Swedish Match Ab & Anr vs Securities & Exchange Board, India & Anr on 25 August, 2004

Equivalent citations: AIR 2004 SUPREME COURT 4219, 2004 AIR SCW 4853, 2004 CLC 1240 (SC), 2004 (8) SRJ 320, 2004 (5) SLT 440, (2004) 7 JT 94 (SC), 2004 (3) LRI 672, 2004 (4) COM LJ 25 SC, 2004 (7) SCALE 158, 2004 (6) ACE 717, 2004 (11) SCC 641, (2004) 4 COMLJ 25, (2004) 62 CORLA 74, (2004) 4 BANKCAS 211, (2004) 7 SUPREME 615, (2004) 7 SCALE 158, (2004) 22 INDLD 93, (2004) 122 COMCAS 83, 2005 (1) BOM LR 45

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Bench: N. Santosh Hegde, S.B. Sinha, A.K. Mathur

CASE NO.:
Appeal (civil) 2361 of 2003

PETITIONER:
Swedish Match AB & Anr.

RESPONDENT:
Securities & Exchange Board, India & Anr.

DATE OF JUDGMENT: 25/08/2004

BENCH:
N. Santosh Hegde,S.B. Sinha & A.K. Mathur

JUDGMENT:

J U D G M E N T S.B. SINHA, J:

BACKGROUND FACTS:

Wimco Limited (Wimco) is a target company. Its shares are listed on the stock exchanges at Mumbai, Delhi, Calcutta, Kanpur as also on the National Stock Exchange. It is engaged in the business of manufacture and sale of a broad range of safety matches.

The Appellant No. 1 herein (Swedish Match) is incorporated in Sweden. It is a holding company of the Appellant No. 2 (S.M.S) holding its entire paid up capital. It is also a holding company of Haravon Investments Private Limited (Haravon) and Seed Trading Private Limited (Seed). These four companies hereinafter would be called and referred to as the Swedish Match Group. It had acquired in the target

company 52.11% shares, i.e., 46.18% by Haravon and 5.93% by Seed. AVP Trading Private Limited (AVP) and Plash Floods P. Ltd. (Plash) were Indian promoters of the target company. They belong to one Jatia Group of companies holding 24.11% of the share capital of the target company, i.e., AVP holding 6.03% and Plash holding 18.08%.

The Swedish Match entered into an agreement with the Jatia Group to acquire majority shoreholding in Haravon and Seed and to make a public announcement of offer to acquire 20% shares in Wimco. The obligation to make a public announcement of offer arose in view of indirect acquisition of more than 10% shares in Wimco (in view of the law as prevailing thence) attracting the provisions of Regulation 10 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter called and referred to for the sake of brevity as "the Regulations").

On or about 17th December, 1997, the public announcement of offer was made by S.M.S. together with the Jatia Group of Companies, viz., Plash and AVP as "acquirers" and "persons acting in concert". In the letter of offer, it was specified that both Swedish Match Group and Jatia Group intend to exercise joint control over the affairs of Wimco. For the purpose of the public announcement of offer, 'Haravon' and 'Seed' being subsidiaries of Swedish Match Singapore were deemed to be "persons acting in concert" in terms of Regulation 2(e)(2)(i) of the 'Regulations'.

Upon completion of the process of public offer, the share holding in Wimco was as under : Haravon 28.28%, Seed 10.33%, AVP 5% and Plash 15%. The aggregate of total share holding of both the groups, thus, came to 58.61%.

It is not in dispute that subsequent to April, 1998 the said Groups were exercising joint control over the affairs of Wimco. By a Special Resolution adopted in this behalf, the target company allotted shares on a preferential allotment basis to 'Haravon', 'AVP' and 'Plash' purported to be in terms of Section 81(1)(A) of the Companies Act, 1956 whereupon the share holding in Wimco came to as under:

Haravon 46.18%, AVP 6.03%, Plash 18.08%.

As no preferential shares were allotted to Seed, its shareholding was diluted to 5.93%.

Swedish Match Group, thus, held 52.11% and Jatia Group held 24.11% of the total shares in Wimco. The aggregate shareholding of both the Groups came to 76.22%. The Government of India by an order dated 5th July, 1999 permitted increase in foreign equity participation in the target company from 38.61% to 52.11%.

S.M.S. thereafter acquired from Jatia Group (as the latter was desirous of exiting from the joint control over Wimco) the following extent of share:

AVP 5.47%, Plash 16.42%, at a price well above the market price.

> Pursuant to or in furtherance of the letter of the Government of India dated 19th May, 2000 increasing foreign collaboration to the extent of 74.00438%; the Swedish Match Group acquired 74% shareholding and Jatia Group was left with 2.22% in Wimco.

It is also not in dispute that although the market value of each acquired share of the target company was only Rs. 9.55; the consideration paid to Jatia Group by the Swedish Match Group was Rs. 35/- per equity share. Pursuant to or in furtherance of the said arrangement, the Directors belonging to Jatia Group resigned as a result whereof, their joint control with Swedish Match Group ceased leading to sole control of the latter. Allegedly, the cessation of joint control was approved in a general meeting of the shareholders of Wimco held on 27th September, 2000. S.M.S. thereupon by a letter dated 27th September, 2000 in terms of Regulation 7 of the Regulations disclosed to WIMCO its holding of more than 5% of the equity share capital. The said transaction was also brought to the notice of the SEBI (the Board) by a letter dated 28th September, 2000. It also agreed to adhere to the 'lock-in' restrictions applicable to the locked in shares forming part of 21.89% shares purchased from AVP and Plash (Jatia Group of Companies). Upon receipt of the said information, SEBI by a letter dated 17th October, 2000 made a query as to whether the said transaction took place in accordance with Regulation 20 (pricing guidelines), Regulation 7 (mandatory disclosures) and Regulation 12 (change in control) of the Regulations, in response whereto, Swedish Match by a letter dated 1st November, 2000 submitted its replies thereto. An additional query by SEBI was made as regard calculation of market price and compliance of the provisions of the Regulations by a letter dated 30th November, 2000; to which a reply was given on 8th January, 2001.

PROCEEDINGS BEFORE SEBI :

> A show-cause notice was served upon the Appellants by SEBI asking them to show cause as to why no public announcement of offer had been made in terms of Regulations 10 and 11(1) of the Regulations stating:
>
> "4. As you have acquired the shares of WL in the manner as stated above without making a public announcement as required by the provisions of the captioned regulations, you have, prima-facie, violated the provisions of Regulation 10 individually and Regulation 11(1) collectively of the captioned Regulations and, therefore, you are liable for penal action under the Regulations and SEBI Act, 1992.
>
> 5. In view of the above, you are called upon to show cause as to why one or more or all action (s) under Regulation 44 and Regulation 45(6) of the Regulations and Section 11B of the SEBI Act 1992, should not be initiated against you for violation specified above."

The Appellants herein filed a show cause before the Board.

ORDER OF SEBI :

The Chairman, SEBI upon hearing the Appellants by an order dated 4th June, 2002 observed that Regulation 12 has no application.

It was, however, held:

"In view of the above, the submission of the Acquirers that Regulation 11(1) should exclude a transaction involving a transfer of shares as part of cessation of participation in joint control, particularly where such persons in joint control acquired shares as persons acting in concert is not tenable.

Therefore, if an Acquirer triggers either of the Regulations, i.e., Regulations 10, 11 or 12, he has to make a public announcement unless the acquisition is specifically exempt in terms of the Regulations. Therefore, each of the Regulations 10, 11 & 12 has to be complied with independently by the Acquirers. The acquisition falling under proviso to Regulation 12 is not automatically exempt from the applicability of Regulations 10 &

11."

Consequent upon the said findings, the following directions were issued :

"In view of the above the exercise of the powers conferred upon me under sub-section (3) of Section 4 read with Section 11B SEBI Act 1992 (hereinafter referred to as the Act) read with Regulation 44 & 45 of the Regulations, I hereby direct the Acquirers to make public announcement in terms of Chapter III of the Regulations in terms of sub-Regulation (1) of Regulation 11 taking 27/9/2000 as the reference date for calculation of offer price within 45 days of passing of this order."

THE TRIBUNAL :

Aggrieved by and dissatisfied with the said order, an appeal was filed by the Appellants herein before the Securities Appellate Tribunal (Tribunal). The Tribunal took notice of the Appellant's letter dated 28.9.2000 contending "We wish to inform you that we have through our wholly owned subsidiary Swedish Match Singapore Pte. Ltd. and pursuant to the requisite approvals acquired an additional 11382800 equity shares from the aforesaid Indian companies such that we are not in sole control of WIMCO Ltd." and held:

"Sequence has been mentioned correctly thus that they acquired additional shares and thereby acquired sole control of WIMCO Ltd. As the control is relatable to the shareholding in the instant case and to nothing else and cessation of control was due to divesting of the said ownership of shares in the absence of any other evidence to the contrary it can be safely concluded that the Acquirers acquired shares from the Jatia Group and consequently Jatia Group ceased to be in joint control of the target

> company. Assuming that if the Jatia Group had been in joint control due to some other factors, then section 11 would not have attracted. In the instant case, it is a clear case of acquisition of shares and cessation of control consequential to divestment of shares held by the person in control."

(Emphasis supplied) Holding that the provisions of Regulations 11(1) and 12 are not in conflict with each other in any manner and further holding that the Regulation is a beneficial legislation, the Tribunal held:

> "The legislative intent behind the Regulations is clear. The objective is to protect the interests in securities. It is with the said objective that regulations 10, 11 and 12 have been framed providing an opportunity to the existing shareholders of a company under acquisition and that exit opportunity cannot be denied by resorting to a narrow and technical interpretation of the regulations. As already stated in this order regulations 10, 11 and 12 are put in position to meet different situations. Which one of these regulations is attracted to an acquisition, would depend on the specific facts. In my opinion in the light of the facts, as the Respondent has held, the acquisition in question attracts the provisions of regulation 11(1)."

This appeal has been filed by the Appellants herein before this Court in terms of Section 15-Z of the Securities and Exchange Board of India Act, 1992 (for short "the Act") SUBMISSIONS :

> Mr. F.S. Nariman, learned senior counsel appearing on behalf of the Appellants would contend that although each one of the Regulation 10, 11 and 12 of the Regulations require making of public announcement, but the same are mutually exclusive and independent of one another as they address different types of acquisitions (as found by SEBI) and should necessarily, thus, be limited to the context of the situation with which it deals and should not be projected into the other.
>
> The learned counsel would point out that Regulation 10 applies to initial acquisition of shares or voting rights by an acquirer whereas Regulation 11 having been captioned as "Consolidation of Holdings" deals with consolidation of existing shareholder (s) by way of acquisition of additional shares, i.e., such acquisition must be by way of combined shareholding of acquirer and persons who previously acted in concert with him resulting in increase of more than 5% and in case of Regulation 11(1), by acquisition of any additional shares.
>
> Regulation 11, Mr. Nariman would submit, does not cover purchase of shares by the acquirer from the persons who have previously acquired shares in concert with him as in such a case there is no acquisition of additional shares as the aggregate shareholding of the parties does not increase at all and far less by 5%. Elaborating his submission, Mr. Nariman would argue that as both Swedish Match Group and Jatia Group had 76.22% which was reduced to 74%, there had been no acquisition of additional shares and in that view of the matter the purported admission by the

Appellants in its letter dated 28.9.2000 should be ignored. Proviso appended to Regulation 12, according to Mr. Nariman, is squarely attracted in the instant case, in view of the fact that the shareholders in a general meeting had approved the change in control in favour of the Swedish Match Group from the joint control of Swedish Match Group and Jatia Group and in that view of the matter, no public announcement therefor was required. In the alternative it was submitted that Regulation 11 does not envisage inter se transfer between one group to the another. The Scheme of the statute is such, it was urged, that the requirement of public announcement is not attracted in all cases which would be evident from Regulation 3 of the Regulations and in that view of the matter it cannot be said that the proviso appended to Regulation 12 will have no application in the instant case. In this connection our attention has also been drawn to the subsequent amendments made to the regulations. The learned counsel would argue that also in a situation like death or bankruptcy of a person in joint control may lead to sole control of the target company in which event also the rigours of Regulation 12 will have no application. Pointing out the difference between Regulations 11 and 12, it was urged that whereas in terms of Proviso to Regulation 12 the change in control is exempted from the applicability thereof (which otherwise requires the making of a public announcement) by a resolution passed by the shareholders in the General Meeting, but the necessity of making a public offer under Regulation 11 cannot be condoned by the shareholders because a right to have the shares offered under the public offer is conferred upon the remaining shareholders as even a majority of them cannot barter away the right of a minority. The position, however, would be different in a case where change in control of the target company is approved by the majority of the shareholders in a general meeting, as therein the question as regard protection of the interest of the shareholders would fall for cosnideration.

Regulations 10, 11 and 12 having been intended for the benefit of the shareholders of the target company, the learned counsel would argue, only a letter of offer is required to be sent to all the shareholders of the target company in terms of Regulation 22(3) for the purpose of allowing and enabling the existing shareholders to avail of the opportunity to offer their shares for purchase to the acquirers at a price specified in the public announcement and the letter of offer. Requirement of change from joint control to sole control would be fulfilled if all the existing shareholders approved the change from joint control to sole control, urged Mr. Nariman, as by reason of such a resolution, the transfer from joint control to the sole control would be offered which would amount to an election not to exit from the company and to remain therein under the management of the sole controller.

It was urged that Explanations (i) and (ii) are explanations to the proviso appended to Regulation 12 and not to the main part thereof, which had been inserted only for the purpose of clarifying the phrase "change in control" occurring therein.

The learned senior counsel would submit that where there is a mere cessor of control by one out of two persons already in control or where any person or persons are given joint control and the combined degree of control is not greater than being presently exercised, a resolution in a general meeting is not necessary; since there is no change in control and, thus, the question of any acquisition of control within the meaning of the main part of Regulation 12 would not arise. Proviso to Explanation (i) i.e. cessor of control by one or more persons already in control, according to Mr. Nariman, imposes a further restriction if the transfer of joint to sole control is through sale of shares at less than the market value of the shares, in which an event only a special Resolution is required to be passed at a specially called meeting of the shareholders of the target company.

Without prejudice to the submissions as referred to hereinbefore, Mr. Nariman would argue that once a direction has been issued by the Board, the penalties specified in Regulation 44 including (a) criminal prosecution under Section 24 of the Act; (b) monetary penalty under Section 15H of the Act and (c) directions under the provisions of Section 11B of the Act may ensue but in the facts and circumstances of the case penal provisions should not have been directed to be resorted to having regard to the fact that the Regulations contained no clear and unambiguous words to indicate the true legal position. The penal provisions, it was contended, are required to be strictly construed. Reliance in this connection has been made on Francis Bennion's Statutory Interpretation, Third Edition, at page 637, Avais Vs. Hartford Shankhouse and District Workingmen's Social Club and Institute, Ltd. [1969 (1) All ER 130 at 135], The Seksaria Cotton Mills Ltd. Vs. the State of Bombay [1953 SCR 825 at 834] and State of Bihar Vs. Bhagirath Sharma and Another[(1973) 2 SCC 257 at 261].

Mr. Kirit N. Raval, learned senior counsel appearing on behalf of the Respondent, on the other hand, would contend that the language in Regulations 10, 11 and 12 of the Regulations being clear and unambiguous, this Court should apply the principles of literal interpretation. He would urge that having regard to Explanation I appended to Regulation 12, the question of application of Regulation 12 would not arise inasmuch as by reason thereof a transfer of control from joint owners (Swedish Match A.B. and Jatia Group) to a single sole owner (Swedish Match Group) stands excluded from the concept of "Change in Control".

Mr. Raval would submit that although the Board has accepted the position that there was no violation of Regulation 12, relying on or on the basis of proviso appended thereto, the Tribunal has clearly held that there has been no change in control in terms of the Regulations and in that view of the matter the opinion of the Tribunal shall prevail over that of the Board. Reliance in this connection has been placed on S. Shanmugavel Nadar Vs. State of T.N. [(2002) 8 SCC 361].

The learned counsel would strenuously urge that the application of Regulation 11 cannot be excluded by bringing the transaction in question as having been made under Regulation 12 in terms whereof an additional liability was required to be incurred by the Appellants. It was pointed out that no disclosure has ever been made by the Appellants that in fact they had intended to purchase the shares belonging to the Jatia Group at a price of Rs. 35 as against the then prevailing market price of Rs. 9.55 per equity share. In fact the stand of the Appellants had all along been that they would not sell the shares below the market price and, thus, indicating that the shares would be sold at the prevailing market price.

Mr. Raval would urge that the Appellants withheld a very valuable information from the shareholders i.e. the actual price of share being paid to Jatia Group which would have otherwise become known to them if a public announcement of offer was made. If it is to be held that even in a case of this nature no public announcement is to be made, the intent and purport of the legislature in bringing Regulations 10, 11 and 12 to the statute book with a view to protect the interest of the investors shall be frustrated.

The learned counsel would further submit that the regulations were amended only for the purpose of plugging the loopholes which existed in the 1994 Regulations in terms of the recommendations of a Committee consisting of experts in the fields of law, securities market, accounts, finance, management etc. and, thus, if the interpretation of regulations as suggested by Mr. Nariman, is accepted, the same would frustrate the object of bringing the said regulations. Reliance in this behalf has been placed on Reserve Bank of India Vs. Peerless General Finance & Investment Co. Ltd. [(1987) 1 SCC 424] and Shashikant Laxman Kale & Ors. Vs. Union of India and Anr. [(1990) 4 SCC 366].

The learned counsel would urge that Regulations 14, 15 and 16 clearly make a distinction in the timing of offer to be made between Regulations 10 and 11 on the one hand and Regulation 12, on the other, having regard to the fact that process of action initiating the operation of Regulations 10, 11 and 12 would be different.

In a given case, Mr. Raval would submit, a transaction may trigger both Regulations 11 and 12, in which event, an appropriate combined notice of public announcement of offer may be issued.

Drawing our attention to Regulation 44, the learned counsel would contend that in terms thereof the Board is not obliged to issue any direction only in terms of Clauses (a) to (d) thereof as the words "give such directions as it deems fit including" must be held to be of wide amplitude. Clauses (a) to (d) are only illustrative and not exhaustive and in that view of the matter, the Board was within its jurisdiction to issue the impugned directions.

It was contended that the penal provisions contained in Section 15H are not the subject matter of the present proceedings. Further, an order which may be passed under Section 15H of the Act would

be separate and distinct.

ISSUE FOR DETERMINATION :

The core issue which falls for our determination is the interpretation of Regulations 10, 11 and 12.

STATUTORY PROVISIONS :

The Securities and Exchange Board of India Act, 1992 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. Section 11 of the Act provides for functions of the Board which would include registering and regulating the working of persons specified in Clauses (b) and (ba). Section 11A provides for the matters which are to be disclosed by the companies. Section 11B empowers the Board to issue directions as specified therein.

Chapter VIA of the Act deals with penalties and adjudication whereas Section 15A provides for penalty for failure to furnish information, return etc., Section 15H provides for penalty for non-disclosure of acquisition of shares and takeovers which include a case where public announcement to acquire shares at a minimum price is not made as required under the Act or the rules or the regulations. Section 15H of the Act provides for a penalty of twenty-five crores or three times the amount of profits made out of such failure, which is higher. Section 15I confers power upon the Board to adjudicate in the event a penalty proceeding is directed to be initiated. Section 15T deals with appeal to the Securities Appellate Tribunal. Section 15Z, which has been brought in the statute book by Act 59 of 2002, provides for an appeal to this Court from any decision or order of the Tribunal on any question of law arising thereunder.

Regulation 2(e) of the Regulations defines "person acting in concert". Regulation 3 inter alia contains an exclusionary clause stating that the matters specified therein shall not apply to Regulations 10, 11 and 12.

Regulations 10, 11(i) and 12 of the Regulations read as under: "10. Acquisition of [15%] or more of the shares or voting rights of any company. 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 fifteen percent 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 the provisions of law, 15 per cent

> or more but less than 75 per cent of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, in any period of 12 months, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations.
>
> 12. Acquisition of control over a company -

Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the Regulations.

Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a resolution passed by the shareholders in a general meeting.

Explanation : (i) For the purposes of this Regulation where there are two or more persons in control over the target company, the cessor of any one such person from such control shall not be deemed to be a change in control of management nor shall any change in the nature and quantum of control amongst them constitute change in control of management.

Provided however that if the transfer of joint control to sole control is through sale at less than the market value of the shares, a shareholders meeting of the target company shall be convened to determine mode of disposal of the shares of the outgoing shareholder, by a letter of offer or by block-transfer to the existing shareholders in control in accordance with the decision passed by a special resolution. Market value in such cases shall be determined in accordance with Regulation 20.

(ii) where any person or persons are given joint control, such control shall not be deemed to be a change in control so long as the control given is equal to or less than the control exercised by person(s) presently having control over the company."

Regulation 14 provides for the timing of public announcement of offer to the effect that the same shall be made not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentages specified therein. Clause (3) of Regulation 14 provides for public announcement referred to in Regulation 12 to be made not later than four working days after any such change or changes are decided to be made as would result in the acquisition of control over the target company by the acquirer.

Regulation 14 provides for the mode and manner of the public announcement to be made under Regulations 10, 11 or 12 whereas Regulation 16 specifies the contents thereof.

Regulation 44 of the Regulations reads as under:

> "44. Directions by the Board - The Board may, in the interests of the securities market, without prejudice to its right to initiate action including criminal prosecution under section 24 of the Act give such directions as it deems fit including :
>
> (a) ***
>
> (b) ***
>
> (c) directing the person concerned to sell the shares acquired in violation of the provisions of these Regulations;"

Regulation 44, as amended in the year 2002, provides for several directions. Clauses (f) and (i) thereof are in the following terms:

> "44. Directions by the Board. Without prejudice to its right to initiate action under Chapter VIA and section 24 of the Act, the Board may, in the interest of securities market or for protection of interest of investors, issue such directions as it deems fit including: -
>
> (f) directing the person concerned to make public offer to the shareholders of the target company to acquire such number of shares at such offer price as determined by the Board;
>
> (i) directing the person concerned, who has failed to make a public offer or delayed the making of a public offer in terms of these Regulations, to pay to the shareholders, whose shares have been accepted in the public offer made after the delay, the consideration amount along with interest at the rate not less than the applicable rate of interest payable by banks on fixed deposits."

ANALYSIS :

> Establishment of independent regulatory agencies and need for expert regulations were long felt primarily as a response to the growing complexity in human affairs and trade and business in particular. It was felt that a regulator who was aware of the realities of that field should be ready to regulate that field. Demand for regulators who were not mere Government officials but people who are experts in the field came up. Regulations framed by an expert body like SEBI was felt to be an effective substitute for government regulation. The evolution in respect whereof can be traced back to the Great Depression of 1930s. As a part of the new deal, several expert bodies were established like the Federal Communications Commission and Securities Exchange Commission. In the Indian context, this rationale was invoked for the establishment of an expert body to regulate the securities market after the Securities Scam in 1992.

The statement of Objects and Reasons of the Act are as under :

> "Securities and Exchange Board of India (SEBI) was established in 1988 through a Government resolution to promote orderly and healthy growth of the securities market and for investors' protection. SEBI has been monitoring the activities of stock exchanges, mutual funds, merchant banks, etc., to achieve these goals.
>
> The capital market has witnessed tremendous growth in recent times, characterized particularly by the increasing participation of the public. Investors' confidence in the capital market can be sustained largely by ensuring investors' protection. With this end in view, Government decided to vest SEBI immediately with statutory powers required to deal effectively with all matters relating to capital market. As Parliament was not in session, and there was an urgent need to instill a sense of confidence in public in the growth and stability of the market, the President promulgated the Securities and Exchange Board of India Ordinance, 1992 (Ord. 5 of 1992) on 30th January, 1992. The Bill seeks to replace the aforesaid Ordinance".

Section 30 of the 1992 Act empowers the Board (the expert body) to make regulations consistent with the Act and the rules made thereunder to carry out the purposes of the Act inter alia providing for :

> "(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;"

SEBI made Regulations in the year 1994. The said regulations were said to have many loopholes and, thus, the Bhagwati Committee consisting of experts in different fields was set up to suggest amendments therein. Regulations 1997 indisputably were made pursuant to or in furtherance of the recommendations made by the said Committee. It is also not in dispute that whereas most of the recommendations made by the Bhagwati Committee were accepted, some were not.

In the aforementioned backdrop, this Court has been called upon to interpret the scope and ambit of Regulations 10, 11 and 12. Before we advert to the said question, we must bear in mind that the said Regulations seek to protect the interests of the shareholders. Public announcement of offer is one of the modes of protecting the interests of the shareholders.

Interpretation Principles of :

> It is a well-settled principle of law that where wordings of a statute are absolutely clear and unambiguous recourse to different principles of interpretations may not be resorted to but where the words of a statute are not so clear and unambiguous, the other principles of interpretation should be resorted to.

SEBI was an expert body. It made regulations which were meant to sub-serve the interests of investors as also promote and regulate the securities market.

Regulations 10, 11 and 12 ex-facie operate in three different fields. They seek to control creeping acquisition which may lead to substantial acquisition and ultimately total control of the company. There may, however, be a case where control of the company is sought to be taken over by transfer of share only i.e. by a single transaction, in which event Regulations 11 and 12 both may apply.

We would at the outset proceed to consider the admitted fact of the matter that both Swedish Match Group and Jatia Group were acquirers "in concert with each other". They were in joint control of Wimco. Jatia Group intended to transfer the control of the target company by transferring their shares in favour of Swedish Group.

APPLICABILITY OF REGUALTIONS 11 AND 12:

With a view to arrive at an answer to the question, we may begin with Regulation 12. The said Regulation like Regulations 10 and 11 also speaks of public announcement. Such public announcement is required to be made irrespective of whether or not there has been any acquisition of shares or voting rights in a company. In either of the case, the acquirer is statutorily required to make public announcement of acquisition of shares and control of the target company in accordance with the regulations. The proviso appended to Regulation 12 curves out an exception as regard necessity of making public announcement. Explanation appended to Regulation 12, however, states that it would have no application where a change in control takes place pursuant to a resolution passed by the shareholders in a general meeting. As would be noticed shortly hereinafter, the proviso to Regulation 12 cannot be said to have any application in the instant case as by reason of the Explanation appended thereto, Regulation 12 would have no application.. Result in change in control over the target company in terms of Regulation 12 would come into being in two situations; viz. (i) by acquisition of share, or voting rights; or (ii) where there has been none.

A control over the target company may be achieved by amending the memorandum of association or by any other mode which necessitates a resolution to be passed by the shareholders in a general meeting. The expressions "in pursuance to a resolution passed by the shareholders in a general meeting" are crucial as the proviso will apply only when the change of control over the target company takes place otherwise than by acquisition of shares or voting rights.

The primal question would be as to whether Explanation (i) appended to Regulation 12 would bring the matter out of the purview of the regulation? In the fact of the present case, it does. Explanation appended to Regulation 12 postulates that where there are two or more persons in control over the target company (here Swedish Match Group and Jatia Group), the cessor of any one such person (Jatia Group) from such control shall not be deemed to be a change in control of management nor

shall any change in the nature and quantum of control amongst them constitute change in control of management. By reason of the said Explanation, a legal fiction has been created pursuant whereto or in furtherance whereof applicability of Regulation 12 is excluded. Change of control contemplated under Regulation 12 calls for a public announcement when the same is sought to be achieved by acquiring shares or voting rights. A change of control in terms of Regulation 12 may also take place pursuant to a resolution passed by the shareholders in a general meeting. Only in the latter case the proviso which carves out an exception would be attracted. The effect and purport of the first proviso may also be construed having regard to the second proviso appended thereto. The second proviso appended to Regulation 12 takes within its fold a case where the joint control to sole control is through sale at less than the market value of the share. It, therefore, speaks of a different situation, namely, control by transfer of joint control to sole control through sale was at less than the market value of the shares. In a case where the second proviso is attracted, the Explanation (1) will have no role to play. Situation, however, would be different when the transfer of joint control to sole control takes place through sale at a price which is higher than the market value of the shares leading to change in control over the target company, which cannot be done pursuant to a resolution passed by the shareholders in a general meeting in terms of the first proviso. In other words, in the event, the change in control is sought to be achieved by sale of shares at a price higher than the market value of the share, Regulation 12 will clearly be attracted making public announcement imperative. Such public announcement evidently is required to be made having regard to the fact that the interest of investors is required to be protected; pursuant whereto and in furtherance whereof the shareholder would be informed of the value of the share at which the transfer of control would take place so as to enable him to exercise his option to sell his shares at the price offered by the acquirer or continue to keep the same.

A general meeting of the shareholders of the target company had taken place but the same does not sub-serve the requirements of law inasmuch as, it would bear repetition to state, when transfer of control over the target company takes place by reason of acquisition of shares at a price higher than the market price the acquirer has a statutory obligation to make the public announcement. Such a statutory requirement is not capable of being waived by the majority shareholders. In this case, the records reveal that the shareholders were not informed that although the market value of the share was about Rs. 9.55, Jatia Group was offered the price of Rs. 35/- per equity share. It was merely disclosed that such acquisition would not be at a price lower than the market price. If such transfer was to take place at a price less than the market price, the second proviso appended to Regulation 12 would have been attracted. It was, therefore, obligatory on the part of the acquirer to furnish correct information as regard the price which was being offered to Jatia Group.

There may be cases where to some extent Regulations 11 and 12 may overlap. But Regulations 14, 15 and 16 clearly postulate that public announcement is required to be made in relation to transfer of shares attracting Regulations 10 or 11 not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein and in case of acquisition of control in terms of Regulation 12; not later than four working days after any such change or changes are decided to be made as would result in the acquisition of control over the target company by the acquirer.

In a given situation, a public announcement can be made upon compliance of both Regulations 11 and 12.

It is also not a case where Regulation 3 will have any application. Admittedly, the Appellants did not claim any exemption in terms of Regulation 3 nor were they eligible therefor. It is also not a case where change in control had taken place by reason of inheritance or succession but by reason of conscious act of transfer of shares by one acquirer from another.

In a case of this nature, thus, Regulation 12 would not apply, the logical corollary whereof would be that Regulation 11 will apply. Let us now consider the legal principles as regard 'Proviso and Explanation'.

In S. Sundaram Pillai, etc. Vs. V.R. Pattabiraman [AIR 1985 SC 582], a 3-Judge Bench of this Court held that proviso may serve four different purposes, namely:

> "(1) qualifying or excepting certain provisions from the main enactment;
>
> (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
>
> (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

Proviso to Regulation 12 exempts only a part of the main enactment. It does not take within its umbrage both the situations contemplated under Regulation 12.

As regard functions of an Explanation, it was opined:

> "52 (a) to explain the meaning and intendment of the Act itself,
>
> (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,
>
> (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
>
> (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

> (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

The Explanation was inserted evidently with a view to clear the obscurity occurring in Regulation 12 as regard a class of cases of cessation of joint control to sole control.

In Laxminarayan R. Bhattad and Others Vs. State of Maharashtra and Others [(2003) 5 SCC 413] this Court held that the proviso acted as an exception to the main provision but such an exception must be strictly construed and confined to the intent of the legislature. [See also Ali M.K. and Others vs. State of Kerala and Others (2003) 11 SCC 632 and Union of India vs. Sanjay Kumar Jain JT 2004 (6) SC 318].

In Dipak Chandra Ruhidas Vs. Chandan Kumar Sarkar [(2003) 7 SCC 66] it was held that in a case where a legal fiction created in the Explanation was construed to be validly made as thereby main provision was made absolutely clear and explicit, the legal fiction so created must also be given its full effect.

It is true that Regulation 12 could have been better worded but the application of Regulations 11 and 12 in a case of this nature is free from doubt. This is not a case where having regard to the explanations in the provisos and reading the provision in the manner we have done, it stands obscure. The Explanations (i) and (ii) are not Explanations to the provisos but the main part thereof.

It would, therefore, be not correct to contend that where there is a mere cessor of control by one out of two persons already in control or where any person or persons are given joint control and the combined degree of control is not greater than being presently exercised, a Resolution in general meeting would sub-serve the purpose, is devoid of any merit as change in control has taken place by reason of acquisition of shares from another person in control. Having regard to the fact that the price offered to Jatia Group was higher than the market price, a public announcement was imperative so as to enable the shareholders to elect as to whether to sell their shares held by them or not. No exemption from public announcement has been carved out by reason of the proviso appended to Regulation 12 as in terms of the Explanation, Regulation 12 would have no application. The purported resolution dated 27.9.2000 reads as under:

> "Resolved that the cession of their participation in the joint control of the company by the Jatia Group as of the date hereof such that Swedish Match AB and its subsidiary are in sole control of the company be and is hereby approved."

The said resolution is of no avail in the fact of the matter as neither the proviso nor the second explanation appended to Regulation 12 is attracted.

Furthermore, only because Regulation 12 also speaks of public announcement, the same by itself would not exempt the acquirer from making a public announcement in terms of clause (1) of Regulation 11. WAS THERE ANY REQUIREMENT TO COMPLY WITH REGULATION 11?

With a view to advert to the question, the admitted facts may be noticed.

Swedish Match Singapore agreed to acquire majority shareholding in Haravon and Seed subsequent to 17th December, 1997 wherefor the public offer was made. S.M.S. comprising of Haravon and Seed had 28.28% and 10.33% whereas Jatia Group comprising of AVP and Plash had 5% and 15% respectively whereas public/others had 41.39% shares. In concert with each other the two Groups acquired shares from public. On or about 25th August, 1999 by acquiring preferential shares the Swedish Match Group obtained 52.11% and Jatia Group obtained 24.11% as a result whereof in Wimco the shares held by public/others came down to 23.78%. Both Swedish Group and Jatia Group were exercising the joint control. By reason of Jatia Group opting out of the joint control by transfer of shares in favour of Swedish Match Singapore, a subsidiary of Swedish Match AB (a part of Swedish Match Group) obtained 74% of shares whereas shares i.e. Haravon 46.18%, Seed 5.93% and SMS 21.89%. Thus, the extent of shares of Jatia Group came down to 2.22%. Jatia Group sold their shares to public as a result whereof shares of public became 23.78%. S.M.S. is a subsidiary of the Singapore Match Group. The Swedish Match is the holding company being the owner of the 100% shares of SMS. It stands categorically admitted by the Appellants herein that acquisition of shares from Jatia Group in favour of SMS was done by the Swedish company as a group and not as an individual company. Factually, therefore, it is not correct to contend, although in its notice dated 28.1.2002, SEBI had given indication thereof, that SMS had acquired 21.89% shares of its own. Even if SMS had done so, Regulation 10 would apply as no public announcement was made therefor. S.M.S. was a part of the Swedish Match Group and they acquired 21.89% shares from Jatia Group. On or about 25th August, 1999, indisputably, Swedish Group and Jatia Group acted in concert with each other. By reason of acquisition made in September, 2000, Swedish Group, as acquirer, together with Jatia Group, had acquired more than 15% but less than 75% of shares. Any of those acquirers whether Swedish Match Group or Jatia Group, therefore, was prohibited from acquiring by itself any additional share entitling it to exercise more than 5% of the voting rights. Regulation 11 does not brook any other interpretation. If additional shares are acquired entitling an acquirer to exercise more than 5% of the voting rights, the statutory embargo to the effect that the acquirer (in this case Swedish Match Group) must make a public announcement to acquire shares in accordance with the Regulation comes into operation. The words "additional shares" are not terms of art. It speaks of acquisition of shares in addition to what it had got. Such acquisition of additional shares may be either from public or from a person with whom at one point of time the acquirer had acted in concert. If such a meaning is not assigned, the disjunctive clauses contained in the expressions "either by himself or through or with person acting in concert with him" may not carry a true and effective meaning.

The pre-conditions attracting Regulation 11 are: (i) that an acquirer had acquired shares in concert with another; (ii) such acquisition was more than 15% but less than 50% of the shares or voting rights in a company; (iii) in the event, the acquirer intends to acquire such additional shares or voting rights which would allow him to exercise more than 5% of the voting rights within a period of 12 months, public announcement is required to be made therefor. (iv) such acquisition of additional shares contemplates three different situations, i.e., the acquisition may be by acquirer himself or through or with the person acting in concert with the person with whom they had acquired shares earlier in concert with each other. Regulation 11, therefore, contemplates both situations, namely,

where substantial acquisition of shares may result in change of control and where it does not. Only because in a case where acquisition of additional shares may result in change of control, the same by itself would not exempt the acquirer from complying with the statutory requirement of Regulation 11. Primarily, Regulations 10, 11 and 12 operate in different fields which is manifested from a plain reading of Regulations 14, 15 and 16. We may, however, hasten to add that there may be a situation where Regulations 11 and 12 may overlap with each other, in which event, it would be open to the acquirer to issue a combined notice fulfilling the requirement of both Regulations 11 and 12.

Indisputably, the purport and object of which a regulation is made must be duly fulfilled. Public announcement is at the base of Regulations 10, 11 and 12. Except in a situation which would bring the case within one or the other 'exception clause', the requirement of complying with the mandatory requirements to make public announcement cannot be dispensed with.

Admittedly in this case no public announcement has been made. It may be true that the Board in its impugned order dated 4th June, 2002 proceeded on a wrong premise that having regard to the proviso appended to Regulation 12, Regulation 12 would be attracted. But the SAT, in our opinion, rightly construed the provisions of Regulations 11 and 12 in arriving at a finding that Regulation 11 would be attracted and Regulation 12 would not be. The tribunal was entitled to take a different view of the matter from that of the Board with a view to sustain the ultimate result in the appeal in exercise of its appellate power. Such a power in the appellate court/ tribunal is akin to or analogous to the principles contained in Order 41 Rule 33 of Code of Civil Procedure. Even otherwise before us the judgment of the Tribunal is in question, this Court is required to consider the correctness or otherwise of the Tribunal. In any event, the reasonings of the tribunal shall prevail over the Board. (See S. Shanmugavel Nadar (supra), para 17) Although we do not find any difficulty in construing the provisions of Regulations 11 and 12 but assuming Regulations 11 and 12 are not clear, the rule of purposive construction should be taken recourse to. It is now trite that when an expression is capable of more than one meaning, the Court would attempt to resolve that ambiguity in a manner consistent with the purpose of the provisions and with regard to the consequences of the alternative constructions. (See Clark & Tokeley Ltd. (t/a Spellbrook) Vs. Oakes [1998 (4) All ER 353].

In Anwar Hasan Khan Vs. Mohd. Shafi and Others [(2001) 8 SCC 540], this Court held:

> "8 It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction. The statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved ."

In Inland Revenue Commissioners Vs. Trustees of Sir John Aird's Settlement [1984] Ch. 382, it is stated:

> " Two methods of statutory interpretation have at times been adopted by the court. One, sometimes called literalist, is to make a meticulous examination of the precise words used. The other sometimes called purposive, is to consider the object of the

> relevant provision in the light of the other provisions of the Act the general intendment of the provisions. They are not mutually exclusive and both have their part to play even in the interpretation of a taxing statute."

It was also observed:

> "Where there is an exemption provision in a fiscal statute the onus is on a taxpayer to show that the exemption applies: Barron v. Littman [1953] A.C. 96 and Imperial Chemical Industries Ltd. v. Caro [1961] 1 W.L.R. 529."

In Indian Handicrafts Emporium and Others Vs. Union of India and Others [(2003) 7 SCC 589] this Court referred to various decisions including Peerless General Finance (supra) whereupon the Appellate Tribunal as also Mr. Raval placed strong reliance expounding the theories of purposive construction. (See also Ramesh Mehta Vs. Sanwal Chand Singhvi and Ors, JT 2004 (Suppl.1) SC 274) Regulations 10, 11 and 12 were amended in the year, 1997 having regard to the fact that the 1994 Regulations contained many loopholes, and, thus, the mischief rule should be resorted to so as to suppress the mischief which would have surfaced had the literal rule been allowed to cover the field. [See Reema Aggarwal Vs. Anupam and Others, (2004) 3 SCC 199] IS STRICT CONSTRUCTION OF THE REGULATION CALLED FOR?

A penal statute indisputably is required to be strictly construed. But a different situation may arise if the penalty is sought to be levied as a result of failure on the part of the person statutorily obliged to comply with the statutory provisions which are imperative in nature.

There may not be any doubt or dispute as regard the proposition that when words employed in a penal statute employs are not clear, the principle 'against doubtful penalisation' would be applied.

In Francis Bennion's Statutory Interpretation, Fourth Edition, at page 704, Section 271 it is stated that principle against penalization under a doubtful statute is a legal policy which would apply in a given situation but the learned Author himself states that different consequences of enactments are possible depending upon the text and context of the statute. In the same treatise at page 367, it is stated:

> "(2) A construction put forward may rely entirely on the literal meaning, or may elaborate (but still correspond to) the literal meaning, or may depart from the literal meaning in favour of a strained meaning. The court, where it considers (or prefers to say) that the literal meaning is unambiguous, will tend to decide in favour of what it regards as the unglossed literal meaning and reject other versions."

Referring to Trustees of Sir John Aird's Settlement (supra), the learned Author at pages 368 & 369 states:

> "Subsection (2) Where the enactment is grammatically ambiguous, the opposing constructions put forward are likely to be alternative meanings each of which is

> grammatically possible. Where on the other hand the enactment is grammatically capable of one meaning only, the opposing constructions are likely to contrast an emphasized version of the literal meaning with a strained construction. In the latter case the court will tend to prefer the literal meaning, wishing to reject the idea that there is any doubt.
>
> Example 149.2 In a tax avoidance case concerning capital transfer tax, the Court of Appeal were called on to construe the Finance Act 1975 Sch 5 para 6(7) as originally enacted. Counsel for the Inland Revenue put forward several alternative arguments on construction, but the court preferred the one based on the unglossed literal meaning. It may be conjectured however that the other arguments helped to convince the court that the Inland Revenue's case was to be preferred."

Failure to comply with a statute may attract penalty. But only because a statute attracts penalty for failure to comply with the statutory provisions, the same in all situations would not call for a strict construction. A statute ordinarily must be literally construed. Such a literal construction would not be denied only because the consequence to comply the same may lead to a penalty. This aspect of the matter has been considered by this Court in Indian Handicrafts Emporium (supra). Proceeding on the basis that there existed a dichotomy, the Court ultimately held that the resolution will have to be reached by reading the entire statute as a whole. [See also Reema Aggarwal (supra)] In Balram Kumawat Vs. Union of India and Others [(2003) 7 SCC 628] this Court held:

> "The Courts will therefore reject that construction which will defeat the plain intention of the Legislature even though there may be some inexactitude in the language used. [See Salmon vs. Duncombe [(1886) 11 AC 627 at 634]. Reducing the legislation futility shall be avoided and in a case where the intention of the Legislature cannot be given effect to, the Courts would accept the bolder construction for the purpose of bringing about an effective result. The Courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that the Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve. (See BBC Enterprises Vs. Hi-Tech Xtravision Ltd., (1990) 2 All ER 118 at 122-3)"

Referring to its earlier decisions, this Court :

> "36. These decisions are authorities for the proposition that the rule of strict construction of a regulatory/penal statute may not be adhered to, if thereby the plain intention of the Parliament to combat crimes of special nature would be defeated."

Let us now consider the decisions relied upon by Mr. Nariman.

In Avais (supra), the House of Lords was concerned with the construction of the meaning applied in Gaming machine. In that case itself, it was held:

> " The task of the courts is to ascertain in any particular case whether the conditions have been (or, as in this case, would be) complied with or not. There is no evident reason for interpreting the conditions otherwise than according to their natural meaning. Indeed, there is this point to be borne in mind in favour of a literal construction. If the conditions are not complied with, the club officials who allow the club premises to be used for the gaming are guilty of criminal offences. The Act would be setting a trap for them, if by some artificial construction of the provisions an apparently innocent financial agreement (such as accepting from the owner of the machines a guarantee of the club's takings) were held to involve or lead to a breach of the conditions."

The said decision, thus, runs counter to the submissions of Mr. Nariman. In this case also conditions are imposed in the matter of acquisition of shares. If the conditions have not been complied with, the Act having set up a trap for them, the logical consequences would ensue.

In The Seksaria Cotton Mills Ltd. (supra), the Court was dealing with the activities of a welfare agent vis-`-vis the meaning of 'possession' in the relevant Act. The Court found:

> "The facts are truly and accurately given according to the popular and natural meaning of the words used; nothing was hidden. The goods did reach the quota-holder in the end, or rather his proper agent, and we cannot see what anyone could stand to gain in an unauthorised way over the very natural mistake which occurred owing to what seems to have been a time-lag in the consequences of a change of agency. So, even if there was a technical breach of the law, it was not one which called for the severe strictures which are to be found in the trial court's judgment and certainly not for the savage sentences which the learned Magistrate imposed. In the High Court also we feel a nominal fine would have met the ends of justice even on the view the learned Judges took of the law."

In the aforementioned backdrop only, it was held:

> "In a penal statute of this kind it is our duty to interpret words of ambiguous meaning in a broad and liberal sense so that they will not become traps for honest, unlearned (in the law) and unwary men. If there is honest and substantial compliance with an array of puzzling directions, that should be enough even if on some hypercritical view of the law other ingenious meanings can be devised."

This is a case of non-compliance of mandatory statutory provisions and not of substantial compliance. It is also not a case involving unlearned or unwary men.

In Bhagirath Sharma (supra), the question which fell for consideration was whether 'tube' is included within the expression 'tyre'. Keeping in view the provisions of the Essential Commodities Prices and Stocks (Display and Control) Order, 1967, this Court applied the rule of strict construction.

Regulations being regulatory in nature, the intent and object sought to be achieved thereby must be firmly applied with. In this view of the matter, we are of the opinion that Regulations do not deserve strict constructions so as to hold that even a public offer was not necessary.

ANOTHER FACET OF THE CASE:

> Having held so, would it be proper for this Court to direct the Board not to take any penal action against the Appellants? The Board is an expert body. As a legislature, it makes the regulations, as an executive, it implements the legislation and in case of a breach it takes upon a quasi-judicial function. While functioning in its judicial capacity, it has wide discretion. It can initiate criminal proceedings in terms of Section 24 of the Act, issue directions in terms of Section 11-B and Regulation 44 as also take recourse to penal provisions as contained in Section 24 and Chapter VI-A of the Act. Its decision is final subject to the decision of the Tribunal. But the sequences of events, as noticed hereinbefore, clearly go to show that even the Board was not sure of the legal position.
>
> It in no uncertain terms held:
>
> "As the said change from joint to sole control took place in pursuance to a resolution passed by the shareholders in general meeting, the same would not trigger Regulation 12, same being covered under proviso to Regulation 12."

The Board even did not think it fit to apply the Explanation appended to Regulation 12 in its proper perspective.

It is only the Tribunal at a later stage came to a clear finding that proviso appended to Regulation 12 will have no application and Explanation would.

Before us also the Counsel read the regulations in question over and over again. Focus on certain words was placed differently at different times. It is only after considering the matter from different angles, we have been able to arrive at a definite conclusion.

In Trustees of Sir John Aird's Settlement (supra) upon taking into consideration several alternative arguments on construction of the Finance Act 1975 Schedule 5 para 6(7) as originally enacted, the Court preferred the one based on the unglossed literal meaning.

The adversarial system prevailing in India allows a counsel to put forward construction of the enactment in question relying on several alternative arguments and the Court may ultimately base its judgment on unglossed literal meaning. (See Example 149.5 of Francis Bennion's Statutory Interpretation, Fourth Edition, page 371). In the aforementioned backdrop, this Court thought it fit to consider as to whether in exercise of its jurisdiction under Article 142 of the Constitution of India a direction should be issued directing the Board to forbear from proceeding under Section 15H of the Act against the Appellant. It is accepted that once a public offer is made the investors would be

entitled to elect to transfer their shares at a higher price which may be offered by the acquirer with a view to acquire control over the target company. The investors would also be entitled to interest at such rate as the Board may determine. The provisions of Section 15H of the Act mandates that a penalty of rupees twenty-five crore may be imposed. The Board does not have any discretion in the matter and, thus, the adjudication proceeding is a mere formality. Imposition of penalty upon the Appellant would, thus, be a forgone conclusion. Only in the criminal proceedings initiated against the Appellants, existence of mens rea on the part of the Appellants will come up for consideration.

We, therefore, are of the opinion that it is a fit case where this Court should exercise its jurisdiction under Article 142 of the Constitution to direct the Board to forbear from proceedings with the adjudication proceeding against the Appellants. This may not, however, be treated to be a precedent. These appeals are allowed in part and to the extent mentioned hereinbefore. In the facts and circumstances of this case, there shall be no order as to costs.