Karamsad Investments Limited, GMM Pfandler Limited, Karamsad Holdings Limited and Karamsad Securities Private Ltd. Vs Nile Limited and Others

Court: Andhra Pradesh High Court

Date of Decision: Aug. 16, 2001

Acts Referred: Companies Act, 1956 â€" Section 108A, 108A(1), 108A(2), 108B, 108C
Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 â€" Regulation 10, 15, 7

Citation: (2002) 46 CLA 23 : (2002) 108 CompCas 58 : (2002) 1 CompLJ 251

Hon'ble Judges: J. Chelameswar, J

Bench: Single Bench

Advocate: Ravi S, for the Appellant; Y. Ratnakar, for the Respondent

Judgement

J. Chelameswar, J.
These four appeals are preferred against the common order passed by the Company Law Board, Southern Bench,

Chennai, in C. P. Nos. 15, 21, 22, 23/111-A/SRB of 1998. The appellants in Appeals Nos. 2, 3, 4 and 5 of 2001 herein were the petitioners in

C. P. Nos. 23,15, 21 and 22 of 1998 respectively before the Company Law Board. M/s. Nile Ltd. is the common respondent in all the appeals

herein and before the Company Law Board.

2. All the four company petitions were disposed of by the Company Law Board by its common order dated November 1, 2000. The appellant in

Appeal No. 3 of 2001, viz., M/s. Gujarat Machinery Manufacturing Limited (hereinafter shall be referred to as ""GMM"") is admittedly the holding

company of all the three other companies which are appellants in the other three appeals, i.e., Company Appeals Nos. 2, 4 and 5 of 2001.

3. The various dates and facts to be mentioned hereafter are culled out from the list of dates furnished by the appellants at the time of the hearing of

the appeals which list is directed to be made a part of the record.

4. The admitted facts are that between April 23, 1997, and February 11, 1998, GMM acquired 1,48,100 equity shares of the respondent-

company, viz., M/s. Nile Limited. Admittedly, the said quantum constituted 4.96 per cent. of the paid up share capital of the respondent-company.

Subsequently GMM acquired another lot of 1,38,100 equity shares of the respondent-company. There is dispute about the actual date of

acquisition of the said shares to which I shall advert later. But the fact remains that, the total number of shares thus acquired by GMM constituted

9.58 per cent. of the total paid up capital of the respondent-company.

5. On April 15, 1998, the board of directors of the appellant in Appeal No. 4 of 2001, i.e., Karamsad Holdings Limited (hereinafter referred to as

KHL"") resolved to acquire up to 6,00,380 shares of the respondent-company which would constitute 20 per cent. of the subscribed equity share

capital of the respondent-company. In view of the fact that KHL decided to acquire up to 20 per cent. of the shares of the respondent-company

and in view of the stipulation contained in regulation 10 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and

Takeovers) Regulations, 1997 (for short ""the Regulations""), framed under the Securities and Exchange Board of India Act, 1992, by virtue of

power vested in it u/s 30 of the Act, which obligated persons acquiring shares or voting rights of any ""company"" beyond 10 per cent. of the total

share capital of such company to make a public announcement, as stipulated under regulation 15 of the regulations, KHL made a publication in

various newspapers as required under the regulation. However, the company could acquire only 18,300 shares pursuant to the said public offer.

6. On May 13, 1998, the board of directors of the appellant in Appeal No. 2 of 2001, viz., Karamsad Investments Limited (hereinafter referred to

as ""KIL"") resolved to acquire up to four lakhs of equity shares of the respondent-company. In pursuance of the said decision, it appears that KIL

did in fact acquire 3,15,595 equity shares of the respondent-company between June 4, 1998, and July 2, 1998, on the stock exchange.

Thereafter, on September 4, 1998, KIL forwarded the above-mentioned shares to the respondent-company for registration.

7. On September 4, 1998, the appellant in Appeal No. 5 of 2001, viz., Karamsad Securities Private Limited (hereinafter referred to as ""KSPL"")

forwarded 10,000 equity shares of the respondent-company acquired by them between June 30, 1997 and February 11, 1998, for the purpose of

registration.

8. Thus, admittedly, between April 23, 1997, and July 3, 1998, the appellants herein acquired 6,30,095 equity shares of the respondent-company,

though the acquisitions were made on different dates. The said shares constituted 21.08 per cent. of the paid up equity share capital of the

respondent-company.

9. The respondent-company by resolution of its board of directors dated May 7, 1998, resolved to refuse registration of the ownership of the

shares of GMM in so far as 2,86,200 shares acquired by it are concerned. The same board by another resolution dated October 30, 1998,

resolved to refuse registration of the ownership of the shares acquired by the other three appellants herein. The fact that the respondent-company

refused such registration, mentioned above, was intimated to these companies. In so far as GMM is concerned the same was intimated by letter

dated May 7, 1998. In so far as KHL is concerned the same was intimated by letter dated September 21, 1998, and in so far as KIL and KSPL

are concerned the same was intimated by letter dated September 28, 1998.

10. On May 11, 1998, the respondent-company informed the Department of Company Affairs, Government of India, that there was violation of

Section 108A of the Companies Act by GMM and requested the Government to take appropriate action in that regard. By another letter on the

same day, the respondent-company also complained to the SEBI regarding the violation of Section 108A of the Companies Act and the

regulations framed under the SEBI Act.

11. On receipt of intimation from the respondent-company refusing to register the transfer of shares in favour of GMM, GMM by letter dated

September 12, 1998, called upon the respondent-company to furnish a copy of the minutes of the meeting where the decision to reject registration

was taken.

12. On May 22, 1998, the respondent-company filed a writ petition, W. P. No. 14014 of 1998 in this court seeking a declaration that the public

offer made by KHL (referred to earlier) was illegal and inoperative. On May 28, 1998, this court directed the Department of Company Affairs to

consider various representations made by the respondent-company herein and to pass appropriate orders. Eventually the writ petition came to be

disposed of by order dated June 30, 1998, by this court on the ground that nothing survived in the writ petition since the Department of Company

Affairs was considering the complaint filed by the respondent-company.

13. A letter dated July 24, 1998, addressed by the Government of India, Department of Company Affairs to the solicitors of the three subsidiary

companies of GMM (it is admitted by learned counsel on both the sides that such a communication was made by the Department of Company

Affairs in response to the complaint made by the respondent-company about the violation of Section 108A of the Companies Act.) By the said

communication, the Department of Company Affairs opined that GMM is a ""dominant undertaking"" for the purpose of Section 108G, read with

Section 108H of the Companies Act. The expression ""dominant undertaking"" is defined in Section 108H of the Companies Act to have the same

meaning as assigned to that expression in the Monopolies and Restrictive Trade Practices Act, 1969. Aggrieved by the conclusion reached by the

Department of Company Affairs both GMM and KHL filed a writ petition, W. P. No. 2227 of 1998 in the Bombay High Court and the same is

still said to be pending.

14. Aggrieved by the decision of the board of directors of the respondent-company in rejecting the registration of the shares acquired by the

appellants herein, the appellants herein approached the Company Law Board invoking its jurisdiction u/s 111A of the Companies Act. The

Company Law Board, by its common order dated November 1, 2000, as already mentioned, dismissed the petitions (since reported in Gujarat

Machinery Manufacturers Ltd, v. Nile Ltd. [2001] 105 CC 817). Hence, the present appeals.

15. While dismissing the petitions filed by the appellants, the Company Law Board recorded a finding that (page 824) :""..... the petitioners are

acting in concert, being a holding and subsidiary companies--to acquire the shares in the company and therefore they fall within the definition of

Clause 2 (e) of the Take over Code"". The Company Law Board also held that the acquisition of shares by GMM and its subsidiaries is in

contravention of Clause 7 of the regulations. Apart from that the Company Law Board also held that the Government of India had already taken a

view that GMM is a dominant undertaking for the purpose of Section 108G of the Companies Act and therefore in view of the stipulation made in

Section 108A of the Companies Act, the previous approval of the Government ought to have been obtained and in the absence of such a previous

approval, the acquisition of shares by the appellants herein is illegal and consequently held that the refusal on the part of the respondent-company

to register the acquisition of shares by the appellants is valid and held to be for ""sufficient cause"", as contemplated under Sub-section (2) of Section

111A of the Companies Act.

16. On behalf of the appellants Sri Chagla, learned counsel made the following submissions, that the order of the Company Law Board rejecting

the petitions of the appellants herein is illegal for the reason,

(1) that the respondent-company in its decisions to reject the registration of the ownership of the shares of the appellants herein never mentioned

anything about the contravention of regulation 7 of the Takeover Regulations of 1997 referred to earlier.

(2) that the expression ""sufficient cause"" occurring u/s 111(2) proviso takes within its sweep only those contingencies contemplated under Sub-

section (3) of Section 111A. Therefore the rejection by the respondent to register the shares, for the reasons, which are not covered by Sub-

section (3), are not sufficient reasons for refusing.

(3) that the decision of the Company Law Board in so far as it held that the acquisition of the shares held by GMM and its subsidiaries is in

contravention of regulation 7 of the Takeover Regulations for the reason that the requisite intimation contemplated under the said regulation is not

made within the period of four days is factually incorrect. Assuming for the sake of arguments that such an intimation was not made within the

stipulated period of four days, the consequences of such a violation would only be the exposure of the appellants to penal action under the

provisions of the SEBI Act but cannot authorize the respondent to refuse the registration of the ownership of shares. Ancillary to this submission,

learned counsel further submitted that the stipulation under regulation 7 calling upon the acquirer to intimate the ""target company"" is not mandatory

but only directory.

17. Learned counsel fairly submitted that the decision of the Government of India to the effect that GMM is a ""dominant undertaking"" as defined

u/s 108H read with the Monopolies and Restrictive Trade Practices Act 1969, is the subject-matter of an attack before the Bombay High Court in

a writ petition, the details of which are already mentioned earlier. Therefore, for the purpose of present case he would proceed on the basis that

GMM is a ""dominant undertaking"", still it is not under an obligation to obtain the previous approval of the Central Government before the

acquisition of the shares is made as the expression ""agree to acquire"" occurring in Section 108A only contemplates a concluded agreement

between an intending purchaser of shares and an intending seller. Obtaining the previous approval of the Central Government, the moment a

decision is taken by KHL to acquire 20 per cent. of the equity share capital of the respondent is not contemplated u/s 108A of the Companies Act

as held by the Company Law Board.

18. For deciding the correctness of the submissions made by learned counsel for the appellants an analysis of various provisions of law applicable

to the case is required. The subject of transfer of shares of companies is dealt with under Sections 108 - 112 of the Companies Act. Section 108

prescribes the various conditions which are required to be complied with before a transfer of shares is registered by the company, the details of

which may not be necessary for the purpose of present case.

19. Sections 108A to 108-1 as they appear in the statute today were inserted by the MRTP (Amendment) Act, 1991, with effect from September

27, 1991.

20. Section 108A mandates that no person shall acquire more than 25 per cent . of the paid up equity share capital of a public company or a

private company, which is a subsidiary of a public company except with the previous approval of the Central Government. A much closer analysis

of Section 108A is required to be made, but at a later stage. Section 108B mandates that whenever shares of some company are held by a body

corporate or bodies corporates under the ""same management"" to the extent of 10 per cent. or more, they shall intimate to the Central Government

if they propose to transfer any portion of their holding to any other person. In this regard, the transferring company is required to furnish certain

particulars mentioned in the section to the Central Government and this section also contemplates certain action to be taken by the Central

Government wherever felt necessary, the details of which may not be necessary for the present purpose.

21. The point then required to be emphasized in this regard is that Section 108B, in substance, restricts or regulates the right of the holder of the

shares to transfer such shares where such holder happens to be a body corporate and also happens to hold more than 10 per cent. of the total

equity share capital of a company.

22. Section 108C on the other hand imposes certain restrictions on the right of bodies corporate described in the section to transfer the equity

share capital of the ""foreign company"" in favour of a citizen of India or body corporate incorporated in India. The section stipulates that before any

such transfer is made the previous approval of the Central Government is required to be taken in all those cases where the transferor happens to

hold 10 per cent. or more of the equity share capital of the foreign company.

23. Section 108D empowers the Central Government to direct any company not to give effect to the transfer of any shares if in the opinion of the

Central Government, such a transfer would result in a change in a controlling interest of the company and in the opinion of the Central Government

such a change would be prejudicial to either the interest of the company or the public.

24. Section 108E prescribes the time-limit within which the Government is required to accord its approval in cases falling u/s 108A or 108C and

the consequences of the non-communication of the decision of the Central Government within the period stipulated therein. Section 108F declares

broadly that various restrictions contemplated under Sections 108A to 108D shall not apply to companies held by the Central Government,

bodies" corporate and ""financial institutions"" an expression defined under the MRTP Act.

25. Section 108G declares that the provisions contained in Sections 108A to 108F Shall apply to the acquisition or transfer of shares by or to, as

the case may be the various persons mentioned therein in cases where such an acquisition is by the owner in relation to a dominant undertaking.

(Both the expressions ""owner"" and ""dominant undertaking"" bear the same meaning assigned to them under the MRTP Act.) It is further stipulated

that if as a result of such an acquisition of shares by the owner of a dominant undertaking, the consequences stipulated under Sub-section (a)(i)(ii)

follow or in the alternative where such an acquisition or transfer itself would have the effect of making the acquirer of such shares, the owner of a

dominant undertaking, Sub-section (c) of Section 108G also stipulates that the restrictions contained under Sections 108A to 108F would also

apply, in cases where the owner in relation to a dominant undertaking is seeking to transfer his shares of share capital.

26. Section 108H defines certain expressions like dominant undertaking, etc., employed in the preceding sections. Section 108-1 provides for the

penalties for the contravention of the preceding sections. The analysis of other Sections in the group other than the Sections 111 and 111A, in my

view is not required for the purpose of present case.

27. Section 111 recognizes certain contingencies under which a company is entitled to refuse registration of the transfer of its shares and the

procedure for such refusal and the remedy of the person seeking the transfer. But in view of the language of Sub-section (14) of Section 111, the

content of Section 111 is applicable only to private companies and private companies, which have become public companies by virtue of operation

of Section 43A of the Companies Act.

28. Section 111A deals with companies other than those covered u/s 111 subject of course to the clarification that wherever the context required,

it also applies to companies covered u/s 111 also. Sub-section (2) of Section 111A declares that the shares or debentures and any interest therein

of a company shall be freely transferable ; this freedom is subject to the other parts of Section 111A. A closer analysis of Section 111A is required

but at a later stage.

29. In substance, the scheme of the above-mentioned provisions appears to be that the shares of public companies are freely transferable and the

right of transfer cannot be restricted by the company. But in the interest of the company or in public interest, the Central Government is required to

monitor the transfer of shares of public companies where the transfer is made in bulk or the transfer is made by or in favour of the owner of a

dominant undertaking"" or the transfer itself has the effect of making the acquirer the owner of a dominant undertaking. The purpose of imposing

such restrictions on the right to acquire or to transfer shares which is property, seems to be the need to monitor and regulate the stock markets as

the recent economic history of this country demonstrated the need for such monitoring, secondly the need to control acquisition or transfers by the

owners of dominant undertakings as those undertakings could seriously affect the supply of materials to the society and also perhaps to see that the

control of industrial undertakings does not go into the hands of inexperienced and inefficient as the same might seriously affect the availability of

goods or services to the society. The scheme, when it imposes a condition that the previous approval of the Central Government is required to be

taken in the various instances mentioned under the various provisions discussed above implies that in an appropriate case the Government could

withhold or decline to accord such permission.

30. In the context of the present case, the provisions of Sections 108A and 111A require a much closer analysis. Section 108A reads as follows :

108-A. (1) Except with the previous approval of the Central Government, no individual, firm, group, constituent of a group, body corporate or

bodies corporate under the same management, shall jointly or severally acquire or agree to acquire, whether in his or its own name or in the name

of any other person, any equity shares in a public company, or a private company which is a subsidiary of a public company, if the total nominal

value of the equity shares intended to be so acquired exceeds, or would, together with the total nominal value of any equity shares already held in

the company by such individual, firm, group constituent of a group, body corporate or bodies corporate under the same management, exceed

twenty-five per cent. of the paid-up equity share capital of such company.

(2) Where any individual, firm, group, constituent of a group, body corporate or bodies corporate under the same management (hereafter in this

Act referred to as the acquirer), is prohibited, by Sub-section (1), from acquiring or agreeing to acquire except with the previous approval of the

Central Government, any share of a public company or a private company which is a subsidiary of a public company, no-

(a) company in which not less than fifty-one per cent. of the share capital is held by the Central Government; or

(b) corporation (not being a company) established by or under any Central Act; or

(c) financial institution,

shall transfer or agree to transfer any share to such acquirer unless such acquirer has obtained the previous approval of the Central Government for

the acquisition, or agreement for the acquisition, of such share.

31. Sub-section (1) prohibits the acquisition of the equity shares in public company or a private company, which is a subsidiary of a public

company by the various categories of persons mentioned therein either jointly or severally without the previous approval of the Central

Government. Apart from the well known legal persons like natural persons, firms and bodies corporate, two more entities described as a ""group

and ""constituent of a group"" are also brought within the sweep of this prohibition. The expression group by virtue of Section 108H of the

Companies Act shall have the same meaning as assigned to it under the MRTP Act though the expression ""constituent of a group"" is not defined

anywhere, it must be understood in the normal grammatical sense in the context of the proceeding expression group. But Section 108A does not

demand the previous approval of the Central Government in every case of acquisition of shares. Such an approval is required only when the ""total

nominal value of the equity shares intended to be so acquired exceeds"" 25 per cent. of the paid up equity share capital of such company. Sub-

section (2) mandates that any company in which not less than 51 per cent. of the share capital is held by the Central Government or a corporation

or a financial institution (once again a defined expression under the MRTP Act) shall not transfer or agree to transfer any shares to any one of the

categories of the persons mentioned in Sub-section (1) called the acquirers unless such acquirer has obtained the previous approval of the Central

Government for the acquisition or agreement for acquisition of such shares. In substance, Sub-section (1) places an embargo on the acquirer

whereas subsection (2) places an embargo on the various kinds of public bodies (intending transferors) mentioned therein from transferring or

agreeing to transfer any shares held by them in favour of an acquirer who has not obtained the previous approval of the Central Government but

obliged to obtain the same in view of Sub-section (1).

32. In my view, the embargo both on the acquirer and the transferor although in a limited variety of the cases, has significance in the context of the

penal provisions of Section 108-1.

33. Section 108G makes the restrictions adumbrated u/s 108A applicable to the acquisition by or transfer to of the various categories of

acquirers"" mentioned u/s 108A(1), who are the owners of a dominant undertaking or would become the owners of a dominant undertaking as a

consequence of such acquisition or transfer by the owners of dominant undertakings. To understand the exact purport of Section 108G, it requires

a much closer scrutiny of the same, I do not propose to go into the same as it is not required for the present case.

34. The next question is as to the meaning to be given to the expression ""agree to acquire"" occurring u/s 108A(1) of the Companies Act. The

expression ""agree"" or ""agreement"" presupposes the existence of more than one person to the transaction. In the context of transfer of shares

according to learned counsel for the appellants, such person could be only the intending purchaser and the prospective seller of the shares and only

when both the persons reach an agreement, the transfer of shares is possible. Learned counsel for the appellants argued, that to interpret Section

108A in such a way as requiring the intending acquirer to seek the approval of the Central Government even before an agreement with the

prospective sellers is entered into would be highly unreasonable and impracticable. According to learned counsel, a decision by any acquirer may

be taken to acquire more than 25 per cent. of the shares of any company, but he may not really pursue the same or even if he pursues he may not

fully succeed in achieving his goal, in either case, the approval would be unnecessary.

35. In the present case, admittedly, the previous approval of the Central Government as required u/s 108A was not taken by the appellants.

36. On the facts of the case, at least by March 25, 1998, GMM admittedly, acquired 9.8 per cent. of the paid up capital of the respondent-

company and on April 15, 1998, one of the subsidiaries that is KHL resolved to acquire up to 20 per cent. of the shares of Nile, which resolution

if accomplished would have made the total holding of these two companies, more than 25 per cent. of the equity share capital of the respondent-

company. However, KHL could acquire pursuant to its resolution, in the public offer, only 18,300 shares. It is an admitted fact that 6,00,380

equity shares of the respondent-company would represent 20 per cent. of the subscribed equity share capital of the respondent-company as can

be seen from the public announcement made by M/s. KHL. It is also an admitted fact that the four appellants herein together, did in fact acquire

6,30,095 shares. Therefore, the entire acquisition by all the four appellants put together did not cross the prescribed limit of 25 per cent. u/s

108A(1) of the Companies Act. The Company Law Board while deciding the aspect of the violation of Section 108A of the Act held that the

previous approval of the Central Government is required even to implement a proposal to acquire shares beyond 25 per cent.

37. Learned counsel for the appellants argued that such a requirement is not contemplated u/s 108A of the Act. Learned counsel further submitted

that what is prescribed u/s 108A of the Act is either an acquisition of 25 per cent. or more of the shares of a company or an agreement to acquire

the same without the previous approval of the Central Government but not the decision of the intending acquirer. According to learned counsel, the

agreement contemplated u/s 108A of the Act is an agreement between the intending acquirer and the prospective seller.

38. I am not able to agree with the submission made by learned counsel for the appellants, for the reason, that the expression ""agree to acquire

occurring in Section 108A of the Act has only reference, in my view, to an agreement between some of the persons enumerated in the preceding

clause in that Section to jointly acquire the shares of a company, but not to an agreement between the intending purchaser and the prospective

seller. The expression ""agree to acquire"" which immediately follows the clause "". . . shall jointly or severally acquire ..,"" in my view, makes the

intention of the Legislature clear that the agreement to acquire contemplated therein is an agreement in the context of a joint acquisition by some of

the enumerated categories of persons in the said section. This view of mine gains further strength from the language of the later part of the same

section which says ""... if the total nominal value of the equity shares intended to be so acquired . . ."" The expression ""intended"" is significant in this

context. Obviously, the Legislature in its wisdom thought that the Union of India must have the information regarding the acquisition of shares in any

company beyond 25 per cent. the moment a prospective acquirer either severally or jointly with some other person takes such a decision. The

reason for such a stipulation, to me, appears to be that not only the actual acquisition of the shares of a company but even a decision to acquire in

bulk, depending on the person taking such a decision, would have a serious effect on the stock market. Apart from that the decision of the

intending acquirer if implemented would have serious impact on the management of the target company and in some cases even on the community

at large depending on the nature of the industry run by the target company.

39. If that is the true meaning and import of Section 108A of the Act, applying the same to the facts of the case the acquisition by GMM was

complete at least by March 26, 1998. The decision of KHL to acquire 20 per cent. of the equity share capital of the respondent-company is on

April 15, 1998. The intention of KHL to acquire 20 per cent. coupled with the fact that the holding company of KHL (GMM) by then held 9.58

per cent. of the paid up share capital of the respondent-company makes the requirement of obtaining the previous approval of the Central

Government imperative u/s 108A of the Act. It is not available on the record whether there was any agreement between GMM and KHL to

acquire beyond 25 per cent. of the equity share capital of the respondent-company, In fact, only those two bodies can make it clear whether there

was any such agreement or not as it is a matter of the internal affair of those two companies--one the holding company and the other subsidiary

company. In the absence of any material on record to show as to when such an agreement between these two bodies came into existence, the only

inference that can be drawn is that, at least by April 15, 1998, when KHL resolved to acquire 20 per cent. of the share capital of the respondent-

company, there was an agreement between these two bodies to acquire more than 25 per cent. of the shares of the respondent-company having

regard to the inter-relationship between the said two companies. That raises two further questions : (1) whether it was GMM or KHL which is

required to obtain the previous approval of the Central Government ? In view of the fact that there is nothing on the record to show that by March

26, 1998, by which date at the latest GMM completed the acquisition of 9.58 per cent. of the share capital of the respondent-company/ there was

an agreement to acquire beyond 25 per cent. of the share capital of the respondent-company as explained above, GMM need not have sought the

previous approval of the Central Government. It was the decision of the KHL to acquire 20 per cent . of the share capital of the respondent-

company which calls for the previous approval of the Central Government. In view of the fact that the holding company of KHL (i.e., GMM)

already held 9.58 per cent. of the share capital of the respondent-company making the intention of both the bodies to acquire 25 per cent. of the

shares, it is only the KHL which is required to obtain the previous approval of the Central Government. Then the second question is as to what

should happen to the shares acquired by the GMM ? In view of the conclusion reached above by me that there is no violation of the provisions of

Section 108A of the Act in so far as GMM''s acquisition of 9.58 per cent. of the respondent-company''s share capital is concerned, the same is

required to be registered by the respondent if the acquisition is otherwise in accordance with law. On the other hand, the acquisition of 18,300

shares by the KHL as already discussed above is in contravention of the provisions of Section 108A of the Act. The respondent-company is

justified in refusing to register the same.

40. Coming to the acquisition of 3,15,595 shares acquired by KIL--another subsidiary company of GMM, the resolution to make such an

acquisition was admittedly made on May 13, 1998. To decide whether such a decision would fall within the prohibition contained u/s 108A of the

Act, the fact that the holding company GMM had already acquired by then 9.58 per cent. of the equity share capital of the respondent-company

and another subsidiary of the same holding company, i.e., KHL had by then, i.e., April 15, 1998, resolved to acquire up to 25 per cent. of the

share capital of the respondent-company are relevant in view of the inter-relation between the three bodies. The decision of KIL coupled with the

existing decision of KHL to acquire 25 per cent. shares of the respondent-company by itself would make KIL liable to obtain the previous

approval of the Central Government as required u/s 108A of the Act as the decision of KIL coupled with the decision of KHL would make the

intention of both the bodies put together clear that they intended to acquire more than 25 per cent. shares of the respondent-company. Apart from

that it must be remembered that by the said date the holding company had already acquired 9.58 per cent. paid up share capital of the respondent-

company. Therefore, in my view, the respondent-company was justified in refusing to register the shares acquired by KIL.

41. Coming to the legality of the acquisition of 10,000 shares of the respondent-company by KSPL--the third subsidiary company of GMM,

nothing is available on record as to when the decision to make such an acquisition was made nor the actual date of the acquisition. The only

admitted fact available on record is that on September 4, 1998, KSPL forwarded the said 10,000 equity shares to the respondent-company for

registration, by which date the resolutions of both KHL and KIL--the other two subsidiaries of GMM to acquire more than 25 per cent. of the

equity share capital of the respondent-company were in existence and the holding company, i.e., GMM had already acquired 9.58 per cent. of the

respondent-company''s equity share capital. In the absence of any specific material as to the exact date of the acquisition, it is not possible for this

court to decide whether the same is hit by Section 108A of the Companies Act as in my view, if the acquisition was prior to April 15, 1998 (the

date on which KHL resolved to acquire 20 per cent. of the respondent-company''s share capital), such an acquisition would not be hit by Section

108A and if the acquisition was later than the above-mentioned date the same would be hit by Section 108A. Therefore, the appeal of KSPL, i.e.,

Company Appeal No. 5 of 2001 is required to be remanded to the Company Law Board for recording evidence in this regard.

42. The next issue that is required to be dealt with in these appeals is--whether the acquisition of the shares by the appellant companies herein or

any one of them is in contravention of the regulations of the SEBI (Substantial Acquisition of Shares and Take Over) Regulations, 1997, framed by

the Securities and Exchange Board of India. Before such an enquiry is embarked upon a brief survey of the scheme of the regulations is necessary.

The regulations are divided into five Chapters. Chapter I deals with the definitions of various expressions used in the Regulations and the

applicability of the Regulations, etc. Three expressions ""acquirer"", ""person acting in concert"" and ""target company"" defined therein are relevant for

the purpose of the present case.

43. Chapter II deals with the obligations of the ""acquirer"" and the ""target company"" to make disclosure as stipulated therein in all cases where the

shares are held or acquired by any person in excess of 5 per cent. Chapter III deals with the acquisition of shares by any acquirer beyond 15 per

cent. and consequential obligations of such an acquirer. The further details of Chapter III may not be required for the present.

44. Chapter IV deals with bail out take-overs with which we are not concerned in the present case. Chapter V deals with the authority, obligations

and procedure of the Securities and Exchange Board of India to conduct investigations into the violations of the regulations. Regulation 45 which

occurs in the said Chapter deals with the penalties for the violation of the regulations.

45. Regulation 7 reads as follows :

(1) Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to

more than five per cent. shares or voting rights in a company, in any manner whatsoever, shall disclose the aggregate of his shareholding or voting

rights in that company, to the company.

(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 ; or

(b) the acquisition of shares or voting rights, as the case may be.

(3) Every company, whose shares are acquired in a manner referred to in Sub-regulation (1), shall disclose to all the stock exchanges on which the

shares of the said company are listed the aggregate number of shares held by each of ""such persons referred above within seven days of receipt of

information under Sub-regulation (1).

46. It can be seen from the above that regulation 7(1) deals with the obligation of the acquirer to disclose the aggregate of his shareholding if he

happens to be of more than 5 per cent. of the shares of any particular company. Sub-regulation (2) prescribes the time-limit within which the

disclosure contemplated under Sub-regulation (1) is to be made. Sub-regulation (3) deals with the obligations of the company the shares of which

are acquired as contemplated under Sub-regulation (1).

47. A close analysis of regulation 7 (1) shows that an ""acquirer"" who acquires more than 5 per cent. of the shares of the particular company or

who has acquired some shares of a particular company coupled with the existing shareholding of such an acquirer in the same company would

make him the holder of more than 5 per cent. of the shares of a particular company, he is called upon to make a disclosure of the aggregate of his

shareholding to that particular company within the period stipulated under Sub-regulation (2) ; whereas regulation 10 occurring in Chapter III reads

as follows :

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) 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.

48. Regulation 10 mandates that no acquirer shall either acquire 15 per cent. or more of the shares of any particular company, or such number of

shares coupled with the existing shareholding of such an acquirer in the same company would make him the holder of more than 15 per cent. of the

shares unless such an acquirer makes a public announcement contemplated under the Chapter. The details of public announcement and the

procedure thereof may not be relevant for the purpose of this case.

49. It is sufficient to notice that there is a clear difference in the scheme of regulation 7 and regulation 10. While regulation 7 obligates the acquirer,

that on the acquisition of 5 per cent. or more of the shares of any company, to intimate the same to that company, regulation 10 mandates that no

acquirer shall acquire shares of any particular company beyond 15 per cent. without following the procedure mentioned under the Chapter.

50. The distinction in the scheme of both the above-mentioned regulations and the difference in the language of the above-mentioned two

regulations would be very relevant for the purpose of deciding the consequences of the acquisition made in violation of those regulations.

51. Coming to the facts of the case, GMM acquired a total of 2,86,200 shares in two lots. Admittedly, the first lot of 1,48,100 shares were

acquired between April 23, 1997, and February 11, 1998. The said shares admittedly constitute 4.96 per cent. of the total equity share capital of

the respondent-company. In which case, regulation 7 is not attracted. The second lot of 1,38,100 shares acquired by GMM according to it on

March 25, 1998. The Company Law Board refused to believe that the acquisition of the second lot of 1,38,100 of shares by GMM is made on

March 25, 1998, in the following words :

. . . that the petitioners are acting in concert, being a holding and subsidiary companies--to acquire the shares in the company and therefore they

fall within the definition of Section 2(e) of the Take Over Code . . . .

52. In my view, the finding is not based on the material on record, but it is purely a conjecture made by the Company Law Board. In a matter like

this where the dates of acquisition are very crucial, the Company Law Board in my view should have called upon the parties to adduce evidence to

establish the date of the acquisition of the shares before rejecting their claim that the shares were acquired on March 25, 1998. This requirement of

permitting the GMM to adduce evidence becomes all the more necessary in view of the fact that the respondent-company when it decided to

reject the registration of the transfer of 2,86,200 shares in favour of GMM by its resolution dated May 7, 1998, nowhere indicated that the

violation of regulation 7 of the Take Over Code is one of the grounds on which such a resolution was passed. Naturally, GMM did not know as to

what exactly the case that it is required to meet. Therefore, in my view, the appeal of GMM, i.e., Company Appeal No. 3 of 2001 is required to

be remanded to the Company Law Board for recording the evidence as to the date of the actual acquisition of the second lot of 1,38,100 shares

by GMM and if the entire lot is not acquired on the same day on what date did GMM''s acquisition exceed the limit of 5 per cent. shares

contemplated under regulation 7. But I do not propose to remand the appeal on this count, for the reason, that the violation, if any, on the part of

the GMM, in my view, does not affect the legality of the acquisition by the GMM, but the failure on its part if any to comply with an obligation

created under regulation 7 after the acquisition is validly made, might expose GMM to penalties contemplated under regulation 45 and nothing

more in the facts of the present case.

53. Coming to the issue of KSPL, I have already indicated that the appeal is required to be remanded for recording the evidence as to the actual

date of acquisition by the said appellant of the 10,000 shares of the respondent-company in the context of the alleged violation of Section 108A of

the Act. But even in the context of the violation of regulation 7 assuming for the sake of arguments that the acquisition of the said 10,000 shares is

made either simultaneously with the dates of the acquisition of the shares by GMM or prior to it thereby rendering the total shareholding of these

two companies more than 5 per cent. of the total share capital of the respondent-company. Even then the legality of the acquisition is not affected

but if the violation is established, it might expose the case to penalties under regulation 45.

54. In so far as the other two subsidiaries of GMM, KHL and KIL are concerned, the Company Law Board has not recorded any finding that

there was any violation of regulation 7. Therefore, those two appeals do not require any consideration from that angle.

55. The only question which still remains to be considered is that apart from the violation of any law in acquiring the shares is there any other

reason for which a company could refuse to register the transfer of shares ? As it is already noticed that Section 111A(2), proviso of the Act

contemplates the refusal to register the transfer of shares for ""sufficient cause"".

56. Learned counsel for the appellants--Sri Chagla very vehemently argued that the said expression ""sufficient cause"" should be understood only in

the light of the various grounds enumerated under Sub-section (3) of Section 111A of the Act, which authorized the Company Law Board to

direct any depository or a company to rectify its registers or records. Learned counsel further argued that in view of the language of Sub-section

(2) of Section 111A of the Companies Act which declares that the shares of any company shall be freely transferable, the conclusion such as the

one suggested by him is irresistible and the company cannot refuse to register the transfer of shares on any other ground whatsoever.

57. I regret my inability to agree with the submission made by learned counsel for the appellants. Sub-section (3) of Section 111A empowers the

Company Law Board to issue directions to a company to rectify its registers or records in cases where it is found by the Company Law Board

that the transfer of shares is in contravention of any one of the specified enactments under the said Sub-section or any other law for the time being

in force. Obviously, Parliament thought it fit to authorise the Company Law Board to look into the complaints of the acquisition of shares in

contravention of law and take appropriate action in that regard as nothing done in contravention of law shall be permitted to subsist. The scope of

the power under Sub-section (3) conferred on the Company Law Board is limited only to the acquisition of shares in contravention of law, but

violation of statutory law is not the only infirmity in the matter of acquisition of shares. In a given case, shares could be acquired or transferred by a

person in contravention of some existing contractual obligations of the transferor or some other obligation attached to those shares. The legal

position in the case of such contravention of contractual obligations is discussed in Palmer''s Company Law, 24th edition, at page 637 at para. 40-

34 :

If the shares have been acquired by means of a loan which requires payment of the debt out of specific property including those shares, such a

contract is enforceable by a grant of specific performance and creates an equitable interest in the shares in favour of the lender. A subsequent

equitable mortgagee of the shares, who proposes to deal with the shares in such a way as to cause a breach of that contract will be restrained by

injunction if he acquired them with actual knowledge of the contract.

58. This position of law stated by Palmer is based on a decision of the Court of Appeal reported in Swiss Bank Corporation v. Lloyds Bank Ltd.

[1980] 2 ALL ER 419.

59. The principle of law was confirmed by the House of Lords on an appeal from the above decision in Swiss Bank Corporation v. Lloyds Bank

Ltd. [1981] 2 ALL ER 449. Though on the facts of the case both the courts held that there was no violation of any contractual obligation. It

therefore follows that a party seeking to transfer shares held by him which would result in the breach of an obligation attached to the shares created

by a prior contract could be injuncted from transferring the shares. It logically follows that the transfer if made and registered even before the

aggrieved party could obtain an order of injunction, the transfer could be declared illegal in an appropriate action before a court of law. In which

case the company would be bound by such a declaration made by the court, of the illegality arising out of a breach of the contractual obligation and

bound to give effect to the decree of the court to refuse registration of transfer.

60. The declaration of free transferability contained in Section 111A(2) of the Companies Act, in my view must be understood in the background

of the preexisting legal position that, the Articles of association of a company could restrict the right of the shareholder, to transfer his shares. The

existence of such power is still recognized in the context of private companies u/s 111 of the Companies Act. But the right to transfer is the right of

the holder of the shares (property). In my view all that Section 111A(2) declares is that such a right cannot be restricted. However a transfer of

property requires always two parties ; the transferor and transferee. The declaration of the right of the transferor need not always create a

corresponding legal right in the transferee. For instance, to take an extreme example, a transferor decides to transfer his shares in favour of a

person who is legally incapacitated to enter into a contract ; like an alien enemy, or an insane person the transaction is clearly illegal in which case

the transferor cannot be heard to say that his right to freely transfer the shares held by him is curtailed. In such cases what is curtailed is the right of

the acquirer. From the examination of the scheme of Sections 108A to 108G it is clear that Parliament thought it fit to curtail the right of the

acquirers in certain cases, either in the interests of the company or the public (see Sections 108B(2), 108D). Though it is not made express in

Section 108A, the Central Government while exercising the authority under the said section is obviously required to keep in mind both the above-

mentioned factors, i.e., interests of the company and public. The language and the scheme of Section 108D makes the above clear.

61. Therefore if the interest of the company is one of the factors to be considered by the Central Government while granting or declining to grant

the approval u/s 108A or 108D, necessarily the Government is required to examine various factors like the impact of the acquisition on the

management of the company, whether such an impact is desirable, etc. In my view, the existing legal obligations of the company should also be one

of the factors.

62. If that is the true import of the scheme of Sections 108A to 108G, the company (target) would be equally entitled to at least make an

assessment of the probable impact of the registration of the acquisition of the bulk shares by any acquirer, on the interests of the company. If in the

process the company comes to the conclusion that registering such a transfer would be detrimental to the interests of the company, in my view the

company could certainly avail of the benefit of Section 108D and seek appropriate directions from the Central Government or in the alternative

itself take a decision to refuse registration and render itself liable for an appellate scrutiny by the Company Law Board as provided u/s 111A(2),

proviso.

63. Similarly if the transfer of shares in favour of a person is likely to create, or, would ultimately place the company itself, in a situation to make a

breach of certain existing contractual obligations of the company, thereby exposing the company to action in law, in my view the company would

be justified in refusing to register such transfer of shares.

64. In my view, the expression ""sufficient cause"" occurring in the proviso to Sub-section (2) of Section 111A of the Act takes within its sweep not

only those contingencies contemplated under Sub-section (3) but, there can also be circumstances and reasons other than those contemplated

under Sub-section (3) which might require the company to refuse to register the transfer of shares and such a refusal in my view would be refusal

for ""sufficient cause"".

65. Thus in my view, there can be various reasons, though it is not possible to enumerate all of them and it is to be decided on the facts of each

case, which could constitute ""sufficient cause"" for a company to refuse the registration of transfer of shares.

66. The submission of learned counsel for the appellants that in view of the language of Section 111A(2) there cannot be any other ground that

they are contemplated u/s 111A(3) cannot be accepted.

67. One of the reasons recorded by the respondent-company in its minutes dated May 7, 1998, and also October 30, 1998, is that the

respondent-company obtained the technology from M/s. Hakko Sangyo Company Limited of Japan on condition that the respondent-company

will not transfer either directly or indirectly the technology to any other individual or organization without the said Japanese company''s permission.

In this background, the respondent-company''s board opined as follows :

Nile started its glass lining operations more than a decade ago with technology from Hakko Sangyo of Japan. GMM''s technology is from

Pfaudler of USA, which has a 40 per cent. shareholding in GMM. Pfaudler also has manufacturing facilities in several countries, and is a direct

competitor of Hakko Sangyo in global market. Hakko Sangyo Company Limited has transferred the technology to Nile on the condition that it will

not be transferred directly or indirectly to any other individual or organization without Hako"s permission. If GMM were to acquire 30 per cent.

stake in Nile, it would be difficult for Nile to honour the confidentiality commitments given to Hakko Sangyo. Also, at the time of termination of the

technical collaboration between Nile and Hakko Sangyo it was agreed by both parties that Hakko would transfer new technologies to Nile as and

when developed on a case to case basis. This access to continued technological upgradation is vital to Nile"s survival and growth.

One such technology relates to the manufacture of glass lined shell and tube heat exchangers. Hakko is widely acknowledged as having by far the

best technology for their product. Hakko indicated that they would transfer their technology only if Nile can give an unconditional guarantee that

this technology would not be directly or indirectly passed on to any other individual/organization, who is a competitor.

If GMM were to acquire a 30 per cent. stake in Nile now there is every likelihood of Hakko backing out on the fears that GMM may one day be

able to get access to this critical technology and may ultimately let it fall into the hands of their competitor in the world market, viz., Pfaudler. Under

these conditions, Hakko will not part with either this or any other glass lining technology. If access to these new technological developments is thus

denied to Nile, it will be highly detrimental to the interests of Nile, and will threaten its very survival.

68. The language of the resolutions of the respondent-company by which they decided to refuse the registration of the transfers in favour of the

appellants herein does not clearly indicate what exactly is the obligation owed by the respondent to the Japanese company and therefore it is not

possible for this court to make any assessment whether the acquisition of shares by appellants herein would any way undermine the legal

obligations of the respondent-company to the above mentioned Japanese company or not.

69. In the result, all the four appeals are remanded to the Company Law Board for recording evidence as to what are the contractual obligations of

the respondent-company to the Japanese company which made available the technology to the respondent-company. In so far as the appeal

preferred by KSPL is concerned, the Company Law Board is also directed to record evidence as to the actual date of acquisition of 10,000

shares by the said company of the respondent-company and record a further finding whether the acquisition of 2,86,000 shares by GMM and

10,000 shares by KSPL would any way result in a situation by which the respondent-company will be compelled to violate any one of its

contractual obligations, if any, with the Japanese company from whom the respondent-company acquired technology and dispose of the appeals

accordingly.