1993 and 1997 without making any public offer. 27.21 per cent of the shares of Herbertsons Ltd., were acquired prior to the Notification of 1994 Regulations. It is further stated that the concerned six companies had a common address, and were very small companies with very few shareholders. The shareholding pattern of these companies revealed that the companies held the shares of each other, and all of them were subsidiaries of Galan. The grant of interest-free loan of Rs. 4.13 crores to Imfa, defendant No. 3, did not appear to be based on any commercial prudence having regard to the fact that the paid-up capital of this company in March 1995 was only Rs. 4,00,200, and the total reserves and surplus were only Rs. 3,17,640. Similar comments are made regarding advance of the sum of Rs. 1.12 crores to Mahameru Trading Co. (P.) Ltd., defendant No. 4 company and Shirish Finance & Investments Ltd., defendant No. 5 company which had paid-up capital of Rs. 200 each but to whom loans amounting to Rs. 1.12 crores and Rs. 1.35 crores, respectively, had been advanced. These loans were apparently advanced to these companies for purchasing the shares of Herbertsons Ltd., defendant No. 12. Ultimately, when the companies defaulted in repayment of the alleged dues, the shareholding of the companies were taken over by defendant Nos. 1 and 11 thus resulting in defendant Nos. 1 and 11 acquiring the control of shares of Herbertsons Ltd. It appears that the acquisition of shares were done in a manner to circumvent the provisions of 1994 Regulations. If the corporate veil of all the companies referred to above is lifted, then it appears that the acquisitions of the shareholding in Herbertsons Ltd., defendant No. 12, are a device to circumvent the provisions of the 1994 Regulations, and to acquire

the shares of Herbertsons Ltd., in violation of the said Regulation. The notice, therefore, called upon them to show-cause as to why action be not taken under Sections 11, 11B and 24 of the Act and Regulation 39 of the 1994 Regulations read with Regulations 44, 45(6) and 47(2a) of the 1997 Regulations. 36. It may be observed that pursuant to the last notice, SEBI has instituted an enquiry and is presently seized of the matter. Defendant Nos. 1 and 11 are participating in the said proceedings. Apart from the proceedings initiated by SEBI, defendant Nos. 3 and 5 have filed appeals under Section 111A(2) of the Companies Act before the CLB being appeal Nos. 22 and 21 of 1998 respectively, challenging the refusal of defendant No. 12 company to register transfer of shares in their favour. These appeals are pending before the CLB. As stated by the counsel, defendant Nos. 6, 7 and 8 also propose to file appeals under Section 111A(2). 37. To complete the picture, we may notice that another suit being Suit No. 297 of 1999 has been filed by defendant Nos. 3, 7 and 8 on 18-12-1998 for a declaration that they are the beneficial owners of the unregistered shares acquired by them. In that suit, Notice of Motion No. 184 of 1999 has been taken out by them for restraining the defendants therein from preventing them to attend and vote at the annual general meeting on 30-12-1998. The notice of motion was disposed of by a learned Judge of this Court on 29-12-1998, when an agreed order came to be passed. This notice of motion was not pressed by Mr. Rafiq Dada, senior advocate, appearing on their behalf when the matter came up for hearing along with the other two notices of motion in Suit No. 3910 of 1997 (in which the impugned order has been passed). He stated that the aforesaid defendants were plaintiffs in the suit and will seek their remedy before the CLB. In the suit, the two defendants are Herbertsons Ltd. and Mr. Vijay Mallya. 38. It is also worth noticing that when the three notices of motion in the two suits came up together for hearing before the learned Judge, Chamber Summons No. 1153 of 1998 filed on behalf of the defendants asking for better particulars was not pressed, and no order was, therefore, required to be passed but the Court observed that the Chamber Summons may be decided later either separately or with the suit. 39. Having noticed the factual background of the case, we may now notice the legal provisions on which parties have relied, and which call for interpretation in this appeal. We may first notice Clauses 40A and 40B of the Listing Agreement. The relevant part of the aforesaid clauses are as under : "40A. The company agrees that the following shall also be the conditions for continued listing : (a) When any person acquires or agrees to acquire any shares in the company and when the total nominal value of such shares so acquired or agreed to be acquired together with the total nominal value of the shares already held by such person, exceeds or shall exceed in the aggregate 5% of the voting capital of the company, the Stock Exchange shall be notified within 2 days of such acquisition or such agreement for acquisition, by thecompany, by the authorised intermediary and also by the acquirer. (b) When any person holds shares which in the aggregate carry less than 10% of the voting rights in the company, he shall not acquire any shares which, when aggregated with the shares already held by him shall carry 1096 or more of the voting rights unless he notifies the Stock Exchange and fulfils the conditions specified in Clause 40B.

Provided that nothingin the above sub-clause shall apply to a person who on an application to the SEBI is specifically granted exemption. (c) The Company shall notify the Stock Exchange within 7 days about any information which has ah effect on its assets and liabilities or financial position or on the general course of its business leading to substantial movements in the price of the shares and in particular information about transactions mentioned above. (d) The above conditions shall not be applicable to an acquisition by a person who has announced his firm intention to make an off er to the Company and also notified the Stock Exchange." "40B. Takeover Offer (1) The Company also agrees that it is a condition for continued listing the whenever a takeover of fer is made to or by it whether voluntarily or compulsorily, the following requirements shall be fulfilled. (2) A public announcement of a takeover offer shall be made both by the offerer company and the offeree company when : (a) any person in his own name or in the name of the any other person acquires, whether by a series of transactions over a period of time or otherwise, shares which, when aggregated with shares already held or acquired by such person, shall carry 10% or more of the total voting rights of the offeree company, or (b) secure the control of management of a company, by acquiring or agreeing to acquire, irrespective of the percentage of the voting capital, the shares of the Directors or other members, who by virtue of their shareholdings together with the shareholdings of their relatives, nominees, family interested, and group control or manage the company, or (3) if the offer is made by a person other than the ultimate offerer the identity of such person shall be disclosed at the outset in the public announcement as also in the notification to the Stock Exchange." Before Clauses 40A and 40B were included in the Listing Agreement, there was old Clause 40 which provided for making of a public offer for acquisition of shares by any person who sought to acquire 20 per cent or more voting rights. Clause 40 was replaced in the year 1992 by Clauses 40A and 40B. 40. In the year 1992, the Securities and Exchange Board of India Act, was enacted with a view to provide for the establishment of the Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto. Section 3 of the Act provided for the establishment of the Board by the name of The Securities and Exchange Board of India', a body corporate with its Head Office at Bombay. Section 11 of the Act provides that subject to the provisions of the Act, it shall be the duty of the Board 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. The measures which the Board could take include regulating substantial acquisition of shares and takeover of companies [Section 11(2)(h)]. Chapter VIA provides for penalties and adjudication. Section 15H deals with penalty for nondisclosure of acquisition of shares and takeovers which reads as under: "Penalty for non-disclosure of acquisition of shares and takeovers.–If any person, who is required under this Act or any rules or Regulations made thereunder, fails to,– (i) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or (ii) make a public announcement to acquire shares at a minimum price, he shall be liable

to a penalty not exceeding five lakh rupees." Under Section 15K, the Central Government shall, by notification, establish one or more Appellate Tribunals to be known as the Securities Appellate Tribunal to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under the Act. Section 15T provides that save as provided in Sub-section (2), any person aggrieved by an order made, by an Adjudicating Officer under the Act may prefer an appeal to the Securities Appellate Tribunal having jurisdiction. Sub-section (2) provides that no appeal shall lie to the Tribunal from an order made by an Adjudicating Officer with the consent of the parties. Section 15Y provides as under:– "Civil court not to have jurisdiction.–No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Officer appointed under this Act or a Securities Appellate Tribunal constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act." Section 15Z provides a further appeal to the High Court in the following terms : "Appeal to High Court.–Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of decision or order of the Securities Appellate Tribunal to him on any question of fact or law arising out of such order : Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days." Section 20 provides for an appeal to the Central Government from an order of the Board made under the Act or the Rules or Regulations made thereunder. Section 20A provides as under : "Bar of jurisdiction.–No order passed by the Board under this Act shall be appealable except as provided in Section 20 and no civil court shall have jurisdiction in respect of any matter which the Board is empowered by, or under, this Act to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by the Board by, or under, this Act." Section 21, however, provides : 'Savings.—Nothing in this Act shall exempt any person from any suit or other proceedings which might, apart from this Act, be brought against him." Section 30 vests in the Board, with the previous approval of the Central Government, by Notification to make Regulations consistent with the Act and the Rules made thereunder to carry out the purpose of the Act. It provides as under: "Power to make Regulations.–(1) The Board may, with the previous approval of the Central Government, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act. (2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:– (a) the times and places of meetings of the Board and the procedure to be followed at such meetings under Sub-section (1) of Section 7 including quorum necessary for the transaction of business; (b) the term and other conditions of service of officers and employees of the Board under Sub-section (2) of Section 9; (c) the matters relating to issue of capital, transfer of

securities and other matters incidental thereto and the manner in which such matters shall be disclosed by the companies under Section 11A; (d) the conditions subject to which certificate of registration is to be issued, the amount of fee to be paid for certificate of registration and the manner of suspension or cancellation of certification of registration under Section 12." Section 32 provides: "32. Application of other laws not barred,–The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force." 41. In exercise of powers conferred by Section 30 of the SEBI Act, the Board with the previous approval of the Central Government, framed Regulations, viz., Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994. These Regulations came into force with effect from 4-11-1994. Under Regulation 2(f)), 'acquirer' has been defined as follows : "2(b) 'acquirer' means any person who acquires or agrees to acquire shares in a company either by himself orwith any person acting in concert with the acquirer;" 'Person acting in concert' has been defined as follows: "2(d) 'person acting in concert' comprises persons who, pursuant to an agreement or understanding acquires or agrees to acquire shares in a company for a common objective or purpose of substantial acquisition of shares and includes : (i) a company, its holding company, or subsidiaries of such companies or companies under the same management either individually or all with each other; (ii) acompany 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 Clause (i) and his associates; and (iv) mutual fund, financial institution, merchant banker, portfolio manager, and any investment company in which any person 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. Explanation.– 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); (B) the director or his relative whether individually or in the aggregate holding more than 2% of the paid-up equity capital of such company." Shares have been defined in Regulation 2(i) as under : "2(i) 'shares' means share in the share capital of a company carrying voting rights and includes any securities which would entitle the holder to receive shares with voting rights." Under Regulation 2(2), all other expressions unless defined herein shall have the same meaning as have been assigned to them under the Act or the Companies Act, or the Securities Contract (Regulation) Act, 1956, as the case may be. Regulation 3 which deals with the applicability of the Regulation provides that nothing contained in Chapter III of the Regulations shaU apply to acquisition of shares in certain cases including "in companies whose shares are not listed on any stock exchange". Regulation 4 vests in the Board to grant exemption in the following terms : "Power of the Board to grant exemption.–The Board may after considering all the relevant factors such as family arrangements amongst promoters or re-organisation of the company where more than 10 per cent of the voting rights of shares are acquired by the existing shareholders of that company or any of its holding company or of a company under the same management, may pass an order of exemption from the provisions of Chapter III after recording

the reasons in writing for grant of such exemption." Regulations 5 and 6 are to the following effect: "5. Transitional provision.–(1) Any person, who holds more than five per cent shares in any company, shall within two months of notification of these regulations disclose his aggregate shareholding in that company. (a) to all the stock exchanges on which the shares of the said company are listed, and (b) to the aforesaid company (2) Every company whose shares are held by the persons referred to in Sub-regulation (1) shall disclose to the stock exchange within two months from the date of notification of these regulations the aggregate number of shareholdings of each of the acquirer referred to above. 6. Acquisition of 5 per cent and more shares of a company.–(1) Any acquirer, who holds five per cent or less than five per cent shares in a company and acquires more than five per cent shares:– (a) in pursuance of a public issue, or (b) by one or more transactions, or (c) in any other manner not covered by (a) and (b) above, shall disclose the aggregate or his shareholding in that company to the company and to all the stock exchanges where the shares arc listed. (2) The disclosures mentioned in Sub-regulation (1) shall be made within four working days of- (a) the receipt of intimation of allotment of shares in respect of shares acquired under Clause (a) of Sub-regulation (1) or; (b) the acquisition of shares, as the case may be. (3) Every company, whose shares are acquired as referred to in Sub-regulation (1), shall disclose to all the stock exchanges, where the shares are listed the aggregate shareholdings of that company of all such persons within seven days of receipt of information under Sub-regulation (1)." Regulations 9 to 23 which are important provide as follows : "9. Acquisition of 10 per cent or more of the shares of any company through negotiation.–(1) Any acquirer who holds shares carrying ten per cent or less of voting rights in the capital of the company shall not through negotiations acquire any further shares, which, when taken together with his existing shareholdings would carry more than ten per cent of the voting rights, unless, the acquirer makes a public announcement to acquire shares at a minimum offer price from the other shareholders of the company in accordance with these regulations, or (2) Any acquirer who on the date of commencement of these regulations, holds shares in a company which carry more than ten per cent of the voting rights in the capital of the company, shall not acquire any further shares through negotiations unless the acquirer makes a public announcement to acquire shares at a minimum of fer price from the other shareholders of the company in accordance with these regulations. (3) Where an acquirer acquires securities which would entitle him to more than ten per cent of the voting rights together with the voting rights on shares already held by him, then, such persons shall make a public announcement referred to in Sub-Regulation (1) at the time immediately before his entitlement to obtain voting rights on such securities. (4) Nothing in Sub-regulation (2) shall apply to any person, who on the date of coming into force of these regulations holds snares carrying more than ten per cent of the voting rights in the capital of a company, if he has already complied with the provisions of Clause 40A and Clause 40B of the Listing Agreement of any stock exchange. 10. Acquisition of 10 per cent or more of the shares of any company through open market purchases.–(1) Any acquirer, who holds shares carrying

ten per cent or less of voting rights in the capital of the company shall not acquire any further shares in the company from the open market which when taken together with this existing shareholders, would carry more than ten per cent of the voting rights, unless such acquirer makes a public announcement of intention to acquire shares in the open market in accordance with these regulations, (2) An acquirer who on the date of commencement of these regulations holds shares which carry more than ten per cent of the voting rights in the capital of the company, shall not acquire any further shares in the company from the open market unless such acquirer makes a public announcement of intention to acquire shares in the open market in accordance with the regulations. 11. Who should make the public announcement of offer.–Beforemaking any public announcement of offer referred to in Regulation 9 or Regulation 10, the acquirer shall appoint a merchant banker holding a certificate of registration given by the Board. 12. Public announcement of offer.–A public announcement to be made under Regulation 9 or 10 shall be made in at least one national English daily and one vernacular newspaper of that place, where the shares of the company are listed and most frequently traded. 13. Timing of the public announcement of offer under Regulation 9.–The public announcement referred to in Regulation 9 shall be made not later than four days of either the f inalisation or the negotiation, or entering into an agreement, or memorandum of understanding to acquire shares, whichever is earlier. 14. Timing of the public announcement of intention under Regulation 10.–A public announcement of intention to acquire shares referred to in Regulation 10 shall be made either immediately before the acquisition of any shares, which would increase the existing shareholdings of the person making the announcement beyond ten per cent or in case his existing shareholding is already beyond ten per cent, any time before the person seeks to acquire any shares in order to increase his existing shareholding. 15. Contents of the public announcement ofoffer.–A public announcement referred to in Regulation 9 or 10 shall contain the following particulars, namely: (i) the object and terms of offer including the price at which the shares are being sought to be acquired; (ii) the identity of the ultimate person seeking to acquire shares; (iii) details of the existing holdings of the person acquiring shares together with those of persons acting in concert with him; (iv) details of shareholdings in respect of which the person acquiring shares has entered into an agreement or memorandum of understanding to acquire the shares; (v) intention of acquisition of shares; (vi) the record date and the date by which individual letter of offers would be posted to the shareholder and the manner and the date by which the acceptance or otherwise of offer should be communicated. (vii) the time and manner of payment of consideration for acquisition of shares; (viii) all conditions subject to which the offer is made including the following conditions, namely:– (a) the total number of shares to be acquired from the public, subject to a minimum as specified in Regulation 21; (6) the statutory approvals under the Companies Act, 1956 (1 of 1956), Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and Foreign Exchange Regulation Act, 1973 (46 of 1973), required to be obtained for the purpose of acquiring the shares, and (c) approvals to be obtained from shareholders of the company of which the shares

are being acquired. (ix) such other information in the investors' interest having a bearing on the substantial acquisition of shares. 16 .Brochures, advertising material, etc.–(1) The public announcement of offer or any other advertisement, circular, brochure or publicity material issued in relation to the acquisition of shares shall contain information essential for the shareholder to make an informed decision on the offer made. (2) Copies of any advertisement, brochure or document issued to the public under Sub-regulation (1) shall be submitted to the Board at least twenty-four hours' before its issuance. 17. Letter of offer.–(1) Within fourteen days of the public announcement made under Regulation 9 or 10, the acquirer shall through a merchant banker submit the draft of a letter of offer to the Board for its approval. (2) The acquirer shall alongwith the letter of offer referred to in Sub-regulation (1) make payment of a fee to the Board for a sum of Rs. 25,000 payable either by cheque or bank draft in favour of the Securities and Exchange Board of India at Bombay. (3) The merchant banker shall submit a due diligence certificate to the Board stating that the statements made in any documents advertisement or brochure issued to the public contains statements, which are true to the best of his or its knowledge. 18. Record date.–(1)The letter of offershall be sent to all the shareholders of the company whose shares are sought to be acquired and whose names appear on the books of the company as on the record date. (2) The record date shall be not more than the sixtieth day from the date of the first public announcement. 19. Minimum offer price.–(1) An offer to acquire shares under Regulation 9 or Regulation 10 shall be made at a minimum offer price which shall be:– (a) payable in-cash; or, (b) by exchange of shares if the person seeking to acquire the shares is a body corporate; or (c) a combination of (a) and (b): Provided that where the agreement or any memorandum of understanding stipulates payment in cash to any class of shareholders, whose shares are being acquired, the remaining shareholders shall also be paid in cash for the shares offered by them for sale of their shares. (2) For the purpose of Sub-regulation (1), the minimum offer price shall be:- (a) in case of acquisition of shares under Regulation 9, the negotiated price or the average of the weekly high and low of the closing prices of the shares as quoted on the stock exchange during the last six months preceding the date of announcement, whichever is higher, provided there has been a market for such shares during that period in that stock exchange; (b) in caseof acquisition of shares under Regulation 10, the highest price paid by the acquirer in the open market or the average of the weekly high and low of the closing prices of the shares as closed on the stock exchange during the last six months preceding the date of announcement, whichever is higher, provided there has been a market for such shares during that period in that stock exchange; (c) where there has been no continuous marketing the stock exchange for the share to be acquired, such average shall be calculated on the basis of weigthed average prices quoted in at least one other stock exchange to be determined on the basis of the daily trading volume of such shares in that exchange or in any other reasonable manner with the prior approval of the Board; (d) in case where the shares of the company are offered in lieu of cash payment, the value of such shares shall be determined in the same manner as mentioned in Clauses (a) and (b) as the case may be. 20.

Generalobligations,–(1) The announcement of public offer to acquire shares shall be made only when the acquirer has every reason to believe that he shall be able to implement the offer. (2) Within fourteen days of the public announcement of offer, the acquirer must also submit a letter of offer to the Board of Directors of the company, whose shares are being acquired. (3) The acquirer shall state the period for which the offer to acquire shares from the other shareholders shall remain open: Provided that every such offer shall be kept open for a period of not less than four weeks from the date of the offer. (4) The directors of the company of which the shares are being acquired shall not sell or enter into an agreement for sale of assets not being sale or disposal of assets, in the ordinary course of business, of the company or its subsidiaries or issue any authorised but unissued securities carrying voting rights during the period, when the offer is bpen for acceptance unless the approval of the general body of shareholders is obtained. (5) Every document issued to shareholders or any advertisement published in connection with the offer must state that the directors in case the acquirer, is a company, accept the responsibility for the information contained in the document or advertisement: Provided that if any of the directors desire to exempt himself from the responsibility of the information in such document or, as the case may be, the advertisement, the document or, advertisement, as the case may be, shall contain a statement to that effect together with reasons thereof. (6) The company whose shares are being acquired shall furnish to the acquirer, within seven days of the request of the acquirer, a list of names of shareholders and of those persons whose applications for transfer of registration are considered valid and accepted by the company. (7) The company, whose shares are being acquired, shall also inform the persons whose applications for transfer are considered valid within sixty days and also inform about such transfers to the transferor and transferee, so that they have an opportunity to accept the offer. (8) The letter of offer shall be sent to all the shareholders so as to reach them within ten days from the record date. (9) Any acquirer who has made any acquisition of shares either by negotiation or through open market purchases shall not make any further public announcement for acquisition of shares in the succeeding six months. 21. Minimum number of shares to be acquired.–(1) Subject to Sub- Regulation (2), the offer shall be made to acquire shares from each of the shareholders, such number of shares, which shall not be less than the minimum marketable lot as determined by the Stock Exchange in which these shares are listed, or the entire holding if it is less than the marketable lot. (2) The public offer shall be made to the remaining shareholders of the company, to acquire from them an aggregate minimum of 20 per cent of the total shares of that company. (3) Where an acquirer holds more than ten per cent shares at the time of commencement of these regulations and was not required to comply with the provisions of Clause 40A and Clause 40B of the Listing Agreement, the public offer referred to in Sub-regulation (2) shall be to acquire a minimum of such percentage as would increase his shareholding to at least thirty per cent of the total shares of that company. (4) The offer referred to above shall not result in the public shareholding being reduced to less than 20 per cent of the voting capital of the company. (5) Where a person seeking to make acquisi-

tion of shares by reason of holding securities, which may carry voting rights at a later point of lime, the percentage referred to in the Sub-regulations (2) and (3), shall be computed with reference to voting capital of the company including the securities which would carry voting rights. (6) Where 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 subject to Sub-regulation (1) accept the offers received from the shareholders on a proportional basis. 22. Completion of the offer.–The acquirer shall within a period of four weeks from the date of the closure of the offer complete all procedures relating to the of fer including payment of consideration to the shareholders who have accepted the offer. 23. Competitive acquisition.–(1) Any person other than the acquirer making a public announcement may, within two weeks of such announcement, make a competitive bid for acquisition. (2) The provisions of this chapter shall mutatis mutandis apply to the competitive bid made under Sub-regulation (1): Provided that the period of offer in the public announcement shall not in any case extend beyond that of the first offer mentioned in Sub-regulation (3) of Regulation 20." Regulations 37 and 39 are relevant which read as under : "37. Communication of findings, etc.–(1) The Board shall after consideration of the investigation report communicate the findings to the person concerned to give him an opportunity of being heard before any action is taken by the Board on the findings of the investigating authority. (2) On receipt of the explanation, if any, from the person concerned, the Board may call upon the person concerned to take such measures as the Board may deem fit in the interest of the securities market and for due compliance with the provisions of the Act, rules and regulations." "39. Directions by the Board.–On receipt of the report under Regulation 36, the Board may without prejudice to its right to initiate criminal prosecution under Section 24 of the Act give such direction as it deems fit for all or any of the purposes, namely : (a) directing the person concerned not to further deal in securities: (b) prohibiting the person concerned from disposing of any of the securities acquired in violation of these regulations; (c) directing the person concerned to sell the shares acquired in violation of the provisions of these regulations; (d) taking action against the person concerned who is an intermediary holding a certificate of registration under Section 12 of the Act." 42. The 1994 Regulations were replaced by the 1997 Regulations which came into force with effect from 20-2-1997.The 1997 Regulations were the outcome of the report and recommendations of the Committee set up by the SEBI Board under the Chairmanship of Justice P.N. Bhagwati. Under the 1997 Regulations, acquirer has been defined as follows : "(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," Regulation 2(o) defines a target company in the following terms : "2(o) 'target company' means a listed company whose shares or voting rights or control is directly or indirectly acquired or is being acquired." Regulations 10 and 11 provide as follows: " 10. Acquisition of 10 per cent or more of the shares or voting rights of any company.–No acquirer shall acquire shares or voting right

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 ten per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations. 11. Consolidation of holdings.–(1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with theprovisions of law, not less than 10 per cent but not more than 51 per cent of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concept with him, additional shares or voting rights entitling him to exercise more than 2 per cent 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 per cent 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." 43. It will be seen that the concept of indirect acquisition of shares was brought in by amending the definition of 'acquirer' to mean any person who directly or indirectly acquires or agrees to acquire shares for voting rights in the target company. The words 'directly or indirectly' were also incorporated in the definition of 'person acting in concert'. Regulation 10 clarifies that the Regulations apply to an acquirer who may or may not be a shareholder of the company. Regulation 11 brought in a new concept of minimum acquisition which was permissible. We are informed that Regulation 11 has since been amended to provide for minimum acquisition of upto 5 per cent voting rights. We may also notice Regulations 20 and 21 which are reproduced for the sake of convenience. "20. Minimum offer price.–(1) The offer to acquire the shares under Regulation 10, 11 or 12 shall be made at a minimum offer price which shall be payable- (a) in cash; or (6) by exchange, and/or transfer of shares of acquirer company, if the person seeking to acquire the shares is a listed body corporate; or (c) by exchange and/or transfer of secured instruments with a minimum of 'A' grade rating from a credit rating agency; (d) a combination of Clause (a), (b) or (c): Provided that where payment has been made in cash to any class of shareholders for acquiring their shares under any agreement or pursuant to any acquisition in the open market or in any other manner during the preceding 12 months from the date of public announcement, the offer document shall provide that the shareholders have the option to accept payment either in cash or by exchange of shares in other secured instruments referred to above. (2) For the purposes of Sub-regulation (1), the minimum offer price shall be the highest of- (a) the negotiated price under the agreement referred to in Sub-regulation (1) of Regulation 14; (b) highest price paid by the acquirer or persons acting in concert with him for any acquisitions, including by way of allotment in a public or rights issues, if any, during the 26 week period prior to the date of public announcement; (c) the price paid by the acquirer under a preferential allotment made to him or to persons acting in concert with him, at any time during the twelve months period upto the date of closure of the offer; (d) the average of the

weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the 26 weeks preceding the date of public announcement. (3) Where the shares of the target company are infrequently traded, the offer price shall be determined by the issuer and the merchant banker taking into account the following factors: (a) the negotiated price under the agreement referred to Sub-regulation (1) of Regulation 14; (b) the highest price paid by the acquirer or persons acting in concert with him for acquisitions including by way of allotment in a public or rights issue, if any, during the twenty-six week period prior to the date of public announcement; (c) the price paid by the acquirer under a preferential allotment made to him or to persons acting in concert with him, at any time during the twelve month period upto the date of closure of the offer; and (d) other parameters including return on net worth, book value of the shares of the target company, earning per share, price earning multiple vis-a-vis the industry average. Explanation.–(i) For the purpose of this clause, shares will be deemed to be infrequently traded if on the stock exchange, the annualised trading turnover in that share during the preceding 6 calender months prior to the month in which the public announcement is made is less than two per cent (by number of shares) of the listed shares. For this purpose, the weighted average number of shares listed during the said six months period may be taken. (ii) In case of shares which have been listed within six months preceding the public announcement, the trading turnover may be annualised with reference to the actual number of days for which the share has been listed. (4) Notwithstanding the provisions of Sub-regulations (1), (2) and (3) above, where the acquirer has acquired shares in the open market or through negotiation or otherwise, after the date of public announcement at a price higher than the minimum offer price stated in the letter of offer, then the highest price paid for such acquisition shall be payable for all acceptances received under the offer, then the highest price paid for such acquisition shall be payable for all acceptances received under the offer. (5) In case where shares or secured instruments of the acquirer company are offered in lieu of cash payment, the value of such shares or secured instruments shall be determined in the same manner as mentioned in Sub-regulations (2) and (3) above to the extent applicable, as duly certified by an independent Category-1 Merchant Banker (other than the managers to the offer) or an independent Chartered Accountant of 10 years standing. (6) The letter of offer shall contain justification on the basis on which the price has been determined. Explanation.–(1) The highest price under Clause (b) or the average price under Clause (d) of Sub-regulation (2) may be adjusted for quotations, if any, or cum-rights, or cum-bonus basis during the said period. (2) Where the public announcement of offer is pursuant to acquisition by way of firm allotment in a public issue or preferential allotment, the average price under Clause (d) of Sub-regulation (2) shall be calculated with reference to the 26 week period preceding the date of the board resolution which authorised the firm, preferential allotment. (3) Where the shareholders have been provided with an option to accept payment either in cash or by way of exchange of security then subject to the provisions of Regulation 20, the pricing for the cash offer could be dif-

ferent from that of a share exchange offer or offer for exchange with secured instruments, provided that the disclosures in the offer documents contains suitable justifications for such differential pricing. (4) Where the offer is subject to a minimum level of acceptances the acquirer may subject to the provisions of Regulation 20, indicate a lower price for the minimum acceptance of 20 per cent should the offer not receive full acceptance. 21. Minimum number of shares to be acquired.–(1) The public of fer shall be made to the shareholders of the target company to acquire from them an aggregate minimum of 20 per cent of the voting capital of the company: Provided that where the open off er is made in pursuance to Sub-regulation (2) of Regulation 11, the public offer shall be for such percentage of the voting capital of the company as may be decided by the acquirer. (2) Where the offer is conditional upon minimum level of acceptances from the shareholders as provided for in Clause (xviii) of Regulation 16, the provisions of Sub-regulation (1) of this regulation shall not be applicable, if the acquirer has deposited in the escrow account in cash a sum of 50 per cent of the consideration payable under the public offer. (3) If the public offer results in the public shareholding being reduced to 10 per cent or less of the voting capital of the company, or if the public offer is in respect of a company which has public shareholding of less than 10 per cent of the voting capital of the company/ the acquirer shall either,– (a) within a period of 3 months from the date of closure of the public offer make an offer to buy out the outstanding shares remaining with the shareholders at the same offer price, which may result in delisting the target company; or (b) undertake the disinvest through an offer for sale or by a fresh issue of capital to the public, which shall open within a period of 6 months from the date of closure of the public offer, such number of shares so as to satisfy the listing requirements. (4) The letter of offer shall state clearly the option available to the acquirer under Sub-regulation (3). (5) For the purpose of computing the percentage referred to in Sub-regulations (1), (2) and (3), the voting rights as at the expiration of 30 days after the closure of the public offer shall be reckoned. (6) Where 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 the merchant banker, taking care to ensure that the basis of acceptance is decided in a fair and equitable manner and does not result in non-marketable lots: Provided that acquisition of shares from a shareholder shall not be less than the minimum marketable lot or the entire holding if it is less than the marketable lot." 44. The learned Judge, after considering the voluminous record before him, in the two notices of motion, came to the following conclusions, prima facie: (a) That the plaintiffs could claim an interm injunction only if they could make out a prima facie case which would involve examining the prima facie defence of the defendants. (b) 3,75,00 equity shares which became available to defendant No. 2 by virtue of acquisition of 75,000 fully convertible debentures on 14-12-1993, were equity shares which were redeemable on purchase of convertible debentures on a date prior to the Regulations coming into force. No injunction could be granted so far as the voting rights which flow therefrom. (c) As regards the equity shares purchased

by defendant Nos. 3 and 4, registered in their names, and the unregistered equity shares acquired by defendant No. 5, the plaintiffs had made out a prima facie case to justify the injunction as sought for by them since these purchases were made in excess and in breach of the mandatory requirement of prior public announcement provided under the Regulations. (d) The action brought about by the plaintiffs was a personal action and not a derivative action. The right to claim rectification of register of members of the company was common law right and, therefore, the plaintiffs could maintain a suit for rectification of register of members. (e) The plaintiffs have a prima facie right to maintain the present suit to seek a declaration that the acquisition of the disputed shares was void being in breach of the concerned Regulations. On these findings, the learned Judge made the notices of motion absolute in part as earlier noticed. 45. At this stage, it is necessary to notice the objection taken by defendant Nos. 1 and 11 in Notice of Motion No. 3120 of 1997 to the effect that this Court did not have jurisdiction to try, entertain and dispose of the suit. It was submitted on behalf of the defendant Nos. 1 to 11 that so far the question of registration or non-registration of shares is concerned, the plaintiffs could approach the CLB under Section 111A of the Companies Act, which was the competent forum to go into such matters. Similarly, the allegations regarding violation of the SEBI Regulations could have been gone into by the SEBI which was the competent authority to go into those allegations, particularly when proceeding was arising out of the notices issued by it. When this question of jurisdiction was raised, Mr. Nariman, the learned counsel appearing on behalf of the plaintiffs, sought clarification from defendant Nos. 1 to 11 as to their stand on the question of jurisdiction, viz., whether the defendants were pressing the plea of jurisdiction. According to Mr. Nariman, if the plea of lack of jurisdiction was to be urged and decided, an issue had to be framed and decided at that stage itself. He, therefore, insisted that if the Court was required to frame an issue on the question of jurisdiction, the same may be framed and decided as a preliminary issue having regard to the specific provision of Section 9A of the Code of Civil Procedure, 1908 as amended by a Maharshtra State Amendment. Unless an issue was framed, the Court could not go into the question of jurisdiction and record a finding thereon. At best, the Court could record submissions of rival parties without recording its finding on the issue of jurisdiction. If the plaintiffs insisted that a finding be recorded on the question of jurisdiction, the Court must first frame an issue and thereafter decide the same, as contemplated by Section 9A of the Code of Civil Procedure, as amended in its application to the State of Maharashtra. Particular reliance was placed on two decisions of this Court in Meher Singh v. Deepak Sawbay 1998 (4) ALL MR 536 and Institute Indo Portuguese v. Borges . Reliance was also placed on the judgment of a Single Judge of this court in Ignatius O'Cunbo v. Eather Denis 1993 (2) MLJ 1441. 46. In the light of the submissions urged by Mr. Nariman, the defendants replied that their plea was not one of ouster of jurisdiction, which could be tried as a preliminary issue in view of Section 9A of the Code of Civil Procedure. Their submission was that the Court may not exercise its discretionary jurisdiction in view of the fact that the aforesaid disputes could appropriately be

agitated either before the CLB or the SEBI. The jurisdiction of the civil court and that of the authorities concerned, was somewhat overlapping and concurrent. Mr. Nariman, however, drew the attention of the Court to a letter dated 22-1-1999 written on behalf of the defendants to SEBI requesting it to defer the determination in view of the fact that the High Court was seized of the matter. He, therefore, insisted that the defendants must agree to an issue being framed on the question of jurisdiction and the same be tried as a preliminary issue or, alternatively, the defendants must agree not to press the issue in the manner in which it is worded in para 1(g) of the Affidavit-in-Reply of defendant No. 11, which is as follows: "This Hon'ble Court does not have jurisdiction to try, entertain and dispose of the suit." 47. In view of the objection of Mr. Nariman, the defendants filed a joint affidavit of defendant No. 1 and defendant No. 11, affirmed on 16-3-1999, slating that for the reasons contained therein, the submission was not being pressed. Referring to Clause (g) of para 1 of the Affidavit dated 21-12-1998, in reply to Notice of Motion No. 3120 of 1997 and para 1A of the Reply dated 21-12-1998 in Notice of Motion No. 3932 of 1998 it was clarified that if the company had filed the present suit, the defendants could and would have contended that the jurisdiction of this Court is ousted in view of Section 111A(2) and (3). Since the plaintiffs as shareholders had filed the suit alleging violation of civil rights, such a suit can be filed before a civil court which has territorial and pecuniary jurisdiction. The defendants, therefore, urged that at an interlocutory stage this Hon'ble Court should not exercise its discretion to grant interim relief to the plaintiffs, since there is another forum which could be moved by the company for rectification of the register. Moreover, Mr. Reddy, (Plaintiff) is only a name render for the company and since no civil rights of Mr. Reddy are infringed, no relief should be granted to him. These are some of the factors amongst others which the Court should consider while exercising its jurisdiction in refusing the interim relief. At the trial of the suit, however, the defendants would urge that the defendants do not have any right to oppose registration or to have the register rectified and hence, the suit should be dismissed. In the light of the above submissions, Ground (g) of paragraph 1 and paragraph 1A of the two aforementioned affidavits both dated 21-12-1998 were not pressed. 48. It would, thus, appear that in view of the objection of Mr. Nariman, appearing on behalf of the plaintiffs, the defendants clarified that they were not pressing the plea urged by them in the aforesaid two notices of motion that this Court does not have the jurisdiction to try, entertain and dispose of the suit. One of the contentions urged by Mr. Nariman is that the defendants having given up the plea, they should not be permitted to urge the bar of jurisdiction in any other form as they seek to do in these appeals. His categoric objection is to the plea of jurisdiction being raised in the appeals by contending that (1) in view of Section 111A of the Companies Act, this Court had no jurisdiction to entertain the suit; (2) in view of the provisions of the regulations, SEBI is the only competent authority to look into the allegations regarding breach of SEBI Regulations; and (3) that the repeal of the 1994 Regulations by the 1997 Regulations deprived the plaintiffs of any cause of action. We shall consider the submissions urged by Mr. Nariman at the appropriate stage. 49. We may, how-

ever, notice the main submissions urged on behalf of the defendants/appellants, as well as the plaintiffs/respondents before us. Mr. Chidambaram, appearing on behalf of defendant No. 11, viz., M.D. Chhabria took as through the record so far it relates to the acquisition of shares of Herbertsons, Defendant No. 12, by the defendants. He submitted that the facts of the case would disclose that there was no violation of the 1994 Regulations which govern the transactions. His first main submission in this regard is that Regulation 10(1) of the said Regulations refers to the acquisition of 'further shares' by 'an acquirer who holds shares' having ten per cent or less of voting rights in the capital of the company. He submitted that since the defendant-companies which acquired the shares of Herbertsons (Defendant No. 12) did not hold any shares in that company, Regulation 10 is not at all attracted, since those regulations would apply only to the case of acquirer who already held shares in the capital of the company. In other words, Regulation 10 will not apply to an acquirer whose name is not present in the register of the company as a shareholder. Secondly, it was submitted that defendant No. 11 when he took control of Imfa and Mahameru, (Defendant Nos. 3 and 4 respectively), he acquired shares of unlisted companies which had already acquired the shares of Herbertsons Ltd., Defendant No. 12. The 1994 Regulations did not cover the concept of 'indirect acquisition', which was introduced for the first time in the 1997 Regulations, and also did away with the requirement of an acquirer being an existing shareholder. Thirdly, it was submitted that there was no obligation to make a public announcement or public offer in the facts and circumstances of the case, since the said obligation was cast only on an acquirer who holds shares in the capital of the company and who intended to acquire further shares. Fourthly, it was submitted that even if a public offer was to be made, it would have been an exercise in futility, because of Regulation 21(2) read with Regulation 21(4) of the 1994 Regulations. Having regard to the share holding of the defendants concerned and other shareholders, if an offer to acquire 20 per cent further shares in the capital of the company were to be made, it would have resulted in the public share holding being reduced to less than 20 per cent of the working capital of the company. 49.1 The next main submission urged by Mr. Chidambaram is that the plaintiffs did not have a civil right or common law right to apply for rectification of register in respect of shares held by a third party in a public limited company, on the ground that no public offer was made by such a third party. There is no common law right to seek rectification on the plea of violation of SEBI Regulations. In any event, in view of Section 111A, which was introduced in the Companies Act by the Depositories Act, 1996 with effect from 20-9-1995, the common law right, if any, stood extinguished by necessary implication. 49.2 Whatever may have been the position before 20-9-1995, after the introduction of Section 111A in the Companies Act, and in particular after 15-1-1997 (after amendment of Section 111A), a public company cannot refuse to register transfer of shares. It is bound to register the transfer of shares and the right to apply for rectification can be availed of only by the five specified categories mentioned in Section 111A(3). Though in the case of private companies, members of the company have a right to apply for rectification in view of the provisions of Sections 38, 155 and 111

of the Act, in respect of public companies this right has been taken away by the statute from the members in respect of shares in which the members have no interest as investors. The right to apply for rectification is now a statutory right and available only to five specified categories of persons and only on the grounds specified in Section 111A. 49.3 The contention of the plaintiffs that the purchase of shares by the appellants and the resultant take over arising out of the voting in a particular manner are two parts of a contract, and that it is the latter part which remained to be completed, is not sustainable. Section 23 of the Indian Contract Act could not be applicable because a transfer of title between the transferor and the transferee of shares is effective from the date of transfer. There was no justification for splitting of such transaction into - (i) property nghts in the shares; and (ii) right to vote on the strength of the shares. The contract is performed and executed and no part of the contract remains executory, once the transferor delivers the share certificate with transfer forms to the transferee. In any event, even if the shares are purchased in contravention of the SEBI Regulations, that would not make the purchase void. Section 23 of the Indian Contract Act applies only to executory contracts and not to transfers which are concluded or acted upon in pursuance of such contract. 49.4 Having regard to the rights conferred upon the shareholders by various provisions of the Companies Act and in the absence of any provision under the SEBI Act or Regulations for suspension of voting rights, the learned Judge was not justified in suspending the voting right in respect of registered and unregistered shares acquired by defendant Nos, 3, 4 and 5. 49.5 Having regard to the facts of the case and the conduct of defendant No.11 M.D. Chhabria, it cannot be held that he was acting in concert with other defendants to acquire substantial shares in defendant No. 12 company in violation of the provisions of the 1994 Regulations. There was total transparency on the part of defendant No. 11 as well as defendant Nos. 3, 4 and 5. Hence, defendant No. 11 acted bona fide without violating any of the provisions of the 1994 Regulations. 50. Mr. Ashok Desai, the learned counsel appearing on behalf of the defendant No. 1 Kishore R. Chhabria submitted : (1) The function of SEBI is to protect the interest of the investors, to promote the development of securities market and to regulate the securities market. As a market regulator, it is a protector of investors, not managements. The provisions of the SEBI Act, the 1994 and 1997 Regulations, the Depositories Act and Section 111A of the Companies Act show that there is a significant shift of law, as a result of which the managements are no longer protected. The interest of investors and the interest of security markets are now the vital concern of law. The thrust of the SEBI Regulations is to enable a stray shareholder to participate in a higher price being offered by someone who wants to acquire a substantial share holding. Having regard to the interpretation of these Legislations and the Regulations, the transactions impugned can never be regarded as a nullity or void or requiring any interference of the Court. The statutory scheme does not contemplate that Court can rectify the register of members for alleged breach of the SEBI Regulations and that too at the instance of a person who has no interest in the shares. (2) Assuming that there was a breach of 1994 Regulations, the said Regulations having been

repealed and Section 6 of the General Clauses Act being not applicable to the repeal of the aforesaid Regulations, and having regard to the savings clause in the 1997 Regulations, pending proceedings are not saved and it can be inferred that the intention of the Legislature is that the pending proceedings shall not continue, but fresh proceedings may be initiated under the provisions. The savings clause in the 1997 Regulations does not keep alive any obligation that an acquirer may have incurred (if any) under the 1994 Regulations. This would include an obligation to make a public offer, which in the 1994 Regulations are obliterated, except to the extent and in the manner saved under the provisions of Regulation 47 of 1997 Regulations. (3) The show-cause notices issued by the SEBI alleging that defendant Nos. 1 and 11 were acting in concert are not evidence of the fact that the statutory body has taken a prima facie view that the 1994 Regulations have been violated. Any prima, facie conclusion reached by the SEBI in the said show-cause notices are of no assistance to the plaintiffs or relevant for the purpose of the proceedings in the Court since the allegations contained therein cannot be deemed to be final and cannot be referred to in collaterial proceedings. A show-cause notice cannot be equated with an order which has attained finality. Reliance placed on these show-cause notices was, therefore, misplaced. (4) Having regard to the principle of corporate democracy and balance of convenience, the impugned order injuncting voting of 21.75 per cent votes of the shareholding is not justifiable. It has resulted in the management being continued by persons who are in a minority and who continue in office by virtue of the interim order. (5) Mr. Ashok Desai also commented on the conduct of the plaintiffs and has highlighted the collusion between Mallya and the plaintiffs and plaintiffs having been setup by Mallya to file the suit. On the other hand, according to him, there is nothing clandestine about the conduct of Kishorc Chhabria, defendant No. 1. He has referred to the material on record in support of his submissions. He also advanced before us submissions to supplement the arguments already advanced by Mr. Chidambaram and submitted that in the facts and circumstances of the case, no interference by the Court was called for. The dispute regarding the breach or otherwise of the SEBI Regulations should have been left to the Tribunal mentioned in the Regulations. The Court's jurisdiction can be invoked only after the designated Tribunal has given its decision. It is undoubtedly for the Court to interpret the law and declare the legal meaning of the statute, but this is what the Courts must do after the designated Tribunal has given its decision. The impugned order freezing the voting rights of registered shareholders remains operational not only pending action by the SEBI, but also pending the suit. The said order has been characterised as an unprecedented order. On a proper interpretation, neither the 1994 nor the 1997 Regulations have been breached. The 1994 Regulations permitted the acquisitions which were indirect; it did not prohibit acquisition by persons who are not shareholders and did not apply to the purchase of shares of unlisted companies. The plaintiffs have no right to maintain any action before this Court and at best they could make a complaint to the SEBI. 51. Mr. Rafiq Dada, appearing for the appellants in Appeal No. 12 of 2000, viz, defendant Nos. 7 and 8 to the suit, adopted the submissions urged by Mr. Chidambaram and Mr. Desai. He sub-

mitted that the aforesaid two defendants had made creeping acquisitions of 1.31 per cent and 0.21 per cent shareholding in defendant No. 12 Herbertsons which are saved by the 1997 Regulations. 52. Similarly, the appellants in other appeals have adopted the arguments advanced by Mr. Chidambaram and Mr. Desai. 53. Mr. Nariman, appearing on behalf of the plaintiffs in all the appeals replied to the submissions advanced on behalf of the appellants-defendant, and submitted that the impugned order passed by the learned Judge ought not to be interfered with as it is perfectly in accordance with law, and based on material on record, He submitted, inter alia: (1)That the facts on record disclose that defendant Nos. 1 to 11, acting in concert with each other and with the remaining defendants, acquired shareholding in excess of 10 per cent of Herbertsons, defendant No. 12, in blatant disregard and violation of the 1994 Regulations, These transactions are void and defendant Nos. 1 to 11 cannot claim any right based on such acquisition of shares which is void in law, being in breach of the 1994 Regulations, particularly Regulation 10 thereof. (2) In view of the provisions of Section 9A of the Code of Civil Procedure, as amended in its application to the State of Maharashtra, any issue relating to the question of jurisdiction had to be raised at the interim stage as preliminary issue and was required to be decided by the Court. In view of the categoric stand of the defendants that they were not raising the plea of jurisdiction, the defendants were precluded from urging any question in the appeals touching on the question of jurisdiction, in particular, the plea of the defendants that the Court had no jurisdiction in the matter in view of the exclusive jurisdiction conferred on the SEBI, and in view of the provisions of Section 111A of the Companies Act as well as the plea based on repeal of the 1994 Regulations. He, therefore, strongly objected to the consideration of these issues by this Court. (3) A member of a company has a common law right to seek rectification of the Register of Members of the company. The common law right is not extinguished merely because regulatory legislations are enacted to regulate the right, in the absence of express ouster of Court's judisdiction. In the instant case, he submitted, there was nothing in Section 111A to oust the jurisdiction of the Court and, therefore, the right of a member of a company to seek rectification of the register of members existed notwithstanding Section 111A. (4) Assuming that a member of a company has no remedy under Section 111A as contended by the defendants, in that event, his pre-existing common law right to seek rectification of the register is kept intact. In any event, he submitted, Section 111A does not have the effect of extinguishing the common law right of a member of a company to seek rectification of the register of members with a view to uphold the purity of the register of members. (5) The transactions relating to the acquisition of shares by the defendants in breach of the mandatory provisions of the 1994 Regulations render the transactions void, and the plaintiffs have a right to claim a declaration from a civil court that the transactions are void. (6) The repeal of the 1994 Regulations by the 1997 Regulations, did not in any manner effect the invalidity of the transactions. What was illegal and invalid under the 1994 Regulations does not become legal and valid merely because the 1994 Regulations have been repealed. (7) The allegations of misconduct levelled against the plaintiffs by the

defendants did not in any manner help their case because even in equity, the principle that the plaintiffs must come with clean hands is applicable to his conduct in regard to the subject-matter of litigation, or which has some connection with the reliefs sought, or has an immediate and necessary relation to the equity sued for. The Court is not concerned with the plaintiffs general conduct. In the instant case, the allegations made by the defendants relate to matters which are not subject-matter of the litigation nor do they have any relationship with the equity sued for. Moreover, those matters are pending before the appropriate authorities, and, therefore, it would not be proper for this Court to express any opinion on those matters. (8) The trial Court being satisfied that the plaintiffs had a prima facie case, and having regard to the balance of convenience and irreparable injury that may be caused, has rightly passed an order freezing the voting rights in respect of the shares acquired by the defendant Nos. 3, 4 and 5. The order passed by the trial Judge cannot be characterised as unprecedented because such an order can be passed in law. He referred to some decisions of American Courts, not as binding precedents, but only to establish that such freezing orders have been passed by the American Courts. In any event, such an order can be passed by the CLB even under Indian laws, and therefore, there can be no objection to such an order being passed by a Court. 54. To appreciate the merit of the rival submissions, we may briefly notice the Scheme of the SEBI Act, 1992 and the 1994 Regulations. The relevant provisions of the Act and the Regulations have been extracted earlier in this judgment. The Act was enacted to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market, and for matters connected therewith or incidental thereto. The powers and functions of the Board have been enumerated in Section 11 of the Act. The Act casts a duty on the Board 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 the measures being 'regulate substantial acquisition of shares and take-over of the companies'. Chapter VIA of the Act provides for penalties and adjudication. Section 15H provides for non-disclosure of acquisition of shares and takeovers. Under the aforesaid section, if any person who is required under the Act or any rules or regulations made thereunder, fails to disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or make a public announcement to acquire shares at a minimum price, he shall be liable to a penalty not exceeding five lakh rupees. Section 15Y bars the jurisdiction of a Court to entertain any suit or proceeding in respect of, any matter which an Adjudicating Officer appointed under the Act or the Tribunal is empowered to determine, and further prohibits the grant of injunction by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. Similarly, Section 20A bars jurisdiction of civil court in respect of any matter which the Board is empowered by, or under, the Act to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by the Board by, or under, the Act. Section 30 vests in the Board the power to make

regulations. It is in the exercise of this power that the 1994 Regulations were framed by the SEBI. Section 32, however, clarifies that the provisions of the Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force. 55. The regulations framed by the SEBI came into force with effect from 7-11-1994. Regulation 3 makes the provisions of Chapter III of the regulations inapplicable to acquisition of shares in companies whose shares are not listed on any stock exchange. Regulation 4 empowers the Board to grant exemption from the provisions of Chapter III after recording the reasons in writing for grant of such exemption. Chapter II deals with disclosures of shareholding. Regulation 5 provides that any person who holds more than five per cent shares in any company, shall within two months of notification of the regulations disclose his aggregate shareholding in that company to all the stock exchanges on which the shares of the said company are listed and to the aforesaid company. The company whose shares are held by such persons are also required to disclose to the stock exchange within two months the aggregate number of shareholdings of each of such acquirer. Regulation 6 deals with an acquirer who holds five per cent or less than five per cent shares in a company and acquires more than five per cent shares in pursuance of a public issue, or by one or more transactions, or in any other manner. Such an acquirer is required to disclose the aggregate of his shareholding in that company to the company, and to all stock exchanges where the shares are listed. Regulations 5 and 6, therefore, oblige any person who holds more than five per cent shares or who holds five per cent or less than five per cent shares but acquires more shares to take his shareholding to more than five per cent, to disclose his aggregate shareholding to the company and the stock exchanges. Though these regulations cast an obligation, they do not provide for the consequence of non-disclosure. 56. Chapter III deals with take-overs. Regulation 9(1) relates to an acquirer who holds shares carrying ten per cent or less of voting rights in the capital of the company. He is forbidden from acquiring any further shares through negotiations, which, when taken together with his existing shareholding would carry more than ten per cent voting rights, unless he makes a public announcement to acquire shares at a minimum offer price from the other shareholders of the company in accordance with the regulations. Similarly, an acquirer who already holds shares in a company which carry more than ten per cent of the voting rights in the capital of the company is, prohibited from acquiring any further shares through negotiations unless the acquirer makes a public announcement to acquire shares at a minimum offer price from the other shareholders of the company in accordance with the regulations. The words used in these regulations are shall not acquire any further shares. Regulation 9(3) provides that where an acquirer acquires securities which would entitle him to more than ten per cent of the voting rights together with the voting rights on shares already held by him, then, such person shall make a public announcement referred to in Sub-regulation (1) at the time immediately before his entitlement to obtain voting rights on such securities. Regulation 9, therefore, forbids further acquisition of shares by the acquirers mentioned therein through negotiations, and obliges them in cases covered by Regulation 9 to make a public announcement

to acquire shares at a minimum offer price from the other shareholders of the company. 57. Regulation 10, on the other hand, deals with acquisition of shares from the open market. Regulation 10(1) prohibits an acquirer who holds shares carrying ten per cent or less of voting rights in the capital of the company from acquiring any further shares in the company from the open market which, when taken together with his existing shareholding, would carry more than ten per cent of the voting rights, unless such acquirer makes a public announcement of intention to acquire shares in the open market in accordance with the regulations. Similarly, an acquirer who, on the date of commencement of the regulations, holds shares which carry more than ten per cent of the voting rights in the capital of the company is prohibited from acquiring any further shares in the company unless he makes such a public announcement. By definition an 'acquirer' includes persons acting in concert with the acquirer. These provisions clearly spell out the objective Sought to be achieved by the regulations, viz., to bring about transparency in the dealing of securities particularly in relation to takeovers as also to ensure a fair return to a shareholder of the company in case of such acquisition taking place. The public announcement referred to in Regulation 9 is to be made not later than four days of either the finalisation of negotiations or entering into an agreement or memorandum of understanding to acquire shares, whichever is earlier. This highlights the fact that the public announcement must be made soon after the decision is taken to acquire such shares and before the actual acquisition of the shares. Similarly, Regulation 14 provides that the public announcement of intention to acquire shares referred to in Regulation 10 shall be made either immediately before the acquisition of any shares which would increase the existing shareholding of the person making the announcement beyond ten per cent, or in case his existing shareholding is already beyond ten per cent, any time before the person seeks to acquire any shares in order to increase his existing shareholding. The emphasis is on the voting rights in the capital of the company. This again, emphasises the requirement of a public announcement being made before the acquisition of shares. Regulation 15 provides the particulars to be contained in the public announcement referred to in Regulation 9 or 10. The particulars to be specified relate, inter alia, to the identity of the ultimate person seeking to acquire shares, and the intention of acquisition of shares, apart from conditions subject to which the offer is made. The particulars to be disclosed in the public announcement enable a shareholder or an investor to take an informed decision on the offer made to him, apart from ensuring transparency in such transactions. The letter of offer is required to be placed before the Board for its approval through a merchant banker appointed by the acquirer. The merchant banker is required to submit a due diligence certificate to the Board stating that the statements made in any document, advertisement or brochure issued to the public contains statements, which are true to the best of his or its knowledge. The letter of offer is required to be sent to all the shareholders. The manner in which the payment is required to be made and the minimum offer price determined is laid down in Regulation 19. Regulation 21 obliges the acquirer to make a public offer to be made to the remaining shareholders of the company to acquire from

them an aggregate minimum of 20 per cent of the total shares of that company. However, under regulation 21(4), the offer shall not result in the public shareholding being reduced to less than 20 per cent of the voting capital of the company. Under Regulation 23, any person, other than the acquirer making a public announcement, may within two weeks of such announcement, make a competitive bid for acquisition, and to such a bid, the provisions of Chapter III shall mutatis mutandis apply. This, again, is designed to protect the interest of the investor, ensuring him a better price for his shares, if possible. Regulation 33 in Chapter V empowers the Board to appoint one or more persons as investigating authority to investigate and undertake inspection of the books of account, other records and documents of any person who may have acquired or sold securities to any person for any of the purposes specified in Sub-regulation (2). The investigation has to be done after giving reasonable notice to the person concerned. After the investigating authority has submitted its report to the Board, the Board shall communicate the findings to the person concerned, and give him an opportunity of being heard before any action is taken by the Board on the findings of the investigating authority. On receipt of the explanation, if any, from the person concerned, the Board may call upon the person concerned to take such measures as the Board may deem fit in the interest of the securities market and in due compliance with the provisions of the Act. rules and regulations. Under Regulation 39, the Board may, without prejudice to its right to initiate criminal prosecution under Section 24 of the Act, give such directions as it deems fit which may include a direction prohibiting the person concerned from disposing of any of the securities acquired in violation of the Regulations and/or directing the person concerned to sell the shares acquired in violation of the provisions of the Regulations. 58. The Regulations disclose a Scheme to bring about transparency in the transactions relating to acquisition of large block of shares which may ultimately lead to a take-over. That is why it insists on public announcement being made when the shareholding and, consequently, the voting power is increased beyond the extent contemplated by regulations 9 and 10. By obliging the acquirer to make a public announcement or a public offer, it ensures that a member of the company or an investor is able to take an informed decision on such public announcement/offer. The particulars which are required to be disclosed in the public announcement/offer are intended to give a clear picture to a member of the company or a prospective investor, as the case may be, as to the purpose for which such shares are being acquired and by whom. It also ensures to existing shareholders a fair return on their investment, and permits any other person to make a matching bid which may ultimately benefit the shareholders of the company. On the basis of the particulars furnished, the shareholder is enabled to take a decision as to whether he should retain his holding or dispose of them for the price offered. Thus, transpar- ency in dealings as well as fairness to the shareholders of the company are ensured. 59. It is trite to say that the statute must be construed according to the intent of its framers, and it is the duty of the Court to act upon the true intent of the Legislature. Cannons of interpretation lend a guide, without affording a strait jacket formula. It is often said that the function of the Courts is only

to expound and not to legislate, a theory which has in the recent past invited dissents in the sense that the gaps in the legislation may call for a judicial filling up with a view to dealing with situations and circumstances that may emerge after enacting a statute, not within the imagination of the Legislature, when its application may be called for. If the words are plain and clear, no difficulties arise, but where a statutory provision is open to more than one interpretation, it becomes the duty of the Court to so interpret the provision that without doing any violence to the language of the statute, it is given its true meaning as may have been intended by the Legislature, having regard to its context, the object which the statute seeks to achieve, and the mischief it seeks to avoid. Definitions given in the statute more often than not assist the Court in giving meaning to a provision, but definitions are always made subject to the context, and therefore, reading the statute as a whole, contextual interpretation may at times widen or narrow the definition. The process of construction, therefore, combines both literal and purposive approaches. We are tempted to quote from the judgment in RBI v. Peerless General Finance & Investment Co. Ltd. AIR 1987 SC 1023, where Justice O. Chinnappa Reddy, speaking for the Court observed:– "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know by it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With those glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression 'Prize Chit' in Srinivasa and we find no reason to depart from the Court's construction." (p. 1042) 60. Keeping these principles in mind, we now proceed to consider the first submission urged on behalf of the defendants which consists of four limbs, and which directly raise questions of interpretation of the 1994 Regulations. Mr. Chidambaram submits that the defendants have not violated the regulations since no action of theirs is in breach thereof. Firstly, the acquiring companies not being existing shareholders of the target company on the date of acquisition of shares, or on the date of coming into force of the regulations, they do not come within the mischief of Regulation 9 or 10 which relate to 'an acquirer, who holds shares'. Secondly, by reason of Regulation 3(d), the provisions of Chapter III relating to the take-overs do not apply to acquisition of shares of unlisted companies. It

did not matter that these companies had, even before their take-over, acquired substantial shares of the target company over which defendant No. 11 gained control indirectly as a result of their take-over. Thirdly, in the facts of the case, there was no obligation to make a public announcement or public offer. Lastly, having regard to the pattern of shareholding in Herbertsons, defendant No. 12, a public offer was futile as it would have resulted in public shareholding being reduced to less than 20 per cent of the voting capital of the company, a consequence expressly prohibited by Regulation 21(4). 61. It is not disputed before us that the acquisition of shares by defendant Nos. 3,4 and 5 (except 54,000 shares purchased by defendant No. 3) were made from the open market when the 1994 Regulations were in force, before their repeal by the 1997 Regulations on 20-2-1997. We may also notice that the aforesaid Defendants acquired the shares, not by one transaction but by a series of transactions spread over several months. Defendant No. 3 acquired shares representing about 10.91 per cent of the equity share capital of the defendant No. 12, Herbertsons, while the defendant Nos. 4. and 5 acquired 4.97 per cent and 3.83 per cent respectively. It is also not disputed that the transactions have to be viewed by reference to the 1994 Regulations and not 1997 Regulations. Mr. Chidambaram contended that 1997 Regulations not being retrospective in operation, they did not apply to the transactions in question. Mr. Nariman agreed and went further to say, drawing support from Vaijnath v. Guramma that 1994 Regulations must be construed on their own without reference to 1997 Regulations because a subsequent Act cannot be used to interpret the provisions of an earlier enactment. On the question of interpretation, Mr. Chidambaram submitted that if the provisions are penal, the words in a statute must be read in their plain, literal and grammatical meaning. The Court must confine itself to the words within their natural meaning. Reliance was placed on the following decisions: (i) London & North Eastern Railway Co. v. Berrimal [1946] AC 278 @ 295, 313 &315. (II) Tolaram v. State of Bombay . (iii) Union of India v. Rai Bahadur Shree Ram Durga Prasad , Likewise, an Act must be interpretated in accordance with the plain words of the Act. Courts cannot aid the Legislature's defective phrasing of the Act and cannot add and mend the same by construction making up the deficiencies which are left there. The Court has no power to re-write a section nor will the Court supply the 'Causes Omissus'. He referred to the decisions in: (i) Crawford v. Spooner 6 Moo PC 1 @ 9 and 11. (II) Nahirathya Bysack v. Shyam Sunder Hauler . (III) P.K Unni v. Nirmala Industries . Mr. Nariman, for the plaintiffs, submitted that the principles of interpretation of statutes are well settled though at times some difficulties arise in their application to the facts of a particular case. He, however, submitted that even while construing the regulations of this nature having penal consequences, and conceding that the words in the statute must be given their plain, literal and grammatical meaning, that is not to say that in construing such a statute, the other canons of interpretation have no application. A penal statute, like any other statute, attracts the rule that where two interpretations are reasonably possible, that which helps to achieve the objective of the statute must be preferred. It must be so construed as to be consistent with the legislative intent and purpose so as

to suppress the mischief and advance the remedy. He relied upon the decision of the Supreme Court in NEPC Micon Ltd. v. Magma Leasing Ltd. . The Apex Court was considering penal provisions viz., Sections 138 and 140 of the Negotiable Instruments Act, 1881. Noting the submission that Section 138 being a penal provision, it should be strictly interpreted and if there is any omission by the Legislature, wider meaning should not be given to the words than what is used in the section, it was observed that even with regard to penal provisions, any interpretation, which draws life and blood of the provision and makes it ineffective and a dead letter should be averted. If the interpretation, which is sought for, were given, then it would only encourage dishonest persons to issue cheques and before presentation of the cheques, close that account and thereby escape from the penal consequences of Section 138. A passage from Kanwar Singh v. Delhi Administration was referred to which reads as follows : "It is the duty of the Court in construing a statute to give effect to the intention of the Legislature. If, therefore, giving a literal meaning to a word used by the draftsman, particularly in a penal statute, would defeat the object of a Legislature, which is to suppress a mischief, the Court can depart from the dictionary meaning or even the popular meaning of the word and instead give it a meaning which will advance the remedy and suppress the mischief." Their lordships also quoted with approval a passage from Maxwell wherein it was emphasised that the manner of construction has two aspects. One is that the Courts, mindful of the mischief rule, will not be astute to narrow the language of a statute so as to allow persons within its purview to escape its net. The other is that the statute may be applied to the substance rather than the mere form of transactions, thus, defeating any shifts and contrivances which parties may have devised in the hope of thereby falling outside the Act. When the Courts find an attempt at concealment, they will brush away the cobweb varnish, and show the transactions in their true light. 62. In Baldev Krishna Sahiv. Shipping Corpn. of India Ltd. AIR 1987 SC 2245, a question arose as to whether the term 'officer or employee' in subsection (1) of Section 630 of the Act must be interpreted to mean not only the existing officer and employee of the company but must also include past officer and employee of the company. It was submitted before the Court that Section 630 makes it an offence where any officer or employee of the company wrongfully withholds possession of such property of the company. Secondly, it was contended that the Legislature never intended to include past officers and employees of a company within the ambit of Section 630 which provides for prosecution of an officer or an employee of a company for wrongfully withholding the property of the company inasmuch as it has used different language where it was so intended, namely, in Sections 538 and 545. The Apex Court did not approve of the judgment of the Calcutta High Court which had placed a narrow construction on the provision contained in Sub-section (1) of Section 630 as their Lordships were of the view that such a narrow construction defeated the very purpose and object with which the provision has been introduced. It was observed that the beneficient provision contained in Section 630 no doubt penal, has been purposely enacted by the Legislature with the object of providing a summary procedure for retrieving the property of the

company. It is the duty of the Court to place a broad and liberal construction on the provision in furtherance of the object and purpose of the legislation which would suppress the mischief and advance the remedy. After a full discussion, their lordships held that the term 'officer or employee' of a company included not only the existing officers or employees but also past officers or employees. 63. In Directorate of Enforcement v. Deepak Mahajan , the Apex Court was called upon to interpret Section 167 of the Code of Criminal Procedure, 1898. After referring to the authorities on the subject. Their lordships observed thus: "31. True, normally courts should be slow to pronounce the Legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment as affording the best guide, but to winch up the legislative intent, it is permissible for courts to take into account of the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the Legislature inane. In cases of this kind, the question is not what the words in the relevant provision mean but whether there are certain grounds for inferring that the Legislature intended to exclude jurisdiction of the courts from authorising the detention of an arrestee whose arrest was effected on the ground that there is reason to believe that the said person has been guilty of an offence punishable under the provisions of FERA or the Customs Act which kind of offences seriously create a dent on the economy of the nation and lead to hazardous consequences. Authorities, a few of which we have referred to above, show that in given circumstances, it is permissible for courts to have functional approaches and look into the legislative intention and sometimes it may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and objective may not become futile." (p. 455) 64. Keeping in view the principles laid down in the authorities cited at the Bar by the learned counsel for the parties, we shall now proceed to consider the submissions urged by Mr. Chidambaram on the question of interpretation of the Regulations to find out their true meaning and import. The term 'an acquirer who holds shares' is used in Regulations 9 and 10, with which we are concerned in this case. The term 'acquirer' has been defined under Regulation 2(b) of the 1994 Regulations to mean any person who acquires or agrees to acquire shares in a company either by himself or with any person acting in concert with the acquirer. By definition 'acquirer' includes persons acting in concert with the acquirer and, therefore, the acquisition of the acquirer and all those who act in concert with him is considered to be the acquisition of the acquirer. Mr. Chidambaram submitted that since the term 'holder of a share' is not defined in the 1994 Regulations, the definition assigned to that expression in the Act must be imported. In Regulation 10, the word 'acquirer' is qualified by the words 'who holds shares'. Therefore, to fall within the purview of Regulation 10, an acquirer is required to have an existing shareholding in the company, meaning thereby that the acquirer must be one

whose name is present on the register of the company as a shareholder/member. He emphasised the fact that Regulation 10 does not prohibit the acquisition of any shares, but only prohibits the acquisition of 'any further shares'. The use of the word 'further' presupposes the existence of a prior shareholding, in the absence of which Regulation 10 is not attracted. The same principle applies to Regulation 6. He submitted that in Fascinating Leasing 1998 (17) SEBI and Corporate Laws 204, such a construction has been accepted by the Tribunal. He further submitted that in Regulation 10(1), it would not be permissible to read the words 'if any' after the words 'existing shareholding'. According to him, the words 'if any' did not appear in 1994 Regulations and were brought in later by the 1997 Regulations. The privilege of a member can be exercised only by that person whose name is recorded in the Register of Members, and, hence, he alone could be called a 'holder of the shares' or 'a holder'. He, therefore, concluded that the expressions 'member', 'holder of a share' and a "holder", are synonyms, and for this, he placed reliance on two decisions of the Supreme Court in (i) Howrah Tradingv. I.T. Commissioner and (n) Balkrishna Gupta v. Swadeshi Polytex . On the other hand, Mr. Nariman submitted that to equate a holder with a registered owner of the share whose name appears in the register of Members, would completely defeat the very purpose of the Act and the regulations. The submission that an acquirer does not come within the ambit of Regulation 10 unless he holds shares from before would completely defeat the twin objectives of the Act and the Regulations, viz., to bring about transparency in dealing in securities, and to secure fairness to the existing shareholders of the company. If what Mr. Chidambaram contends is accepted, then, Imfa could have acquired even 50 per cent shares in Herbertsons Ltd., defendant No. 12, and lodged them for registration at one time, and yet, Regulation 10 would not be attracted. Such a meaning would defeat the very objective of the Regulations. The policy of the Regulations is very clear, viz., to enable the shareholders of a company to reach a proper informed decision as to whether they would part with their shares and to assure them a proper price. The provision is enabling, making it mandatory for a public announcement to be made prior to acquisition, followed by an offer, making it open to anyone to make a competitive bid. Therefore, it must be construed so as to achieve the objective rather than defeat by strategem. He placed reliance upon two decisions, one of the Privy Council and the other of the Supreme Court to support his submission that the person who is said to hold the shares within the meaning of Regulations 9 and 10 need not necessarily be a person whose name appears in the register of members as a shareholder of the company. The acquisition of shares is complete when the shares are paid for and the shares delivered to the transferee with transfer forms. He further sought to distinguish the judgment of the Tribunal dated 16-7-1998 in Fascinating Leasing & Finance P. Ltd's case (supra) and further submitted that in any case, the decision was erroneous and contrary to well settled law. 65. In Howrah Trading's case (supra), the facts were that the shares purchased by the Appellant from other persons under blank transfers had not been registered with the various companies. The Appellant claimed in Income-tax assessment proceeding that these shares, although not

registered in the name of the applicant were the property of the applicant and, therefore, dividend income should be grossed up under Section 16(2) and credit for the tax deducted should be allowed to the applicant under Section 18(5). The Court noticed the fact that where shares are sought to be transferred under blank transfers, unless the transfers are registered by the company, the company recognises no person except the one whose name is on the register of members. Of Course, between the transferor and the transferee, certain equities arise even on the execution and handing over of blank transfers, and among these equities is the right of the transferee to claim the dividend declared and paid to the transferor who is treated as a trustee on behalf of the transferee. These equities, however, do not touch the company. The scheme of the Indian Companies Act shows that the words 'member', 'shareholder', and 'holder of a share' have been used interchangeably in that Act. The transferee has a right to call upon the company to register his name and no more. No rights arise till such registration takes place. Their Lordships then considered the question which arose in that case, viz., whether by reason of Sections 16(2) and 18(5), the assessee who was a transferee on a blank transfer was entitled to the benefit of the grossing up of the dividend income. The assessee's contention was negatived, and the conclusion reached by the Court after considering the authorities on the subject was summed up thus : 'The question that falls for consideration is whether the meaning given to the expression 'shareholder' used in Section 18(5) of the Act by these cases is correct. No valid reason exists why 'shareholder' as used in Section 18(5) should mean'a person other than the one denoted by the same expression in the Indian Companies Act, 1913." It will, thus, be seen that the Court came to the conclusion that in the context of Section 18(5), the meaning to be given to the expression 'shareholder' was the same as in the Act. 66. In Balkrishna Gupta's case (supra), a question arose whether by reason of the appointment of a receiver under the Land Revenue Act in respect of the shares of the Polytex Co. held by the cotton mills company, the cotton mills company ceased to have the rights of a member under Section 169 of the Companies Act, and whether by the attachment of the shares under Section 149 of the Land Revenue Act, the cotton mills company suffered any diminution or curtailment in its rights as a shareholder in respect of the shares so attached. Lastly, whether by the pledge of certain shares, the cotton mills company suffered any such diminution or curtailment. In this context, the Court observed that the expressions 'a member', 'a shareholder' or 'holder of a share' are used as synonyms to indicate the person who is recognised by a company as its owner for its purposes. On a careful consideration of the provisions of the Act, a question arose as to whether a shareholder ceases to be entitled to exercise any of the rights conferred on him. The Court then considered the consequences of a receiver being appointed under the Land Revenue Act, of attachment of shares under the said Act, and the pledge of the shares, and came to the conclusion that these events did not in any manner affect the rights of the shareholder, viz., the cotton mills company to call a meeting in accordance with the notice issued under Section 169. This decision, no doubt, supports the submission urged on behalf of the defendants that under the Act, the expressions 'a member', 'a shareholder' or 'a

holder of a share' are used as synonyms to indicate the person who is recognized by a company as its owner for its purposes. The question still remains whether in the context of the Regulations, the same meaning must be assigned to the expression 'a holder of a share'. 67. On the other hand, Mr. Nariman relied upon a decision of the Privy Council in Bank of India Ltd. v. Jamsetji A.H. Chinoyll IA 76. In that case, a question arose whether the agreement for sale, which was, admittedly, made without the permission of the RBI, contravened Rule 93 of the Rules made under the Defence of India Act, 1939. Mr. Nariman placed reliance on a paragraph appearing at page 90 of the report which reads as follows: "For the defendants it was contended that to agree to purchase was to 'acquire' within the meaning of Rule 93(2). Both courts in India were of opinion that this submission was ill-founded, and their Lordships agree with that view. It was conceded that in India a contract for the sale of shares does not, of itself and in the ordinary course of events, create an equitable interest in the purchaser, and that no question arose as to the acquisition of such an interest. The point is therefore solely one of construction. In the opinion of the Board the natural meaning of the expression 'acquire any securities' in relation to a sale of shares points to the completion of the contract, in the sense of the acquisition by the purchaser of the documents necessary to procure his registration, rather than to the contract itself. There is nothing in the context to point away from this construction. On the contrary, the words 'or in the performance of a contract' appear to recognize the distinction on which this interpretation is based." Mr. Nariman placed considerable reliance on the decision of the Supreme Court in World Wide Agencies (P.) Ltd v. Margaret T. Desor [l990] 67 Comp. Cas., 607, and submitted that the decision is a clear authority for the proposition that a member of the company may be the holder of shares, but the holder of shares may not be a member of the company. The question arose whether the legal representatives of a deceased member whose name was still on the register of members, were entitled to file a petition under Sections 397 and 398, for relief against mismanagement and oppression. A preliminary objection was raised regarding the maintainability of the petition on the ground that the appellants were not members of the company as their names were not recorded in the register of members. Rights under Sections 397 and 398 being statutory rights, had to be strictly construed in the terms of the statute, which was given to 'any member' of the company, which could not be enlarged to include 'any one who may be entitled to become a member'. After a careful examination of the scheme of the Act and the provisions of Sections 397 and 398 and noticing that the question was no longer res Integra so far as England was concerned in view of the clear enunciation of the law by Pennycuick, J. in Jermyn Street Turkish Baths Ltd. [1970] 3 All E.R. 57, the Court held that having regard to the scheme and purpose of Sections 397 and 398 the reasoning on a pari materia provision of the English Act would be a valuable guide. It was observed- "The said construction, appeals to us, to further the purpose intended to be fulfilled by petitions under Sections 397 and 398 of the Act. It facilitates solution of problems in case of oppression of the minorities when the member is dead and his heirs or legal representatives are yet to be substituted. This is an equitable

and just construction. This construction, as suggested by Pennycuick J., does not militate against either equity or justice. We would, therefore, adhere to that constructions. In this connection, it may be mentioned that, in the 1972 edition of Gore-Browne on Companies, it has been stated as follows (p. 798): It has recently been settled that the personal representatives of a deceased member, even though they are not registered as members, are entitled to present a petition under Section 210. In Jermyn Street Turkish Baths Ltd., In re [1970] 3 All ER 57, Pennycuick J., held that on its true construction, Section 210 required that the word 'member' should include the personal representatives of a deceased member, on whom title of his shares devolved by operation of law." Later in the judgment, the Court observed : "In some situations and contingencies, a 'member' may be different from a 'holder'. 'A 'member' may be a 'holder' of shares but a 'holder' may not be a 'member'. In that view of the matter, it is not necessary, for the present purpose, to examine this question from the angle in which the learned single judge of the Calcutta High Court analysed the position in the case of Kedar Nath Agarwal v. Jay Engg. Works Ltd. [1963] 33 Comp, Cas. 102, to which our attention was drawn. Admittedly, in the present case, the legal representatives have been more than anxious to get their names put on the register of members in place of the deceased member who was the managing director and chairman of the company and had a controlling interest. It would, therefore, be wrong to insist that their names must be first put on the register before they can move an application under Sections 397 and 398 of the Act. This would frustrate the very purpose or the necessity of action". The judgment would lend support to the submission of the plaintiffs that a 'holder' need not necessarily be a 'member' of the company, and it is possible to give the expression a different connotation in the context of the statutory provision having regard to the statutory scheme and objective. Mr. Nariman also referred to Kedar Nath Agarwal v. Jay Engg. Works Ltd. [1963] 33 Comp. Cas. 102 where a learned Judge of the Calcutta High Court highlighted the distinction between a 'member' and 'holder' by reference to the provisions of the Act. He, therefore, submitted that the distinction between a 'holder' and a 'member' was not alien to the Act. 68. From the authorities cited at the bar, it is quite apparent that under the Companies Act, the words 'member', 'shareholder' and 'holder of a share' are used as synonyms, but the question arises as to whether in the context of the provisions of the 1994 Regulations having regard to its scheme and objective, the terra 'holder of a share' should be given the same meaning as in the Act, meaning thereby that it must be construed as restricted to those whose names appear in the register of members. In Howrah Trading's case (supra), the Court held that there was no reason to give to the term a. different meaning under the Act than the meaning assigned to it under the Act. In Balkrishna Gupta s case (supra), it held that the right to vote was not affected by a pledge of the shares or the receiver being appointed in respect thereof. In Worldwide Agencies P. Ltd's case (supra), however, the Court clearly held that a 'member' may be a 'holder' but a 'holder' may not be a 'member' of the company. It is, therefore, possible to give to the words 'who holds shares' a meaning different than the one assigned to it under the Act as including a

person who holds the shares by reason of his having purchased the same with a right of registration of those shares on the strength of the blank transfer forms, but in whose favour the shares have not actually been registered. The question that arises is whether in the scheme of the 1994 Regulations the words 'who holds shares' must be given a narrow meaning as canvassed by Mr. Chidambaram or the wider meaning so as to include the holder of a share whose name is not on the register of members. 69. In our view, on a contextual and purposive interpretation, and having regard to the object sought to be achieved by the Act and the regulations, the words who holds shares' must be given a construction so as to include a person who holds shares with a right to get his name registered as a member, but whose name has not actually been entered in the register of members. If such a meaning is not given to those words, the consequence will be that while a person who holds shares will be required to comply with Regulations 9 and 10, but one whose name does not appear on the register of members will not be required to comply with those regulations. It would thus be possible for a stranger to defeat the provisions of the regulations though that would not be possible for an acquirer if he happens to be an existing shareholder. There appears to be no reason to create this distinction between an acquirer who is a shareholder, and one who is not. The object of the Regulations is to bring about transparency in the dealing of securities, and also to enable the existing shareholders to take informed decision to accept or not to accept the public offer that may be made by a person who seeks to acquire substantial shares in the company. There appears no rational basis for a distinction between an acquirer who is an existing shareholder, and an acquirer who is not, since the regulatory measures are designed primarily to regulate the substantial acquisition of shares by any acquirer, not necessarily a member of the company. We, therefore, hold that the words 'an acquirer who holds shares' carrying 10 per cent or less of voting rights must include an acquirer whose holding in a'company may be NIL. Less than 10 per cent of the voting rights must include NIL shareholding in the context of Regulations 9 and 10 of the Regulations. Any other interpretation would completely defeat the provisions of the regulations as it would permit a person who does not hold shares in the company to acquire substantial shares in a company without having to give a public notice, and without making an offer as contemplated by the regulations. In sum and substance, an acquirer not holding shares in the company will not be bound by the regulatory provisions of the Regulations, nor by the prohibitions and mandatory requirements thereof. 70. We shall now consider the judgment in Fascinating Leasing & Finance P. Ltd. (supra) on which considerable reliance has been placed by Mr. Chidambaram. It is no doubt true that the Tribunal took the view as canvassed by Mr. Chidambaram before us, and for the same reasons. But as submitted by Mr. Nariman, this decision completely overlooks the law as laid down in World Wide Agencies P. Ltd, 's case (supra). In this context, he also relied upon a judgment of the Calcutta High Court in the case of Kedarnath Agarwal's case (supra). In any event, he submitted that fascinating leasing is a case of a one shot acquisition by negotiations (under Regulation 9) under MOU and not by a series of purchases in the open market. So far

as acquisition of Imfa is concerned, it did not purchase 10.91 per cent of the shares in one transaction. By separate transactions, the shares were purchased between 27-10-1994 and 21-11-1995. The very fact that they were lodged in one lot does not detract from the fact that Imfa, after the initial purchase, was a 'holder of the shares' under Regulation 10(1) and, therefore, could not purchase shares in excess of 10 per cent without first making a public offer. Mr. Nariman submitted that the Tribunal in Sharad Doshi v. Adjudicating Officer (decided in April 1998) held that holder in the regulations means a person who has acquired shares notwithstanding that they are not registered. 71. There is substance in the submission urged by Mr. Nariman, Fascinating Leasing & Finance P. Ltd.'s case (supra) is not a binding precedent so far as this court is concerned. We have already held that the words who holds shares in the 1994 Regulations include an acquirer who has acquired the shares by purchase under a blank transfer with a right of registration but who has not actually got the shares registered in his name. We are of the view that in the context of the 1994 Regulations, this is the only meaning that can be assigned to those words if the regulations have to be effectively implemented with a view to suppress the mischief and advance the remedy. 72. Mr, Chidambaram faintly invoked the principle of contemporaneous expositio, relying upon the decisions in Desk Bandhu Gupta & Co. v. Delhi Stock Exchange Association Ltd. and Indian Metals & Ferro Alloys v. CCE . The aforesaid principle has been noticed in Desh Bandhu Gupta & Co,'s case (supra) but the Court observed that the principle will not always be decisive of the question of construction. Moreover, as Mr. Nariman rightly pointed out, the decision in Fascinating Leasing & Finance P. Ltd. 's case (supra) was rendered on 16-7-1998, much after the acquisition of shares by the three companies and, therefore, the defendants cannot be heard to say that they had acted on the basis of this view of Regulation 10 while acquiring the shares. On facts, Mr. Nariman appeals to be right. 73. Mr. Chidambaram next submitted that the acquisition of shareholding of defendant Nos. 3 to 5 by seven star and defendant No. 11 did not violate the regulations because of the express provisions in Regulation 3(d) of the 1994 Regulations. Regulation 10 has no application when shares of unlisted companies are acquired by virtue of Regulation 3(d). Defendant Nos. 3 to 5 not being listed companies, their acquisition did not attract Regulation 10. He relied on the decision of the SEBI in the case of Sesa Goa (supra) which was affirmed by the appellate authority. Mr. Nariman, on the other hand, submitted that Regulation 3(d), no doubt, makes the provisions of Chapter III of the regulations inapplicable to acquisition of shares 'in companies whose shares are not listed on any Stock Exchange'. He emphasised the words 'in companies' and submitted that the words used are not 'through companies'. According to him, if it was a simple transaction of take over of an unlisted company, regulation 10 may not be attracted, but in the facts of this case, since the defendants were acting in concert with each other, the complexion of the case changes, and it must be held that the acquisition of these companies in the manner they were acquired was also a part of the scheme designed by defendant Nos. 1 and 11 in concert with the other defendants to acquire the shares of Herbertsons Ltd., defendant No. 12. The real purpose was

not the acquisition of the three unlisted companies viz., defendant Nos. 3 to 5, but to acquire shares which were held by these companies and purchased with the help of funds provided by the defendant Nos. 1 and 11 and the companies controlled by them. If it is held that the Defendants were acting in concert, it must be held logically that even when the defendant Nos. 3 and 5 acquired the shares of Herbertsons, the acquisition was in concert with the defendant Nos. 1 and 11 as well as the other defendants. In other words, defendant Nos. 3 to 5 acquired the shares of Herbertsons directly, while acting in concert with the other Defendants, some of whom provided the funds for such acquisition. 74. It is true that in view of Regulation 3(d), Chapter III of the regulations does no apply to acquisition of shares in companies whose shares are not listed on any stock exchange. Defendant Nos. 3 to 5 companies, undoubtedly, are companies whose shares were not listed on any stock exchange. It would, therefore, follow that, if without anything else, the shares of these companies were acquired by the defendant No. 11, the acquisition of these companies by him may not come within the purview of Regulation 10. But the facts of the case give a different picture altogether. It was not as if defendant Nos. 3 to 5 had acquired the shares of Herbertsons Ltd., on their own. These companies were controlled by persons known to defendant Nos. 1 and 11, and in fact, related to them though not within the meaning of Section 6. These companies did not have the capacity to make such huge investments in shares of Herbertsons Ltd. According to the plaintiffs, and indeed admitted by the defendants, the funds were made available to them by defendant Nos. 1 and 11 through the companies under their control. The plaintiffs, therefore, contend that all the defendants, which include defendant No. 1, defendant No. 11 and the defendant companies under their control, were acting in concert with each other. A concerted plan had come into existence much before the acquisition of these three companies by the defendant No. 11, and it was in pursuance of such a common plan that funds were made available to the three unlisted companies who acquired the shares of Herbertsons Ltd., and later, handed over those companies to the defendant No. 11. Since an acquirer by definition includes any person acting in concert with the acquirer, the acquisition by these three unlisted companies of the shares in Herbertsons Ltd., were in fact acquisition by the acquirers within the meaning of Regulation 10. When two or more persons acquire shares in a company, acting in concert with each other, each one of them is an acquirer within the meaning of Regulation 2(b) of the 1994 Regulation. If this Court ultimately finds that the defendants were acting in concert with each other pursuant to a common plan to acquire substantial shares of Herbertsons Ltd., the acquisition of these unlisted companies by the defendant No. 11, at a later stage, would not help the defendants because the initial acquisition by the aforesaid three unlisted companies would itself be an acquisition of shares by an acquirer in breach of the prohibition contained in Regulation 10. 75. So far as the judgment of the SEBI and the appellate authority in Sesa Goa is concerned, the facts of that case are distinguishable. The acquisition of Sesa Goa Co. Ltd., by Mitsui & Co., Japan through Finsider International Co. Ltd., was alleged to be in violation of the SEBI Regulations, and in violation of the provisions of Clauses 40A and 40B of

the listing agreement. In that case, it was found that after the regulations came into force, no acquisition of shares in Sesa Goa took place. It was in this context that the following observations were made in the order: "Assuming that what the petitioners have contended is correct and Mitsui, Early Guard and Finco are persons acting in concert under the Regulations, the fact remains that no shares of Sesa Goa have been acquired either by Finco, Mitsui or Early Guard. Sesa Goa is the company which is said to have been taken over. However, this change in control, if at all, has taken place without acquiring any shares. Even if interpretation of the petitioner is accepted, the provisions of the Regulations dealing with substantial acquisition of shares could not be applicable in the facts of the case, It is worth mentioning that the Regulation does not have any concept of change in the control of management requiring public offer. Therefore thequestion of violation of Regulations does not arise. It may be mentioned that these Regulations have now been repealed by SEBI and new Regulations have been notified on February 20, 1997. Only in the new Regulations, the concept of control triggering off public offer been introduced." So far as the instant case is concerned, the acquisition of shares of Herbertsons Ltd., defendant No. 12, took place while the 1994 Regulations were in force. The decision of the SEBI and the appellate authority in Sesa Goa must, therefore, be understood in the facts and circumstances of that case, because the question of acquisition of shares in breach of Regulation 10 did not arise in that case. 76. It was then submitted on behalf of the appellant/defendants that certain changes were brought about in the 1997 Regulations which repealed the 1994 Regulations based on the report of the Committee on substantial acquisition of shares and takeovers under the Chairmanship of Justice P.N. Bhagwati, dated 18-1-1997. Mr. Chidambaram submitted that the 1994 Regulations did not cover the concept of 'indirect acquisition' of a company through acquisition of unlisted investment companies which was a possible route of acquisition of a listed company. This deficiency was sought to be remedied and the concept of indirect control or acquisition was introduced for the first time in the 1997 regulation which came into force on 28-2-1997. Regulations 2(d), (c) and (o) specifically introduced the concept of indirect acquisition and control. The Regulations also did away with the requirement of an acquirer being an existing shareholder. According to him, the validity of acquisition of the defendant Nos. 3 to 5 has to be determined on the plain terms of the 1994 Regulations which were clearly inapplicable to the acquisition of the defendant Nos. 3 to 5. 77. As noticed earlier, Mr. Nariman also agrees that the provisions of the 1994 Regulations must be understood on their own, and in fact he went to the extent of submitting that the aid of a subsequent law cannot be taken for interpretating an earlier law. He, therefore, submitted that one need not look at the 1997 Regulations. Even without the aid of the 1997 Regulations, it must be held that under the 1994 Regulations, an acquirer need not be a registered shareholder, and a holder of shares on the basis of blank transfer with a right to get his name registered was included in that term. On the question of indirect acquisition and control, he submitted that in the facts and circumstances of this case that was not relevant in view of the fact that the Defendants were acting in concert with each other, and there-

fore, on a purposive interpretation whether acquisition was direct or indirect is immaterial. 78. We are inclined to agree with Mr. Nariman. We have already recorded our conclusions earlier. As far as indirect acquisition is concerned, in the facts and circumstances of this case, if it is held that the Defendants were acting in concert with each other, each one of them must be deemed to be an acquirer, and the question of direct or indirect acquisition does not arise. 79. Relying upon the judgment of the Supreme Court in Md Quasim Larry v. Muhammad Samsuddin , Mr. Nariman submitted that in the 1997 Regulations, there are at least three matters in regard to which the regulations are merely clarificatory and declaratory. In this regard, he referred to - (i) definition of 'acquirer' which has been defined to mean any person who directly or indirectly acquires or agrees to acquire shares for 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; (II) regulation 3(1)(k) makes it explicit what was implicit in regulation 3 of 1994 by providing that the exemption under Clause (k) (acquisition of shares in unlisted companies) shall not be applicable if, by virtue of acquisition or change of control of any unlisted company, the acquirer acquires shares or voting rights or control over a registered company; and (iii) in Regulation 10, the addition of the words 'if any' has clarified that an acquirer need not be an existing shareholder. We agree with Mr. Nariman in view of the findings already recorded by us, but we may only add that so far as acquisition of unlisted Companies is concerned, under the Regulations of 1997, regulations 10 to 12 thereof will apply to the acquisition of shares in unlisted companies in the category of cases enumerated under the Explanation, to which the Regulations of 1994 may not have applied, such as Sesa Goa 's case (supra), it is not necessary for us to delve into this question further as this issue does not arise in this case. 80. Fourthly, it was submitted that under regulation 10(1), a public announcement to acquire shares in the open market is required to be made in accordance with the Regulations. Regulation 20(1) provides that the public announcement shall be made only when the acquirer has any reason to believe that he shall be able to implement the offer. Regulation 21(2) further provides that a public offer shall be made to the remaining shareholders of the company to acquire from them an aggregate of the minimum 20 per cent of the total shares of that company. This is subject to Regulation 21(4) which requires that the offer referred to above shall not result in the public shareholding being reduced to less than 20 per cent of the voting capital of the company. It was submitted that Vijay Mallya and the plaintiffs held 25.66 per cent shares in Herbertsons Ltd., in December 1994, while the defendant Nos. 2 and 6 to 10 held 25.97 per cent shares, making a total of 51.63 per cent. Imfa acquired 10.91 per cent shares which attracted Regulation 10(1) according to the plaintiffs. Imfa was, therefore, required to make a public announcement. It was, therefore, submitted that the promoters and the defendant Nos. 2 and 6 to 10, holding 51.63 per cent shares and Imfa having acquired 10.91 per cent shares was left amongst the remaining shareholders was only 37.46 per cent. If Imfa was required, by virtue of the Regulation 21(2) to acquire a minimum of 20 per cent, there will not be left in the market a

public shareholding of 20 per cent which is the requirement under Regulation 21(4). The submission is attractive but devoid of merit. The submission overlooks Regulation 21(2) which provides that the public offer shall be made 'to the remaining shareholders of the company' to acquire from them an aggregate minimum of 20 per cent of the total shares of that company. This clarifies that the offer has to be made to the remaining shareholders of the company which means all the shareholders other than the acquirer. In the instant case, if it is assumed that Imfa was acting in concert with the other defendants, then the shareholding of the acquirer was 10.91 per cent plus 25.97 per cent, i.e., the total shareholding of the acquirer was 46.88 per cent. Mr. Chidambaram has erroneously included as shareholding of the acquirer the shares held by Vijay Mallya to the extent of 25.66 per cent. For the purposes of public offer to be made by the acquirer, viz. Imfa or persons acting in concert with Imfa, the snares of Vijay Mallya must be reckoned as shares belonging to the remaining shareholders of the company. Thus, after deducting the shareholding of Imfa and the shares held by the other Defendants, if they are deemed to be acting in concert with Imfa, the shares that remained with the remaining shareholders of the company was 53.12 per cent. If 20 per cent shares were acquired by Imfa and its associates, the public shareholding would still be to the extent of 33.12 per cent which is far above 20 per cent. Mr. Chidambaram, therefore, rightly did not press this point further when this was brought to his notice. In any event, the calculation of public shareholding is to be done before the acquisition of shares by the acquirer, and not after the acquisition. 81. This takes us to a consideration of the question as to whether the defendant Nos. 1 to 11 acted in concert with each other within the meaning of the 1994 Regulations to acquire the shares of Herbertsons Ltd., the defendant No. 12, in breach of the aforesaid regulation without making a public announcement as required by the Regulations 10. In the plaint, the plaintiffs have asserted that the defendant Nos. 2, 3, 4, 5, 7 and 8 have, acting in concert with the remaining defendants (except defendant No. 12), acquired substantial shares of Herbertsons Ltd., defendant No. 12, in breach of the regulations. In paragraph 4 of the plaint, the plaintiffs have separately alleged in respect of each of the defendant Nos. 2, 3, 4, 5, 7 and 8 that they have acted in concert with the remaining the defendants except the defendant No. 12 to acquire substantial shares in Herbertsons Ltd., from the open market without making a public announcement in accordance with the regulations. The said acquisitions were made with the common objective and purpose of substantial acquisition of shares and voting rights in order to gain control over Herbertsons Ltd., by co-operating on the basis of an understanding/ agreement to gain such control. 82. Mr. Chidambaram submitted that the Regulation 2(1)(b) defines 'an acquirer' to 'mean any person who acquires or agrees to acquire shares in a company either by himself or with any person acting in concert with the acquirer'. According to him, the use of the word 'with' means that the acquisition has to be made both by the acquirer and the person acting in concert with him, that is to say, during the transaction period, when the acquisition of the shares takes place, both the acquirer and the person acting in concert with him should acquire shares in the open market. He relied

upon the meaning of the word 'with' in Black's Law Dictionary, Vth Edn., and submitted that word means 'in association' or 'in addition to'. He, therefore, submitted that when the defendant Nos. 3,4 or 5 acquired shares, the defendant No. 11, M.D. Chhabaria did not acquire any shares in his name during the transaction period or at any time. On facts, he submitted that the allegation of acting in concert has not been made out by the plaintiffs. The expression 'person acting in concert' has been defined as comprising persons who, pursuant to an agreement or understanding acquire or agree to acquire shares in a company for a common objective or purpose of substantial acquisition of shares. We have earlier reproduced this definition in their judgment, and it is not necessary to repeat the same. According to Mr. Chidambaram, the essential ingredients are: (a) Persons must act pursuant to an agreement or understanding; (b) There must be a target company; (c) They must have a common objective or purpose for substantial acquisition of shares or gaining control; and (d) They must acquire or agree to acquire shares in or gain control over the target company. In the present case, he submitted there is no allegation that the persons who were acting in concert did so pursuant to an agreement or understanding. In fact, no agreement or understanding is pleaded. No particulars including names, time or places have been given. He also pointed out that in the plaint, it is alleged that Imfa was acting in concert with the other defendants in December 1995 but the facts will show that Imfa had acquired the shares in question between 27-10-1994 and 22-11-1995. Similarly, an allegation is made in the plaint that Mahameru, the defendant No. 4, acting in concert with the other defendants, acquired shares around September 1996 whereas Mahameru, the defendant No. 4, acquired shares between 14-11-1985 and 10-8-1986. Lastly, Shirish Finance & Investment P. Ltd., which was incorporated on 19-8-1996, is alleged to have acting in concert with the other defendants in May 1997 whereas the facts disclose that all the shares were purchased between 27-8-1996 and 14-2-1997. In the absence of any allegation in the plaint that the persons named therein had acted in concert to acquire the shares during the transaction period, the allegation falls to the ground. 83. Mr. Chidambaram further argued that it was wrong to allege that the method adopted by the defendants to acquire shares of Herbertsons Ltd., defendant No. 2, was a device, a mere pretence to defeat the law. In fact, the transactions were transparent, and funds were advanced to investment companies after obtaining expert advice. Since those companies failed to repay the loans, those companies were taken over. He referred to the declaration filed by the defendant No. 11 on 17-4-1997 and the note submitted by him to the SEBI dated 22-7-1997, giving a clear picture about the transactions which depicted transparent honest transactions of purchase of shares by the investment companies. He submitted that the initial acquisition of about 26 per cent shares by defendant Nos. 2, 6, 7, 8, 9 and 10 on 14-12-1993, before the 1994 regulations came into force, were the shares of the defendant No. 1 and not of the defendant No. 11. If this position is accepted, Regulation 10(2) is not attracted, and if at all, the case may fall under Regulation 10(1). The aforesaid companies were owned by K.R. Chhabria, defendant No. 1 and not M.D. Chhabria, the defendant No. 11. Referring to the letter written by D.F.

Lalla, Managing Director of Herbertsons Ltd., the defendant No. 12, the Chief Editor of Asian Age, dated 5-5-1995, it is submitted that in the said letter, the company refuted the statements made in an article in connection with the acquisition of over 12 per cent stock in Herbertsons Ltd., by Kishore Chhabria, defendant No. 1, in addition to his existing 26 per cent shareholding in the company. The company emphatically stated that the allegations made therein were totally untrue, and baseless. The letter refers to 25 per cent holding in the company of Kishore Chhabria. Similarly, in two other letters dated 17-7-1995 and 6-9-1995, the Managing Director of the Herbertsons Ltd., the defendant No. 12, had written to SEBI that K.R. Chhabria had not acquired substantial voting rights in the company and, therefore, there was no occasion for the company to comply with the relevant provisions of the 1994 Regulations. In the letter addressed to the SEBI dated 6-9-1995, the Managing Director of Herbertsons Ltd., had annexed thereto Annexure 1 which gave a detailed shareholding pattern and identification of each group as at th'e beginning of 1993, end of 1993 and end of 1994. In the said Annexure, the shareholding of the defendant No. 2 and the defendant Nos. 6 to 10 was shown. He, therefore, submitted that M.D. Chhabria, the defendant No. 11 had nothing to do with the 26 per cent shares of Herbertsons Ltd., acquired by the defendant Nos. 2 and 6 to 11 which shares really belonged to Kishore Chhabria, the defendant No. 1. Though the defendant Nos, 1 and 11 are related, it is no one's case that they are relatives within the meaning of section 6. 84. Referring to acquisition by Imfa, he submitted that the shares were acquired over a period of 13 months from different sellers. It may be that at a point of time, the acquisition may reach the 10 per cent mark, but according to him, the acquisitions made thereafter could only attract the provisions of the regulations. Referring to the chart annexed to the letter of Imfa, addressed to the SEBI dated 24-1-1996, he submitted that there were in all 32 transactions of purchase of shares by Imfa between 27-10-1994 and 21-11-1995. The first four transactions which took place between 27-10-1994 and 30-10-1994 were made before the 1994 Regulations came into force. Thereafter, purchases up to 3-5-1995 brought the shareholding by Imfa in Herbertsons Ltd., to the 5.56 per cent mark (up to 9th transaction). The transactions between 4-5-1995 and 16-11-1995 brought the shareholding of Imfa in Herbertsons Ltd., to a little over 10 per cent mark. Thereafter, there were only three transactions between 17-11-1995 and 21-11-1995. He further submitted that the Board of Herbertsons Ltd., was not mislead by the statement that the purchase of shares by Imfa were by way of investment. In fact, Herbertsons Ltd., refused registration of shares on the 3-1-1996 but allowed application for transfer later on 30-5-1996. Moreover, there is nothing in the declaration of the defendant No. 11, filed under Regulation 8(2) of the 1997 Regulations, to show that he was acting in concert with anyone. He, therefore, submitted that the acquisition of shares of Herbertsons Ltd., was made in normal course and the defendant Nos. 3, 4 and 5 purchased the shares of Herbertsons Ltd., as investment companies, and in doing so, did not act in concert either with the defendant No. 11 or any other defendant. The mere fact that they were taken over by the defendant No. 11 on account of their failure to repay the loans advanced to them, did

not necessarily lead to the inference that they were acting in concert with the defendant No. 11 or any of the other defendants. 85. Mr. Nariman, on the other hand, submitted that the defendant Nos. 1 to 11 were always acting in concert with the acquisition of shares of the defendant No. 12 company. He has taken us through the record to explain the nature of transactions entered into by the several defendants. He submitted that even the initial acquisition of about 27 per cent shares in December 1993, before the regulations came into force, was the result of concerted action of the defendant Nos. 1, 11 and the companies under their control through the ultimate holding company, viz., Galan Finvest P. Ltd. Having acquired about 27 per cent shares through the companies under their control, viz., the defendant Nos. 2 and 6 to 10, the defendant Nos. 1 and 11, acting in concert with companies under their control, proceeded to acquire further shares in Herbertsons Ltd., even after the 1994 Regulations came into force. He submitted that the facts of the case would disclose a pattern of conduct which is only consistent with the hypothesis of the defendant Nos. 1 to 11 acting in concert pursuant to a common plan, the objective being to take over control of Herbertsons Ltd., by acquisition of substantial shares thereof. 86. The submission urged by Mr. Chidambaram that the use of the words 'with' in Regulation 2(l)(b) means that the acquirer must acquire the shares with the person acting in concert with him, does not impress us. It is not necessary that if two persons act in concert with the common objective to purchase shares in a Company, they cannot be said to have acted in concert with each other unless the shares are acquired either in their joint names or by each of them during the period in question. Such an interpretation would completely defeat the very purpose of the regulations as it would amount to saying that unless the name of a person appears as a shareholder, he cannot be said to have acted in concert with the other. In our view, concerted action must relate to their effort to acquire shares. If one provides the fund and the other acquires the shares in his name, it must be held that they have acted in concert to acquire the shares, and in view of the definition of 'acquirer' in the 1994 Regulations, both are considered to be acquirers. It does not matter who is shown as the purchaser of the shares. 87. The fact that in the plaint, the plaintiffs had not given the exact date/ dates of acquisition of shares by the defendant Nos. 3, 4 and 5 is of no consequence. The shares were purchased by defendant Nos. 3, 4 and 5 companies and the plaintiffs really had no knowledge of those transactions. It was only when the shares were lodged for registration of transfer and several articles appeared in the newspapers, that the plaintiffs came to know about the acquisition of shares by the defendant Nos. 3, 4 and 5. The dates given by them in the plaint are approximate dates. In fact, the defendant No. 11 in his affidavit disclosed the details of those transactions. The plaintiffs had no means of finding out the accurate details of those transactions. In any event, they rely on the averments made by the defendant No. 11 in his affidavit in reply, and do not challenge any statement of fact made by the defendant No. 11 in his aforesaid affidavit regarding the dates of acquisition of the shares in question. The defendants were not at all misled by the statements made in the plaint about the approximate dates of those transactions because, they were

in the knowledge of all facts relevant to those transactions. 88. In reply to the submission of Mr. Chidambaram that no particulars have been mentioned about the agreement said to have been reached between the several defendants, said to be acting in concert, and fact that no agreement or understanding was pleaded, Mr.Nariman submitted that it is not always possible for a plaintiffs to give such particulars. Such plans are drawn up in secrecy so that it may not be possible for a stringer to specifically and accurately give particulars of the agreement reached, time and place, etc. Relying upon the judgment of the Supreme Court in CIT v. East Coast Commercial Co. Ltd. AIR 1967 SC 768, he contended that no direct evidence of overt act or concert between the members of the group having control over voting rights is always available. He relied upon the observations of the judgment wherein it was observed- "(13) But in CIT v. Jubilee Mills Ltd. this Court held that no direct evidence of overt act or concert between the members of the group having control over voting was necessary to prove that the company was not one in which the public were substantially interested. It is observed in Raghvanshi Mills case that in deciding if there is such a controlling interest, there is no formula applicable to all cases. Relationship and position as director are not by themselves decisive. If relatives act, not freely, but with others, they cannot be said to belong to that body, which is described as"public" in the Explanation'. In Jubilee Mills case this Court elaborated those observations and stated: The test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together. It is not necessary to state the kind of evidence that will prove such concerted actings. Each case must necessarily be decided on its own facts.'(14) But, as already observed, if the members of the Kedia family formed a block and held more than seventy-five per cent of the voting power, it was not necessary to prove that they actually exercised controlling interest. It is the holdingin the aggregate of a majority of the shares issued by a person or persons acting in concert in relation to the affairs of the company which establishes the existence of a block. It is sufficient, if having regard to their relation etc., their conduct, and their common interest, that it may be inferred that they must be acting together; evidence of actual concerted acting is normally difficult to obtain, and is not insisted upon. (15) It was for the Tribunal to determine, having regard to ordinary human experience whether it may be safely taken that the members of the Kedia family must have acted together as a controlling block. That enquiry has not been made, and the case has been decided on the application of a test which is erroneous. We are, therefore, unable on the statement of case to answer the question referred." (p. 772) He, therefore, submitted that the question as to whether two or more persons have acted in concert has to be considered having regard to their relation etc., their conduct and their common interest, and on the basis of such evidence, one may infer that they must have acted in concert because evidence of actual concerted action is normally difficult to obtain and is not insisted upon. He further submitted that policy of the law cannot be defeated by ingenious devices, arrangements or agreements, and in this context, he relied upon the judgment of the Supreme Court in McDowell & Co. Ltd.

v. CTO , wherein Justice O. Chinnappa Reddy, agreeing with the judgment of Justice Ranganath Misra observed- "... We must recognise that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is a pretense to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be constructed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai, J. in Wood Polymer Ltd. v. Bengal Hotels Ltd. [1977] 47 Com. Cas. 597 (Guj.) where the learned Judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax. 18. It is neither fair nor desirable to expect the legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of 'emerging' techniques of interpretation was done in Ramsay (1982 AC 300), Burma Oil (1982 STC 30) and Dawson (1984-1 All ER 530), to expose the devices for what they really are and to refuse to give judicial benediction." (p. 655) In the judgment of Justice Ranganath Misra, the following observations were made: "45. Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges." (p. 662) Mr. Nariman also relied upon the observations in Moti Chand v. Ikram Ullah Khan AIR 1916 PC 59, wherein it was observed: "It appears to their Lordships that it cannot be doubted that the policy of Act No. II of 1901 is to secure and preserve to a proprietor whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the mahal a right of occupancy in his 'sir' lands, and in the land which he has cultivated continuously for twelve years at the date of the transfer, and that such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. The policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by a vendor of his 'sir' land or land which he has cultivate continuously for twelve years at the date of the transfer; for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands; or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands. All such devices, arrangements, and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void; and cannot be enforced by the vendee in any Civil Court or in any Court of

revenue." 89. Mr. Nariman submitted that the ingenuous device adopted by the defendant Nos. 1 and 11, acting in concert with the companies under their control should not mislead this Court into thinking that the series of transactions entered into by them and the companies under their control were independent transactions by way of investment, and not pursuant to a common plan for the acquisition of substantial shares in Herbertsons Ltd., with a view to its ultimate take over. He submitted that from the facts on record, it would appear that the defendant Nos. 1 and 11 had worked out a plan to acquire substantial shares in Herbertsons Ltd., and in the execution of that plan, they acted in concert with the companies under their control. From the facts established on record, the only inference that must follow is that they, together with the companies under their control, acted in concert in acquiring substantial shares of Herbertsons Ltd., the defendant No. 12 in breach of the 1994 Regulations. 90. It is not in dispute that the total paid up capital of Herbertsons Ltd., since August 1993 and up to August 1995 was 85,22,323 shares of Rs. 10 each. After conversion of fully convertible debentures into shares in August 1995, the paid up capital was 95,22,323 shares of Rs. 10 each. It is also not in dispute that in December 1993, Kishore Chhabria, the defendant No. 1 acquired 25.9 per cent of the then paid up capital of Herbertsons Ltd., through and in the name of the companies under his control, viz., the defendant No. 2 and the defendant Nos. 6 to 10. In addition, the defendant No. 2 acquired 75,000 fully convertible debentures resulting in acquisition of additional 3,75,000 shares, resulting in the aggregate holding of K.R. Chhabria of 27.21 per cent. It is also not in dispute that the ultimate holding company of all these companies was Galan Finvest P. Ltd. The only shareholders of Galan Finvest P. Ltd., were K.R. Chhabria, his wife Mrs. B.K. Chhabria and his two daughters who held 80 per cent of the equity capital of the company. M.D. Chhabria, the defendant No. 11 and his wife Mrs. L.M. Chhabria held the remaining 20 per cent. Obviously, therefore, the entire share capital of Galan Finvest P. Ltd., was owned by the defendant No. 1 and his family members together with defendant No. 11 and his wife. Initially, they held shares in the proportion of 80:20 but it is also not disputed that on 22-11-1996, the wife of the defendant No. 11 acquired 30 per cent holding of K.R. Chhabria, the defendant No. 1 in the capital of the company. Thereafter, K.R. Chhabria's family members and M.D. Chhabria and his wife held 50 per cent shares each in the ultimate holding company, viz., Galan Finvest P. Ltd. The acquisition of shares by the defendant No. 1 through the six companies under his control aggregating 27.21 per cent of the paid up capital of Herbertsons Ltd., has not been questioned in the suit. The fact, however, that the holding company of all these six companies was Galan Finvest P. Ltd., in which the two major shareholders were defendant Nos. 1 and 11 and their family members is significant. It cannot be said that the defendant No. 11 did not have knowledge of the fact that the defendant No. 1 was seeking to acquire through the companies under his control substantial shareholding of Herbertsons Ltd. Both were directors of the holding company. In fact, in November 1996, the defendant No. 11 increased his shareholding in Galan Finvest P. Ltd., to 50 per cent by acquiring 30 per cent shares held by the defendant No. 1. The circumstance

which emerges from these facts is that the defendant Nos. 1 and 11 were the major shareholders of Galan Finvest P. Ltd., which through its subsidiaries acquired 27.21 per cent of the shareholding of Herbertsons Ltd., even before the 1994 Regulations came into force. One other circumstance worth nothing is that Mr. Ram Raheja, wife's sister's husband of K.R. Chhabria, the defendant No. 1 was also a director of Galan Finvest P. Ltd., apart from defendant No. 1 and the defendant No. 11. 91. Mr. Nariman emphasised the fact that pursuant to Board Resolution of Imfa dated 18-10-1994, 'to invest in the purchase of up to 11 lakh equity shares of Rs. 10 each in the capital of Herbertsons Ltd.', 10,39,341 shares of Herbertsons Ltd., were acquired in separate lots at different times in the open market between 27-10-1994 and 21-11-1995 in the name of Imfa Holdings P. Ltd., the defendant No. 3. This was done without making a public announcement/public offer. 99.95 per cent of the total shares capital of Imfa Holdings P. Ltd., the defendant No. 3, was held by Mr. Ram Raheja who held 40,000 shares of Rs. 10 each whereas Mr. Imtiaz Kheyrolla, a close associate of K.R. Chhabria and his wife held only 10 shares each of Imfa Holdings P. Ltd. Ram Raheja, at the relevant time, was also a director of the defendant Nos. 8 and 9 companies which were under the control of the defendant No. 1. He was also a director of Cacosmistle Finleas Ltd., an intermediate holding company of the defendant Nos. 8 and 9. Similarly, Harish Raheja was a director of the defendant Nos. 6 and 10 companies and a director of Mozzart Trading Ltd., an intermediate holding company of the defendant Nos. 6 and 10. Mr. Nariman submitted that the decision of Imfa Holdings P. Ltd., to invest in up to 11 lakh shares of Herbertsons Ltd., on 18-10-1994 was on the basis that the investment was to be funded by the defendant No. 1 and the defendant No. 11. The actual funds for the acquisition of 10,39,341 shares of Herbertsons Ltd., through and in the name of Imfa Holdings P. Ltd., were provided by the defendant Nos. 1 and 11 commencing from 21-11-1994. Relying upon the balance sheet of Imfa Holdings P. Ltd., for the year 1994-95, as on 31-3-1995, it was submitted by him that a sum of Rs. 1.31 crores was received between 21-11-1994 and 31-3-1995 from the companies under the control of the defendant No. 1 viz., the defendant Nos. 2, 6, 7, 8, 9 and 10 apart from Standard Distilleries & Breweries P. Ltd., a company owned and controlled by M.D. Chhabria. (This is shown in the copy of the audited accounts of Imfa Holdings P. Ltd., enclosed with Imfa Holdings P. Ltd., letter dated 24-1-1996, addressed to SEBI). The auditors report has been signed by Mr. Ashok Kukreja, Chartered Accountant and auditor of Imfa Holdings P. Ltd. the defendant No. 3. 92. On the basis of these facts, Mr. Nariman submitted that Imfa Holdings P. Ltd., was almost a proprietary concern of Ram Raheja who was related to K.R. Chhabria, being his co-brother. The defendant Nos. 2 and 6 to 10 companies were companies of which Galan Finvest P. Ltd., was the ultimate holding company, and in the latter, at one stage, K.R. Chhabria, the defendant No. 1 and M.D. Chhabria, the defendant No. 11 along with their family members held 80 per cent and 20 per cent shares respectively, and after November 1996, they held 50 per cent shares each. The Chhabrias, acting through Galan Finvest P. Ltd., and the companies controlled by them provided funds to the extent of Rs. 1.31 crores to Imfa Holdings P.

Ltd., which was a company controlled by Ram Raheja, the co-brother of the defendant No. 1 some amount was also made available by a company controlled by M.D. Chhabria, the defendant No. 11. Mr. Nariman then submitted that the nature of transaction entered into with Imfa Holdings P. Ltd., does not appear to be a purely business transaction by way of investment, as submitted by Mr. Chidambaram, on the advice given by a professionally qualified Chartered Accountant Mr. Ashok Kukreja. Though the loans were said to be secured by issue of zero rated debentures, as would appear from the report of the Directors for the years 1995,1996 and 1997 of Imfa Holdings P. Ltd., the debentures were never issued. Moreover, the only quoted investment of Imfa Holdings P. Ltd., as shown in the balance sheet were the shares held by Imfa Holdings P. Ltd., in Herbertsons Ltd. Though the advice of Mr. Ashok Kukreja was obtained, it appears that Mr. Kukreja was a close associate of the defendant No. 1 being a director in three of the companies controlled by the defendant No. 1, including the defendant Nos. 8 and 9 companies. Later, a sum of Rs. 4.13 crores was made available to Imfa Holdings P. Ltd., by M.D. Chhabria, the defendant No. 11, through his proprietary concern. Royal Wines, and the said amount was utilised for the acquisition of the shares. Mr. Nariman referred to the note of the defendant No. 11 to the SEBI dated 22-7-1997 and affidavit of the defendant No. 11 dated 21-12-1998. In this manner, a sum of Rs. 1.31 crores coming from the companies under the control of K.R. Chhabria, the defendant No. 1 and a sum of Rs. 4.13 crores coming through the proprietary concern or defendant No. 11 were advanced by way of interest-free loans to Imfa Holdings P. Ltd., without any specified period of repayment and without any security. As noticed earlier, the fully secured debentures were in fact never issued. The shares so acquired were registered in the name of Imfa Holdings P. Ltd. The share capital of Imfa Holdings P. Ltd., was only Rs. 4,00,200. The defendant No. 11, M.D. Chhabria, acquired the entire shareholding of Imfa Holdings P. Ltd., through Seven Star Investments & Trading P. Ltd., on 29-7-1996, and thereby he got control over 10.91 per cent shareholding of Herbertsons Ltd. This was ostensibly on the ground that the erstwhile owners of Imfa Holdings P. Ltd., were unable to repay the loans, and agreed to sell away their shareholding in Imfa Holdings P. Ltd., to the companies of the defendant No. 11. These facts, therefore, establish the circumstance that 10,39,341 shares of Herbertsons Ltd., were acquired by Imfa Holdings P. Ltd., of which 99.95 per cent shareholding was of Ram Raheja, co-brother of the defendant No. 1. The funds for the acquisition of these shares were provided by the companies under the control of the defendant No. 1 and the defendant No. 11. Another circumstance which is equally evident is that Imfa Holdings P. Ltd., had a share capital of only Rs. 4,00,200, and did not have the means to acquire such large number of shares of Herbertsons Ltd. 93. The next transaction relates to acquisition of shares by the defendant No. 4, Mahameru Trading Co. P. Ltd. Between 14-11-1995 and 10-8-1996, 4,73,100 shares of Herbertsons Ltd., were acquired in the name of Mahameru Trading Co. P. Ltd. The pattern of investment was similar. Interest-free loan, without any security and without any stipulated period of repayment, was advanced by the defendant No. 11 through his proprietary concern (Royal

Wines) to the tune of Rs. 1.12 crores. In his affidavit dated 27-1-1999, filed in reply to the second notice of motion, the defendant No. 11 claimed that the amount advanced by him to the defendant No. 4 was Rs, 2.8 crores. Before the shares were lodged with the company, Mrs. A.M. Kakade and Sanjay Masand became directors of the Defendant No. 4 on 2-9-1996, and acquired control of Mahameru Trading Co. P. Ltd. Mrs. Kakade is the wife of M.G. Kakade, who was at all relevant times director of the defendant Nos. 8 and 9. All the shares were lodged for registration at one time on 10-9-1996, and the same were actually transferred on 26-9-1996. It is also not in dispute that the share capital of Mahameru Trading Co. P. Ltd., was only Rs. 200. Since the defendant No. 4 was unable to repay the loan, its entire share capital was sold to Seven Star Investment & Trading Co., a company of M.D. Chhabria, defendant No. 11, on 13-2-1997. It is the case of the defendants that the dealings with Mahameru Trading Co. P. Ltd., the defendant No. 4, was on the basis of advice received from a firm of Chartered Accountants, viz„ Arup Mitra & Co. In this case also, zero rated unsecured fully convertible debentures (FCDs) were never issued by the defendant No. 4. Mr. Nariman pointed out that the advice of Arup Mitra & Co., dated 15-11-1995 was to the effect that the amount should be advanced to a company which is under Mr. Abid All's and Sanjay Masand's control and definitely not as personal loan. But it appears that during the entire period of purchase of these shares, between 14-11-1995 and 10-8-1996, Sanjay Masand was never a director of the defendant No. 4 as he took over as director only on 2-9-1996. Abid AH resigned as director two days later, on 4-9-1996. He, therefore, submitted that much value should not be attached to the so-called advice given by Arup Mitra & Co., Chartered Accountants. 94. The acquisition of shares in the name of Mahameru Trading Co. P. Ltd., also discloses that the funds were advanced by the defendant No. 11 and when the company failed to repay the loan, it was taken over by a private limited company under the control of the defendant No. 11. Even Mahameru Trading Co. P. Ltd., the defendant No. 4, did not have the capacity to invest such a huge amount in the shares of Herbertsons Ltd., it being a company with a share capital of Rs. 200 only. 95. Between 27-8-1996 and 14-12-1997, 3,64,750 shares of Herbertsons Ltd., were acquired in the name of Shirish Finance & Investment P. Ltd., the defendant No. 5. This company, again, had a share capital of Rs. 200 only, which was held by S.J. Chhabria and his wife. Though not related within the meaning of section 6, the said S.J. Chhabria is a cousin of the defendant No. 1 and nephew of the defendant No. 11. He was also a director in defendant Nos. 2, 6, 7 and 10 companies apart from other companies under the control of the defendant No. 1. A sum of Rs. 1.35 crores was made available to defendant No. 5 as interest-free loan through a Company owned and controlled by the defendant No. 11. On 13-2-1997, a further sum of Rs. 5 lakhs was made available by the defendant No. 11 through one of his companies. On 18-2-1997, the erstwhile owners of the defendant No. 5 being unable to repay the loans, sold off their holdings in Shirish Finance & Investments P. Ltd., to M.D. Chhabria, the defendant No. 11 and his wife. Despite the fact that the company was unable to repay the loans, S.J. Chhabria continued as a director

of the defendant No. 5 almost up to April 1998. In this case also, it was urged by Mr. Chidambaram that funds were advanced to the defendant No. 5 on the basis of the advice received from Mr. Kukreja, a professionally qualified Chartered Accountant, and he had clearly advised them to the effect that the funds should be paid to a company which is under the control of SJ. Chhabria, and not to him personally. This company had been incorporated only on 19-8-1996 with a paid up share capital of Rs. 200. In this case also, zero rated unsecured FCDs were never issued. Mr. Nariman submitted that the defendant Nos. 1 and 11 had made identical declaration on 17-4-1997 under Regulation 6(3) of 1997, which required a promoter or any person having control over a company to disclose the number and percentage of shares or voting rights held by him, and of persons acting in concert with him in that company, to the company. He submitted that the names of the defendant Nos. 2 to 10 were mentioned in those declarations and, therefore, their declarations made it clear that the defendant Nos. land 11 in the matter of their shareholding in Herbertsons Ltd., were acting in concert with the defendant Nos. 2 to 10 companies. Mr. Nariman, therefore, submitted that the following circumstances are clearly established: (a) that K.R. Chhabria (defendant No. 1) and M.D. Chhabria (defendant No. 11) were plainly acting with the common objective of substantial acquisition of further shares in Herbertsons Ltd., (i.e., in addition to the holding acquired by negotiations in December, 1993). (b) that they achieved this objective by acquisitions effected with their own funds through the defendants 3, 4 and 5. (c) that they owned and/or controlled these companies (defendants 3, 4 and 5), through their nominees even before the shares of these companies were directly taken over by M.D. Chhabria and/or his company (Seven Star Investment & Trading P. Ltd.) is also shown by the following facts: (i) the directors and shareholders of each of these companies, the defendants 3, 4 and 5, were related to defendants 1 (K.R. Chhabria) and 11 (M.D. Chhabria), or were directors and/or nominee shareholders of and in defendants 2 and 6 to 10 and/ or their intermediate holding companies which companies are also admittedly described as K.R. Chhabria's companies; (ii) substantial sums of money in excess of Rs. 9 crores in the aggregate were advanced by K.R. Chhabria/M.D. Chhabria to these three companies (defendants 3, 4 and 5) interest free without any stipulation as to date for repayment and without any tangible security, and were utilised for the purpose of acquiring only the shares of the listed company, Herbertsons Ltd.; (iii) the shares of Herbertsons Ltd., having been acquired, the shares of these acquiring companies (having negligible share capital) were 'sold' to/'taken over' by M.D. Chhabria directly or in the name of his company Seven Star Investment & Trading P. Ltd.; significantly the ostensible reason in each of the three cases of taking over of the shares was that these companies were allegedly unable to repay the moneys advanced to them and utilised for acquiring the shares of Herbertsons Ltd.; that admittedly, in the case of Mahameru Trading Co. P. Ltd., (defendant No. 4) and Shirish Finance & Investment P. Ltd. (defendant No. 5), the allegedly defaulting shareholders and directors of these companies were continued as directors even after they were directly taken over by M.D. Chhabria (allegedly for their default in repayment of the loans').

(d) The alleged advice of Kukreja/Mitra even if implemented, would have given no security for the loans advanced because there was no control over the shares acquired by the three companies. K.R. Chhabria and M.D. Chhabria were contend with this position and this could only be on the footing that they already owned and/or controlled the said three companies and the shares of Herbertsons Ltd., acquired by them. 96. It was also submitted by Mr. Nariman that the case pleaded by the defendants that the funds advanced to the defendant Nos. 3,4 and 5 were in the nature of bona fide investment was not convincing because, in that event, the investment could have been made through one's own investment company, and not through allegedly armslength companies. According to him, giving of interest-free loans with no return at all could hardly be considered to be an investment. The genuineness of the transactions was also doubtful because it does not appear that the creditors, at any time, called upon the debtors for the repayment of the loans. In case such a demand was made, it was open to the debtor companies to sell off the shares of Herbertsons Ltd., and repay the loans in full or in part, depending upon the prevailing market price of those shares, and in the alternative, to hand over the shares of Herbertsons Ltd., or part thereof towards the repayment of the loans in full or in part. In case the companies were not in a position to repay the loans in full, the creditor could always sue for the balance as allegedly they had by way of collateral, promissory notes given by the erstwhile owners of the concerned companies. In the case the value of the shares was more than the amount of the loan, the debtor could retain the excess either in cash or in specie. On the date of take over of Imfa Holdings P. Ltd., the lowest official quoted price of Herbertsons Ltd., on the Bombay Stock Exchange on 29-7-1996 was Rs. 32.25 per share. If the avowed purpose was taking over the company in satisfaction of the loan, the shares would have been sold when the price reached Rs. 41 which was only 10 days later, i,e, 8-8-1996, which was sufficient to recover the entire loan. Significantly, although M.D. Chhabria allegedly suffered a loss of Rs. 78 lakhs in value, but he admits that after taking over Imfa Holdings P. Ltd., in settlement of his demand on account of the funds advanced by him, the promissory notes earlier executed by Ram Raheja were cancelled and returned. Similarly, in the case of Mahameru Trading Co. P. Ltd. (supra) the lowest official quoted price on 13-2-1997 (the date of the take over) was Rs. 82 per share. If the shares purchased by the defendant No. 4 were sold on that date, the defendant No. 4 would have realised a sum of approximately Rs. 3.88 crores as against the loan amount of Rs. 2.8 crores giving a profit to the defendant No. 11 of approximately Rs. 1 crore, which works out to a return of approximately 36 per cent on alleged interest-free loan. In the case of Shirish Finance & Investment P. Ltd., the lowest official quoted price of Herbertsons Ltd., on the Bombay Stock Exchange on 18-2-1997 (the date of take over) was Rs. 78 per share, and if sold, the shares would have realised approximately Rs. 2.8 crores as against the loan amount of Rs. 1.35 crores, giving a profit to the defendant No. 11 of approximately Rs. 1.49 crores which works out to a return of approximately 110 per cent on the alleged interest-free loan. He, therefore, submitted on the basis of these facts, that the amounts advanced to the defendant Nos. 3, 4 and 5 companies were

not for the purpose of investment, and despite the declarations of defendant No. 11 that he was not interested in taking over the management of Herbertsons Ltd., the real purpose for which these advances were made was to acquire the shares of Herbertsons Ltd., through unlisted Companies. If the shares were purchased only as a matter of investment, they should have been sold when the market was favourable, but that was not done, and instead, the defendant No. 11 took over the three investment companies along with the shares of Herbertsons Ltd. The medium of unlisted companies was employed deliberately with a view to avoid the requirement of making a public announcement since the 1994 regulations did not apply to unlisted companies. 97. We are satisfied that the circumstances established on record prima facie do lead to the inference that the defendant Nos. 1 and 11, acting in concert with the defendant Nos. 2 to 10, acquired the shares of Herbertsons Ltd., over a period of time. Since they were acting in concert, the acquisition by each one of them must be considered to be the acquisition of the others as well. The funds for the acquisition of the shares, whether through the defendant Nos. 2 and 6 to 10 or through defendant Nos. 3 to 5, originated from the companies controlled either by the defendant No. 1 or the defendant No. 11. Advancing of funds to the defendant Nos. 3,4 and 5 cannot be said to be by way of investment because the facts disclose that the amounts were advanced free of interest and without any security, and for acquiring the shares of Herbertsons Ltd., the defendant Nos. 3, 4 and 5 were also managed by persons known to the defendant Nos. 1 and 11 and associated with them in their various companies. It is not necessary that persons acting in concert must be related to each other within the meaning of section 6. Even two strangers can act in concert, provided they act pursuant to a common plan and to achieve a common objective. Even if we assumed that the defendant No. 1 had acquired shares of Herbertsons Ltd., to the extent of about 27 per cent, before the coming into force of the 1994 Regulations, the moment it is found that he was acting in concert with the defendant No. 11, it must be held that the concerted action was of an acquirer holding more than 10 per cent shares in the capital of the target company. Mr. Nariman is, therefore, right submitting that in the facts of this case, Regulation 10(2) was attracted. The course adopted by the defendant Nos. 1 and 11 leaves no room for doubt that they were acting in concert, and through unlisted companies, who hardly had a share capital base, and which were managed by persons related to known to them. They provided funds to those companies to acquire the shares of Herbertsons Ltd., and in all three cases, the companies were unable to repay the loans and, therefore, the defendant No. 11 took over those companies. The identical nature of transactions and the events that followed, prima facie established that the defendant Nos. 1 and 11 along with the defendant Nos. 3, 4 and 5 were acting pursuant to a plan and that the similarity of events was not accidental. Funds were advanced to all the three companies for the purchase of shares of Herbertsons Ltd., and all the three companies failed to repay with the result that they were taken over by the defendant No. 11. In all the three cases, there is hardly anything to suggest that apart from major investments in the shares of Herbertsons Ltd., those companies invested any sizable amount in shares of other

companies, except in one case, where some shares of one other company were purchased. It, therefore, appears that these three companies which purported to be investment companies, invested only in the shares of Herbertsons Ltd., and that too, with the aid of funds provided by the defendant No. 1 and the defendant No. 11 through their concerns/companies. 98. Mr. Chidambaram, in rejoinder, submitted that there were circumstances to indicate that the transactions of purchaser of shares by the defendant Nos. 3, 4 and 5 were bona fide transactions entered into a transparent manner, and did not suffer from any illegality. The bona fide of the defendant No. 11, M.D. Chhabria, could not be doubted. The investment companies, viz., the defendant Nos. 3, 4 and 5 had acquired shares of Herbertsons Ltd., with their own funds also which they had procured from other sources. This, they would not have done, if funding the acquisition was the exclusive responsibility of M.D. Chhabria, the defendant No. 11. According to him, Imfa, the defendant No. 1, had acquired shares of Samudra Shoes to the extent of Rs. 60 lakhs. If, what is alleged by the plaintiffs is true, then there appears to be no reason why Imfa should have invested such a huge amount in the purchase of shares other than those of Herbertsons Ltd. In our view, these are matters which cannot be answered at this stage in the absence of evidence on record. Similarly, why Mr. M.D. Chhabria, the defendant No. 11 would utilise three companies to purchase shares if that could be done by using only one of them as a vehicle, is a question which can be answered only by Mr. M.D. Chhabria, the defendant No. 11. Similarly, why Imfa wrote to the SEBI on 7-12-1995 enquiring whether the 1994 Regulations were attracted, is again a question which only M.D. Chhabria, the defendant No. 11, can answer. He also commented on the conduct of Herbertsons Ltd., in showing Imfa under the column 'related to promoters', while showing Mahameru under 'other corporate bodies', and of registering the shares of Imfa and Mahameru on various dated knowing that they were mere devices of Mr. M.D. Chhabria, the defendant No. 11. Surprisingly, they refused to register the shares lodged by Shirish whereas later, Herbertsons Ltd., registered 250 shares of Imfa and 850 shares of Mahameru on 26-8-1997. The submission of Mr. Chidambaram is that if these three companies were the vehicles of M.D. Chhabria, defendant No. 11, Herbertsons Ltd., would not have acted in the manner it did. This, again, is a question which cannot be answered at this stage because these are question which have to be answered by Herbertsons Ltd., the defendant No. 12, and not by the plaintiffs. These and other submissions urged by Mr. Chidambaram cannot be considered at this stage when there is no evidence on record, and the defendants are yet to file their written statement, and thereafter the parties may produce evidence in support of their respective cases. 99. Mr. Chidambaram submitted that the plaintiffs have erred on facts in submitting that the loans were interest-free loans. Reliance is placed on the reports of Mr. A.T. Kukreja and Arup Mitra & Co., qualified Chartered Accountants. It was argued that the professionally qualified Chartered Accountants had prepared two schemes, one of which was accepted by M.D. Chhabria, and the scheme prepared by the professionals shows that he would get a return of 25 per cent on investments. We have carefully perused the reports submitted by these two Chartered Ac-

countants. In their recommendation to M.D. Chhabria, they had suggested that the borrower must give a commitment to give minimum return of 45 to 50 per cent at the end of two years. They had suggested the issuance of zero rated unsecured FCDs with no premium. Each debenture was to be of Rs. 100 each, with a right to convert it into 10 shares of Rs. 10 each, after a period of two years. The experts expected that the FCDs issued be taken over after two years at a premium of 45 to 50 per cent before conversion, which will give an earning of 25 per cent per annum. Based on anticipation of professional experts, it was sought to be argued before us that M.D. Chhabria, the defendant No. 11, was assured a return of 25 per cent on his investment. All that can be stated is that on the basis of calculation made by the qualified Chartered Accountants, and on the anticipation that the value of the shares will rise, it was expected that he would get a return of 25 per cent per annum on his investment. The plaintiffs are, therefore, not wrong in contending that the amounts advanced carried no interest. 100. Commenting on the conduct of M.D. Chhabria, the defendant No. 11, Mr. Chidambaram, submitted that he acted on the advice of professionally qualified Chartered Accountants. Each transaction provided adequate safeguards to him, and all the transactions were duly recorded in the books of account and the balance sheets of the respective companies. As advised by the experts, the funds had been secured by execution of promissory notes and FCDs. If the three companies, the defendant Nos. 3, 4 and 5 were used by the defendant No. 11, M.D. Chhabria, as instruments to acquire the shares of Herbertsons Ltd., there was no reason for him to take over control of these three unlisted companies because, it would have been wiser for him to leave those three companies in the hands of the erstwhile management who would have acted on his directions. The extent of the share capital of these three companies was irrelevant because in the case of an investment company, the strength of the company lies in the persons behind the company and their solvency. Obviously, an investment company may not have substantial assets. He, therefore, submitted that the transaction was transparent, and there was no evidence on record to conclude or suspect even remotely that the acquisition of the defendant Nos. 3 to 5 companies were not real, or not on their own behalf and that they were actually acting in concert with anyone when the acquisition of shares took place. 101. We are not impressed by the submission urged by Mr. Chidambaram. We have earlier held that much value cannot be attached to the reports of the professional experts who also cannot be characterised as independent persons, in view of their association with other companies of defendant No. 11. Moreover, the FCDs were never issued, and even the promissory notes were cancelled and returned after take over of the companies. The facts on record to prima facie establish that the three companies, the defendant Nos. 3, 4 and 5 made substantial investments in the shares of Herbertsons on the strength of the funds advanced to them by the companies under the control of the defendant No. 1 and the defendant No. 11. It is premature at this stage to speculate as to the source from which they procured further funds to purchase the shares of Herbertsons Ltd., or the circumstances in which one of them, Imfa, the defendant No. 3, invested some amount in the purchase of shares of

Samudra Shoes. These are matters which will have to be decided on evidence. What is apparent is that the acquisition of Herbertson's shares was substantially funded by the defendant No. 1, defendant No. 11 and the companies and concerns under their control. Similarly, all transactions and the events that followed lead as to hold prima facie that it was a well thought out plan to acquire shares of Herbertsons Ltd., with the parties acting in concert. On the basis of the facts on record as at present the conclusion appears to be inescapable that the defendant Nos. 1 and 11 were acting in concert with the companies under their control, viz„ defendant Nos. 2 to 10 in the matter of substantial acquisition of shares of Herbertsons Ltd., the defendant No. 12. We may hasten to add that is only a prima facie view based on the material on record as they appear. The defendants are yet to file their written statement, and the parties had yet to lead evidence in support of their respective cases. A final finding of fact can be recorded only after evidence is brought on record by the parties. The conclusion reached by us is only prima facie and only for the purpose of disposal of the Notices of Motion. The material on record does establish a prima facie case of defendant Nos. 1 to II having acted in concert with each other in the acquisition of substantial shares of Herbertsons Ltd., (defendant No. 12) in breach of the Regulations of 1994. 102. Mr. Chidambaram submitted that under Section 11(1) as also under Regulation 37(2) of the 1994 Regulations, it is open to SEBI to take such measures as it think fit and this would include granting permission to the acquirers to make a public announcement even after the lapse of the period stipulated in either Regulation 13 or 14. In fact, according to Mr. Chidambaram, this has been done in many cases. He submitted that in this case as well, the SEBI vide its letter dated 25-9-1996, called upon Imfa Holdings P. Ltd., to comply with the Regulations and this could only mean the making of an ex post facto public announcement. He submitted, by reference to documents on record, that in fact the SEBI had taken a decision to require a post-factor public announcement to be made, but this course was deflected on extraneous consideration, and ultimately, the SEBI took recourse to issuance of show-cause notice dated 8-1-1999. This argument was also advanced before the trial Judge but the submission was not accepted inasmuch as there was neither any authenticated document to support these facts nor could this question be considered in the absence of the SEBI or its Chairman or the former Chairman of the Committee at whose behest it was submitted that the SEBI changed its decision. The learned Judge also found that the document, Annexure 'O' was an unsigned, unauthenticated document and did not come from proper custody. He, therefore, refused to look at the document which was not duly authenticated. In any event, this question need not detain us because the SEBI is not a party in the suit. That apart, we should not make any observation in this order which may even remotely touch upon matters within the jurisdiction of the SEBI. What appropriate the order SEBI may pass in a case of this nature must be left to the SEBI, and we, therefore, do not consider it appropriate to make any observations. 103. Before adverting to the other submissions urged on behalf of the defendants, we may notice the preliminary objection raised by Mr. Nariman on the basis of Section 9A as amended in its application to the

State of Maharashtra. We have earlier noticed the relevant provisions. Mr. Nariman submitted that in view of the statement filed on behalf of the defendant Nos. 1 and 11 that they were not pressing the question of the jurisdiction of the court, but were only submitting that having regard to these provisions, no interim relief should be granted to the plaintiffs, the defendants cannot be permitted to urge questions relating to the jurisdiction of the Court to entertain a suit and to grant relief. In particular, he submitted that the defendants should not be permitted to urge the contention that in view of the provisions of the SEBI Act and the 1994 Regulations any breach of the regulations can be looked into and appropriate order passed only by the SEBI and that the jurisdiction of Courts was barred. Similarly, the defendants could not be permitted to urge the submission that in view of Section 111A, Courts had no jurisdiction to order rectification of Register of Members. These submissions were urged by him before the trial Court as well. Before us, another submission was urged by both Mr. Chidambaram and Mr. Ashok Desai, appearing on behalf of defendant No. 1, that in view of the repeal of the 1994 Regulations by the 1997 Regulations, the plaintiffs had no cause of action whatsoever. Mr. Nariman submitted that this also raises a question of jurisdiction, and in any event, such an issue could not be tried in the absence of the SEBI. We will deal with this part of the submission later, when we deal with the question of repeal of the 1994 Regulations. 104. Mr. Nariman relied upon a decision of the Supreme Court in M.L. Sethi v. R.P. Kapur . He laid particular emphasis on the observations of the judgment which reads thus: " 10. The word "jurisdiction" is a verbal cast of many colours. Jurisdiction originally seems to have had the meaning which Lord Baid ascribed to it in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147, namely, the entitlement 'to enter upon the enquiry in question'. If there was an entitlement to enter upon an enquiry into the question, then any subsequent error could only beregarded as an errorwithin the jurisdiction. The best known formulation of this theory is that made by Lord Denman in R. v. Bolton [1841] 1 QB 66. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. . . " (p. 2384) He also relied upon a decision rendered by a Division Bench of this Court in Sadguna Chimanlal Shah v. New Sagar Darshan Co-operative Housing Society Ltd [1980] Mh. LJ 203, which has considered Section 9A as amended by the Maharashtra Amending Act 25 of 1970. The Court held that the issue as to jurisdiction must be decided as a preliminary issue while granting an interim relief. The amendment directs that if an objection is raised as to the jurisdiction of a Court at the stage of granting of interim relief, the Court shall proceed to determine, at the hearing of such application, the issue as to jurisdiction as a preliminary issue before granting or setting aside the order granting interim relief. Such an application is not to be adjourned to the hearing of the suit. The provisions of the Maharashtra Amendment Act were imperative and nobody has a choice to conduct the proceedings in the suit contrary to the directions of the Legislature. In Meher Singh v. Deepak Sawhny 1998 (4) ALL MR 536, a Division Bench of this Court considered the provisions of Section 9A and the reasons why it became necessary for the Legislature to bring about the amendment. It

appears from the statement of objects and reasons for adding the said Section 9A, that the practice of granting injunctions, without going into the question of jurisdiction even though raised, had led to grave abuse. It was, therefore, proposed to provide that if a question of jurisdiction is raised at the hearing of any application for granting or setting aside an order granting an interim relief, the Court shall determine that question first. In paragraph 10 of the judgment. Their Lordships observed: "10. Section 9A is a departure from the procedure established for deciding the preliminary issue as prescribed under Order XIV Rule 2 of the Civil Procedure Code, On many occasions, it is not always proper to pass an order of hearing the preliminary issue with regard to maintainability of a suit at the time of final hearing of the suit. If such issue is decided at an earlier stage, rights of the parties can be crystallized. As stated earlier, Section 9A is a departure from the procedure prescribed under Order XIV Rule 2 of the Code of Civil Procedure for achieving that object. For determination of the preliminary issue, which may be mixed question of law and facts, the parties are required to lead evidence. Without permitting the parties to lead evidence the issue of jurisdiction cannot be finally determined. If it was to be decided only for prima facie purpose for granting interim relief, then there was no necessity of adding Section 9A in the Civil Procedure Code. Secondly, on the basis of prima facie determination without proper adjudication, in our view, suit cannot be disposed of. The Plaintiff cannot be non-suited on the basis of the averments made in the plaint or in the Written Statement. If the issue is a pure question bf law, then it may be decided without recording evidence, but if it is a mixed question of law and fact, then parties should be permitted to lead evidence on the facts of the case. Question of jurisdiction, even if it is a mixed question of law and fact, it is required to be decided first. For deciding the said issue, the parties are entitled to lead evidence, oral as well as documentary, as that issue is required to be tried and adjudicated finally by the Court. The determination of the said issue is not only for the limited purpose of granting interim relief or vacating interim relief. It is true that this procedure requires piecemeal determination of the suit, but that cannot be avoided because of the mandate of Section 9A." It was concluded that Section 9A was added with a specific object to see that objection with regard to jurisdiction of the Court is decided as a preliminary issue. The practice of granting injunctions, without going into the question of jurisdiction even though raised, had led to grave abuse. Hence, the said section is added to see that the issue of jurisdiction is to be decided as a preliminary issue notwithstanding anything contained in the Code of Civil Procedure, including Order XIV Rule 2. Once this is to be decided by raising it as a preliminary issue, it is required to be determined after proper adjudication, and adjudication would require giving of opportunity to the parties to lead evidence, if required. Relying upon these decisions, Mr. Nariman submitted that any point taken to non suit the Plaintiffs at the threshold, amounts to raising a question of jurisdiction. In the grounds of appeal, particularly grounds 193, 243, etc., question of jurisdiction has been raised in regard to matters which, according to the defendants, fall within the jurisdiction of the SEBI alone. The defendants themselves considered those

grounds as grounds of jurisdiction. Mr. Nariman, therefore, submitted that either the Defendants should back out from the statement made by them before the trial Court and invite the Court to decide the question of jurisdiction or they should not be permitted to urge the question of jurisdiction at all in the appeal. 105. Mr. Chidambaram submitted that by filing an affidavit, the defendants did not lose the right to agitate those questions as was contended on behalf of the plaintiffs. He submitted that there may be threshold bar to entertain a suit but in the given circumstances, the defendants were entitled to argue that no relief should be granted. He sought to buttress this submission by relying upon several decisions so as to distinguish between Court having jurisdiction to entertain a matter and error committed by it in the exercise of jurisdiction. He, therefore, submitted that the defendants did not object to the court entertaining the suit but submitted that it would not be proper to exercise jurisdiction to grant interim relief as prayed for. 106. He relied upon the decisions in Mohesh Chandra Dass v. Jamiruddin Mollah ILR 28 Cal. 324 ; A. Venkataseshayya v.Virayya AIR 1958 AP 1 ; PanthalakunntimmalPokkutty's daughter Kunheema Umma v. Puthalath Balakrishnan Nair ; Union of India v. Tarachand Gupta & Bros. ; M.L. Sethi's case (supra) and Ittyavira Mathai v. Varkey Varkey . The principles laid down in these authorities are well recognised. In Moheshchandra Dass' case (supra) the Court observed that the word 'jurisdiction' is used in two different senses. It may either mean what is ordinarily understood by the term 'jurisdiction' when used with reference to the local jurisdiction of a Court, or pecuniary jurisdiction of a Court, or its jurisdiction with reference to the subject-matter of a suit, or it may mean the legal authority of a Court to do certain things. It is only in this latter sense that an erroneous order of remand by an Appellate Court can be treated as an order made without jurisdiction. Similarly, in A. Venkataseshayya's case (supra) it was emphasised that there is an essential distinction between the question of jurisdiction of the Court to entertain a suit and the rule of law which precludes a man from avowing the same thing in successive litigations. There is also a marked difference between inherent want of jurisdiction to entertain a matter and the regular exercise of jurisdiction. In Panthalafcunnummal Pokkutty's case (supra) it was observed that there is an essential difference between inherent want of jurisdiction in a Court to entertain a cause and the irregular exercise of it. Their lordships referred to the judgment of the Calcutta High Court in Sukh Lal v. Tarn Chand 33 Cal. 68, in which it was observed that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. The judgment also quoted, with approval, the observations of the Calcutta High Court in Hriday Nath v. Ram Chandra AIR 1921 Cal. 34, that there is a fundamental distinction between existence of jurisdiction and exercise of jurisdiction. In Union of India's case (supra), the Apex Court referring to its earlier judgment in Finn Illuri Subbayya Chetty & Sons v. Andhra Pradesh , quoted with approval the proposition that there is no justification for the assumption that if a decision has been made by a taxing authority under the provisions of a taxing statute, its validity can be challenged by a suit on the ground that it is incorrect on merits and as such it

can be claimed that the provisions of the said statute have not been complied with. Their lordships also referred to the observation of Lord Reid in Anisminic Ltd. v. Foreign Compensation Commission [1969] 1 All ER 208, wherein it was observed that it has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense. It is better not to use the term except in the narrow and original sense of the Tribunal being entitled to enter on the enquiry in question. In M.L. Sethi's case (supra) the Supreme Court referred to the dicta of Lord Denman in R. v. Bolton [1841] 1 QB 66, that the question of jurisdiction was determinable at the commencement, not at the conclusion of the enquiry. In Ittyavira Mathai's case (supra) the Supreme Court observed that it is well settled that a Court having jurisdiction over the subject-matter of the suit and over the parties thereto though bound to decide right may decide wrong; and that even though it decided wrong, it would not be doing something which it had no jurisdiction to do. 107. Mr. Nariman, on the other hand, relied upon the decision of the Supreme Court in Official Trustee v. Sachindra Nath Chatterjee . He submitted that the Supreme Court, after an exhaustive consideration of the authorities on the subject summarised the legal position thus: "From the above discussion, it is clear that before a Court can be held to have jurisdiction to decide a particular matter, it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the question at issue, the authority to hear and decide the particular controversy that has arisen between the parties." 108. These judgments, at best, highlight the distinction between inherent lack of jurisdiction, and the error in exercise of jurisdiction. In the context of Section 9A, as amended in its application to the State of Maharashtra, it is in the former sense that the question of jurisdiction must be viewed. The section insists that if any interim relief is asked for, and the question of jurisdiction is raised, then the issue of jurisdiction must be tried. It emphasizes the fact that the issue must be determined at the commencement and not at the conclusion of the enquiry, as was emphasised by Lord Denman in Bolton (supra), Mr. Nariman is, therefore, right in submitting that in view of the defendants' contention that the Court had no jurisdiction to deal with any matter relating to the violation of the SEBI Regulations since that jurisdiction exclusively vested in the SEBI, and that questions relating to rectification of register of members could be determined only by the CLB which was vested with jurisdiction, the plea amounted to a plea that the Court had no jurisdiction even to enter upon the enquiry, i.e., there was a threshold bar. Once the Defendants raised this objection on the question of jurisdiction, in view of Section 9A as applicable to the State of Maharashtra, they had no option but to insist upon issues being framed and determined at the commencement of the enquiry, and could not claim any relief or object to any relief being granted to the plaintiffs on the ground that the Court had no jurisdiction to entertain the suit. Such an objection could be raised only if the question of jurisdiction were gone into by the Court after framing of issues and decided in favour of

the defendants. We find considerable force in the submission of Mr. Nariman but since the matter has been argued at length, we shall also consider those questions separately. 109. It was submitted on behalf of the defendants that the plaintiffs did not have a civil right or any common law right to apply for rectification of shares held by a third-party in a public limited company on the ground that no public offer was made by such third-party under the SEBI Regulations. He submitted that in the present case, the plaintiffs assert that they have a right to get the register rectified in respect of the registered shares of Imfa and Mahameru, the defendant Nos. 3 and 4 on the ground that after the purchase of the shares, the acquirer did not make a public offer, as required by the SEBI Regulations. According to Mr. Chidambaram, the right asserted by the Plaintiffs is not a common law right, and in fact, such a right is created for the first time by the SEBI Regulations. Such being the legal position, there was no question of the plaintiffs seeking to establish their right in a civil suit. 110. In sum and substance, the contention of the defendants is that there is no common law right to seek rectification on the plea of violation of the SEBI Regulations. It was further submitted that the cases in which it was held that the shareholder had a right to claim rectification of the register were all cases related to the plaintiffs' own shares in respect of which the plaintiffs claimed property rights. In any event, it was submitted that the law has undergone a change. It was earlier understood to mean that under Section 155, the plaintiffs may either file a petition for rectification or if there were complicated questions involved, file a suit. This was the position when the Supreme Court rend credits judgment in Public Passenger Service Ltd v. M.A. Khadar . The law has undergone a significant change after the decision of the Supreme Court in Ammonia Supplies Corpn. (P.) Ltd. v. Modern Plastic Containers P. Ltd. . According to the defendants, Section 155 vests jurisdiction in the company Judge, and impliedly ousted the jurisdiction of the civil court in respect of rectification. All matters related to or connected with rectification can be adjudicated by the company court hearing a rectification application. However, if the company Judge hearing the matter feels that the matter involved complicated questions of fact, he could direct the parties to have it adjudicated in a civil court. Having regard to the law as laid down in Ammonia Supplies Corpn. a party seeking rectification either under Section 111 in respect of a private limited company or under Section 111A in respect of a public limited company must move the CLB if it falls under the five specified categories. Thereafter, if the CLB is satisfied that there are complicated question of fact, it may direct the party to seek reliefs in a civil court. A shareholder as a member of a public limited company has no right either under the common law or under any statute to ask for rectification of shares standing in the name of the defendant Nos. 3 and 4. At best, he can bring the facts to the notice of the company and asked the company to file a petition under Section 111A(3). Section 111A has made a significant departure from the existing law. By necessary implication, the common law right, if any, is now extinguished. 110A. On the other hand, Mr. Nariman, appearing on behalf of the plaintiffs, submitted that a shareholder/member of the company always enjoyed the common law right to uphold the purity of the register. He referred

to the authorities on the subject which have consistently upheld the right of a member of a company to seek rectification of the register of members by way of a suit. 111. Two questions arise for consideration. Firstly, whether a shareholder of a company has a common law right to seek rectification of register by way of a suit. If it is found that a shareholder has such a common law right, whether Section 111A has extinguished that right. In support of his submission, Mr. Chidambaram relied upon the oft-quoted passage appearing in the opinion of Willes, J. in Wolverhampton New Water Works v. Hawkesford (1859) 6 CB (NS), 336 which reads as follows: "There are three classes of cases in which a liability might be established, founded upon statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at common law. But there is a third class, viz-, where a liability not existing at common law is created by statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class." The principle so enunciated has been approved by the Apex Court in several decisions and it is not necessary at this stage to refer to all of them, but we may refer to two decisions of the Supreme Court which have clarified the matter further. In Raja Ram Kumar Bhargava v. Union of India , after referring to the authorities, the Court observed- "... Generally speaking, the broad guiding considerations are that wherever a right, not pre-existing in common-law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created uno flatu and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the civil court's jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil court's jurisdiction, then both the common-law and the statutory remedies might become concurrent remedies leaving open an element of election to the persons of inherence. To what extent, and on what areas and under what circumstances and conditions, the civil court's jurisdiction is preserved even where there is an express clause excluding their jurisdiction, are considered in Dhulabhai's case." (p. 756) This judgment is an authority for the proposition that if a pre-existing right in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil courts' jurisdiction, then both the common law and the statutory remedies might become concurrent remedies. 112. Similarly, in Shiv Kumar Chadha v. Municipal Corpn. of Delhi , the Court referred to the observations of Willes, J. in Wolverhampton New Water Work's case (supra), and after exhaustive consideration of the decisions

of the Supreme Court and other Courts, laid down the principle in the following words: "With the increase in the number of taxing statutes, welfare legislations and enactments to protect a class of citizens, a trend can be noticed that most of such legislations confer decision making powers on various authorities and they seek to limit or exclude court's power to review those decisions. The result is that the power of the court under Section 9 of the Code is being denuded and curtailed by such special enactments, in respect of liabilities created or rights conferred. This Court in the judgments referred to above has upheld the ouster of the jurisdiction of the court on examination of two questions - (1) Whether the right or liability in respect whereof grievance has been made, had been created under an enactment and it did not relate to a pre-existing common law right ? (2) Whether the machinery provided for redressal of the grievance in respect of infringement of such right or imposition of a liability under such enactment, was adequate and complete ? The ouster of the jurisdiction of the court was upheld on the finding that the rights or liabilities in question had been created by the Act in question and remedy provided therein was adequate. But the situation will be different whereas statute purports to curb and curtail a pre-existing common law right and ports to oust the jurisdiction of the court so far remedy against the orders passed under such statute are concerned. In such cases, the courts have to be more vigilant, while examining the question as to whether an adequate redressal machinery has been provided before which the person aggrieved may agitate his grievance." This decision emphasises the principle that when a statute purports to curb or curtail a pre-existing common law right and purports to oust the jurisdiction of the Court, the Courts have to further examine the question as to whether an adequate redressal machinery has been provided before which the person aggrieved may agitate his grievance. 113. We shall now consider the authorities cited by Mr. Nariman in support of the proposition that a shareholder had a common law right to seek rectification of the register of members. In T.A.K. Mohideen Pichai Taraganar v. Tinnevelly Mills Co. Ltd. and Ors. , the plaintiff had filed a suit for rectification of the register since the defendant-company refused to register his shares in his name. An objection was raised by the company that the plaintiff was not entitled to enforce his right by a suit. After noticing Section 38 of the Companies Act of 1913, which provided for an application for rectification of the register of companies, whenever the name of any person was fraudulently or without sufficient cause entered in or omitted from the Register. Their lordships referred to the judgment in the case of Manilal Brijlal Shah v. Gordhan Spg. & Mfg. [1920] 47 Cal. 901 wherein it was observed that in a simple case when an immediate rectification is essential, it may be desirable to apply under that section; but if the case is at all complicated, an action should be brought. Approving the above principle, it was observed: "I respectfully agree entirely with those observations. If the principle is that the provisions contained in and the procedure prescribed by a certain enactment are exhaustive and it should be open to parties to seek for such reliefs in regular actions only in cases where the enactment can be said to create entirely a new sphere of rights and obligations, it becomes important to discuss the question in this case whether the Indian Companies Act must,

having regard to its true nature, be regarded as an Act creating such a new sphere or as merely legislating for or regulating certain rights recognized under the common law. It seems to me that the true and correct view would be to regard it only as of the latter kind. By the terms of Section 4, the Act declares as illegal any association or partnership consisting of more than ten persons formed for the business of banking and any company, association or partnership of more than twenty persons formed for the purpose of carrying on any other business. It is clear that the scope of the Act is regulative and it is concerned only with making provisions in respect of rights and obligations which would have existed apart from the Act. In all such cases, the true principle is that though remedies are provided in the enactment, the general right of suit cannot be considered as taken away merely by reason of such provision and except by express enactment. The objection, therefore, that the appellant-plaintiff had no right of suit must be overruled." In Rao Saheb Maniolal Gangaram Sindore v. Western India Theatres Ltd. [1963] 33 Comp. Cas. 826 (Bom.), it was held by a Division Bench of this Court (speaking through J.C. Shah, J. as he then was), that for the relief contemplated by Section 155, a suit was the primary remedy under the general law. The relief contemplated by that section was one which was available at common law. Section 155 merely provided a statutory remedy. Its object was not to whittle down or abrogate the procedure by way of suit for getting the relief contemplated by that section. In Killick Nixon Ltd. v. Dhanraj Mills [1983] 54 Comp. Cas. 432 (Bom.), the contention that only a person aggrieved by an incorrect or wrong entry in the share register was entitled to file a rectification application under Section 155, was repelled by a Division Bench of this Court (per Sawant, J. as he then was), and it was held that any member was entitled to apply for rectification under Section 155 without being compelled to show that he was aggrieved, or any prejudice was caused to him. In Jayshree Shantaram Venkudre v. Rajkamal Kalamandir P. Ltd. [1960] 30 Comp. Cas. 141, the petitioner was a shareholder in respect of 251 ordinary shares of the respondent No. 1 company but by a deed of transfer dated 28-6-1955, signed by her, she purported to transfer those shares, and accordingly, the shares were transferred and registered in the name of the respondent No. 2. It appears that later, some disputes arose between the petitioner and her husband, and the petitioner denied having at any time executed a deed of transfer of the kind which was annexed as Exhibit 2 to the affidavit in reply made on behalf of the respondent No. 1 company. Her case was that the contents of the deed of transfer which bore her signature were forged and fabricated. It was, therefore, contended that questions of forgery and fabrication of documents were not proper to be tried in a summary procedure under Section 155. Reliance was placed on the following passage appearing in Volume VI of Halsbury's Laws of England at page 218: "The application may be made by the person aggrieved.... It may be by motion or summons or by action commenced by writ. If the court thinks that the case, by reason of its complexity or on the ground that there are matters requiring investigation or otherwise, could more satisfactorily be dealt with by an action, the court will decline to make an order on a motion, without prejudice to the right of the applicant to institute an action for rectification. An

action may, without any direction by the court, be instituted for rectification of the register, a course which should be followed where there is much complexity, or where other relief is required." In Om Prakash Berlia v. Unit Trust of India [1983] 54 Comp. Cas. 469, a learned Judge of this Court (Bharucha, J. as he then was), considered the submission urged before him by the plaintiffs that the right to rectify the share register of a company was the individual right of each of its shareholders, and each shareholder was entitled to have the register reflect the true position and to take action to ensure that it did. Referring to the authorities on the subject, he negatived the contention that the expression 'any member' in Section 155 meant only a member who was aggrieved or who was in a position to show that some prejudice or wrong was caused to him. He held that any member was entitled to apply for rectification under Section 155 without being compelled to show that he was aggrieved or any prejudice has been caused to him. For the relief contemplated by Section 155, a suit was a primary remedy under the general law. The relief contemplated by that section was one which was available at common law. Section 155 merely provided a summary remedy. Its object was not to whittle down or abrogate the procedure by way of a suit for getting the relief contemplated by the section. A long line of judicial decisions recognised that the court was not bound to give relief under Section 155 if it was found that complicated questions of fact were involved but had the power to direct the party concerned to file a proper action in a civil court. He further noticed the judgment of the Madras High Court in T.A.K. Mohideen Pichai Taraganar's case (supra) that the true and correct view to take would be that the Companies Act merely legislative for or regulated rights recognised under the common law. After a full consideration of the matter, the learned Judge concluded- "In my view, every shareholder of a company has an individual right and interest in seeing that the share register of the company reflects the true position. Upon the share register rests each shareholder's right to receive his due share of the company's profits by way of dividend, his right to exercise his vote and to have it correctly assessed as against the votes of other rightful shareholders, and his right to acquire new shares in the company pro rata with other rightful shareholders. An entry in the register which is bad or illegal affects these rights of the individual shareholder. He is thereby prejudiced and aggrieved. The right to rectify was recognised as common law and was translated into the statutes, English and Indian. (The provisions of Section 116 of the English Companies Act, 1948, provide to any member of the company the right to apply for a rectification of the company's share register). The statutes do not create any new right in the member. In England, as in most High Courts in India, it is recognised that the procedure of rectification made available by the Companies Act is a summary procedure and that the petitioner may, in the court's discretion, if the matter be a complex one, be referred to a suit. It would be anomalous if a shareholder, who can maintain a petition under Section 155 of the Indian Companies Act or Section 116 of the English Act, is directed to file a suit because the matter is complex, and is then told that he is not entitled to maintain the suit because he is not a person aggrieved." (p. 503)

114. Mr. Chidambaram pointed out that the judgment in Om Prakash Berlia's

case (supra) was overruled by a Division Bench of this Court and, therefore, it does not lay down good law. On the other hand, Mr. Nariman submitted that the judgment was upset on another question, and not on this point. In any event, he submitted that the reasoning of the learned Judge which is consistent with the principles laid down in several earlier decisions which are binding, precedents has considerable persuasive value, and he would adopt them as his argument, apart from relying upon the earlier decisions of this Court noticed in the judgment. 115. In Avanthi Explosives (P.) Ltd. v. Principle Subordinate Judge [1987] 62 Comp. Cas. 301 (AP), a question arose in the Writ Petition as to the jurisdiction of the civil court to entertain a civil suit involving the question as to the disqualification of the Director of a company under the Companies Act. An argument was advanced by the Petitioner that the rights of the second respondent are creatures of the company law and hence the remedy under that law alone has to be followed. After noticing observations in Wolverhampton New Water Work's case (supra), M. Jagannatha Rao, J. (as he then was) formulated the question that arose for consideration, viz., whether, the rights and obligations in question owe their very creation to the Companies Act, or whether, they are traceable to a basic contract which is statutorily regulated. His Lordship then proceeded to consider the historical background of the company statutes. He observed– "I may point out that as a result of reforms in recent times, the English Company Law (subsequently re-enacted as the Companies Act, 1967, 1976, 1980, 1981) and the European Companies Act, 1972, came to be enacted. The series of Acts only show that the law of contract which was the basis of the 'deed of settlement company' was regulated by a statue at various stages. It is, therefore, clear that the position in law is that the rights and liabilities between the contracting parties and governed by the articles of association are regulated by the various statutes relating to company law, and these laws have not created any special rights and remedies." Reference was then made to T.A.K. Mohideen Pichai Taraganar's case (supra), and his Lordship recorded his conclusion in the following words:- "I, therefore, hold that the general law of contracts is the basis of the rights of parties and that the Companies Act, 1956, merely regulates these rights and does not create any new rights or remedies. Unless, as stated in Wolverhampton's case [1859] 6 CB (NS) 336, there is an exclusion of the jurisdiction of the civil court, by words express or implied, the suit is maintainable, and no such exclusion has been held existing by the courts in respect of individual rights." The same view was reiterated in Tej Prakash S. Dangi v. Coromandal Pharmaceuticals Ltd. [1997] 89 Comp. Cas. 270 (AP). The learned Judge reached his conclusion after referring to the authorities on the subject, including Avanthi Explosives (P.) Ltd.'s case (supra), 116. This brings us to a consideration of the judgment of the Supreme Court in Public Passenger Services Ltd.'s case (supra). In that case, the Board of Directors of the Appellant-Company passed a resolution under article 13 forfeiting the shares held by Respondent Nos. 1 and 2 in the company. This was because the Respondents failed to pay the call monies despite notice. Respondent Nos. 1 and 2 filed two separate applications under Section 155 of the Companies Act, 1956, praying that the forfeiture be set aside and

the necessary rectification be made in the share register of the company. The application was allowed by a conditional order passed by a learned Judge of the Madras High Court. The decision was affirmed by the appellate Court which held that the notice of forfeiture was defective and invalid. The company came in appeal to the Supreme Court. The Supreme Court agreed with the finding of the High Court that the notice was defective, and, therefore, the forfeiture was not justified. It was urged before the Supreme Court that the relief under Section 155 being discretionary, the Court should have refused relief in the exercise of its discretion. Repelling the contention, the Court observed- "Now where by reason of its complexity or otherwise the matter can more conveniently be decided in a suit, the Court may refuse relief under Section 155 and relegate the parties to a suit. But the point as to the invalidity of the notice, dated 20-1-1957 could well be decided summarily and the Courts below rightly decided to give relief in the exercise of the discretionary jurisdiction under Section 155. Having found that the notice was defective and the forfeiture was invalid, the Court could not arbitrarily refuse relief to the respondents." (p. 492) In Ammonia Supplies Corporation (P.) Ltd. v. Modern Plastic Containers (P.) Ltd. AIR 1994 Delhi 51, a Full Bench of the Delhi High Court was called upon to consider the jurisdiction exercised by the Company Court under Section 155 and the authorities cited at the Bar including the judgment of the Supreme Court in Public Passenger Services Ltd's case (supra), and speaking for the Court (Y.K. Sabharwal, J. as he then was) observed- "The object of Section 155, in our view, is to provide remedy in non-controversial matters or in matters where a quick decision is necessary and can be rendered in order to obviate irreparable injury to a party. Section 155 each ordinarily not intended for settling controversies necessitating a regular investigation and in such cases, the Company Court can decline to entertain petitions in exercise of its discretionary power and say that since serious disputes are involved, the proper forum for their adjudication is a civil court. Section 155(3) only shows that question relating to title can also be examined by the Company Court but that is also possible without detailed examination of complicated questions of fact and law, requiring extensive oral and documentary evidence and it cannot be inferred from Section 155(3) that the remedy is not summary. It would depend on facts of each case. It is not necessary in every case where the question relating to title may be involved that there has to be a detailed examination and determination of oral and documentary evidence. The question is not whether the Company Court has no jurisdiction but is that can the Court in its discretion decline to exercise it where disputed and complicated questions are involved requiring examination of extensive oral and documentary evidence. We do not think that a respondent would be able to oust the jurisdiction of the company Court by a mere assertion in the reply about fraud or forgery or want of consideration. In such a case the Company Court can and certainly would examine whether the said assertion is being made only with a view to oust the jurisdiction of the Company Court or assertions are such which would require detailed examination of the evidence. In the former case the Company Court would proceed with the adjudication of a petition under Section 155. In the later case the Company Court would

be justified in exercise of its discretion to reject the petition and relegate the parties to a regular civil suit. It has to be borne in mind that the power to rectify the register of members is discretionary and so also the power to decide questions relating to title as is apparent from bare reading of Sub-section (3) of Section 155 of the Act. We do not agree with the contention that jurisdiction of wide amplitude would be rendered fruitless and nugatory and purpose behind introducing Section 155 would be defeated if it is held that the Company Court exercises summary jurisdiction under Section 155 of the Act." (p. 58) The Conclusions of the Full Bench were recorded thus:– "(1) The jurisdiction exercised by the Company Court under Section 155 of the Act is discretionary and summary in nature. (2) In exercise of discretionary and summary jurisdiction the Company Court can decline to entertain petition involving disputed and complicated questions requiring examination of extensive oral and documentary evidence. (3) The remedy of suit for adjudication of disputes relating to title to shares is not barred." (p. 59) 117. Against the Full Bench judgment of the Delhi High Court, an appeal was preferred by Amonia Supplies Corpn. (P.) Ltd's case (supra) and the judgment of the Supreme Court is Amonia Supplies Corpn. (P.) Ltd's case (supra). We shall carefully consider this judgment of the Supreme Court because it is the submission of Mr. Chidambaram that whatever may have been the position in law, when Public Passenger Services Ltd's case (supra) was decided. Ammonia Supplies Corporation (P.) Ltd's case (supra), makes a departure and the law has undergone a change. We may, at the outset, notice that the earlier judgment in Public Passenger Services Ltd's case (supra), was considered in Ammonia Supplies Corporation (P.) Ltd's case (supra) and the same has not been overruled. We are of the view that the law as laid down in Public Passenger Services Ltd's case (supra) has been re-affirmed with certain clarifications. The law as understood by the Full Bench of the Delhi High Court pertaining to the jurisdiction of the court under Section 155, has also been approved. The contention feebly urged that the judgment in Public Passenger Services Ltd's case (supra), was per incuriam has also been rejected. The question is whether despite all this. Ammonia Supplies Corporation (P.) Ltd's case (supra) lays down a law different than what was laid down in Public Passenger Services Ltd's case (supra). 118. In Ammonia Supplies Corporation (P.) Ltd's case (supra) the Court considered the definition of 'Court' under Section 2(ii) of the Companies Act, and came to the conclusion that in respect of any question raised within the peripheral field of rectification, there can be no doubt that the Court as referred under Section 155 read with Section 2(ii) and Section 10, namely, the Company Court alone had exclusive jurisdiction. Their Lordships then proceeded to examine the power of the Court to rectify the register of members of the Company under Section 155. The appellant contended that the Court, under the Act, could not direct an applicant to seek his remedy by way of suit but the Court, under the Act, having exclusive jurisdiction should decide itself. Strong reliance was placed on the deletion of proviso to Section 38 of the 1913 Act which provided that the Court may direct an issue to be tried in which any question of law may be raised. While considering this question, the court observed- "....By this deletion, submission is that the Company

Court now itself has to decide any question relating to the rectification of the register including the law and not to send one to the Civil Court. There could be no doubt any question raised within the peripheral field of rectification, it is the Court under Section 155 alone which would have exclusive jurisdiction. However, the question raised does not rest here. In case any claim is based on some seriously dispute civil rights or title, denial of any transaction or any other basic facts which may be the foundation to claim a right to be a member and if the Court fees such claim does not constitute to be a rectification but instead seeking adjudication of basic pillar some such facts falling outside the rectification, its discretion to send a party to seek his relief before Civil court first for the adjudication of such facts, it cannot be said such right of the Court to have been taken away merely on account of the deletion of the aforesaid proviso. Otherwise under the garb of rectification one may lay claim of many such contentious issues for adjudication not falling under it. Thus in other words, the Court under it has discretion to find whether the dispute raised are really for rectification or is of such a nature, unless decided first it would not come within the purview of rectification. The word 'rectification' itself connotes some error which has crept in requiring correction. Error would only means everything as required under the law has been done yet by some mistake the name is either omitted or wrongly recorded in the register of the Company. . . ." (p. 3161) The Court also observed- "Sub-section (1)(a) of Section 155 refers to a case where the name of any person without sufficient cause entered or omitted in the Register of Members of a Company. The word 'sufficient cause' is to be tested in relation to the Act and the Rules. Without sufficient cause entered or omitted to be entered means done or omitted to do in contradiction of the Act and the Rules or what ought to have been done under the Act and the Rules but not done. Reading of this Sub-clause spells out the limitation under which the Court has to exercise its jurisdiction. It cannot be doubled in spite of exclusiveness to decide all matter pertaining to the rectification it has to act within the said four corners and adjudication of such matter cannot be doubted to be summary in nature. So, whenever a question is raised Court has to adjudicate on the facts and circumstances of each case. If it truly is rectification all matters raised in that connection should be decided by the Court under Section 155 and if it finds adjudication of any matter not falling under it, it may direct a party to get his right adjudicated by Civil Court. Unless jurisdiction is expressly or implicitly barred under a Statute, for violation or redress of any such right Civil Court would have jurisdiction. There is nothing under the Companies Act expressly barring the jurisdiction of the Civil Court, but the jurisdiction of the 'court' as defined under the Act exercising its powers under various sections where it has been invested with exclusive jurisdiction, the jurisdiction of the Civil Court is impliedly barred. We have already held above the jurisdiction of the 'court' under Section 155, to the extent it has exclusive, the jurisdiction of Civil Court is impliedly barred. For what is not covered as aforesaid the Civil Court would have jurisdiction. . . ." (p. 3163) It was held that the principle of law as decided by the High Court that jurisdiction of the Court under Section 155 is summary in nature cannot be faulted. However, Their Lordships were of the view that the

Court should have examined itself to see whether even prima facie what is stated is complicated question or not. Even dispute or fraud, if by bare perusal of the document or what is apparent on the face of it on comparison of any disputed signature with that of the admitted signature, the Court is able to conclude no fraud, then it should proceed to decide the matter and not reject it only because fraud is stated. Since the High Court had not considered the matter from this angle, Their Lordships remanded the matter to the High Court to see for itself whether the dispute raised on the ground that the documents were forged was meant only to exclude the jurisdiction of the Court or it was genuinely so. 119. Mr. Nariman also submitted that the Court in Ammonia Supplies Corpn, (P.) Ltd.'s case (supra) was not concerned with the interpretation of Section 111 as it stood after its amendment with effect from 31-5-1991 which vested in the Company Law Board, and not the Court, the power to rectify the Register. This is obvious from paragraph 10 of the report. He submitted that Section 155 is not pari materia with Section 111 of the Companies Act. The Court, after considering the definition of 'Court' under sections 2(11) and 10 of the Companies Act, 1956 held that the company Court had exclusive jurisdiction in regard to matters falling within the peripheral field of rectification. The position has now completely changed, because after the amendment, the power to rectify the register vests in the Company Law Board, which unlike a 'Court' is not exclusively defined. Therefore, to what is taken out from the provision of Section 111 from Courts jurisdiction, and vested in the Company Law Board, exclusivly will not attach. 120. On a careful reading of the judgment of the Supreme Court, it is apparent that the Court held that the jurisdiction exercised by the Court under Section 155 is a summary jurisdiction. The Company Court is invested with exclusive jurisdiction in regard to questions raised within the peripheral field of rectification. However, if the claim is based on some seriously disputed civil right or title, denial of any transaction or any other basic facts which may be the foundation to claim a right to be a member, and if the Court feels such claim does not constitute to be a rectification but instead seeking adjudication of basic pillar, some such facts falling outside rectification, its discretion to sent the party to seek its relief before a Civil Court first for the adjudication of such facts has not been taken away from the Court. The Court, therefore, has to find whether the dispute raised is really for rectification or is of such a nature, unless decided first, it would not come within the purview of rectification. It, therefore, follows that the Company Court, in its discretion, may refer the parties to a suit where the issues involved are issues which cannot be appropriately dealt with in a summary jurisdiction. Where the application for rectification cannot be allowed without deciding other complicated questions of law and fact, or serious disputed questions of title, right, etc., are raised, the Company Court may direct the parties to get such matters decided by a Court of competent civil jurisdiction. As we understand the judgment in Ammonia Supplies Corporation (P.) Ltd.'s case (supra), it only means this, that in an application for rectification under Section 155, the Company Court would entertain and decide the application if the issues raised therein are such as can be decided by a court exercising summary jurisdiction. If, however, it is necessary before grant-

ing the application for rectification to decide other issues involving complicated questions of law and fact, and disputed questions of title, right, etc., then, the Company Court may direct the parties to get their disputes adjudicated by a Civil Court. The exclusive jurisdiction under Section 155 is confined only to those cases where the Court can appropriately in a summary jurisdiction decide the questions raised therein. It, therefore, follows that if an application for rectification does not raise any complicated questions of law or disputed question of title or any other such complicated issue which require determination by a Court of law, the applicant cannot seek relief by filing a civil suit because the questions that arise can be conveniently and appropriately dealt with by a court exercising summary jurisdiction. Thus, in every case, the Court has to consider the facts and the issues involved and, thereafter exercise its discretion to grant relief or to relegate the parties to a suit in exercise of jurisdiction under Section 155. We are, therefore, of the considered view that the decision in Amonia Supplies Corporation (P.) Ltd.'s case (supra) does not overrule the law as laid down in Public Passenger Service Ltd.'s case (supra) and cannot be cited as an authority for the proposition that the jurisdiction of the civil court is completely barred. 121. In V.L. Pahade v. Vinay L. Deshpande [1999] 97 Comp. Cas. 889', a Division Bench of the Andhra Pradesh High Court has taken a similar view after considering the judgment of the Supreme Court in Ammonia Supplies Corporation (P.) Ltd.'s case (supra). A learned Judge of this Court has also taken the same view in National Insurance Co. Ltd. v. Glaxo India Ltd. [1999] 20 SCL 243/98 Comp. Cas. 378 (Born.). 122. In the instant case, the application for rectification proceeds on the basis that the acquisition of shares by defendant Nos. 3 and 4 were illegal and void being in breach of the mandatory provisions of the 1994 Regulations. This was not a case where rectification was sought on the ground that the application for transfer was not properly made or duly stamped or that the name of the transferor did not appear in the share register or that any other formality had not been complied with, but on the ground that defendant Nos. 3 and 4 had acquired no title to the shares in view of the breach of the 1994 Regulations. In a case of this nature, the Court exercising jurisdiction under Section 155 of the Companies Act, 1956 will have to decide many important and complicated questions of law and fact. It will have to consider whether there was in fact a breach of the Regulations which would involve questions relating to interpretation of SEBI Act and the Regulations, the meaning of the word 'acquirer', the meaning and import of 'acting in concert', and appreciation of facts to reach a conclusion as to whether the defendants were really acting in concert, a decision on the question as to whether, in the .facts and circumstances, the defendants acquired any title to the shares at all, and a host of other questions which have been raised in the suit. We arc of the view that these questions cannot be decided in exercise of summary jurisdiction. The rectification of the register could be ordered only after answering all these questions and, therefore, having regard to the ratio in Ammonia Supplies Corporation (P.) Ltd.'s case (supra) these are questions which did not fall within the 'peripheral field of rectification' but raised complicated questions of law and fact, and questions of title, which could appropriately

be decided only by a court of competent jurisdiction. They cannot, therefore, be considered to be questions raised within the peripheral field of rectification contemplated by Section 155, 123. Mr. Nariman, rightly relied upon the decision of the Supreme Court in State of Tamil Nadu v. State of Karnataka 1991 Supp.(1) SCC 240, and submitted that it is for the courts to decide the parameters, scope, authority and jurisdiction of the Tribunal constituted under the Act. The limited jurisdiction conferred upon the Court under Section 155 as it stood earlier, did not confer jurisdiction on it to consider questions which did not squarely fall within the peripheral field of rectification. Those questions must be decided by a Civil Court of competent jurisdiction. In State of Tamil Nadu's case (supra), the grievance of the Appellant -State of Tamil Nadu was that the Tribunal under the Interstate Water Disputes Act, 1956, wrongly decided that it had no jurisdiction to entertain any interim application, as such dispute was not referred to in the reference made by the Central Government. On behalf of the Slate of Karnataka, an objection was raised relying on Section 11 of the aforesaid Act, and Article 262 of the Constitution of India, that the Supreme Court had no jurisdiction to entertain any appeal against the impugned order of the Tribunal. It was argued on behalf of the appellant that the Civil Court had jurisdiction to decide the scope of the powers of the Tribunal under the Act, and in case the Tribunal has wrongly refused to exercise jurisdiction under the Act, then the Court was competent to set it right and direct the Tribunal to entertain such application and to decide the same on merits. The Tribunal being a statutory authority, the Court had jurisdiction to decide the parameters, scope, authority and jurisdiction of the Tribunal. It is the judiciary, i.e., the courts alone that have the function of determining authoritatively the meaning of a statutory enactment and to lay down the frontiers of jurisdiction of any body or Tribunal constituted under the statute. The Court, after noticing the observation of Francis Bennion in his book 'Statutory Interpretation', and the observations of the Court in Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd. and Kehar Singh v. Union of India , upheld the contention of the appellant and held that the Supreme Court was the ultimate interpreter of the provisions of the Interstate Water Disputes Act, 1956, and had authority to decide the limits, powers and the jurisdiction of the Tribunal constituted under the Act. The Court had not only the power but obligation to decide as to whether the Tribunal had any jurisdiction or not under the Act, to entertain any interim application till it finally decides the dispute referred to it. In Sanjeev Coke Manufacturing Co.'s case (supra), the Court observed that once a statute leaves Parliament House, the court is the only authentic voice which may echo (interpret) the Parliament. This, the Court will do with reference to the language of the statute and other permissible aids. Similarly, in Kehar Singh's case (supra), it was observed that the function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court. These decisions clearly lend support to the submission of Mr. Nariman that questions which do not fall within the peripheral field of rectification and

raised larger questions of law as to the parameters of the statute, jurisdiction of the Tribunal and interpretation of law and statutory regulations fall within the domain of courts and it is only the courts which can pronounce their views on these matters. 124. We must, therefore, hold that the authorities on the subject do recognise the common law right of a shareholder to seek rectification of the register of members, and the jurisdiction of the Civil Court in appropriate cases is not barred where complicated questions of law and fact arise in an application for rectification under Section 155, and it is not possible for the Court to grant relief without first adjudicating the disputed questions of law and fact. The Court exercising jurisdiction under Section 155 may exercise its discretion to relegate the parties to a suit for the adjudication of those issues which cannot be decided in a summary jurisdiction. Any member of the Company can apply for rectification under Section 155, and it is not necessary that he must establish that he was aggrieved, or that any prejudice was caused to him. We, therefore, find it difficult to accept the submissions urged by Mr. Chidambaram in this regard. 125. The next submission urged on behalf of the Plaintiffs was that, in any event, after the insertion of Section 111A in the Companies Act, 1956 the common law right, if any, was taken away by the statute from the members in respect of the shares in which such members had no interest. The right to apply for rectification now being a statutory right could be exercised only in accordance with the provisions of Section 111A. Mr. Chidambaram took us through the provisions of the Companies Act as they existed from time to time, and submitted that before 1985, under Section 111, both the transferor and the transferee could appeal to the Central Government against any refusal of the company to register a transfer. Under Section 155, as it then stood, any person aggrieved or any member of the company or the company itself could apply to the Court for rectification of the register of members if the name of any person was without sufficient cause entered in the Register of Members or after having been entered in the Register, was without sufficient cause, omitted therefrom: Section 111, therefore, dealt with transfer of shares while Section 155 dealt with rectification of register of members. 126. With effect from 17-1-1986, Section 22A was inserted in the Securities Contract (Regulation) Act, 1956 which provided for free transferability and registration of transfer of listed securities of companies. Section 22A applied only to Companies whose securities were listed on a recognised stock exchange. Under Section 22A, a Company could refuse to register the transfer of any of the securities in the name of the transferee only on four grounds, viz., (a) that the instrument of transfer was not proper, nor duly stamped or delivered, etc., (b) that the transfer of the security was in contravention of any law or rules made thereunder, (c) that the transfer of the security was likely to result in such change in the composition of the Board of Directors as would be prejudicial to the interest of the company or to the public interest, and (d) that the transfer of the security was prohibited by any order of the Court, Tribunal, etc. Under Section 22A of the Securities Contract (Regulation) Act, 1956 these were the only four grounds on which a company could refuse to register a transfer of securities of a listed company. If the company was of the view that the registration ought to be refused on the ground mentioned

in Clause (a), it had to intimate the transferor and the transferee about the requirements under the law which had to be complied with. In other cases, it has to refer the matter to the Company Law Board and the Company Law Board was required to pass an appropriate order after giving reasonable notice to the company as well as to the transferor and the transferee. 127. With effect from 31-5-1991, the provisions of sections 111 and 155 were imported into Section 111 and Section 155 stood deleted. Sub-section (4) of Section 111 substantially incorporates the provisions of erstwhile Section 155 of the Act. The refusal to register transfer of shares had to disclose reasons and both the transferor and the transferee had a right to appeal to the Company Law Board against the refusal of the company to register the transfer. Similarly, the person aggrieved or any member of the company or the Company itself could apply to the Company Law Board for rectification of the Register of Members. 128. Section 111A of the Companies Act was inserted with effect from 20-9-1995 by the Depositories Act, 1996. Section 111A does not apply to private companies. Sub-section (2) provides that the shares or debentures and any interest therein of a company shall be freely transferable. Subsection (3) lays down that the Company Law Board may, on an application made by a depository, company, participant or investor or the Securities and Exchange Board of India, after such enquiry as it thinks fit, direct any depository to rectify its register or records if the transfer of the shares or debentures is in contravention of any of the provisions of the SEBI Act, 1992 or Regulations made thereunder or the Sick Industrial Companies (Special Provisions) Act, 1985. Sub-section (4) authorises the Company Law Board to suspend the voting rights before making or completing such enquiry under Sub-section (3). However, Sub-section (5) clarifies that the right of a holder of shares or debentures to transfer such shares or debentures is not restricted and any person acquiring such transfers or debentures shall be entitled to voting rights unless the voting rights have been suspended by an order of the Company Law Board. Sub-section (6) permits further transfer of shares, debentures, etc., during the pendency of the application with the Company Law Board, and the transferees of such shares, debentures, etc., shall be entitled to voting rights unless the voting rights in respect of such transferee have also been suspended. On a plain reading of Section 111A, as it was then enacted, it appears that an application for rectification of register could not be made by a member or a shareholder of a company, and the power of the Company Law Board to direct rectification was limited to cases where the transfer of the shares or debentures is in contravention of any of the provisions only of the SEBI and/or Regulations made thereunder or the Sick Industrial Companies (Special Provisions) Act, 1985, and not on the ground of the transfer being in violation of any other law in force. Apparently, therefore, even in the case of violation of the SEBI Regulations, a member of a Company could not ask for rectification of the register, though the company itself could apply for such rectification. The section also enabled the Company Law Board to suspend the voting rights before making or completing such enquiry. 129. So far as Private Companies are concerned, Section 111 continues to govern matters relating to transfer and registration of shares and rectification of the register. Section 22A,

which was inserted in the Securities Contract (Regulation) Act, 1956 was omitted by the Depositories Act, 1996. 130. Thereafter, with effect from 15-1-1997, Section 111A was again amended and as it now stands, it reads as follows : "111 A. Rectification of register on transfer.–(1) In this section, unless the context otherwise requires, 'company' means a company other than a company referred to in Sub-section (14) of Section 111 of this Act. (2) Subject to the provisions of this section, the shares or debentures and any interest therein of a company shall be freely transferable : Provided that if a company without sufficient cause refuses to register transfer of shares within two months from the date on which the instrument of transfer or the intimation of transfer, as the case may be, is delivered to the company, the transferee may appeal to the Company Law Board and it shall direct such company to register the transfer of shares. (3) The Company Law Board may, on an application made by a depository, company, participant or investor or the Securities and Exchange Board of India, if the transfer of shares or debentures is in contravention of any of the provisions of the Securities and Exchange Board of India Act, 1992 (15 of 1992), or regulations made thereunder or the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), or any other law for the time being in force, within two months from the date of transfer of any shares or debentures held by a depository or from the date on which the instrument of transfer or the intimation of the transmission was delivered to the company, as the case may be, after such inquiry as it thinks fit, direct any depository or company to rectify its register or records. (4) The Company Law Board while acting under Sub-section (3), may at its discretion make such interim orders as to suspend the voting rights before making or completing such enquiry. (5) The provisions of this section shall not restrict the right of a holder of shares or debentures, to transfer such shares or debentures and any person acquiring such shares or debentures shall be entitled to voting rights unless the voting rights have been suspended by an order of the Company Law Board. (6) Notwithstanding anything contained in this section, any further transfer, during the pendency of the application with the Company Law Board, of shares or debentures shall entitle the transferee to voting rights unless the voting rights in respect of such transferee have also been suspended, (7) The provisions of Sub-sections (5), (7), (9), (10) and 12 of Section 111 shall, so far as may be, apply to the proceedings before the Company Law Board under this section as they apply to the proceedings under that section." The amendments brought about in 1997 inserted a proviso to Sub-section (2), and under the proviso, if a company 'without sufficient cause' refuses to register transfer of shares within two months, on an appeal by the transferee, the Company Law Board is empowered to direct such a company to register the transfer of shares. In Sub-section (3), apart from the SEBI Act, and Regulations framed thereunder, and Sick Industrial Companies (Special Provisions) Act, 1985, the words 'any other law for the time being in force' were added. 131. Mr. Chidambaram submitted that having regard to the provisions of Section 111A, as it stands after 20-9-1995, and in particular after 15-1-1997, a public company cannot refuse to register a transfer of shares. According to him, even if the Company finds contravention of law, it shall first register the transfer

and then apply to the Company Law Board for rectification of the register. The words 'without sufficient cause' in proviso to Sub-section (2) must be confined to some defect like discrepancy in signature or date or stamp. Sub-sections (2) and (3) had to be read together harmoniously. If it gave a wider description to the Public Company, the language of the section would have been different, and instead of empowering the Company Law Board to direct such company to register such transfer of shares, the Legislature would have used a different language empowering the Company Law Board to pass such order as it thinks fit. He, therefore, submitted that the only order that the Company Law Board can pass under the proviso to Sub-section (2) is an order directing the company to register the transfer of shares and no other order. Therefore, the moment the shares are lodged for registration, the Public Limited Company shall first register the shares, and, thereafter move the Company Law Board for rectification, if there was any contravention of law. 132. We are not impressed with the argument advanced by Mr. Chidambaram that the words 'without sufficient cause' in proviso to Sub-section (2) should be given such a restricted meaning. It is worth noticing that before 15-1-1997, under Section 111A, there was no provision which gave a right to the transferee to move the Company Law Board against refusal of a company to transfer shares lodged by him. To fill up this lacuna, a proviso was added to Sub-section (2). Similarly, before its amendment on 15-1-1997, under Section 111A, rectification could not be claimed by anyone on the ground that the transfer was in breach of 'any other law for the time being in force', and was limited to cases where breach of two Acts mentioned therein was complained of. The concept of free transferability is not a new concept. However, before a transfer may be registered by a company, the company has to satisfy itself that all the legal requirements are fulfilled. No doubt, the company had to examine whether the formalities required have been fulfilled such as signatures, stamp, etc. But it cannot be said that 'without sufficient cause' must be confined to such things only. We fail to understand why a company cannot refuse to register a transfer if it finds that the transfer would involve violation of any other provision of the Companies Act or any other law in force. To us, it appears that the proviso only emphasises the fact that the company was not to act arbitrarily in these matters, and if called upon by the Company Law Board, it had to justify its action. The very concept of an appeal by a transferee against the action of the company involves an adjudication by the Company Law Board which has to hear the parties concerned and then come to a conclusion as to whether the action of the company in refusing the transfer is without sufficient cause. If it is so, it will direct the Company to register the transfer of shares. If it is not so, it will simply dismiss the appeal and no further direction is required to be made. It was submitted that the amended Section 111A brought in the concept of free transferability of shares and, therefore, a company had no discretion not to register a transfer of share if an application for transfer was properly made. In the first instance, the concept of free transferability was not a new concept introduced for the first time by amendment of Section 111A. In any event, the concept cannot be unduly exaggerated so as to render nugatory the relevant statutory regulations, as was beld in LIC v. Escorts AIR 1986 SC

370, nor can it be invoked so as to justify cornering of shares surreptitiously, with a mala fide intention and in a clandestine manner contrary to public policy as was held in N. Parthasarathy v. Controller of Capital Issues . The words 'without sufficient cause' in the Proviso to Sub-section (2) of Section 111A are not without significance, and cannot be so read and understood as to render it otiose. 133. Mr. Chidambaram then emphasised the fact that significantly the right to apply for rectification under Sub-section (3) of Section 111A is given only to a depository, company, participant, investor or SEBI. A member of a company has no right to apply for rectification. Such a right has been conferred on members of Private Companies under Section 111(4). The Legislature has, therefore, made a conscious departure, and has not conferred on the members of a company the right to apply for rectification. He, therefore, submitted that the Parliament has made a deliberate departure from Section 38 of the Companies Act, 1913, and Section 155 of the Companies Act, 1956 as also from Section 111 relating to Private Companies, under which the members of the company could apply for rectification. Section 111A, as amended, takes away that right and confers the right to claim rectification only on five specified categories of persons. He, therefore, submitted that the Plaintiffs did not have a right to claim rectification of register of members. 134. Mr. Nariman submitted that even if it is so, and a member of a Company cannot make an application under Section 111A of the Companies Act to seek rectification of register of members, it would not, ipso facto, follow that his right to claim such a relief by way of suit is also defeated. Since a member had a right in common law based on contract to claim rectification of register of members, that right has only been regulated by the provisions of the Companies Act, as amended from time to time. There is nothing in Section 111A which expressly or by necessary implication takes away his common law right. In fact, it supports his submission that since there is no adequate remedy provided to a member of a company under Section 111A for rectification of register of members, he must necessarily approach a Civil Court by way of suit to assert his common law right to claim rectification of register of members. He relied upon the judgment in Raja Ram Kumar Bhargava's case (supra) and submitted that there is no express enactment taking away the common law right of a member of a Company to seek rectification, nor is an alternative adequate remedy provided. We have earlier held in favour of the Plaintiffs that they have a common law right to seek rectification of register of members. We have also earlier held that a pre-existing common law right can be taken away only by express enactment or by necessary implication. We find nothing in Section 111A which has the effect of talcing away the common law right of a member of a company to seek rectification of register of members. At best, it can be said that after the insertion of Section 111A with effect from 20-9-1995, a member of a Company has no statutory right under the Companies Act to seek rectification of register of members. His common law right, however, remains intact and he can assert that right by filing a suit before a court.of competent jurisdiction. A learned Judge of this Court in Gopal Krishna Banga v. Poona Industrial Hotel Ltd. [1999] 34 CLA 177 (Bom.) has taken the same view. In this context, it is also worth noticing that till 15-1-1997,

when Section 111A was amended, no one could, in a proceeding under Section 111A, challenge a transfer which was in violation of any law in force, other than SEBI Act and Regulations, and Sick Industrial Companies (Special Provisions) Act, 1985. It would, therefore, be difficult to contend that Section 111A took away the common law right of a member to seek rectification on account of the transfer being in violation of a law in force. The jurisdiction of Courts was not expressly excluded, nor Section 111A as originally enacted or even after its amendment, provided an adequate alternative remedy, or a machinery for the enforcement of the pre-existing right of a member recognised at common law, a test to determine whether, exclusion of jurisdiction of Courts was intended. 135. Mr. Nariman, contended that the right of the Plaintiffs to bring a suit of the nature brought cannot be disputed. The Plaintiffs had claimed a declaration that the impugned transactions be declared to be void, and consequently, the register of members be rectified. The principal relief was to declare the transactions void and as a consequence, rectification was claimed. He submitted that even though a declaratory suit is outside Section 42 of the Specific Relief Act, it may, nonetheless, be maintainable under Section 9 of the Code of Civil Procedure. Section 42 of the Specific Relief Act is not exhaustive. He referred to authorities which we shall notice hereinafter. 136. In Vemareddi Ramaraghava Reddy v. Konduru Seshu Reddy , the Plaintiffs had brought a suit as a mere worshiper of a temple for a declaration that the provision in the compromise decree that the lands mentioned in the Schedule were the personal properties of defendant Nos. 1 to 5, and not the absolute properties of the temple, was not valid and binding on the temple. The suit was opposed on the ground that the Plaintiff had brought the suit as a mere worshiper, and that he had no legal or equitable right to the properties of the temple which constitute the subject-matter of the suit. It was contended that in a suit of this description, the conditions of Section 42 of the Specific Relief Act were not specified, and the suit was, therefore, not maintainable. The submission was rejected. Referring to the judgment of the Privy Council in Fischer v. Secretary of State for India in Council 26 IA 16, it was held that the relief which the Plaintiff was seeking was for a declaration that the compromise decree was null and void and if such a declaration is granted, the deity will be restored to its present rights in the trust properties. A declaration of this character, namely, that the compromise decree is not binding upon the deity is in itself a substantial relief and has immediate coercive effect. A declaration of this kind fell outside the purview of Section 42 of the Specific Relief Act, which nonetheless will be governed by the provisions of the Code of Civil Procedure like Section 9 of order VII rule 7. This principle was recognised in Supreme General Films Exchange Ltd v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar , wherein it was held that Section 42 merely gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of Courts to give declarations of right in appropriate cases falling outside Section 42. The principle was further reiterated in Ashok Kumar Srivastav v. National Insurance Co. Ltd. . 137. Mr. Nariman also contended that the 'obligation'

within the meaning of Section 38 of the Specific Relief Act was not confined to contractual obligations but include every duty enforceable by law or individual or government. He placed reliance on Firm Kishore Chand Shiva Charon Lal v. Budaun Electric Supply Co. Ltd. , wherein the submission that relief of specific performance could be granted only in relation to contracts under the Specific Relief Act and the Act did not provide the remedy for the breach of statutory obligation where the statute itself had failed or missed to provide the remedy, was repelled, and it was observed that the Specific Relief Act was enacted not to consolidate but only to define and amend the law relating to certain kinds of specific relief. There was no reason to hold that the direction of sale followed by an award by which the sale price had been determined brought into existence an obligation which, though originally statutory, became also contractual and may be specifically enforced. 138. In Ganga Bai v. Vijay Kumar the Apex Court emphasised the basic distinction between the right of suit and the right of appeal. It was held that there is an inherent right in every person to bring a suit of a civil nature, and unless the suit is barred by statute, one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That is to say, an appeal is a creature of statute. In PYX Granite Co. Ltd. v. Ministry of Housing & Local Government the question before the House of Lords was whether the statutory remedy was the only remedy and the rights of the subject to have recourse to the courts of law was excluded. It was observed that the subject's recourse to Courts for the determination of his rights is not to be excluded except by clear words. 139. Relying upon S.R. Nayak v. Union of India , it was contended that the right to enforce the statute depends upon the object and purpose of the statute. In the instant case, the right of the shareholder was not exhausted by merely bringing to the notice of the court the infringement of the Regulations. The Plaintiffs, in order to protect their interest, are certainly entitled, under Section 9 of the Code of Civil Procedure, to bring a suit with a view to prevent something being done contrary to law. 140. Mr, Nariman, also relied upon a passage appearing in paragraph 1360 of Halsbury's Laws of England, Fourth Edition, Vol. 44(1), wherein it has been stated that where the Act itself provides a remedy but there is no express or implied indication as to whether other remedies are also available, there is a prima facie presumption that it is intended to be the only one available. This presumption will not always exist and the question depends in each case on the construction of the enactment concerned, and the intention of the statute, as disclosed by its scope and by its wording, that other remedies should not be excluded. The general principle equally applies where, although the statute does provide a remedy, part of the liability in question remains to be discharged after the statutory remedy has been exhausted. In paragraph 398 of Halsbury's Laws of England, Fourth Edition, Vol. 45(2), the principle enunciated is whether, or not an individual can bring a common law claim in respect

of a breach of a duty imposed by a statute depends upon whether, the intention of the statute, considered as a whole and in the circumstances in which it was made and to which it relates, was to impose a duty enforceable by an aggrieved individual. No universal rule can be formulated which will answer the question whether in any given case, an individual can sue. In answering the question it is, however, relevant to consider whether the statute was intended to protect a limited class of persons or the public as a whole, whether the damage suffered by the person seeking to sue was of the kind which the statute was intended to prevent, whether a special statutory remedy by way of penalty or otherwise is prescribed for breach of the statute, the nature of the obligation imposed, and the general purview and intendment of the statute. Mr. Nariman contended that in the instant case, the SEBI Regulations were intended to protect the interest of the shareholders and the Plaintiffs fall within that category. In Cutler v. Wandsworth Stadium Ltd. [1949] Vol. I, AER, 544, it was held- "The other matter which I wish to deal concerns the penalties provided by the statute. If there is no penalty and no other special means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action. Otherwise, the duty might never be performed, but, if there is a penalty clause, the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole. The inference that there is a concurrent right of civil action is easily drawn when the predominant purpose is manifestly the protection of a class of workmen by imposing on their employers the duty of taking special measures to secure their safety. The penalties provided by the Act apply when a breach of the duty occurs, but each workman has a right to sue for damages if he is injured in consequence of the breach." To the same effect are the decisions in Krishna Kali Mallik v. Babulal Shaw K. Ramadas Shenoy v. The Chief Officer, Town Municipal Council and D.L. Walton v. Cochin Stock Exchange Ltd. . 141. Having regard to the authorities cited at the Bar, we are persuaded to hold that the Plaintiffs have a right to bring the suit for declaring the transactions to be void, and also for rectification of the register of members. One of the objects of the SEBI Regulations is to protect the interest of shareholders, and if any person, in breach of statutory obligations, acquires shares in a Company, it is not enough that the aggrieved shareholders may bring this fact to the notice of the Board, but to protect their interest, they may as well agitate their cause before a Civil Court since there is no express bar to seeking recourse to a competent court of civil jurisdiction. 142. It was then submitted by Mr. Chidambaram that the trial Court was in error in holding that the purchase of shares by the appellants and the resultant take over arising out of the voting in a particular manner were two parts, and that it is the latter part which remained to be completed and that, Section 23 of the Contract Act applied. He submitted that the shares being movable property and transferable as such like any other movable property, a transfer of title between the transferor and transferee is effective from the date of the transfer. As against the company, it is effective from the date of registration. Insofar as the transferor and the transferee are concerned, the transaction is complete at the time of transfer. The contract

is between the seller and the purchaser and has nothing to do with voting in any particular manner. What is purchased is a share, and this cannot be split into property rights in the share and right to vote on the strength of the share. The contract is performed or executed and no part of the contract remains executory, once the transferor delivers the share certificate with transfer forms to the transferee. He further, submitted that even if shares were purchased in alleged contravention of the SEBI Regulations, that would not make the purchase void. SEBI Regulations did not confer power upon SEBI to declare purchase of shares void on the ground that the acquirer did not make a public offer or on any other ground. For the breach of statutory Regulations, the consequences should be found within the law. There is no provision in the Regulations to declare an acquisition void if it were in contravention of the Regulations. In fact, when a suggestion was made by the Expert Committee to declare such transactions void, the recommendation was not accepted when the 1997 Regulations were framed. The consequence suggested would be inconsistent with the powers of SEBI under Regulation 39 of the 1994 Regulations and Regulation 44 of the 1997 Regulations and would be totally inconsistent with the powers conferred on SEBI by Regulation 44(b) and (c) of the 1997 Regulations. He submitted that the contention of the Plaintiffs that in view of the use of negative mandatory language in the Regulations, the transactions would have to be considered void is erroneous in the absence of there being a consequential provision declaring the transaction void. The mere use of negative mandatory language would not itself make the transaction void. Furthermore, when there is power to exempt from penal provisions, the argument of voidness would no longer survive. He relied on State of Uttar Pradesh v. Manbodhan Lal Srivastava and Banarsi Das v. Cane Commissioner . According to him, Section 23 of the Contract Act applied to executory contracts and not to transfers which were already concluded and acted upon in pursuance of such contract. Reliance was placed on Bank of India Finance Ltd. v. The Custodian : Sajan Singh v. Sardar Ali [1960] AC 167; and Tinsley v. Milligan, [1992] All ER 391. He submitted that Mannalal Khetan v. Kedarnath Khetan only laid down that if a contract was made to do a prohibited act, the same would be unenforceable. Reliance placed by the Plaintiffs on this judgment had to be viewed in the light of the judgment of the Supreme Court in Bank of India Finance Ltd. 's case (supra), which is a later judgment of a three Judge Bench. 143. Mr. Ashok Desai, appearing on behalf of defendant No. 1, referred to the provisions of the SEBI Regulations and of the Companies Act, and submitted that on a proper interpretation of the provisions, the transactions made can never be regarded as a nullity or void or require any interference of the Court. Under Regulation 39 of the SEBI Regulations 1994, the Board can give a range of directions, including retaining the securities as a direction. It may also direct the person concerned to sell the shares, thus recognising the status of the acquirer as a shareholder. The scheme of Section 111A pf the Companies Act also supported this view inasmuch as under Sub-section (5), the holder of a share can transfer the share and the transferee can fully exercise his voting rights. No doubt, the right of a shareholder to vote could be suspended by the Company Law Board, but in the

absence of any such specific order of the Company Law Board, the Companies Act recognises the right of the shareholder not only to vote on the strength of his shares but also to transfer. This, clearly, was indicative of the fact that the transactions have not been regarded as void nor even voidable. SEBI is a pragmatic body which is aware of the market trends and conditions. In a given case of chain of transactions before an actual transfer, it may not be possible to find out who the proximate transferor was. Further, the consideration received by the original shareholder and the person who sold it to the ultimate transferee may be totally different. In a given case, the prices of shares may have gone down steeply, and a re-transfer may be to the disadvantage of the seller. 144. Mr. Nariman, on the other hand, submitted that under Section 15H of the SEBI Act, 1992, for failure to disclose the aggregate of the shareholding in the body corporate before acquiring any shares, and for failure to make a public announcement to acquire shares at a minimum price, a penalty not exceeding Rupees five lakhs may be imposed. Similarly, under Section 24 of the Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of the Act or of any rules or regulations made thereunder, he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both. This is without prejudice to any award of penalty by the adjudicating officer under the Act. Under Regulation 39 of 1994 Regulations the Board is empowered to give such directions as it deems fit for all or any of the purposes enumerated therein. It may direct the persons concerned not to further deal in securities or prohibit the person concerned from disposing of any of the securities acquired in violation of these regulations or even direct the person concerned to sell the shares acquired in violation of the provisions of these Regulations. Section 32 of the Act clearly states that the provisions of the Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force. He also pointed out that Section 6(h) of the Transfer of Property Act refers to Section 23 of the Contract Act. He, therefore, submitted that having regard to these provisions and the language employed, the judgment of theSupreme Court in Mannalal Khetan 's case (supra) squarely covered the case, and following the ratio of that decision, it must be held that such transactions which were prohibited by law were void. He submitted that having regard to the provisions of Section 32 of the Act, Regulation 39 should be read in addition to and not in derogation of the provisions of any other la w for the time being in force such as the Transfer of Property Act and the Contract Act. Regulation 39 was in the nature of a civil sanction for what is otherwise criminal. The directions that may be issued under Regulation 39 are without prejudice to the right of the Board to initiate criminal prosecution under Section 24 of the Act. This is clearly indicative of the fact that transactions in breach of the Regulations are void. He further submitted that the regulator SEBI is empowered to sell the shares or dispose them of as a protem measure. It may thereafter pass any other direction under Regulation 39 which deal with de facto acquisition. Factually, the shares are in the possession of the acquirer though acquired in violation of the Regulations. Section 111A of the Companies Act itself recognises the transfer in violation of the Regulations and other laws as

void, and, therefore, the register of members has to be rectified accordingly. In fact, SEBI can also apply for rectification. Under that provision, it is open to the Company Law Board to put a restraint on the voting right of the shareholders or even restrain them from transferring the shares during the pendency of the proceeding. The shares acquired in violation of the Regulations are in the disposition of the SEBI. The Regulations take into account the ground reality that blank transfers may change so many hands that it may be impossible to undo it. He, therefore, submitted that the mandatory words employed excluded title vesting in purchasers who have acquired shares in violation of the Regulations. He further submitted that so far as the decision in Bank of India Finance Ltd's case (supra) is concerned, there was no reference to any provision similar to Section 32 of the SEBI Act. That apart, he submitted that in the instant case, there was only one transaction which was void unlike the case of Bank of India Finance Ltd.'s case (supra) where there were two transactions, one lawful and the other unlawful. The concept of ready leg and forward leg did not apply to the facts of this case. No doubt, the Plaintiffs claimed that the shares having been acquired in violation of the statutory regulations, the interest of shareholders was seriously and adversely affected, but further damage to their interest should not be caused by permitting the acquirers of such tainted shares to exercise their voting right. It was in this context that it was submitted that even though the holders of the shares may receive dividend till such time as the transactions were held to be void by the Court, in the interregnum, they should not be permitted to vote on the strength of such shares. 145. In reply, Mr. Chidambaram submitted that a protem order that may be passed under Regulation 37(2) of the Regulations cannot be an order for sale of the shares, or any order which may be passed under Regulation 39 after hearing the parties concerned. He, therefore, disputed the contention of Mr. Nariman that under Regulation 37(2), the Board could pass a final order for sale of the shares. According to him, the orders of the nature that may be passed under Regulation 39 cannot be passed under Regulation 37(2). He further submitted that the shares that may be directed to be disposed of under Regulation 39 must be on the basis not that the holder is a de facto holder but that he is a de jure owner of the shares. Only on that basis, a direction can be issued to him to sell the shares. 146. Mr. Ohidambaram, relied on several decision, and argued that in the case of completed transactions, a Plaintiff could not file suit impeaching such a concluded transaction, and at his instance, concluded transactions cannot be declared void. The principle is well accepted that negative words are clearly prohibitory and are ordinarily used as a Legislative device to make a statute imperative. Where the language is clothed in the negative form, the Legislative intent that the provision indicated is mandatory must be inferred. But the principle is not without exception. The authorities lay down that negative words are usually mandatory but rule is like any other rule subject to the context and the object intended to be achieved by the particular requirement. 147. We may notice the authorities cited at the Bar. In Banarsi Das v. Cane Commissioner , Their Lordships referred to apassage in Maxwell on the Interpretation of Statutes at page 364 which reads thus- "It has been said that no rule can be

laid down for determining whether the command (of the statute) is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative with an implied nullification for disobedience, beyond the fundamental one that it depends on thescopeand object of theenactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by consideration of convenience and justice [R. V. Ingall [1876] 2 QBD 199 at p.208, per Lush, J.], and when that result would involve general inconvenience or injustice to innocent persons, or advantage of those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." (1424) Reliance was placed on the judgment in Manbodhan Lal's case (supra) wherein the Supreme Court had observed that no general rule can be laid down but the object of the statute must be looked at and even if the provision be worded in a mandatory form, if its neglect would work serious general inconvenience or injustice to person who have no control over those entrusted with the duty and at the same time would not promote the main object of the Legislature, it is to be treated only as directory and the neglect of It though punishable would not affect the validity of the acts done. Reliance was also placed on Bhikraj v. Union of India wherein it was observed that where a statute requires that a thing shall be done in a particular manner or form but does not itself set out the consequences of non-compliance, the question whether the prescription of law shall be treated as mandatory or directory could only be solved by regarding the object, purpose and scope of that law. If the statute is found to be directory, a penalty may be incurred for non-compliance but the act or thing done is regarded as good. On the facts, the court held that the requirement in that case was directory but even if it was considered to be mandatory, the requirement was complied with. In Lila Gupta v. Laxmi Narain , a question arose as to whether a marriage contracted in contravention of Section 15 of the Hindu Marriage Act is not void but merely invalid not affecting the core of marriage, and the parties are subject to a binding tie of wedlock flowing from the marriage. After a comprehensive review of the relevant provisions of the Act, the Court posed the question as to whether the framers of law intended that the marriage contracted in violation of the provision contained in proviso to Section 5 to be void. Their Lordships, after examining the matter from altpossible angles and keeping in view the fact that the scheme of the Act provides for treating certain marriages void, and simultaneously some marriages which are made punishable yet not void, and no consequences having been provided for in respect of the marriage in contravention of the proviso to Section 15, held that it cannot be said that such marriage would be void. Mr. Chidambaram also placed reliance on Deivanayaga Padayachi v. Muthu Reddi AIR 1921, Mad. 326. In that case, a settlement was made with the object and in consideration of the donee cohabiting with the settlor. In a suit filed by the Plaintiffs who were the mortgagees

of the property, having obtained the mortgagee from the donee, the settlement was challenge by the settlor-defendant contending that the same having been made for immoral consideration, the transaction was void altogether, and the Plaintiff could have no title under the mortgage executed by the donee. The learned Judges observed that when a transaction is entered into for an unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of the particeps criminis to relieve him from the legal effect of transaction. Reference was made to Ayerst v. Jenkins [1978] 16 Eq, Cases 275 which laid down the principle of equity which prevented the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy. It was held that a Court of equity would not, at the instance of a settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such a settlement may have been made for an illegal consideration not appearing on the face of the instrument. After noticing the said equitable principle. Their Lordships held that a person who made such a transfer for immoral consideration cannot claim back the property, having achieved his object by that transfer. An argument was advanced on the basis of Section 6(h) of the Transfer of Property Act that the transfer for such an object or consideration was ipso facto void and therefore the transferor can come to Court and ask its assistance in getting back the property. Their Lordships rejected the contention, and held that all that was intended was that the Court will not enforce a transfer which would have the effect of carrying out its unlawful object. 148. In Sabava Yellappa v. Yamanappa Sabu AIR 1933 Bom. 209, the adoptive father of the Plaintiff had executed a sale deed, Exhibit 35, and he and his wife had executed a deed of gift. Exhibit 55, in favour of defendant No. 1. The Court in Ayerst's case (supra) was noticed. That was a case of letting of certain premises for immoral purpose of carrying on prostitution and running a brothel. The Court took the view that the . equitable principle enunciated in Ayersi's case (supra) has no application where the transfer is void. Under Indian law, a transfer for an unlawful object or consideration within the meaning of Section 23 of the Contract Act is prohibited by Section 6(h)(2) of the Transfer or Property Act. Such a transfer is void and need not be set aside. It was held that refusal by Courts to grant relief on the basis of such maxims as ex turpi causa non oritur actio or pari delicto or parliceps criminis is based on grounds of public policy and therefore if the same or higher public policy demands in a particular context that relief should be give, then such maxims should not be used any more as a bar, and the courts should not deny relief. The rule in Ayerst's case (supra) should never be used to (a) defeat statutes like Section 6(h)(2) of the Transfer of Property Act, (b) make the plaintiff liable to prosecution, conviction and punishment under such statute as the Bengal found that so far as the sale deed was concerned, though it was executed for an ostensible consideration of Rs. 800, no such consideration had passed and that the real consideration for the sale deed was past and future cohabitation. It was observed that under Section 23 of the Contract Act, the consideration or the object of an agreement is lawful unless the Court

regards it as immoral or opposed to public policy. The consideration or object of an agreement in such a case is said to be unlawful, and every agreement of which the object or consideration is unlawful is void. But the consideration is different from the object. If the consideration or object of passing the sale deed be immoral i.e., past or future cohabitation, the transfer would be void under Section 6(h) of the Transfer of Property Act. An earlier judgment of this Court in Husseinali Casam Mahomed v. Dinbai AIR 1924 Bom. 135, which related to an agreement to pay certain amount for services rendered as a nurse but was in reality for past cohabitation, held that the consideration for the document being past cohabitation, it was unlawful as immoral or opposed to public policy. After considering the facts of the case, Their Lordships held that the object of the sale deed in the present case was future cohabitation, and might also be said to be a reward for past cohabitation. If the transfer is invalid, the person passing the document retains the title to himself. Their Lordships noticed the decision in Deivanayaga Padayachi's case (supra). Applying the rule in Avers is case (supra) it was held that the Plaintiff would be prevented from recovering the properties conveyed in the sale deed on the ground that the immoral object had been carried out by Sabu after the date of the sale deed. However, so far as the gift deed was concerned, Their Lordships held in the facts of the case that Sabu did not carry out the immoral object as he was incapable of carrying out it owing to his illness and died soon afterwards. He could, therefore, have maintained a suit to recover the property comprised in the deed of gift. In Pranballav Saha v. Tulsibala Dassi , the equitable principle laid down in Ayerst's Suppression of Immoral Traffic Act and (c) violate the express prohibition of the Constitution such as Article 23 saying that traffic in human being is prohibited. This rule in any event should not be extended to the class of innocent trustees and executors who are administering the estates under orders of court. It was observed in the facts of the case that public interest and public welfare demand discontinuance of the brothel and of the user of the premises as a place of promiscuous sexual intercourse. Public interest is not served by the continue of brothels which bread disease, etc., the lease for immoral purposes ought not to be allowed to stand for reasons of public policy. In Jambu Rao Salappa Kocheri v. Neininath Appayya Hanamannayar , a contract for purchase of land with the knowledge of the parties that the purchaser will be in possession of lands in excess of ceiling under Section 5 of the Bombay Tenancy and Agricultural Lands Act was entered into. It was held that the contract was not void, and there was nothing in the Act to indicate that the Legislature had prohibited a contract to transfer land between one agriculturist and another. The inability of the transferee to hold land in excess of the ceiling prescribed by the statute had no effect upon the contract or the operation of the transfer. 149. Mr. Nariman, on the other hand, relied upon the judgment in Mannalal Khetan 's case (supra). The questions which arose before the Apex Court was (i) whether the provisions of Section 108 of the Companies Act are mandatory in regard to transfer of shares, and (ii) can a company having been served with notice of attachment of shares, register transfer of shares in contravention of the order of attachment. The Court noticed the provisions contained in Section

108 of the Companies Act that 'a company shall no register a transfer of shares' unless a proper instrument of transfer duly stamped. . . .'It was held that the words 'shall not register' are mandatory in character. The mandatory character is strengthened by the negative form of the language. The prohibition against transfer without complying with the provisions of the Act is emphasised by the negative language. Negative language is worded to emphasis the insistence of compliance with the provisions of the Act. After noticing the authorities, it was held that negative words are clearly prohibitive and are ordinarily used as a legislative device to make a statutory provision imperative. The various tests for finding out when a provision is mandatory or directory are the purpose for which the provisions has been made, its nature, the intention of the Legislature in making the provision, the general inconvenience or injustice which may result to the person from reading the provision one way or the other, the relation of the particular provision to other provisions dealing with the same subject and the language of the provision. Prohibition and negative words can rarely be directory. Therefore, negative prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. It was held– "If anything is against law though it is not prohibited in the statute but only a penally is annexed, the agreement is void. In every case where a statute inflicts a penalty for doing an Act, though the Act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act. Penalties are imposed by statute for two distinct purposes (1) for the protection of the public against fraud or for some other object of public policy; (2) for the purpose of securing certain sources of revenue either to the State or to certain public bodies. If it is clear that a penalty is imposed by statute for ihe purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty is imposed is not enforceable." (p. 539) On such reasoning, it was held that the provisions contained in Section 108 of the Companies Act are mandatory and that the High Court erred in holding that the provisions are directory. 150. Mr. Chidambaram, placed much reliance on the judgment of the Supreme Court in Bank of India Finance Ltd. 's case (supra), and in fact, submitted that the law laid down in this judgment which, to a great extent, modified the principles laid down in Mannalal Khetan's case (supra) should be preferred. In Bank of India, by a notification issued under Section 16 of the Securities Control Regulation Act, entering into a forward contract was prohibited, but it expressly permitted sale of securities by spot delivery. The Bank had entered into contracts with the notified persons which were challenged by the Custodian as being void, as they were in breach of the relevant statutes including the Securities Contract Regulation Act and the notification issued under Section 16 thereof. The contention of the Custodian was upheld by the Special Court, against which the Bank went in the appeal to the Supreme Court. 151. It was contended by the Custodian that the ready-forward transactions were composite and unseverable, the illegality attached to the forward element of the contract rendering the contract wholly void. On the other hand, the Bank contended that even if it was assumed that such a contract evidenced one com-

posite transaction, the same was severable into two parts, each of which had a separate consideration and a separate object. Thus, Section 57 of the Contract Act was applicable to the case, and the first set of promises or the ready leg would constitute a binding contract, while the second leg, namely, the forward leg, would be void. Upholding the contentions of the Bank, the Court held- "Section 57 applies to cases where two sets of promises are distinct. When the void part of an agreement can be properly separated from the rest, the latter does not become invalid. The ready-forward transaction consists of two parts. In the ready leg there is a purchase or sale of securities at a stated price which is executed on payment of consideration for the spot delivery of the security certificates together with transfer forms. The full and absolute ownership of the title insecurities vests in the purchaser, the entire property in the security passing immediately upon such delivery and payment. The seller is divested of all the rights, title and interests in the said securities. The forward leg is to be performed at a later date on the stated price being paid. The securities are to be delivered back when the title in interest therein would pass to the original seller. It is clear that such a ready-forward transaction consists of a set of reciprocal promises. The first set of promises were fully executed, but the second set remained executory. Section 57 of the Contract Act would thus be attracted to the present case, the effect of which would be that the first set of promises would constitute a binding contract but the second or the forward leg would be void and unenforceable. Neither the object nor the consideration of the ready leg is illegal, unlawful or prohibited under Section 23 of the Contract Act. The forward leg is neither the consideration nor the object for entering into the ready leg. At best it may be that the forward leg provided the parties with the motive for entering into the contract but that would not affect the severability of the forward leg, which alone is declared illegal under the Securities Control Regulation Act. (p. 1964) What the notification issued under Section 16 did was to prohibit the entering into of a forward contract, i.e., sale at a future date for a fixed price. It expressly permitted sale of securities by spot delivery which, in the present case, is represented by the ready leg. It is only the future sale or the re-sale of the securities at a later dale which the notification did not permit. This latter part of the agreement could not have been entered into and is clearly severable and cannot affect the transfer of the title which had already laken place at the time of the execution of the ready leg. This being so, the securities which had been purchased by the appellants from the notified persons could not be attached." (p. 1965) Mr. Chidambaram, submitted that the principle of equity enunciated in Ayerst's case (supra) was followed and applied by the Madras High Court as well as this Court in Deivanayaga Padayachi and Sambava respectively. The Calcutta High Court carved out an exception to the rule in Pranballav. He, therefore, submitted that apply the Ayerst 's case (supra) rule, it must be held that the transactions relating to purchase of shares being completed transactions, no relief can possibly be granted to the plaintiffs on a finding that the transactions are void. The submission overlooks a significant fact. The equitable rule proceeded on the basis that in equity, a person who had entered into an agreement or transaction, the consideration or object of which

was immoral or opposed to publip policy, cannot be allowed to impugn the agreement or transaction after achieving his immoral objective. Thus, even if the agreement were found to be immoral or opposed to public policy, the Courts will deny relief to such a Plaintiff who was a particeps criminis. In both cases, the agreements were sought to be avoided by the person who was a party to the agreement, or his legal representative. In Sambava Yellappa's case (supra) this Court refused to grant relief of recovery of possession of the properties sold under the sale deed on the ground that the immoral object had been carried out. However, relief was granted in respect of the properties covered by the deed of gift on a finding that the donor did not carry out the immoral object as he was incapable of carrying it out owing to his illness and died soon thereafter. These cases, therefore, do not lay down the proposition that an agreement with an immoral objective or which is opposed to public policy is not void if the transaction is a completed transaction. In fact, they proceed on the basis that they are void, yet the Court would not aid a person guilty of immoral conduct to recover the property on the ground of public policy. These were cases where the settlor or vendor, having executed the settlement/sale deed with an immoral object, sought to recover the properties after fulfilling their immoral objectives by assailing the transactions on the ground of public policy. The Courts refused to grant relief to them, even though it was found that the transactions were void as being immoral and opposed to public policy under Section 23 of the Contract Act. 152. In the instant case, the facts are quite different, and the Plaintiffs not being parties to the alleged tainted transactions, may not be able to invoke Section 23 of the Contract Act. They, however, contend that the transfers are void under Section 6(h) of the Transfer of Property Act, 1882 as they were effected in breach of mandatory statutory regulations, and were, therefore, for an unlawful object within the meaning of Section 23 of the Contract Act, apart from being opposed to public policy. The rule enunciated in Ayerst's case (supra) could not be invoked against them as they were not parties to the impugned transactions nor were they guilty of improper conduct disentitling them to relief either in law or equity. The rule in Ayerst's case (supra) cannot be extended to persons who are not particeps criminis, and in any case, the equitable rule does not even remotely touch on the question of voidness of such transactions. These decisions, therefore, do not assist the defendants. 153. Mannalal Khetan's case (supra) is more apposite. Mr. Nariman drew our attention to the similarity of the negative prohibitory words in Section 108 of the Companies Act and the Regulations of 1994. The words used in Section 108 are 'shall not register', and in the regulations, the words are 'shall not acquire'. Moreover, Mannalal Khetan's case (supra) also dealt with the question in relation to transfer of shares, as in the instant case. Various tests have been laid down in Raza Buland Sugar Co. Ltd. v. Municipal Board which have been referred to in Mannalal. Applying these tests, it will be found that the legislative intent was to prohibit acquisition of shares in breach of the Regulations. For the violation of the relevant Regulations, an acquirer could be prosecuted and sentenced to a term of imprisonment. He was also liable to pay a penalty, apart from prosecution. The whole purpose of the Act is to prbtect the right

of investors in securities and to promote the development of and to regulate the securities market. The Regulations were framed with a view to bring about transparency in transactions relating to securities and to safeguard the interest of the investors. The regulatory measures were designed to achieve these objectives. If the regulations relating to acquisition of shares in certain cases, are not treated as mandatory, and an acquirer is permitted to acquire substantial shares in any way he likes, and in breach of the Regulations, the entire scheme of the Act and the regulations will be defeated. The Board will be faced with a fait accompli, and the acquirer will reap the benefit of the illegal transactions. The take over bids instead of being open and transparent will be clandestine and secretive. The ordinary shareholder will have no participation in the public offer or announcement which are designed primarily to protect his interest, causing him grave injustice. Such being the consequences, and having regard to the negative form of the language, the mandatory character of the prohibition is strengthened. We are, therefore, of the view that the intentment of the Act and the regulations is to prohibit completely the acquisition of shares in breach of the Regulations, particularly Regulations 9 and 10 thereof, and not merely to punish an acquirer who acted in breach thereof. The words 'shall not acquire' in Regulations 9 and 10 are mandatory in character, and any breach thereof must render the transaction void. Such acquisition or transfer of shares must be considered to be void under Section 6(h) of the Transfer of Property Act as being forbidden by law and opposed to public policy within the meaning of Section 23 of the Contract Act. The fact that under the Regulations, the Board may direct the acquirer to sell the shares so acquired or to retain the same, thereby recognising the validity of transfer, is of no avail because the SEBI Act is in addition to and not in derogation of the provisions of any other law for the time being in force, which includes the Transfer of Property Act and the Indian Contract Act. It, therefore, follows that if the transfers are void under Section 6(h) of the Transfers of Property Act, the 1994 Regulations cannot save them from such invalidity. 154. The question then arises whether, the decision in Bank of India has brought about any change in the law as enunciated in Mannalal Khetan's case(supra). In our view, no such change has been brought about. In Bank of India Finance Ltd.'s case (supra), the Court was required to consider the validity of the ready-forward transaction which consisted of two parts which were severable, each of which had a separate consideration and a separate object. The notification issued under Section 16 of the Securities Control Regulation Act prohibited the entering into of a forward contract but permitted sale of securities by spot delivery. Thus, the ready leg was perfectly legal as neither its object nor the consideration was illegal, unlawful or prohibited under Section 23 of the Contract Act. Only the forward leg was prohibited under the Section 16 notification. Applying Section 57 of the Contract Act, the ready leg was held to be valid and the forward leg was declared void. 155. Mr. Nariman submitted that apart from the fact that the Court had not to considered a provision like Section 32 of the SEBI Act, the facts of the case are quite distinguishable. In the instant case, there is only one transaction of transfer, and not two as in Bank of India. The transfer is hit by Section 6(h) of the Transfer of Property

Act, and, therefore, the transfer is void. The transaction in the instant case is, therefore, on the same footing as the forward leg in Bank of India, and must, therefore, be held to be void. The submission has merit and must be accepted. Moreover, in Bank of India, the Supreme Court noticed the earlier judgments of the Court in Manbodhan Lal Srivastava and Bansari Das, which we have also considered earlier in our judgment and followed the principles laid down therein. The mere use of negative mandatory language is by itself not conclusive in determining whether a provision is mandatory or directory. The matter has to be viewed by taking into account several other considerations, and some of the tests that may be applied have been enumerated in Raza Buland Sugar Co. Ltd's case (supra). Applying those tests as well, we find that the prohibitions contained in Regulations 9 and 10 of the 1994 Regulations are mandatory, and any acquisition made in breach thereof is rendered void. We are also not inclined to accept the very broad proposition that Section 23 of the Contract Act applies only to executory contracts, and not to transfers concluded and acted upon in pursuance of such contract. Reliance placed upon the decision in Bank of India is misplaced. The ready leg transaction was not approved because it was a completed and executed transaction, but because it had a legal consideration and object, and was expressly permitted under the relevant notification. Nor was the forward leg held to be void because it was executory, but because it was prohibited by the statutory notification and, therefore, hit by Section 23 of the Contract Act. 156. Mr. Mariman submitted that the shares acquired in violation of the Regulations are in the disposition of the SEBI and that as a protem measure, it is empowered to sell the shares or dispose them of under Regulation 37(2). Mr. Chidambaram, on the other hand, contends that such an order cannot be passed as a protem measure under Regulation 37(2). 157. We are inclined to agree with Mr. Chidambaram that an order for the sale of shares said to have been acquired illegally by an acquirer cannot be directed to be sold as a protem measure under Regulation 37(2) because in that event, if ultimately, it is found that the acquirer had not committed breach of the Regulations, it may not be possible to put him in the same position as he was when the proceeding was initiated. We are inclined to take the view that an order of this kind may be passed by the SEBI only under Regulation 39. An order under Regulation 37(2) may be passed by the SEBI after considering the investigation report and the explanation furnished by the acquirer. SEBI may call upon the person concerned to take such measures as the Board may deem fit in the interest of securities market and in due compliance of the provisions of the Act, Rules and Regulations. In our view, the orders that may be passed under Regulation 37(2) are of an interim nature. The final order that may be passed by SEBI in the nature of directions has to be passed under Regulation 39 after hearing the concerned parties. One of the directions that may be issued under Regulation 39 may be a direction to the person concerned to sell the shares acquired in violation of the provisions of the Regulations. This is the final direction that may be given at the conclusion of the proceeding and such a direction cannot be given as a protem measure because, in that event, the position is irretrievably changed and if finally, SEBI were to hold in favour of

the acquirer, it may not be able to put the acquirer in the same position as he was when the proceeding was commenced. We, therefore, accept the submission urged by Mr. Chidambaram. 158. The next question for consideration is as to the effect of the repeal of the 1994 Regulations by the 1997 Regulations which came into effect from 20-2-1997. Mr. Ashok Desai, appearing for Respondent No. 1, submitted that assuming that the Regulations of 1994 were breached, the Regulations having been repealed, it must be treated as if it never existed. He further, submitted that the saving clause did not apply to the present case. There are substantial differences in the two Regulations and the repealing Regulations did not keep alive anything done or any action taken under the repealed Regulations. It is his submission that in fact no action had been initiated under the repealed Regulations nor was any action initiated under the repealing Regulations. There was, therefore, nothing for the Court to consider on the basis of the repealed Regulations. He submitted that on 9-10-1996, when the 1994 Regulations wherein force, SEBI issued a notice under Section 24 of the Act to Ram Raheja, the Managing Director of Imfa. Ram Raheja informed the SEBI that he was no more in control of Imfa, and thereafter, on 31-3-1997, SEBI issued a show-cause notice addressed to the Managing Director of Imfa, calling upon him to show-cause why criminal prosecution should not be initiated under Section 24 of the Act for violation of Regulations 6 and 10, failing which SEBI will be constrained to initiate criminal prosecution and/or take any action as it thinks fit in the interest of the investors. This notice was issued after the repeal of the 1994 Regulations with effect from 20-2-1997. Subsequently, a third notice was issued on 8-1-1999 to Respondent Nos. 1 and 11 to show-cause why action under Sections 11, 11B and 24 of the Act and Regulation 39 of the 1994 Regulations read with Regulations 44, 45(6) and 47(2)(a) of the 1997 Regulations be not initiated for the alleged violations. According to him, except for the show-cause notice dated 8-10-1996, issued to Ram Raheja, no other action had been taken under the 1994 Regulations, or were pending on the date of its repeal. Section 6 of the General Clauses Act had no application to the repeal of the 1994 Regulations and the saving clause did not apply in the present case. 159. On the other hand, Mr. Nariman contended that the repeal of the 1994 Regulations did not have the effect of making legal what was illegal under the 1994 Regulations. In any event, the facts of the case show that the proceeding had been initiated under the 1994 Regulations, and an enquiry followed by a show-cause notice had commenced. The proceeding was saved by the repeal and saving provision, viz., Regulation 47 of the 1997 Regulations. Regulation 47 of the 1997 Regulations is as follows:– "2. Notwithstanding such repeal:– (a) Anything done or any action taken or purported to have been done or taken including approval of letter of offer, exemption granted, fees collected, any adjudication, enquiry or investigation commenced or show-cause notice issued under the said Regulations shall be deemed to have been done or taken under the corresponding provisions of these regulations; (b) An application made to the Board under the said regulations and pending before it shall be deemed to have been made under the corresponding provisions of these regulations; (c) Any appeals preferred to the Central Government under the said Regulations and pending before it shall

be deemed to have been preferred under the corresponding provisions of these Regulations." Regulation 47, therefore, saves any action taken or purported to have been taken under the 1994 Regulations, and expressly includes any enquiry or investigation commenced or show-cause notice issued under the said Regulations. By a fiction, it was deemed that such action was taken, or anything done was deemed to have been done, or taken, under the corresponding provision of these Regulations. 160. Under the 1994 Regulations, the Board has a right to enquire and investigate, suo motu or upon complaints received for breach of the Regulations, and for this purpose, it may appoint an investigating authority and thereafter call upon the person concerned to offer his comments on the investigation report. Regulation 39 authorises the Board to give certain directions. It is, therefore, obvious that if Regulation 10 is breached, and it appears to the Board that the matter needs to be investigated, it may appoint an investigating authority and investigate the matter and thereafter pass orders in accordance with the Regulations. There is a similar scheme under the 1997 Regulations as contained in Chapter V. It would thus be apparent that both under the 1994 Regulations as well as under the 1997 Regulations, the Board has the power to enquire and investigate into matters relating to breach of the Regulations. It must, therefore, be held that there is nothing in the 1997 Regulations which manifests an intention incompatible with or contrary to the provisions of the 1994 Regulations. Under both Regulations, breach of Regulations can be investigated by the SEBI and appropriate directions issued. The saving clause as contained in Regulation 47 of the 1997 Regulations expressly saves anything done, or any action taken, under the 1994 Regulations, as if it was done or taken under the corresponding provisions of the Regulations of 1997. Enquiry or investigation commenced and show-cause notice, are expressly saved. We have, therefore, no doubt that if under the Regulations of 1994, an enquiry or investigation had been commenced or a show-cause notice issued, it shall be deemed as if they had been commenced or issued under the corresponding provisions of the Regulations of 1997. Regulation 47 introduces a legal fiction whereby anything done or action taken under the Regulations of 1994 shall be deemed to have been done or taken under the corresponding provision of the Regulations of 1997. The effect of the fiction is that the Regulation of 1997 had come into force when such thing was done or action taken. Several decisions have been cited at the Bar on this question, and we shall now proceed to consider the same. 161. In State of Punjab v. Mohar Singh Pratap Singh AIR 1955 SC 84, the respondent had filed a claim in accordance with Ordinance No. 7 which was promulgated on 3-3-1948, claiming to be a displaced person, who had lands situate in West Punjab. On the 1-4-1948, the Ordinance was repealed and Act No. 12 of 1948 was enacted. It was later found that the claim made by him was absolutely false and thereupon a prosecution was started against him on 13-5-1950. In that case, it was held that the provisions of Section 6 of the General Clauses Act applied, because the Ordinance was repealed before its expiry. It was also noticed that the provisions of the Act contained identical provisions as contained in the Ordinance. Section 11 which repealed the earlier Ordinance provided that any rules made, notifications issued, anything done, any action taken in exercise of

the powers conferred by or under the Ordinance shall be deemed to have been made, issued, done or taken in exercise of the powers conferred by, or under this Act as if this Act had come into force on 3-3-1948. The Court held that 'anything done' occurring in the Section does not mean or include an act done by a person in contravention of the provisions of the Ordinance. What was kept alive were the rules, notifications or other official acts done in exercise of the powers conferred by or under the Ordinance and these powers are mentioned in several Sections of the Act. It was held that the claim did not fall under Section 11. Their Lordships, however, held that the proviso to Section 4 of the Act clearly showed that the claim filed under the Ordinance would be treated as one filed under the Act with all the consequences attached thereto. After considering the provisions of the Act Their Lordships concluded that it was not the intention of the Legislature that the rights and liabilities in respect of claims filed under the Ordinance shall be extinguished on the passing of the Act. Since the question of application of Clause 6 of the General Clauses Act arose in the case, the Court was required to consider whether the Act evinced an intention inconsistent with the continuance of rights and liabilities accrued or incurred under the Ordinance. The appeal was allowed, and the Court upheld the conviction of the respondent by the trial Court, which had been set aside in appeal filed by him. Mr. Desai laid considerable emphasis on the fact that 'anything done' does not mean or include an act done by a person in contravention of the provisions of the Ordinance. That question does not arise in the present case because the submission of the Plaintiffs is that the initiation of the proceeding under the Regulations, viz., the inquiry, investigation and issuance of show-cause notice were saved by Regulation 47 and could be continued under the corresponding provisions of the 1997 Regulations. In Shivananda v. Karnataka State Road Transport Corpn. , the Ordinance which was replaced by an Act provided for absorption of certain categories of employees of contract carriage operators in the service of the Corporation. The Ordinance was repealed by the Act which re-enacted the provisions of the repealed Ordinance with the saving clause for preservation of anything done or action taken. The Act was substantially in similar terms except for some minor differences. The contention of the appellants in that case was that there was by operation of law, automatic absorption of the employees of the erstwhile contract carriage operators to the extent provided therein. The Court found that various steps had to be taken before an employee could be absorbed, and automatic absorption of the employees of the erstwhile contract carriage operators was not legally permissible. The question then arose as to whether, anything had been done or any action taken under the repealed Ordinance. It was found that there was neither anything done nor action taken, and, therefore, the appellant did not acquire any right to absorption. The saving clauses saved things done by the Ordinance while in force, and did not purport to reserve the right acquired under the repealed Ordinance. On these findings, the appeal was dismissed. This decision also does not help the defendants because, as a fact, it was found that nothing had been done and no action taken under the repealed Ordinance which were saved by the saving clauses. Mr. Dcsai submitted that the 1997 Regulations did not keep alive any

obligation that an acquirer may have acquired under the 1994 Regulations. It included the obligation to make a public offer. This submission overlooks the fact that what is contended on behalf of the Plaintiffs is thai proceeding initiated against the defendants for the liabilities incurred was saved and could be continued resulting in directions to be passed under Regulation 39. Since the proceeding was expressly saved, the defendants cannot contend that any liability incurred by them was obliterated because that proceeding must be brought to its logical conclusion, and any order which the SEBI is entitled to pass may be passed in such proceeding. 162. Reliance placed by Mr. Desai on the decision in Rayah Corporation (P.) Ltd v. The Director of Enforcement AIR 1970 SC 494 is also of no avail. That was a case where rule 132A of the Defence of India Rules, 1962 was omitted except in respect of things done or omitted to be done under that rule. The Court held that the language of Clause 2.only afforded protection to action already taken while the rule was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted lo be done under the rule, but a new act of initiating a proceeding after the rule had ceased to exist. In the instant case, as noticed earlier, it is the contention of the Plaintiffs that the proceeding for the breach of the Regulations had been initiated when the 1994 Regulations were in force. In Dagi Ram Pindi Lall v. Trilok Chand Jain , the Court found that under Section 54 of the Income-tax Act, 1922, and after its repeal, Section 137 of 1961 Act had only placed fetters on the exercise of jurisdiction which were removed, with the result that the exercise of jurisdiction to call for the production of documents relevant to the case pending before the court, even from the Income-tax authorities revived. There is nothing in this decision which helps the Defendants. Mr. Desai, relied upon a passage appearing in paragraph 20 of the judgment which reads as follows :– "... The general principle is that an enactment which is repealed, is to be treated, except as to transactions past and closed, as if it had never existed..." This proposition is not disputed by the Plaintiffs. 163. In Deonarayan Singh v. Commissioner of Bhagalpur , the question which arose for the court's consideration was the effect of the repeal of the Regulations, particularly Sections 27 and 28 thereof. In that case, provisions of Section 8 of the Bihar General Clauses Act were applicable. The transfer of tenancy right was challenged as being violative of Section 27 of the Regulations which was subsequently repealed. But the facts of the case disclosed that the transfer was challenged, and the matter came-up for consideration before the higher authorities, and ultimately, an order was passed under Section 27(3) of the Regulations whereunder the transfer in favour of the transferee was regularised. In these circumstances, the Court held that after the repeal of Section 27 of the Regulations, the right of the vendee could not be challenged by reason of the repeal. There was no express provision in the Act which laid down that the order passed or actions taken in connection with the transactions under the Regulations, and notwithstanding any rights which might have accrued thereunder, fresh scrutiny of the said transaction could be made under the relevant provisions of the Act which correspond to the earlier repealed Section 27 of the Regulation. There was nothing in the Act to show that it intended to set at naught any final orders rendered by the competent

authority under the repealed Section 27 of the Regulations. Consequently, the immunity earned by the transaction of 22-3-1939 under the Regulation and the approval granted to it by the competent authority, viz., the Dy, Commissioner by order dated 28-12-1939 remained available and accrued to the vendee despite the repeal of Section 27 of the Regulations by the Act. In that decision, the right accrued under the repealed enactment was not affected since a contrary intention did not appear from the scheme of the repealed Act. This authority also does not help the defendants because the decision was passed on the interpretation of the Bihar General Clauses Act and the scheme of the repealed Act. The saving provisions were not in the same terms as in the present case. 164. The last case cited by Mr. Desai is Kolhapur Canesugar Works Ltd. v. Union of India . In that case, the appellants had applied for rebate of excise on excess production of sugar for two months, viz., October and November 1974-75 in terms of the relevant notification. The rebate was sanctioned but on re-examination, it was found that the appellants were not eligible for the said rebate. Accordingly, notice was issued on 27-4-1977, requiring the appellants to show-cause against the proposed recovery under Rule 10A of the Central Excise Rules of the amount of rebate which had been allowed to them erroneously. The Assistant Collector of Central Excise by his order dated 15-10-1977 confirmed the demand for re-credit of the amount of rebate that had been taken into credit by the appellants in their personal ledger account. But before that, the then existing rules 10 and 10A were deleted/omitted, and a new provision was introduced as rule 10. The question arose as to, whether after omission of the old rules 10 and 10A and their substitution by the new rule 10 by notification dated 6-8-1977, the proceedings initiated by the notice dated 27-4-1977 could be continued in law. The question was answered in the negative because there was no saving provision in favour of pending proceedings, and, therefore, action for realisation of the amount refunded could only be taken under the new provision in accordance with the terms thereof. The notification whereby rule 10 was deleted did not contain any saving clause for continuance of the proceeding initiated under the rule which was deleted/omitted. The principle laid down in the aforesaid judgment does not help the defendants because that was a case in which there was no saving clause for continuance of the proceedings. 165. Mr. Nariman, on the other hand, relied upon the decision of the Supreme Court in Ram Kristo Mandal v. Dhankisto Mandal . In that case, the challenge was to a transaction of exchange said to have been entered into in violation of Section 27 of the Regulations. The submission urged on behalf of the Respondents was that Section 27 did not mention in express term an exchange, and therefore, the transaction of exchange was beyond the scope of that Section. The Court found that the objection had no merit since the language of Section 27 of the Regulations was comprehensive enough to include any agreement or contract of exchange. The Court then considered as to what was the effect of the repeal of Sections 27 and 28 of the Regulations, It was held that the transaction of exchange was made when Section 27 was in force and governed the transaction. That transaction being invalid and void, the fact that Section 27 was subsequently repealed made no difference as the repeal could not have the effect of

rendering an invalid and void transaction a valid and binding transaction. Relying upon these observations, Mr. Nariman, submitted that if the acquisition of shares in breach of the Regulations of 1994 was invalid or void, the mere fact that the Regulations of 1994 have been repealed will not make the acquisition legal and valid, and, therefore, the proceeding initiated may be continued under Regulation 47 of the 1997 Regulations. 166. Mr. Nariman placed strong reliance on the judgment of the Supreme Court in Nar Bahadur Bhandari v. State of Sikkim , which, he submitted, clinched the issue. The facts of the case were that the Prevention of Corruption Act, 1947 was extended to the State of Sikkim with effect from 1-9-1976. Cases were registered by the C.B.I. against the Petitioners on 26-5-1984 and 7-8-1984 under various provisions of the Prevention of Corruption Act, 1947. However, the Criminal Law (Amend- ment) Act, 1952, which provided for constitution of Special Courts to try the offences under the Act of 1947, and excluded the jurisdiction of other Courts, was not extended to the State of Sikkim, and no Special Court was constituted in the State of Sikkim to try the offences under the Act of 1947. On 14-9-1994, the C.B.I. filed its report in the case of the Petitioners before the Special Judge appointed under Section 3 of the Prevention of Corruption Act, 1988. This was challenged by the Petitioners, and it was contended that the Special Court constituted under Section 3 of the Act of 1988 had jurisdiction only to try the offences punishable under the said act and not the offences punishable under the Act of 1947, unless the proceedings in relation to such of fences had commenced before aSpecial Judge appointed under the Act of 1952. Since the Act of 1988 was passed repealing both the Acts of 1947 and the Act of 1952, and bringing into force a consolidated and amalgamated legislation providing not only for the ingredients of the offences but also for the constitution of Special Courts to try the same, the Special Court constituted under Section 3 of the Act of 1988 had jurisdiction only to try the offences punishable under the said Act and could not try the offences punishable under the Act of 1947, unless the proceedings in relation to such offences had commenced before a Special Judge appointed under the Act of 1952. In the absence of such Special Judge under the Act of 1952 in the State of Sikkim, Section 26 of the Act of 1988 was not applicable and the proceeding was not governed thereby. Section 30 of the Act of 1988 was not applicable to the facts of the case inasmuch as the repeal under Sub-section (1) of Section 30 is a joint repeal of both the Acts, namely, the Act of 1947 and the Act of 1952. SubSection (2) of Section 30 will come into play only if Sub-section (1) is applicable. In the State of Sikkim, the Act of 1952 was not in force so as to be repealed by Sub-section (1) of Section 30 and consequently, subSection (2) will not apply. It may be noticed that Section 30(2) of the Act of 1988 provided that anything done or any action taken or purported to have been done or taken under or in pursuance of the Acts so repealed shall, insofar as it is not inconsistent with the provisions of the Act, be deemed to have been done or taken under or in pursuance of the corresponding provision of the Act, without prejudice to the application of Section 6 of the General Clauses Act, 1897. Negativing the contention, the Court held- “The contentions urged on behalf of the petitioners are based on a wrong understanding of the provisions

of the Act of 1988. No doubt, Section 3 of the said Act refers only to offences punishable under the Act and the Special Courts constituted under Section 3 will have jurisdiction to try the offences punishable under the Act but Section 3 cannot be read in isolation. It should be read along with other provisions of the Act to understand the scope thereof. Section 30(1) of the Act of 1988 repeals the Acts of 1947 and 1952. That does not mean that any offence which was committed under the Act of 1947 would cease to be triable after the repeal of the said Act. Normally, Section 6 of the General Clauses Act would come into play and enable the continuation of the proceedings including investigation as if the repealing Act had not been passed. As per the provisions of Section 6 of the General Clauses Act, the position will be as if the Act of 1947 continues to be in force for the purpose of trying the offence within the meaning of the said Act. Section 6 of the General Clauses Act, however, makes it clear that the said position will not obtain if a different intention appears in the repealing Act. In the present case, the Act of 1988 is the repealing Act. Sub-section (2) of Section 30 reads as follows:– '30.(2) Notwithstanding such repeal, but without prejudice to the application of Section 6 of the General Clauses Act, 1897 (10 of 1897), anything done or any action taken or purported to have been done or taken under or in pursuance of the Acts so repealed shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under or in pursuance of the corresponding provision of this Act." The said sub-section while on the one hand ensures that the application of Section 6 of the General Clauses Acl is not prejudiced, on the other it expresses a different intention as contemplated by the said Section 6. The last part of the above sub-section introduces a legal fiction whereby anything done or action taken under or in pursuance of the Act of 1947 shall be deemed to have been done or taken under or in pursuance of the corresponding provisions of the Act of 1988. That is, the fiction is to the effect that the Act of 1988 had come into force when such thing was done or action was taken." It may be noticed that the saving clauses in the above case and Regulation 47 in the instant case, are similar and the relevant words in the saving clauses are identical. The principle laid down, therefore, applies with full force and, therefore, it must be held that if any enquiry or investigation had been commenced or any show-cause notice issued under the repealed regulations, it must be deemed that the repealing regulations had come into force when such enquiry or investigation was commenced or show-cause notice issued. Obviously, therefore, the proceeding would be continued under the corresponding provision of the Regulations of 1997. In this view of the matter, the submission of Mr. Chidambaram that in view of the repeal, the obligation to make a public offer did not survive must be rejected. The Regulation of 1994 cast an obligation on the person concerned to make a public offer. He having failed to do so, proceeding could be initiated under the relevant provisions of the Regulations of 1994. Since proceeding is saved by Regulation 47, it must logically follow that the obligation incurred by the person concerned may be enforced in accordance with the corresponding provisions of the Regulations of 1997. Mr. Nariman further submitted that even if the defendants submission based on repeal is accepted, at best SEBI may not be

able to take action. but that does not affect the jurisdiction of a Civil Court, or the right of Plaintiffs to file a suit for declaring the transaction void. 167. The next question which arises for consideration is whether in fact an enquiry or investigation had been commenced or a show-cause notice issued. The defendants take shelter under the fact that a show-cause notice was issued on 9-10-1996 to Ram Raheja, when the Regulations of 1994 were in force, but the second and the third show-cause notices issued on 31-3-1997 and 8-1 -1999 to the Managing Director of Imfa and defendant Nos. 1 and 1 i respectively, were issued after the Regulations of 1997 had come into force. Thus, no show-cause notice was issued to them when the Regulations of 1994 were in force. The submissions overlooks the fact that under the scheme of 1994 Regulations, a show-cause notice may be issued under Regulation 34 after an enquiry is commenced, and pursuant to the enquiry and reply to the show-cause notice, investigation may be ordered and further, action take under Regulations 37 and 39. Mr. Nariman submitted that in the absence of SEBI, which is not a party in the suit, it is not possible to go into the question as to when an enquiry was commenced and what other steps were taken by the SEBI apart from issuance of the three notices to Ram Raheja, Imfa and defendant Nos. 1 and 11. However, the material on record, disclosed that SEBI had commenced an enquiry to the knowledge Of the defendants. For this, he relied upon the letter of 9-6-1995, addressed by SEBI to Herbertsons Ltd. (defendant No. 12) in which it was stated that Kishore Chhabria (defendant No. 1) had acquired substantial voting rights in the company. The company was advised to furnish complete details in this regard, including the status of compliance with the relevant provisions of the SEBI Regulations of 1994 and the Listing Agreement. This letter shows that material was available to SEBI to indicate that acquisition of shares by defendant No. 1 had been made without compliance with SEBI Regulations and the matter was being enquired by SEBI. The next document on which reliance was placed is a letter dated 9-1-1996 by Mulla & Mulla & Craigie Blunt & Caroe on behalf of Kishore Chhabria (defendant No. 1) in which it was stated that their client had come to know of an enquiry being made by SEBI to Herbertsons Ltd., relating to the shareholding of their client in Herbertsons Ltd., by certain of his Companies as set out in Annexure 'A'. With a view to facilitate the said enquiry and complete the same, facts and background related to and relevant for such enquiry were set out in the said letter. The letter contains details about the manner in which shares of Herbertsons Ltd., were acquired, and the manner in which funds were arranged by the ultimate holding company viz., Galan Finvcst (P.) Ltd., which received the fund from Oswal Electronics (P.) Ltd., which, in turn, received the fund from Chhabria Marketing Ltd. It was submitted that in the facts and circumstances, it was not necessary for the purchasers to file a declaration under Regulation 5. The third document on which reliance was placed is a letter dated 20-1-1998, addressed by M.D. Chhabria (defendant No. 11) to the Chairman of SEBI, seeking clarification regarding the applicability of the Take Over Code of 1994 in relation to the purchase of 10.91 per cent of the share capital of Herbertsons. The letter also states that the defendants understood that SEBI was not satisfied with all the explanations given so far

in relation to the direction issued by SEBI's letter dated 21-5-1996 which had to be complied with. In view of the facts stated in the letter, in order to settle the matter to the satisfaction of SEBI, defendant No. 11 had decided to make a public offer without prejudice to his earlier stand. This letter also indicates that defendant No. 11 knew that an enquiry was being conducted by SEBI and certain clarifications had been asked for from Herbertsons Ltd., and that SEBI was not satisfied so far with the explanations given. 168. These letters indicate that an enquiry was pending on the date on which the Regulations of 1994 came to be repealed. It also appears that the enquiry was in respect of acquisition of shares by defendant Nos. 1 and 11, and the companies under their control, in violation of the Regulations of 1994. In this background, the notices issued by SEBI to Ram Raheja in the first instance, and then to the Managing Director of Imfa and lastly to defendant Nos. 1 and 11 has to be understood. In the notice issued to defendant Nos. 1 and 11, detail facts have been stated, and thereafter, they have been called upon to show-cause as to why one or more or all of the actions under sections 11, 11B, 24 of the SEBI Act and Regulation 39 of the SEBI Regulations, 1994 read with Regulations 44, 45(6) and 47(2a) of SEBI Regulations 1997 and Section 23(2) of the Securities Contract (Regulation) Act, should not be initiated for the alleged violations specified in the letter. A mere look at the notices indicates prima facie, that an enquiry must have preceded the issuance of the notices having regard to the details mentioned therein. 169. The fact that notices were issued by SEBI to defendant Nos. and 11 in January 1999, much after the repeal of the 1994 Regulations does not detract from the fact that an enquiry had commenced much earlier. There is no procedure provided for the commencement of an enquiry. An enquiry, by its very nature, is a fact-finding effort. As soon as some evidence is available to the enquiring authority, which may give rise to a suspicion that the Regulations have been breached, and the enquiring authority proceeds further on the basis of such evidence to collect material from relevant sources the enquiry must be deemed to have commenced. After such an enquiry is commenced, and facts come to light, notices may be issued to the persons concerned whose involvement may be suspected. The date of commencement of the enquiry is, therefore, not the date on which notices are issued, but the date on which the enquiring authority takes cognizance of the violations and proceeds in the matter together further information and evidence. In the instant case, on the basis of material on record, we find that the earliest communication was addressed to Herbertson Ltd., by SEBI on 9-6-1995. Mr. Nariman submitted that it may be that even before the issuance of the said letter, some enquiry may have been made. In the absence of SEBI, it is not possible to speculate as to what other steps were taken by SEBI. He submits that the material on record at least establishes this fact that by 9-6-1995, SEBI had before it material justifying an enquiry by it for breach of SEBI Regulations of 1994, and such an enquiry was initiated while the Regulations of 1994 were in force and continued notwithstanding the repeal of the Regulations of 1994. We find that there is material to support the submission of Mr. Nariman. We express this view on the basis of the material on record, and it may be possible for the parties to adduce further evidence on the

subject at the trial of the suit. 170. It was contended on behalf of the defendants that M.D. Chhabria had offered to SEBI to make a public offer and in fact SEBI had agreed to permit him to do so. However, the process was diverted on the interference of a high authority, and instead of asking the defendants to make a public offer, SEBI issued notices to defendant Nos. 1 and 11. This was characterised as mala fide. Mr. Nariman, submitted that in the absence of SEBI, such allegations cannot be investigated. Moreover, it is clear from the record that SEBI always took the stand that the acquisitions had been made in breach of the Regulations of 1994. Nor could the defendants be permitted to challenge the notices issued by SEBI which narrated the circumstances leading to the inference that the defendants acted in concert. According to him, these notices cannot be challenged collaterally, particularly when no responses to the notices on merits were given even though one-and-a-half year had elapsed. In fact, the defendants asked SEBI to wait for the High Court to decide the matter. The facts stated in the show-cause notices were never refuted. On the contrary, their effort was to persuade SEBI to permit them to make a public offer but without dislodging the shares illegally acquired. 171. Mr. Chidambaram, on the other hand, submitted that the show-cause notices issued to defendant Nos. 1 and 11 do not conclude the issue and cannot be relied upon. The defendants are yet to be heard by SEBI on merits. They have also urged other grounds to challenge the notices. He further, submitted that the show-cause notices are not evidence on the fact that the statutory body had taken a prima facie view that the 1994 Regulations have been violated. In any event, any prima facie conclusion reached by SEBI in the said show-cause notices are of no assistance to the Plaintiffs or relevant for the purpose of the proceedings before the Court. The allegations contained in the show-cause notices cannot be deemed to be final and cannot be referred to in collateral proceedings. The contents of the show-cause notices are merely allegations and not final. 172. We are inclined to agree with Mr. Chidambaram that the allegations contained in the show-cause notices cannot be deemed to be final. The issuance of a show-cause notice is justified on the basis of some material available to the enquiring authority which raises a suspicion about the breach of the Regulations. Such notices are a step in the process of enquiry. After the notices submit their reply, the enquiring authority may either proceed further in accordance with the Rules or withdraw the notices. Certainly, a show-cause notice cannot be equated with an order passed by a statutory authority recording a finding therein. However, in the absence of SEBI; it will not be permissible for the defendants of contend that SEBI acted mala fide. If they believed that to be true, they could have taken appropriate proceedings for getting the notices quashed, which they have not done. We, therefore, do not propose to go into the correctness of the facts alleged in the show-cause notices issued to defendant Nos. 1 and 11, nor do we propose to go into the question as to whether SEBI acted mala fide. We have taken notice of the show-cause notices brought on record only for the consideration of the question as to whether, an enquiry had been commenced by SEBI into the transactions relating to acquisition of shares of Herbertsons Ltd., by the defendants in breach of the Regulations of 1994. 173. It was then sought to be

argued before us by the defendants that the conduct of the Plaintiffs was such that they were dis-entitled to equitable relief. The defendants produced before us several documents to show that the Plaintiffs have been prima facie found to be guilty of various serious charges of diversion of funds of RP Nidhi in the State of Tamil Nadu. They have cheated thousands of small investors to whom neither the principal nor the interest has been paid. The Central Government had filed a petition under sections 397 and 398 of the Companies Act and sought supersession of the Board. It was sought to be urged, on the basis of an affidavit filed by the Deputy' Superintendent of Police in the Supreme Court, that the Balaji Group were guilty of serious improprieties and fraudulent transactions. Mr. Nariman, strongly objected to this Court entertaining the plea urged on behalf of the defendants, and submitted that this Court should not go into these matters at all. The affairs of RP Nidhi and the involvement of Balaji Group in those affairs is not relevant in the present suit. Moreover, proceedings are pending and the competent authority or the Courts are seized of the matter. In these circumstances, the defendants cannot be permitted to prejudice the mind of the Court by reference to facts which are not relevant. In any event, he submitted that an allegation of improper conduct which is unrelated to the subject-matter of adjudication and the equity pleaded is not relevant. So far as the affairs of RP Nidhi is concerned, we are satisfied that we will not be justified in investigating the facts in relation to the involvement of Balaji Group in the RP Nidhi affair. Moreover, we are satisfied that those facts are not relevant in the present proceeding. 174. Mr. Nariman, has drawn our notice to paragraph 65.02 of Palmer's Company Law, 24th Edition, and submitted that in this action, which was a personal action and not a derivative action, the requirement of clean hands was not applicable. As observed in Palmer's Company Law, the derivative action is subject to the doctrine of clean hands. As an equitable invention, the derivative action cannot be used to do injustice. The requirement of clean hands, however, does not apply to personal action. In Halsubury's Laws of England, 4th edition, vol. 16, paragraph 1305, it is stated that a Court of equity refuses relief to plaintiff whose conduct in regard to the subject-matter of the litigation has been improper. This was formerly expressed by the maxim 'he who has committed inequity shall not have equity', and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. The maxim does not, however, mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as in a moral sense. To the same effect is the observation in Hanbury and Maudsley Modern Equity, 13th edition, 1989 at page 28 that equitable relief will only be debarred on the ground of clean hands if the plaintiff's blameworthy conduct has some connection with the relief sought. The Court is not concerned with the plaintiff's general conduct. In Shell's Equity, 29th edition, page 32, it is stated that the maxim must not be taken too widely.

Equity does not demand that its suitors shall have led blameless lives. What bars the claim is not a general depravity but one which has an immediate and necessary relation to the equity sued for, and is not balanced by any mitigating factors. Apart from these, the law has been set at rest by the Supreme Court in Public Passenger Service Ltd's case (supra), wherein it was observed -"... Counsel then relied upon the well-known maxim of equity that 'he who comes into equity must come with clean hands', and contended that the Courts below should have dismissed the applications as the respondents did not come with clean hands. This contention must be rejected for several reasons. The respondents are not seeking equitable relief against forfeiture. Tney are asserting their legal right to the share on the ground that the forfeiture is invalid, and they continue to be the legal owners of the shares. Secondly, the maxim does not mean that every improper conduct of the applicant disentitles him to equitable relief. The maxim may be invoked where the conduct complained of is unfair and unjust in relation to the subject-malter of the litigation and the equity sued for...'(p. 492) 175. Counsel for the defendants then brought to our notice the facts which, according to them, constituted improper conduct on the part of the Plaintiffs, disentitling them to grant of discretionary relief. It was submitted that it has come to light that after the filing of the suit, various collusive agreements dated 21-8-1998 were entered into between the Plaintiffs and Herbertsons Ltd., whereunder rights have been given to the Plaintiffs to use the trade-marks of the Company for a period of 19 years for a song. This, according to the defendants, has been done in anticipation of any adverse order that may be passed against the Plaintiffs, adversely affecting the interest of Vijay Mallya. It is also brought to our notice that even in respect of trade-marks which are the most valuable assets of Herbertsons Ltd., collusive agreements have been entered into. The defendants contend that the suit filed by the Plaintiffs is in the nature -of a proxy suit whereby they seek to protect the interest of Vijay Mallya who is a in minority. The suit is clearly an abuse of process of the Court. The documents brought on record prove that the Plaintiffs have unrestricted access to confidential files and materials. That is how they could produce the declarations filed by the Company. It is also alleged that even though Vijay Mallya had similarly acquired 5.51 per cent shares of the Company in the name of various companies under his control, the same has never been challenged by the Plaintiffs nor any suit had been filed to assail those acquisitions. It is further alleged that though the Plaintiffs claimed a personal right or cause of action to file the suit being an alleged right to a competitive bid, they thwarted the offer made by defendant No. 11 to make a public offer without prejudice to his stand that there was no violation, by deflecting the same. The defendants have also alleged that the Plaintiffs along with Vijay Mallya are guilty of diversion of funds of Herbertsons Ltd., and that there are observations to this effect in the assessment order dated 31-3-1997 passed by the Income-tax authorities. It is not disputed that the assessment order was set aside in appeal though on a technical point, and the matter has been remanded for fresh hearing. However, it has been observed that these transactions were suspicious. They have also referred to such other acts of the Plaintiffs in collusion with Vijay Mallya, and submitted that all these

facts would clearly establish collusion between Vijay Mallya and the Plaintiffs. It is also submitted that the claim made by the Plaintiffs that they could have made a competitive bid is a bogus claim and the Plaintiffs were never, and are not, in a position to make any such competitive bid though such an assertion is made in the plaint. A reference is made to proceedings before the Madras High Court in which the Plaintiffs are alleged to have admitted their liability to the extent of Rs. 85 crores though, according to the prosecution, the amount is much larger. It is submitted that the conduct of the Plaintiffs has to be examined in the light of the issue whether they are trying to agitate their own civil rights or are surrogates for someone else. Their close association with Vijay Mallya and the collusive agreements entered into between Herbertsons Ltd., and the Plaintiffs clearly established the fact that they are parties to defraud the company and strip it of its valuable assets. 176. Mr. Nariman, in reply, submitted that several documents were produced by M.D. Chhabria himself, such as copies of agreements produced by him. He does not disclose from where he obtained copies of those agreements. In any event, K.R. Chhabria, defendant No. 1, who is the Vice-President of the Company has not stated that he did not know about the agreements entered into with various parties. Their claim that they came to know of it recently is, therefore, an after-thought. He further submitted that the charge against the defendants that they did not challenge the illegal acquisition of shares in similar manner by Vijay Mallya is a mistake of fact. He referred to the letter written by the Plaintiffs to the SEBI on 26-11 -1998, wherein they have clearly stated that Vijay Mallya had also made similar acquisitions in breach of the Regulations. The fact that a notice has also been issued to Vijay Mallya by SEBI must be appreciated in this background. 177. The claim made by the defendants that they were always thinking of making a public offer post facto, and that, in fact, SEBI has agreed to permit them to make such an offer is a mere assertion without any basis in facts. The stand of SEBI had throughout been consistent, viz., that the acquisitions were made in breach of SEBI Regulations. There is nothing on record to show that SEBI had ever called upon the defendants to make a public offer. The mere fact that on his own, M.D. Chhabria, defendant No. 11, volunteered to make a public offer is of no consequence because he was planning to do so without dislodging the shares illegally acquired by him. With regard to registered users agreement, he submitted that such agreements had been executed in favour of others as well but nothing is said in regard to those agreements. Mr. Nariman, also submitted that the facts alleged by the defendants about the improper conduct of the Plaintiffs, in any case, is not related to the reliefs sought for in the suit and, therefore, are not relevant. 178. Though serious allegations have been made against the Plaintiffs and Vijay Mallya, and the various agreements have been referred to as collusive and fraudulent, it does not appear that those agreements were ever challenged before any authority. In the annual general meetings of the Board of Herbertsons Ltd. also, these issues were not raised. K.R. Chhabria, defendant No. 1, is the Vice-President of the Company, and he also does not claim to have objected to such transactions. He cannot claim that he had no knowledge of the agreements. Moreover, these agreements appear to be agreements entered into

in normal course of business. There is no order of any competent authority or by a competent court declaring that these agreements are collusive or fraudulent. It may not be possible for this Court, in these proceedings, to go into the validity and genuineness of such agreements for the first time. There is hardly any material on record to justify an investigation into these matters by this Court for the first time, nor would it be proper for this Court to consider the question as to whether these agreements were collusive and fraudulent or were executed in the normal course of business. We fail to understand why the defendants did not challenge these agreements before the appropriate forum if it was their case that they are collusive and fraudulent or that they had been executed in breach of any provision of the Companies Act. We are, therefore, of the view that we will not be justified in investigating these transactions for the first time in these proceedings, particularly when the same have not been challenged at any time earlier though the same must have been within the knowledge of the defendants, defendant No. I being the Vice-President of Herbertsons Ltd. Much has been stated about collusion between Vijay Mallya and the Plaintiffs. It may be that the Plaintiffs are on good terms with Vijay Mallya. It is also possible to contend that Vijay Mallya may be supporting the. Plaintiffs because that may help him to consolidate his position in Herbertsons Ltd. However, if the Plaintiffs have apersonal cause of action and a right to maintain a suit for the reliefs prayed for, the mere fact that the reliefs, if granted, may also benefit Vijay Mallya is no ground of denying relief to the Plaintiffs. The benefit that may accrue to Vijay Mallya is only incidental, and primarily, the Plaintiffs have approached the Court to vindicate their own rights Relief cannot be denied to the Plaintiffs merely because it may also benefit Vijay Mallya in an indirect fashion. As regards the claim of the Plaintiffs to be ready and willing to make a competitive bid, the defendants have characterised the claim to be bogus as the Plaintiffs were never in a position to make a competitive bid though they have so asserted in the plaint. This question also is not relevant at this stage. The question of making a competitive bid would arise after the defendants make a public offer. The submission has, therefore, no force. The claim of the defendants that they were willing to make a public offer but the Plaintiffs managed to divert the issue, is again, not based on material on record. In fact, there is nothing on record to show that the SEBI ever called upon the defendants to make a public offer. 179. Much has been said by the Plaintiffs about the conduct of the defendants, both before and after the filing of the suit. The learned trial Judge has carefully considered the submissions advanced before him. We do not consider it necessary to go into that question because grant of relief to the Plaintiffs would depend upon the case established by them and their conduct. The conduct of the defendants would not be very material so far as the question of grant of relief to the Plaintiffs is concerned. No doubt, we have considered the conduct of the defendants for the purpose of finding out whether they were acting in concern. Their conduct in regard to other matters would neither weaken nor strengthen their case or the case of the Plaintiffs. 180. It was then submitted that the order passed by the trial Judge freezing the voting rights in respect of the shares acquired by Imfa and Mahameru, defendant Nos. 3 and 4 was unprecedented. Referring

to various provisions of the Companies Act, it was submitted that the rights of the shareholder could not be curtailed. It was, no doubt, submitted that under Section 111A of the Companies Act, the voting rights may be suspended by an order of the Company Law Board under a proceeding for rectification of the register of members. The defendants, however, contend that Section 111A is a self-contained Code. Since the Civil Court had no power to rectify the register, it does not have the power to suspend voting rights in respect of the registered or unregistered shares. Therefore, the right conferred on every member of the company under Section 87 of the Companies Act must be respected. The defendants complain that despite the fact that they had the support of almost 50 per cent of the shareholders, the present management which is in a minority continues in management because of the impugned order injecting the voting rights of 21.75 per cent of the shareholding. The rule of corporate democracy requires that all shareholders have a right to vote, and the Company must be governed in accordance with the wishes of the majority. The impugned order stultifies the principle of corporate democracy by permitting the minority to govern the company to the detriment of the majority. 181. On the other hand, Mr. Nariman, brought to our notice several American decisions only to convince us that such orders are passed in the United States of America. The learned counsel for the defendants strongly objected to our looking into those judgments which are neither binding precedents nor had persuasive value. Judgments of the District Courts of the United States of America could not be looked into by this Court for determining the question whether, under the Indian law, such a freezing order can be passed. Mr. Chidambaram and Mr. Desai, apart from raising this objection, also sought to distinguish those judgments on facts. We are not persuaded to consider those judgments, and indeed, Mr. Nariman candidly submitted that those judgments have not been produced before this Court because of their binding nature or persuasive value, but for the very limited purpose of establishing that such orders are not unprecedented, and even in other countries, such orders are passed by the Courts. 182. It is not necessary for us to look into the American Courts' decisions because the validity of such an order must be tested by reference to law as it exists in India. The submission of the defendants proceeds on the assumption that it is only the Company Law Board which has the power to suspend voting rights under Section 111A of the Companies Act. Since the Civil Court has no power to rectify the register, it does not have the power to suspend voting rights in respect of the registered or unregistered shares. We have already held that a member of a company has the common law right to move the civil court for rectification of the register of members. Section 111A is only a statutory remedy, and that too is not available to a member of a company. We cannot, therefore, subscribe to the view that Section 111A of the Companies Act is a self-contained Code, and power to suspend voting rights inheres only in the Company Law Board. Since we have held that Civil Court is also competent to entertain a suit for rectification of register of members at the instance of a member, it must be held logically that in such a suit, the Civil Court can also pass such orders as the Company Law Board may pass in a proceeding under Section 111A of the Act. IE the

Company Law Board can pass an order suspending the voting rights in respect of shares acquired, in a proceeding for rectification of register, there is no reason why a Civil Court cannot pass such an order in a suit for rectification of register of members. The suspension of voting rights is not a concept unknown to corporate law jurisprudence in this country, and infact, has statutory recognition. It may be that not many orders may have been passed by the Courts after the coming into force of the SEBI Regulations but, that does not make the. order unprecedented, in the sense that such an order can never be passed by a Civil Court. Having regard to the facts of the case, the trial Judge was justified in holding that that if the voting rights in respect of the shares acquired in breach of the Regulations were not suspended, the defendants who had acquired the shares in an illegal manner would get the benefit of their illegal conduct, and the Plaintiffs would be virtually left without a remedy. The mischief which the Regulations sought to avoid would be perpetrated and completed if the voting rights were not suspended. Mr. Nariman rightly emphasised the fact that the suspension of voting rights was absolutely essential because the votes, on the strength of such shares, would have tilted the balance in the annual general meeting of the Company. In fact, the suspension of voting rights has resulted in the maintenance of status quo, which was necessary to maintain in the facts and circumstances of the case. Apart from the suit, proceedings are pending before the SEBI and the Company Law Board in respect of the shares illegally acquired in breach of the SEBI Regulations. Till a final decision was taken, it was only proper that status quo should be maintained. We agree. We may also notice the judgment of the Supreme Court in Canara Bank v. Nuclear Power Corpn, of India Ltd [1995] 84, Comp. Cas. 70/4 SCL 42, relied upon by Mr. Nariman, in this regard. 183. It was then submitted on behalf of the defendants that till such time as the SEBI investigated the matter and passed an order, the trial Court should not have made the direction it has made in its impugned judgment. Particular reference was made to the observations in the order of the trial Court that, if in future, a public offer is made by the defendants, that must include the impugned shares. It is submitted that this should have been left to the discretion of the SEBI. The trial Judge, after declaring the law, has given this direction. Under the Regulations of 1994, a public offer should have been made before the acquisition of the shares. Thus, the direction only seeks to relegate the defendants to the same position as they would have occupied had they acted in conformity with law. The defendants further contended that in the past, SEBI had, in many cases, directed the acquirer to make a post-facto public offer. This was challenged by Mr. Nariman who sought to distinguish those instances on which reliance was placed by Mr. Chidambaram and Mr. Desai. It is not necessary for us to go into this question because, we do not wish to express any- opinion on this matter. Since SEBI has issued notices for breach of SEBI Regulations of 1994, it may not be proper for us to suggest what orders it may pass. We leave it to the SEBI to pass such orders as it may deem fit and proper, and nothing said in this order should be construed as expression of our opinion on the question as to whether, the defendants should be permitted to make a post-facto public offer or not. Having considered all as-

pects of the matter, we are satisfied that the balance of convenience is in favour of the Plaintiffs. They have made out a prima facie case of breach of SEBI Regulations by the defendants. Proceedings are pending before the Company Law Board as well as SEBI apart form the suit. If protection is not given to the Plaintiffs, on the strength of their illegal acquisition, the defendants may be able to bring about a change in the management of the Company, and thereby defeat the very objective of the SEBI Regulations. The shareholders, for whose protection the Regulations have been framed, will be left high and dry and will not be able to get a fair value for their shares which they would have got had the defendants made a public offer and invited the shareholders of the company to participate in such public offer. These and other considerations which we have discussed earlier in this judgment lead us to the conclusion that the order passed by the trial Judge is a reasonable order, protecting the interest of all the parties concerned. The apprehension of the defendants that the freezing of voting rights will give a licence to Vijay Mallya, who is in a minority, to act as he pleases, must be dispelled by the condition laid down by the learned Judge that any policy decision to be taken by the Board of Directors on items such as sale of assets, amalgamation, merger, etc., if objected to by defendant No. 1 to 11 in writing, will not be implemented for a period of eight weeks from the date on which the decision is communicated to the defendants. The company has also been directed not to hold the general meeting except with the prior application to this Court until SEBI decides the notices before it, and/or until further orders. 184. A submission was advanced before us that the plaintiffs failed to comply with the undertaking which is mandatory under rule 148 of the High Court (Original Side) Rules. It was submitted by Mr. Nariman that the Plaintiffs had offered to deposit an amount of Rs. 15,22,65,422.50 so as to cover financial losses, if any, in case an order of disinvestment was passed later. A photocopy of the cheque produced by the plaintiffs for the said amount was shown to us by Mr. Desai. It appears from the judgment of the trial Court that the defendants were not interested in any monetary protection. In fact, the cheque which was offered and seen by the learned Judge was returned to the Counsel for the Plaintiffs not on the ground of delay but because the defendants themselves were not interested in such deposit being made. In fact, a written undertaking was also handed over to the Court, but the same was also returned. The learned Judge has observed in his order that the defendants were not interested in any such monetary protection inasmuch as their principal submission is that on the basis of free transferability, their voting rights should not be injuncted. and at the highest, a protective mechanism be provided in the management of defendant No. 12 Company. 185. In the end, it was submitted on behalf of the defendants that they must be given adequate representation on the Board of Directors of Herbertsons Ltd. This submission was advanced before the trial Court as well. Having regard to the facts and circumstances of the case, we are not inclined to pass any such direction at this stage of the proceedings. 186. In view of the findings recorded by us, we find no merit in these appeals and the same are accordingly dismissed but without any order as to costs. 187. After the judgment was delivered, a prayer was made on behalf of

the parties jointly, and accordingly, we pass the following order :– The operative part of the judgment and order delivered today is stayed upto 31-12-2001, and in view thereof, the interim order dated 1-12-1999, staying the holding of general meetings of Herberstons Ltd., shall continue for a similar period upto 31-12-2001. The parties agree that all-proceedings in this Court, Delhi High Court, Bombay City Civil Court and the Company Law Board shall not be proceeded with till 31-12-2001. 188. Mr. Doctor, appearing on behalf of the appellants, submitted that a similar interim order may be passed in regard to proceedings pending before the SEBI. We are informed that the SEBI has concluded hearing the parties but no order has been passed. The parties are not agreeing on the question of stay of proceedings before the SEBI. There is also considerable dispute as to whether any interim order had been passed in regard to proceedings pending before the SEBI. In these circumstances, we direct that if there was any interim order operating on the proceeding pending before the SEBI during the pendency of the appeals, the same shall continue to operate upto 31-12-2001. If no such interim order in fact operated during the pendency of the appeals, this order should not be construed as a fresh order of stay, staying the proceeding before the SEBI. 189. Parties to act on a copy of this order duly authenticated by the Associate of this Court.