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Bombay High Court

Case No: Writ Petition No. 174 of 1998 with Notice of Motion No. 256 of 2002

Harinarayan G. Bajaj		APPELLANT
	Vs	
Union of India (UOI) and Others		RESPONDENT

Date of Decision: Nov. 26, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 10
- Companies Act, 1913 - Section 153C
- Companies Act, 1956 - Section 2(1), 2(10), 2(7), 3, 397
- Control of Pollution Act, 1974 - Section 58(1)
- General Clauses Act, 1897 - Section 6
- Interpretation Act, 1978 - Section 16
- Scheduled Districts Act, 1874 - Section 5, 5A
- Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 - Section 10, 11(1), 12, 6, 9(1)
- Securities and Exchange Board of India Act, 1992 - Section 1(1), 11(B), 20, 24
- Securities Contracts (Regulation) Act, 1956 - Section 2, 21, 4

Citation: (2008) 1 ALLMR 604 : (2008) 2 BomCR 780 : (2009) 147 CompCas 579 : (2008) 82 SCL 79

Hon'ble Judges: J.N. Patel, J; A.A. Sayed, J

Bench: Division Bench

Advocate: F.E. D''Vitre, Aspi Chinoy, Zal Andyarujina and Krishna Raja, instructed, Dhru and Co, for the Appellant; Y.R. Mishra and Y.S. Bhate for Respondent No. 1, R.A. Dada, Senior Advocate and Kumar Desai, instructed by y., Maneksha and Sethna for Respondent No. 2, Phiroze Palkhivala and Ravi Gandhi, Kanga and Co. for Respondent No. 3, instructed by y, I.M. Chagla, Senior Advocate, N.H. Seervai, Senior Advocate, Shyam Mehta, Ruchi Narula, M.C. Arvind, Dimple Shah, Kersi Dastur and Firdaus Parsi, Mulla and instructed by y, Mulla and Craigie Blunt and Caroe for Respondent No. 5, P.N. Modi and Sagar Divekar, instructed by y, Wadia Gandhy and Co., for the Respondent

Final Decision: Dismissed

Judgement

J.N. Patel, J.
We have heard the learned Counsel for the parties.

2. This Writ Petition filed by the petitioner challenges the decision of the Appellate Authority u/s 20 of the Securities and Exchange Board of India Act, 1992, which dismissed the appeal preferred by the petitioner against the order dated 6th March, 1997 passed by the Securities and Exchange Board of India (S.E.B.I.) in the case of SESA Goa, which rejected the complaint lodged by the petitioner in the matter of acquisition of Sesa Goa Co. Ltd. by MITSUI & Co. of Japan through Finsider International Co. Ltd. It was the case of the petitioner that the said acquisition was in violation of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 (hereinafter referred to as "the Regulations of 1994") and in violation of the provisions of Clauses 40A and B of the Listing Agreement of the Stock Exchange.

3. In a nutshell, the facts of the case are that respondent No. 4, Finsider International Company (FINCO), held 51% shareholding in respondent No. 3, which is called "M/s. SESA Goa Limited" (SESA Goa). Respondent No. 4 is a 100% subsidiary of EARLY GUARD, which, in turn, is a 100% subsidiary of respondent No. 5, Mitsui & Company (MITSUI). Before respondent No. 4 became a 100% subsidiary of EARLY GUARD, it was a 100% subsidiary of LIVA, which was owned by a consortium of companies held by RIVA Group. In the course of time, the shareholding of respondent No. 4 changed hands from LIVA to EARLY GUARD. The control and management of respondent No. 3, therefore, passed on from RIVA Group to the MITSUI Group, and, therefore, the MITSUI Group now controls respondent No. 4. At the relevant time, the petitioner filed an application on 5th November, 1996, before respondent No. 2 challenging the acquisition of respondent No. 3 by respondent No. 5 through respondent No. 4 on the ground that the same was in violation of Regulations of 1994 and was also in violation of the provisions of Clauses 40A and B of the Listing Agreement of the Stock Exchange. As there was no response from respondent No. 2, the petitioner moved this Court in its Writ Jurisdiction, and by order dated 17th December, 1996 in Writ Petition No. 2385 of 1996, respondent No. 2 was directed to decide all questions arising out of the complaint, and pass final order after hearing all the concerned parties. It is pursuant to the order dated 17th December, 1996 passed by this Court that the petitioner and others were heard by the Chairman of respondent No. 2, who by his order dated 6th March, 1997 held that the provisions of the Takeover Regulations of 1994 would not be applicable in the facts and circumstances of the case, as the said Regulations did not contemplate any concept of change in the control and management requiring public offer. The Chairman of respondent No. 2 further held that the provisions of Clauses 40A and B could not be applied in this case, as there is no change in the position regarding the control of respondent No. 4 visavis respondent No. 3. This order dated 6th March,

1997 was challenged by the petitioner by way of appeal before the Appellate Authority constituted u/s 20 of the Securities and Exchange Board of India Act, 1992. By order dated 15th December, 1997, the Appellate Authority disallowed the appeal preferred by the petitioner, and held that the acquisition of respondent No. 4 by respondent No. 5 from the RIVA Group had not resulted in a change in control of respondent No. 3 insofar as the Indian shareholders of respondent No. 3 were concerned; and thus, the provisions of the Regulations of 1994 were not attracted.

4. It is the case of the petitioner that Regulation 9(1) required an acquirer to make a public offer if he / persons acting in concert with him acquired or agreed to acquire shares whereby he would be entitled to more than 10% of the voting rights of the target company (Sesa Goa Ltd. in this case). It is contended that the prerequisite for attracting Regulation 9(1) is not necessarily the acquisition of shares in the target company, but if the acquirer acquires any share which would give him more than 10% voting rights in the target company, then the obligation to make the public announcement / offer is triggered. Therefore, even if MITSUI through EARLY GUARD acquired shares of FINSIDER whereby it acquired 51% voting rights in the target company, provisions of Regulation 9(1) of the Regulations of 1994 would be attracted. It is the contention of the petitioner that SEBI in its impugned order failed to appreciate that the provisions of Regulation 9(1) would be triggered by way of acquisition of shares of any body corporate if, as a result of such acquisition, the acquirer acquires more than 10% voting rights in the target company, and, therefore, SEBI erred in holding that merely because no shares of target company were acquired, the said Regulation would not be attracted.

5. Another contention of the petitioner is that Regulation 9 (3) is triggered when an acquirer acquires securities which would entitle him to more than 10% of the voting rights of the target company, i.e., SESA Goa. It is his contention that the term ''securities''as defined in Section 2(h)(i) of the Securities Contract and Regulations Act, 1956 includes ''the shares''in a body corporate; and a body corporate would include any company incorporated outside India. Thus, Regulation 9(3) would be triggered if MITSUI through EARLY GUARD acquires and/or agrees to acquire shares of Finsider International (which would be a body corporate), as a result of which it acquires more than 50% of the voting rights of a company, and, therefore, it is the contention of the petitioner that the authorities failed to appreciate that the aforesaid interpretation of the Regulation is itself wrong, holding that the Take Over Regulations are not attracted merely because there is no direct acquisition of shares of the target company, and, therefore, the whole object of the Take Over Regulations is to give a fair deal to the investing public in the case of the take over by the raider company, which was overruled.

6. It is contended by the petitioner that the investor protection requires that even indirect take over of the target company could attract the provisions of the take over code if, in effect, substantial management, control and voting rights are acquired by

a raider company as a result of such an indirect acquisition, and, therefore, it is his case that the whole purpose of MITSUI in acquiring FINSIDER was to acquire 51% shareholding in SESA Goa and thereby its management control; and, according to the petitioner, the Listing Agreement, which, inter alia, contains Clauses 40A and 40B pertaining to take over, has statutory force by virtue of Section 21 of the Securities Regulations Act and compliance thereof is binding on SESA Goa as well as MITSUI.

7. It is the case of the petitioner that the authorities have failed to appreciate that as a result of acquisition of shares / securities of FINSIDER, MITSUI has in effect acquired substantial voting rights, management and control of SESA Goa, and, therefore, the Listing Agreement, which has statutory force, must be held to be arising on any acquirer which, in effect, proposes to take over an Indian listed company, whether such acquirer is a foreign company or not. Therefore, the authorities failed to appreciate that Clause 40B(2)(b) casts an obligation on the target company, SESA Goa, in the present case, apart from the raider to make a public offer in the event of a take over bid, and, therefore, they ought to have held that SESA Goa has acted in concert or colluded with MITSUI in violating the provisions of the Listing Agreement; and that the transaction was nothing but in violation of the Regulations of 1994 and Clauses 40A and 40B of the Listing Agreement, as it was binding upon a raider, and it cannot be said that mainly because the raider is located outside India and/or he acquires securities of a body corporate outside India so as to, in effect, take over an Indian Company.

8. It is contended by the petitioner that the authorities have failed to take into consideration that there is, in substance, a take over of a listed Indian Company, i.e., SESA Goa, by MITSUI, in total violation of the Regulations of 1994 and the Listing Agreement, and the authorities, by not taking action against the target company and the raider company, have failed to protect the interests of the investors, which is the whole object created by the Regulations of 1994 read with Clauses 40A and B of the Listing Agreement, and, therefore, the impugned order is illegal and void, and deserves to be quashed and set aside.

9. The respondents submitted that respondent No. 4 is a holding company of respondent No. 3, and respondent No. 4 holds 51% share of the share capital of respondent No. 3. Respondent No. 4 is incorporated in U.K., and has Registered Office in U.K. It is their case that the capital of respondent No. 4 has been acquired by EARLY GUARD, a Company incorporated in U.K., and having its Registered Office in U.K. EARLY GUARD, which is a subsidiary of MITSUI Group of Companies, has not been made a party to this petition. Neither EARLY GUARD nor respondent No. 5 has acquired any shares in respondent No. 3. Respondent No. 4 has also not acquired any further shares in respondent No. 3 in addition to what it has been holding, viz., 51% of the share capital of respondent No. 3. Consequently, there has been no change in the control or management of respondent No. 3, which continues to vest

in its holding company, respondent No. 4, and the wholetime Directors or Manging Director of respondent No. 3 continued even after the acquisition of respondent No. 4 by EARLY GUARD. It is their case that the issue raised by the petitioner is whether under the SEBI Take Over Regulations of 1994 and the Listing Agreement between respondent No. 3 and the Sock Exchanges, there has been "take over" of respondent No. 3 by reason of acquisition of share capital of respondent No. 4 (a U.K. Company) by EARLY GUARD (another U.K. Company), even though there has not been any acquisition of shares of respondent No. 3 by EARLY GUARD or respondent No. 5 or by anyone else, which is based on misconstruction of the SEBI Regulations of 1994 and Clauses 40A and B of the Listing Agreement between respondent No. 3 and the Stock Exchange. It is their case that having regard to the definition of shares and nonapplication of the Regulations to shares which are not quoted in Indian Stock Exchanges, the Regulation ought to include subclause (3) thereof which can only come into operation if there is any acquisition of shares in respondent No. 3. Respondent No. 3 has not issued any security which would entitle the holder to receive shares with voting rights in respondent No. 3. Also, the securities of respondent No. 3 which are registered under the Securities Contract (Regulation) Act with the Indian Stock Exchanges are its shares and not other securities. Therefore, it is their case that the petitioner''scontention that MITSUI and EARLY GUARD have acted in concert or acquired voting rights in respondent No. 3 is not tenable.

10. It is the case of respondent No. 3 that there has been no contravention of Clauses 40A and B of the Listing Agreement signed by respondent No. 3 with the Stock Exchange. It is their contention that the Listing Agreement is required for listing of securities by the listed company; and the recital provides that it is the requirement of the Stock Exchange that the Company should enter into this Agreement to qualify for the admission and continuance of its securities to be listed on the Stock Exchange; and insofar as Clause 40A is concerned, it shall not be applicable to an acquisition by a person who has announced his firm intention to make an offer to the Company and also notified the Stock Exchange. Further, the expression ''securities''or ''voting capital''in Clause 40B(2) can only refer to the same being of the listed Company. Hence, Clause 40B(2) has no application to this case, and these expressions cannot refer to shares / securities in other companies than the listed company concerned, much less to body corporates situated outside and not listed in India.

11. It is submitted that the Securities Contract Regulation Act under which the Stock Exchanges have to be recognised is intended "to prevent undesirable transaction in securities by regulating the business of dealing therein by prohibiting options and by providing for certain other matters connected therewith".

The Securities Contract Act, therefore, is to regulate the business of securities marketed on recognised Stock Exchanges in India. The Listing Agreement in

schedule thereof provides for the securities which are listed. Therefore, it is the case of the respondents that the securities registered are respondent No. 3''s own shares and not the securities of any other Company.

Therefore, when interpreting Clauses 40A and 40B of the Listing Agreement, the securities in respondent No. 3, viz., its shares, will only attract the provisions of Clauses 40A and 40B, and in the present case, there is no acquisition of the securities in respondent No. 3Company, viz., the shares of respondent No. 3, and, therefore, neither Clause 40A nor 40B is attracted. The acquisition of shares of respondent No. 4 by EARLY GUARD does not attract either Clause 40A or 40B.

Further, Clause 40B can only come into operation if there is a take over offer to or by respondent No. 3. Therefore, according to them, in this case, there has been no take over offer to respondent No. 3 or take over offer by respondent No. 3. Hence, Clause 40B has no application. The securities in respondent No. 3, i.e., shares of respondent No. 3, have not been acquired, and hence, there has been no ''take over''within the meaning of Clauses 40A and 40B.

It is further submitted that the concept of "persons acting in concert" under the Takeover Regulations cannot be imported into the Listing Agreement and even such concept is inapplicable on the facts of this case. It is the case of the respondents that the position in law is clear that the control of respondent No. 3 is vested and continues to vest in respondent No. 4, which holds 51% share capital of respondent No. 3 and in no other person. Therefore, the contention of the petitioner that the Takeover Regulations of 1994 should be interpreted by importing the provisions contained in the Takeover Regulations of 1997 is untenable in law. It is the case of the respondents that the petitioner''s contention that one of the objects (the other being for regulation of dealings and market in securities) being the protection of the rights of the minority shareholders, the clear and unambiguous language of the Takeover Regulations 1994 and Clauses 40A and 40B of the Listing Agreement should be disregarded, is untenable in law.

12. It is the contention of the respondents that the SEBI (Substantial Acquisition of Shares and Take Overs) Regulations, 1997 (hereinafter referred to as "1997 Take Over Regulations") are a completely new set of Regulations, and repeal the earlier 1994

Take Over Regulations. These are not merely clarifications in nature nor do they explain the 1994 Take Over Regulations as contended by the petitioner or otherwise. It is their case that the petitioner based his case on a completely erroneous and illfounded premise and has erroneously invoked the provisions of the 1994 and 1997 Take Over Regulations, both of which have no application to the facts of the transaction in question. Both the SEBI and the Appellate Authority have, vide detailed speaking orders, replied the case of the petitioner.

13. It is the case of the respondents that the Take Over Regulations of 1997 were brought into effect on 20th February, 1997, and the transaction in question took place some time in October, 1995, and it is their contention that the Take Over Regulations of 1997 have only prospective application. Further, the authorities have rightly rejected the contention of the petitioner that there has been an indirect take over of respondent No. 3 (SESA Goa) by respondent No. 5 (MITSUI) or otherwise. All this has been specifically denied by the respondents, and it is their case that the terms "Control", "Target Company" and "Corporate Body" and the very concept of Indirect Take Over were neither contemplated nor provided in the Take Over Regulations of 1994; and that the petitioner has sought to import these definitions and their applicability into the 1994 Take Over Regulations, which have no application to the present case.

14. According to the respondents, respondent No. 4 has been acquired by EARLY GUARD, a company incorporated in U.K. and having its registered office in U.K. EARLY GUARD, which is a subsidiary in the MITSUI Group of Companies, has not been made a party to this petition. Neither EARLY GUARD nor respondent No. 5 has acquired any shares in respondent No. 3; and respondent No. 4 has also not acquired any further shares in respondent No. 3 in addition to its shareholding of 51% of the share capital of respondent No. 3. Thus, EARLY GUARD, a Company incorporated abroad, acquired respondent No. 4, which is also a company incorporated abroad. Therefore, the entire transaction of acquisition of respondent No. 4 by EARLY GUARD took place outside India and beyond the purview and applicability of the Indian Take Over Regulations. Therefore, it is submitted that the petitioner, by his interpretation of facts and law, is seeking to extend the reach of Indian Regulations to a transaction which has taken place outside their purview. On the other hand, it is their case that both the acquirer and the acquire companies are foreign companies, not listed in any of the specified Stock Exchanges in India.

15. According to the respondents, it is settled rule of interpretation that in construing a statute, when the language is clear and unambiguous, reference to legislative history or objects cannot be used in order to read words into the legislation which are not there; and, therefore, the impugned order of the Appellate Authority dated 15th December, 1997 suffers from no infirmity, and the petitioner is not entitled for any relief as sought by him, and the petition deserves to be dismissed with costs.

16. The key issue which arises in the matter for decision is:

Whether an indirect take over of the company, by acquiring control of the corporate body, which holds a large percentage of the shares of the target company, attracts the provisions of SEBI Take Over Regulations, 1994 and the Listing Agreement and makes it mandatory for the acquirer company to make public announcement / offer?

17. The complaint made by the petitioner to the Securities and Exchange Board of India (S.E.B.I.) came to be turned down by the impugned order dated 6th March, 1997 by S.E.B.I. primarily, on the ground that the provisions of the Take Over Regulations are not applicable and in the instant case, they have not been violated; and secondly, the provisions of Clauses 40A and B of the Listing Agreement are not applicable, and in the instant case, they have not been violated; and that the Regulations are applicable if an acquirer has acquired or agreed to acquire more than 10% shares as per the provisions of Regulations 9 and 10. The Regulations prohibit any acquirer who holds less than 10% of the voting rights to acquire more than 10% of the voting rights, unless the public announcement to acquire shares from the other shareholders of the company is made.

18. Further, Regulation 9(2) prohibits an acquirer, who on the date of the commencement of these Regulations holds more than 10% of the voting rights to acquire further shares, unless the public announcement is made. In other words, no investor can acquire more than 10% of the voting rights of a company without attracting the provisions of the Regulations; and, according to them, as FINCO was a shareholder of SESA Goa and even prior to the change of management from RIVA Group to MITSUI Group, FINCO''sshareholding in SESA Goa was 51%, FINCO did not acquire a single share after the notification of these Regulations; nor this has been contended by the petitioner that FINCO has acquired shares in SESA Goa.

19. S.E.B.I. turned down the contention of the petitioner that while determining whether any acquirer has acquired shares, the holding company or the subsidiary company of the acquirer company, whether incorporated in India or not, should be considered as persons acting in concert, for which they placed reliance on Sections 2(7), 4(5) and 4(6) of the Companies Act for interpreting the word ''acquirer''as defined in Regulation 2(b) to include "any person acting in concert", which further, in turn, has been defined in Regulation 2(d) to include, inter alia, company, its holding company and its subsidiary company. The petitioner contended that in the aforesaid background, S.E.B.I. took the view that MITSUI, EARLY GUARD and FINCO should be considered as persons acting in concert for determining acquisition of shares of SESA Goa. Further, in spite of the provisions of Section 1(1) of the SEBI Act, which provides that the SEBI Act extends only to India so long as there is a nexus or circumstance which can be adopted as a ground of interference, the enactment is not extraterritorial.

20. On behalf of SESA Goa and MITSUI, strong reliance has been placed on the preamble and Section 1(1) of the SEBI Act, Sections 2(1) and 3 of the Companies Act and Article 245(2) of the Constitution of India to submit that the provisions of the SEBI Act are applicable to India and cannot be given extraterritorial jurisdiction. S.E.B.I. was of the view that assuming what the petitioner has contended is correct and MITSUI, EARLY GUARD and FINCO are persons acting in concert under the Regulations, the fact remains that no shares of SESA Goa have been acquired either

by FINCO, MITSUI or EARLY GUARD. SESA Goa is the company which is said to have been taken over. However, this change in control, if at all, has taken place without acquiring any shares. Even if interpretation of the petitioner is accepted, the provisions of the Regulations (dealing with substantial acquisition of shares) would not be applicable in the facts and circumstances of this case. It was observed that the Regulations do not have any concept of change in the control of management requiring public offer. Therefore, the question of violation of Regulations does not arise.

21. It may be mentioned that these Regulations have now been repealed by S.E.B.I. and new Regulations have been notified on 20th February, 1997. Only in the new Regulations, the concept of control, triggering off public offer, has been introduced. On the aspect relating to applicability of the Listing Agreement, they gave a finding that as in the instant case, FINCO already holds more than 51% of the voting rights of SESA Goa, and has not acquired any share after the Regulations were notified, the question of exceeding the 10% limit mentioned in Clause 40A(b) and 40B(2)(a) does not arise; and in view of this, the provisions of Clause 40A and 40B(2)(a) are not applicable in the instant case and, therefore, the question of violation of the provisions of Clause 40A and 40B(2) (a) does not arise. According to S.E.B.I., Clause 40B(2)(b) is applicable when control of management of a company is secured by acquiring or agreeing to acquire irrespective of the percentage of voting capital; and as FINCO was as the result of their 51% shareholding, already in control and management of SESA Goa, the acquisition of FINCO by MITSUI from the RIVA Group has not made any change as far as the control of FINCO over SESA Goa is concerned. According to them, the provisions of the Listing Agreement do not contain the concept of "persons acting in concert" which is provided for in the Regulations; and, therefore, the petitioner''ssubmissions regarding the provisions of Sections 4(5) and 4(6) of the Companies Act will, therefore, not be applicable.

22. Clause 40B(2), however, does provide for the "group concept". In other words, while determining, if any person secures the control of management of a company, then the shares held by the group company should also be aggregated for the purpose of determining as to whether any person has secured the management of the company. In this case, MITSUI and EARLY GUARD are companies incorporated outside and have not acquired any shares in SESA Goa and aggregation makes no difference to the shareholding of FINCO or MITSUI. According to them, Clause 40B (2)(b) would not apply to MITSUI or EARLY GUARD in the instant case.

23. As far as FINCO is concerned, it was and is still in control of SESA Goa. Further, on the basis of a mere agreement between a company and a stock exchange, the obligations under the provisions of the Listing Agreement cannot be made applicable to persons who are companies not incorporated, nor listed, nor a shareholder in Indian company nor parties to the Listing Agreement.

24. In reply to the contention of the petitioner, instances of public offer by Essar (in case of Sterling Computers) and by G.E. Capital (in case of SRF) have been cited. It is clarified that in the case of G.E. Capital, it made a public offer under the Regulations and in the case of Essar, the investment companies through which the company was taken over were all Indian Companies. Therefore, reliance cannot be placed on these two cases in the facts and circumstances of the present case; and, therefore, they concluded that the provisions of Clauses 40A and 40B will not be applicable to MITSUI and EARLY GUARD, as there is no change in position regarding the control of FINCO visavis SESA Goa, which resulted in dismissal of the complaint.

25. Before the Appellate Authority, the contention of the petitioner was that the acquisition of SESA Goa Ltd. by MITSUI and Co., Japan, through FINCO was in violation of the SEBI (Substantial Acquisition of Shares and Take Overs) Regulations, 1994 and in violation of the provisions of Clauses 40A and B of the Listing Agreement of the Stock Exchanges on the ground that the provisions of Section 9(1) of the Take Over Regulations are triggered if the acquirer himself or in concert with other persons acquired or agreed to acquire shares whereby he would be entitled to more than 10% of the voting rights of the target company; and that there is no prerequisite for acquiring the shares in the target company for attraction of Regulation 9(1). It is, therefore, wrong for S.E.B.I. to conclude that merely because no shares of the target company were acquired by MITSUI & Co., Regulation 9(1) would not be attracted. They have argued that S.E.B.I. has failed to appreciate that investor protection requires that even indirect take over of the target company could attract the provisions of Takeover Code if, in effect, substantial management, control and voting rights are acquired by the raider as a result of such indirect acquisition; and that S.E.B.I. failed to appreciate that if, in effect, the acquisition of securities overseas has a direct bearing on the take over of the Indian company, S.E.B.I. would have jurisdiction in respect of such take over.

26. The Appellate Authority has also considered whether the provisions of Clauses 40A and B of the Listing Agreement will be attracted, as the statement made by SESA Goa itself proves that the management in control of SESA Goa is now with MITSUI and Company, and it is a fact that the Listing Agreement is binding on SESA Goa Ltd. which has acted in concert or colluded with MITSUI in violating the provisions of the Listing Agreement. It is incorrect for S.E.B.I. to conclude that the Regulations of listing company would not be binding upon the raider merely because he is located outside India or because he acquires securities of a body corporate outside India so as to, in effect, take over an Indian Company

27. The Appellate Authority, while dealing with the issues raised before it, proceeded to deal with the matter by examining the provisions of the Take Over Code prevalent when the acquisition was reported to have taken place, along with the provisions of the New Take Over Code. A reading of Sections 9(1) and 9(2) of the the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers)

Regulations, 1994 and Sections 10, 11(1) and 12 of the the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 would clearly show that the concept of indirect acquisition has been more explicitly introduced in the New Code; but since the transaction pertaining to which the appeal has been made relates to the period of the Old Code, the Appellate Authority did not find it necessary to examine the case of the petitioner in the context of the New Code and held that insofar as SESA Goa, which is a listed company in India, is concerned, it is clear that FINCO was all along the 51% shareholder of SESA Goa and no change in the shareholding of SESA Goa is alleged to have taken place. The acquisition of FINCO by MITSUI from the RIVA Group has not altered the control of FINCO or SESA Goa. It found that insofar as Indian shareholders in SESA Goa are concerned, no change in control of the company has taken place. The provisions of the Old Take Over Code, thus, do not seem to be attracted in the present case, and the Appellate Authority found no reasons to disagree with the findings of S.E.B.I., and dismissed the appeal.

28. In our view, to decide the controversy, it would be proper to refer to some excerpts from the Report of the Committee on Substantial Acquisitions of Shares and Takeovers under the Chairmanship of Justice P.N. Bhagwati, which led to the repeal of the 1994 Takeover Regulations by the 1997 Takeover Regulations:

The SEBI Act enacted in 1992, empowered SEBI to regulate substantial acquisition of shares and takeovers, and made substantial acquisition of shares and takeovers a regulated activity for the first time. The SEBI Regulations for Substantial Acquisition of Shares and Takeovers were notified by SEBI in November 1994. Clause 40 (A & B) of the listing agreement also remained in force. The Regulations preserved the basic framework of Clause 40 (A & B) by retaining the requirements of initial disclosure at the level of 5%, threshold limit of 10% for public offer to acquire minimum percentage of shares at a minimum offer price and making of a public announcement by the acquirer followed by a letter of offer. But the Regulations did make a significant departure from Clause 40 (A & B) by dropping "change in management" simpliciter as a ground for making a public offer. On the other hand, several new provisions were introduced enabling both negotiated and open market acquisitions, competitive bids, revision of offer, withdrawal of offer under certain circumstances and restraining a second offer in relation to the same company within 6 months by the same acquirer. These provisions were used later by some acquirers to launch hostile and competitive bids. Additionally, the Regulations enhanced the level of investor protection in several ways. Being statutory in nature, violation of its provisions attracted several penalties. These inter alia included SEBI''sright to initiate criminal prosecution u/s 24 of the SEBI Act, issue directions to the person found guilty not to further deal in securities, prohibit him from disposing of any securities acquired in violation of the Regulations, or direct him to sell shares acquired in violation of the Regulations and take action against the concerned intermediary who is registered with SEBI. The SEBI Act also empowered SEBI to

adjudicate fines as penalties for certain violations of the Regulations. Indeed, there have already been a number of instances, where SEBI has initiated penal action against the acquirers under these provisions for violation of the Regulations.

The process of substantial acquisition of shares and takeovers is complex. SEBI has now gained considerable experience and insight into the complexities in this area through the administration of the Regulations and Clause 40A & B of the listing agreement. It has also helped SEBI focus attention on certain areas in the regulatory framework which not only required clarity but also needed to be addressed specifically. For example, the provisions for open market acquisition of shares, competitive bid and revised offer in the Regulations allowed hostile takeovers and competitive offers to be launched, and the consequent revision of offers to take place for the first time in the Indian market; nonetheless, these offers demonstrated with certain degree of acuity, the deficiencies in the existing provisions. These needed to be specifically addressed in the extant Regulations to make the regulatory framework more comprehensive and equitable.

A Committee was therefore set up by SEBI in November 1995, under the chairmanship of Justice P.N. Bhagwati, former Chief Justice of India, to review the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994. The terms of reference of the Committee were:

- to examine the areas of deficiencies in the existing Regulations; and

- to suggest amendments in the Regulations with a view to strengthening the Regulations and making them more fair, transparent and unambiguous and also protecting the interest of investors and of all parties concerned in the acquisition process.

29. The Committee submitted its Report in two parts. The first part contains the recommendations of the Committee based on which the new Regulations have been framed, and the newly framed Regulations are given in the second part. For our purpose, a comparative chart of the Regulations highlighting vital and essential distinctions in the 1994 Takeover Regulations and the 1997 Takeover Regulations would enable us to effectively deal with the rival contentions of the parties before us:

1994		1997	
Regulation No.	Takeover Regulation	Regulation No.	Takeover Regulation

Regulation 2 (b)	Definition of Acquirer: "acquirer: means any person who acquires or agrees to acquire shares in a company either by himself or with any person acting in concert with the acquirer:.	Regulation 2 (b)	"acquirer: means any person who, directly or indirectly acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer"

Regulation 2 (c)	No concept of "Control"	Regulation 2 (c)	"Control shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner"
Regulation 3 (d)	"Nothing contained in Chapter III of these regulations shall apply to acquisition of shares: 3(a)..... (b)..... (c).....	Regulation 3 (1)(k)	"Nothing contained in Regulation 10, 11, 12 of these Regulations shall apply to: 3(a) to (j).....

	3 (d) in companies whose shares are not listed on any stock exchange".		3(1)(k): acquisition of shares in companies whose shares not listed on any stock exchange" Explanation: The exemption under clause (k) above shall not be applicable if by virtue of acquisition or change of control or any unlisted company, whether in India or abroad, the acquirer acquires shares or voting rights or control over a listed company.
Chapter III	No explanation.	Regulation 11	11 (1) 11(2) ..... Explanation:

			For the purposes of Regulation 10 and Regulation 11, acquisition shall mean and include:- (a) direct acquisition in a listed Company to which the Regulations apply; (b) indirect acquisition by virtue of acquisition of holding companies, whether listed or unlisted, whether in India or abroad.
Regulation 12	Not there.	Regulation 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 pursuant to a resolution passed by the shareholders in a general meeting."

Explanation:

(i) For the purpose 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.

30. "The conflict of interests", which is the subject matter of the petition, i.e., the takeover of respondent No. 3, SESA Goa Limited, the target company (a listed Indian Company), by respondent No. 5, MITSUI, is in the realm of indirect acquisition. In the recommendations made by the Bhagwati Committee on applicability of Regulations, while referring to "indirect acquisition", the Committee has observed:

The Committee had noted that there exists a lacuna in the existing regulations which would allow persons to acquire indirect control of a listed company by acquiring the holding company or a set of investment companies which has block holding and which may be unlisted, because the scope of the Regulations apply only to acquisitions of shares in listed companies. The Committee thought it fit to clarify by way of an explanation that acquisition of an unlisted company would not be exempted if by virtue of such acquisition, or change in control of the unlisted company whether in India or abroad, there is brought about a change in control of the listed company or acquisition of control over the voting rights of the listed company.

The Committee recommends that

• concept of indirect acquisitions be brought in. This has been done in the definition of acquirer in Clause (b) of subregulation (1) of regulation 2; in the definition of persons acting in concert in subclause (1) of Clause (e) of subregulation

(1) of regulation 2; further while excluding unlisted companies from the purview of the Regulations in Clause (k) of subregulation (1) of regulation 3.

Therefore, apart from the submissions made before us by the learned Counsel for the parties, which we propose to deal with in the latter part of our judgment, at least one thing is crystal clear that there existed a lacuna in the existing Regulations, i.e., the 1994

Takeover Regulations, which would allow persons to acquire indirect control of a listed company by acquiring the holding company or a set of investment companies, which has block holding and which may be unlisted, because the scope of the Regulations applies only to acquisition of shares in listed companies, and for that, the Committee recommended that the concept of indirect acquisition be brought in. This has been done in the definition of ''acquirer''in Clause (b) of subregulation (1) of regulation 2; in the definition of "persons acting in concert" in subclause (1) of Clause (e) of subregulation (1) of regulation 2; further while excluding unlisted companies from the purview of the Regulations in Clause (k) of subregulation (1) of regulation 3, which has been accepted and necessary changes have been incorporated in the 1997 Takeover Regulations.

31. Mr. D''Vitre, the learned Senior Advocate, appearing for the petitioner, submitted that it is undisputed that respondent No. 4, FINSIDER -the Holding Company, -at all times held 51% of the share capital of SESA Goa (the target Company). It is also undisputed that this shareholding of FINSIDER was and is its only asset. Save and except for holding the said shares of SESA Goa, FINSIDER has and had no other asset or business.

32. The learned Senior Advocate for the petitioner further submitted that in October, 1996, respondent No. 5 (MITSUI) acquired the shares of respondent No. 4 (FINSIDER) from the previous owner (the RIVA Group of Italy). It cannot be, and is not, disputed that the object and purpose of this acquisition was to get the voting rights to 51% shares of SESA Goa held by FINSIDER -its sole asset.

33. The learned Senior Advocate further submitted that thus, as a result of this acquisition, respondent No. 5 (MITSUI) became entitled to voting rights in respect of 51% of the shares of SESA Goa (Target Company) held by FINSIDER (Holding Company).

34. Therefore, it was contended that though the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 were brought into force on 20th February, 1997, even earlier to that, under the 1994 Takeover Regulations, S.E.B.I. has, in case of Essar Investments Ltd., vetted and approved an open offer by the said Company for the purchase of 20% of equity capital of the target Company, i.e., Sterling Computers Ltd., and this acquisition was admittedly an "indirect acquisition" which acquired three investment companies, which in turn held shares in the target company in that case. Similarly, S.E.B.I.

approved an open offer announced by a foreign company, viz., GE Capital (Mauritius) Investment Ltd. (incorporated under the laws of Mauritius), which had agreed to acquire voting equity share capital of an Indian registered company, viz., SRF Finance Ltd., and, therefore, the impugned order was passed by S.E.B.I. rejecting the petitioner''scomplaint, though the fact remains that no shares of SESA Goa have been acquired by FINCO or MITSUI or EARLY GUARD. SESA Goa is a company which is stated to have been taken over. However, this change in control, if at all, has taken place without acquiring any shares. According to the petitioner, this is palpably a perverse finding of S.E.B.I., which totally ignores the reality that the acquisition of shares of FINSIDER by MITSUI (through EARLY GUARD) entitled MITSUI to exercise voting rights in respect of 51% of the shares of SESA Goa held by FINSIDER. That was the stated purpose of the acquisition.

35. It is further contended that even in the appellate order, the finding to the effect that "Insofar as SESA Goa which is a listed company in India is concerned, it is clear that FINCO was all along the 51% shareholder of SESA Goa and no change in the shareholding of SESA Goa is alleged to have taken place. The acquisition of FINCO by MITSUI from the RIVA Group has not altered the control of FINCO or SESA Goa. Insofar as Indian shareholders in SESA Goa are concerned, no change in control of the company has taken place. The provisions of the old takeover code, thus, do not seem to be attracted in the present case, and we find no reasons to disagree with the findings of S.E.B.I." can be said to be perverse, as it totally ignores the fact that the acquisition of FINSIDER shares entitled MITSUI to exercise the voting rights in regard to 51% of share capital of SESA Goa (the target company), which was the only asset of FINSIDER. Therefore, the Appellate Tribunal has erroneously interpreted the 1994 Regulations in the light of the latter 1997 Regulations. It is, therefore, submitted that the takeover of respondent No. 3, SESA Goa (Target Company) by respondent No. 5, MITSUI [by acquiring voting rights in 51% of SESA Goa''s shares through FINSIDER, holding company] triggered the Substantial Acquisition of Shares and Takeovers Regulations, 1994.

36. It is further submitted that it is undisputed that MITSUI "took over" SESA Goa. This is clear from MITSUI''s own declarations and announcements set out herein.

37. It is also submitted that this takeover triggered the Substantial Acquisition of Shares and Takeovers Regulations, 1994, and fell within the provisions of Clause 9 of the said Regulations, i.e., Acquisition by Negotiation. Clause 10 of the said Regulations relating to the acquisition in the open market would not be attracted to the facts of the present case.

38. It is further submitted that Clause 9(3) of the Substantial Acquisition of Shares and Takeovers Regulations, 1994 is clear and unambiguous, which clause reads as under:" Where an acquirer acquires securities which would entitle him to more than ten per cent of the voting rights together with the voting rights on shares already held by him, then, such person shall make a public announcement referred to in

subregulation (1) at the time immediately before his entitlement to obtain voting rights on such securities."

39. It is also submitted that the emphasis in Regulation 9(3) is on (i) acquisition of securities; (ii) which entitle the person to voting rights. Even the requirement of a public announcement is stated to be at the time immediately before "his entitlement to obtain voting rights" on such securities.

40. It is further submitted that by definition u/s 2(h) of the Securities Contract Regulation Act, ''securities''include the "shares of any body corporate", which definition admittedly applied to the Substantial Acquisition of Shares and Takeovers Regulations, 1994.

41. It is also submitted that u/s 2(7) of the Companies Act, 1956, "body corporate" by definition includes "any company whether incorporated in India or abroad". FINSIDER was, thus, a "body corporate" whose shares were ''securities''. Acquisition of these ''securities''entitled MITSUI to more than 10% of voting rights in SESA Goa.

42. It is further submitted that the shares of FINSIDER are thus ''Securities''for the purposes of the Substantial Acquisition of Shares and Takeovers Regulations, 1994. It is undisputed that the acquisition of these securities, viz., the shares of FINSIDER, gave MITSUI the voting rights in regard to 51% of the share capital of SESA Goa, the target company.

43. It is also submitted that the sole purpose of MITSUI acquiring the shares of FINSIDER " securities" for the purposes of Clause 9(3) of the Substantial Acquisition of Shares and Takeovers Regulations, 1994 - was to acquire voting rights of the target company, SESA Goa. There is no other object for such acquisition. In view of this admitted position, the takeover of SESA Goa by MITSUI squarely falls within the provisions of the Substantial Acquisition of Shares and Takeovers Regulations, 1994.

44. In order to substantiate the above contentions, Mr. D''Vitre, the learned Senior Advocate appearing for the petitioner, placed reliance on the decision of this Court in the case of Shirish Finance and Investment (P) Ltd. v. M. Sreenivasulu Reddy and Ors. Herbertson''s (2002) 2 Comp L J 386 (Bom). He submitted that the object and purpose of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 is:

(a) To bring about transparency in the process of take over of companies and general dealings in the securities market,

(b) Investor Protection and

(c) Protection of minority shareholders of the target company, so that they can take informed decisions in matters regarding the target company and are provided a fair exit route on a takeover.

45. It is further submitted that having regard to these objects, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994, particularly Regulations 3(d) and 9(3) must be construed in the manner so as to give effect to the intention of the legislation and in a manner which does not defeat the object and purpose of the legislation. So construed, the said 1994 Regulations took within their fold the kind of indirect acquisition / takeover, which has taken place in the present case. To construe the said Regulations in any other manner would defeat the purpose and object of the provisions, and this ought to be avoided. Another way of looking at it is that MITSUI attempted to do indirectly that which the Regulations prohibited doing directly. This is impermissible.

46. It is also submitted that in this regard, MITSUI has contended that the SEBI Act, 1992 and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 are penal / criminal statutes which ought to be construed strictly. This is incorrect. The approach of the Court should be to construe the legislation in a purposive manner, so as to give effect to the intention of the legislation and to bring within its regulatory fold all those who would otherwise escape if a strict construction were resorted to.

47. It is further submitted that the SEBI Act, 1992 and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 are not penal or criminal statutes. They are regulatory in nature, and in construing a regulatory statute, as in the present case, the principles of purposive interpretation must be adopted. In order to substantiate his contentions, the learned Senior Advocate placed reliance on Swedish Match AB and Another Vs. Securities and Exchange Board, India and Another, ; M. Sreenivasulu Reddy and Ors. v. Kishore R. Chhabria and Ors. the Herbertson''scase (1999) 5 L.J. 81; and Standard Chartered Bank v. Directorate of Enforcement and Ors. (2005) 125 Comp Cas 513. Therefore, MITSUI''sreliance on the judgment of the Supreme Court in Nathi Devi Vs. Radha Devi Gupta, is misplaced. In any event, by the application of those principles as stated therein, the present transaction would fall within and would be covered by the provisions of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1994 inasmuch as Regulation 9 is clear and unambiguous.

48. In Herbertson''s case, the Single Judge (H.L. Gokhale, J.) in (1999) 5 Comp cas 81 (Bom) -came to the conclusion that some of the acquisitions involved in that case were indirect acquisitions which were covered under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1994. (See paragraph 123 at pages 161 and 162)

Indirect acquisitions cannot be read as outside the 1994 Regulations or else the regulations will be frustrated.

In the same paragraph the learned Single Judge noted that:

...it cannot be lost sight of that these Regulations are for the benefit of the shareholders, companies and society at large and hence while interpreting them, one will have to adopt the purposive approach as done by the Supreme court in Md. Qasim Larry, Factory Manager, Sasamusa Sugar Works Vs. Muhammad Samsuddin and Another, on Industrial Disputes Act. The indirect acquisitions cannot be read as outside the 1994 regulations or else, the regulations will be frustrated.

49. The learned Single Judge in Herbertson''s case in paragraph 95, pages 145 and 146, emphasized that the approach of the Court in the matter of interpretation of these Regulations was to give effect to its objects - to bring in transparency in takeover transactions. It is in this context that the learned Single Judge observed that:

Democracy, corporate or otherwise, implies an open system. It implies knowledge, information and availability of equal opportunity to everybody concerned. If that is not something as to be read in these regulations, then it is better that no such regulations are passed. The fact that some of these difficulties are sought to be taken care of in the subsequent regulations by making specific provisions, need not deter the Court from looking into the regulations as they existed when drafted in the year 1994.

50. The Division Bench in Herbertson''s 2002 (2) Comp 386 (Bom) affirmed the decision of the Single judge -but on a different ground. In paragraphs 99 and 100 at page 448, the Division Bench observed that the question of direct or indirect acquisition did not arise in the facts of the case. The Division Bench proceeded to deal with the matter on the basis that the parties were persons acting in concert. It is in this context that the Division Bench:

(a) distinguished the judgment of SEBI in SESA Goa and 49

(b) held that it was not necessary to delve into the question of acquisition of unlisted companies, as this issue did not arise in that case.

51. It is further submitted that the submission on the part of Respondent No. 5, MITSUI, that the Division Bench in Herbertson''s case has approved the SEBI Order in SESA Goa is plainly incorrect. The Division Bench distinguished the case of SESA Goa and did not approve SEBI''sorder. The correctness of SEBI''s order is a matter for the determination of this Court in the present proceedings.

52. It is also submitted that in substance, therefore, as far as Herbertson''s case is concerned,

(i) the learned Single judge dealt with the matter on the basis that it involved an indirect acquisition of shares in the target company and held that such an indirect acquisition was covered by the 1994 Regulations as otherwise the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1994 would be frustrated.

(ii) the Division Bench dealt with the matter on the basis that it was a case of persons acting in concert and that the question of direct or indirect acquisition did not arise. In that context, the Division Bench distinguished SESA Goa''sorder of SEBI and did not decide the issue as to whether indirect acquisitions were covered by the 1994 Regulations.

53. It is the contention of Mr. D''Vitre that the fact that the 1994 Regulations were repealed by the 1997 Regulations and that the 1997 Regulations contained provisions which ''improved''upon the provisions under the 1994 Regulations is irrelevant. Merely because an indirect acquisition was explicitly covered by the 1997 Regulations would not lead to the conclusion that such an indirect acquisition was not covered by the 1994 Regulations. In the present case, it has been demonstrated that the present acquisition of voting rights in SESA Goa is squarely covered by the 1994 Regulations on a plain reading of those Regulations. It was contended on behalf of MITSUI that the Bhagwati Committee Report (which led to the 1997 Regulations) was intended to plug the loopholes in the 1994 Regulations. Assuming this to be true, this fact is irrelevant, since even on a plain reading of the 1994 Regulations as demonstrated above, an indirect acquisition of the voting rights in the target company (SESA Goa) is, in any event, covered by the 1994 Regulations on their plain language.

54. It is also submitted that in any view of the matter, reliance placed by MITSUI on paragraphs 2.2.1, 2.2 and 3.4 of the Bhagwati Committee Report is misplaced. The Bhagwati Committee itself recognised in paragraph 2.2, inter alia, that even prior to the 1997 Regulations, SEBI had been taking action in the case of indirect acquisitions / acquisition of control. Thus:

The Committee also noted that, in any case, SEBI has been taking notice of situations involving change in control and has been directing acquirers to make public offer in the interest of investors, by relying upon Clauses 40A and 40B, which continued to be in force.

55. Mr. Chagla, the learned Senior Advocate appearing for respondent No. 5, submitted that in view of the fact that as presently, the petitioner does not hold any share of SESA Goa, he lacks locus standi. Further, the petition is not maintainable and has become infructuous, and the remedy sought by the petitioner is wholly academic and meaningless, and such an exercise is not required in the facts and circumstances of the case. It is submitted by Mr. Chagla that the the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 do not require respondent No. 5 to make a public announcement to acquire shares in SESA Goa from the other shareholder of SESA Goa. It is contended that Regulation 3(d) of 1994 Regulations, however, excludes the application of Chapter III of the said Regulations to the acquisition of shares in unlisted companies; and according to Mr. Chagla, the only shares acquired by respondent No. 5 (acting through EARLY GUARD) were the shares in Finsider

International Company (FINCO), respondent No. 4, which is a foreign, unlisted company.

56. In the case of Shirish Finance v. Sreenivasulu Reddy (2002) 2 Comp. L.J. 386 (Bom), a Division Bench of this Court held that by virtue of Regulation 3(d) of the 1994 Regulations, the acquisition of shares in a company, which is not listed on any stock exchange in India does not come within the purview of Regulation 10 of the 1994 Regulations. This dicta also clearly applies to cases under Regulation 9 of the 1994 Regulations which along with Regulation 10 forms part of Chapter III of the 1994 Regulations. In fact, the Division Bench considered the order of the Appellate Authority in SESA Goa, which is impugned in the present petition, and expressly held in that context that the 1994 Regulations did not apply to the acquisition of shares in the SESA Goa case. Respondent No. 5 was not an ''acquirer'' of shares in SESA Goa under the 1994 Regulations. As stated above, respondent No. 5 only acquired shares of FINCO.

57. Mr. Chagla submitted that this Court ought not to import into the 1994 Regulations matters that were only introduced by the 1997 Regulations. To do so would run counter to all principles of statutory interpretation, and it would result in great uncertainty in the capital markets.

58. Mr. Chagla further submitted that the Bhagwati Committee Report of 1997 expressly recognised the various loopholes in the 1994 Regulations and in particular, the position that the 1994 Regulations did not cover indirect acquisition of shares in target companies. The fact that there were loopholes in the 1994 Regulations, which were considered by the Bhagwati Committee, and, therefore, suggested amendments in the 1994 Regulations, and which finally led to the 1997 Regulations has been recognised by the Hon''ble Supreme Court in its decision in the Swedish Match case (2004) 122 Comp Case 83. The case law cited by the petitioner does not support his case and / or can be distinguished from the facts of the present case.

59.1 Mr. Chagla also submitted that the petitioner has sought three final reliefs in his petition -(i) quashing of the order of S.E.B.I. dated 6th March, 1997 and the order of the Appellate Authority dated 15th December, 1997 [prayer (a)]; (ii) declaration that the takeover of FINCO by MITSUI attracted the 1994 Regulations as well as Clauses 40A and 40B of the Listing Agreement [prayer (b)]; and (iii) a direction against MITSUI to purchase the shares of the petitioner and other minority shareholders of SESA Goa in accordance with the 1994 Regulations and Clauses 40A and 40B of the Listing Agreement and to pay interest on the purchase price at the rate of 15% per annum [prayer (c)].

59.2 It is pertinent to note that in every interim application made by the petitioner after the filing of the petition in 1998 till the hearing of the petition, the petitioner relied upon prayer (c) while seeking interim reliefs in the nature of security deposit

and injunction restraining respondent No. 5 from transferring the shares of FINCO acquired by it. However, in the course of the final hearing of the petition, the petitioner stated that he was no longer pressing for this relief. In the circumstances, since a declaration of the nature sought by the petitioner cannot be granted by the Court under Article 226 of the Constitution of India, the only relief that survives is the relief for quashing the impugned orders. In this regard, reference may also be usefully made to the case of General Manager, Eastern Rly and Another Vs. Kshirode Chandra Khasmobis, wherein the Court has held thus:

...Article 226 should not be used and was not intended to be used as a medium or means for declaratory orders or declaratory reliefs, declaring acts and orders invalid even though no relief can be granted to the petitioner. The courts should not issue writs of consolation or writs propounding theories. That is not the function, scope and purpose of Article 226....

As on the date of the hearing of the petition, the petitioner did not hold a single share in SESA Goa. In the circumstances, coupled with the fact that the petitioner was not pressing prayer (c) of his petition, the petitioner ceased to have the locus standi to prosecute the petition and the same was not maintainable and was rendered infructuous and academic.

59.3 The petitioner, vide his affidavit dated 28th March, 2007, admits that he transferred his shareholding in SESA Goa. As on date the petitioner does not hold even a single share of SESA Goa. This is not a representative action or public interest litigation. It is a pure money claim that hinges on the petitioner''s ability to offer shares. Yet he has no shares to sell. The apex Court in Clariant International Ltd. and Another Vs. Securities and Exchange Board of India, held:

...The shareholders contemplated under Clause (i) of Regulation 44 must be those shareholders whose shares have been accepted upon public announcement of offer and who have suffered loss owing to blockage of amount by not being able to sell the shares held by them. The object of the said provision is to protect the interest of such shareholders who had suffered loss for delay in making public announcement, and thus may have been compensated....

In the present case, the petitioner has vide prayer (c) in his petition sought a direction from this Court to respondent No. 5 to make a public offer and purchase the shares of the petitioner and other minority shareholders. As on date, the petitioner has no shares to offer to respondent No. 5 even if such a direction were to be made.

59.4 Even otherwise, the relief sought by the petitioner is meaningless and futile, and hence, this Court ought not to entertain the petition. Assuming (without admitting) that the petitioner is entitled to any remedy, it is submitted that the reference point for any public offer to acquire shares in SESA Goa must be the share price around 30th September, 1996, when, in the petitioner''scase, a public offer

should have been made. The share price of SESA Goa on 30th September, 1996 was Rs. 186.85. Even allowing for interest at the rate of 9% per annum between 1996 and today, respondent No. 5 would be obliged to make a public offer to purchase shares in SESA Goa at Rs. 482/per share. However, the current share price of SESA Goa (as at 25th July, 2007) is Rs. 1840 per share. Further, the public offer of the Vendanta Group is at the rate of Rs. 2036.3 per share. Clearly, no SESA Goa shareholder would sell his shareholding for a quarter of its present market value. Therefore, the remedy sought by the petitioner is not only meaningless for himself, given his lack of shareholding, it is equally academic and futile for all shareholders in SESA Goa.

59.5 The petitioner has sought to rely on the principles of Order 22, Rule 10, of the CPC whereby a suit that would ordinarily abate on the death of a party in the absence of legal heirs being brought on record, may be continued even if there is an assignment / devolution of interest, by or against the person to or upon whom such interest has devolved. It is submitted that the reliance placed by the petitioner on the aforesaid principle of law is completely misconceived and untenable. In the present proceedings, the interest of the petitioner has extinguished and not devolved upon any third party for the proceedings to be continued by that party. The petitioner has lost his right, if any, upon transferring his shareholding in SESA Goa to third parties. A shareholder who does not continue to be a shareholder at the time of the public offer is not entitled to any relief under the Regulations, assuming without admitting that any relief could be granted in the facts and circumstances of the present case. That apart, the rules of the C.P.C. cannot be invoked in aid of writ proceedings before the Court.

59.6 To further support his contention that he continued to have the locus standi to maintain and prosecute the petition, the petitioner relied upon the decision of the Hon''ble Supreme Court in the case of Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others, wherein the Hon''ble Apex Court held that the validity of a petition for oppression and mismanagement filed under the Companies Act, 1913 must be judged on the facts as they were at the time of its presentation and the petition, which was valid when presented, cannot cease to be maintainable by reason of subsequent events. It is submitted that the aforesaid decision of the Hon''ble Supreme Court as well as the principle laid down therein has no application in the present case for at least two reasons. Firstly, that was a case under the Companies Act, Section 153C whereof, inter alia, provided that a member was entitled to apply for reliefs in connection with oppression and mismanagement only if he had obtained the consent in writing of not less than 100 members of the Company or not less than 1/10th the number of members whichever was less. At the time when the petition was filed, the aforesaid conditions had been satisfied. The Hon''ble Apex Court held that any subsequent reduction in the number would not affect the petition. Secondly, the case before the Hon''ble Supreme Court was not one in which the petitioners had ceased to be shareholders of the company, which is the position in the present case the sole petitioner has ceased to be the shareholder

of SESA Goa.

59.7 Mr. Chagla submitted that in the light of the above, this Court be pleased to decline jurisdiction over this petition, which is an abuse of the court process. He sold his shares at a much higher price than that which he originally paid - and certainly, considerably higher than the offer price that would be obtained, were he to succeed in his petition. He does not pretend to be in any special category or class of persons, such as a public interest litigant, or to have any special motivation. Far from it, it is apparent in his petition and his affidavits in support that his sole motivation is money. In furtherance of that goal, he is pursuing multi pronged and vexatious litigation before several Courts, both civil and criminal.

60. In reply to Mr.Chagla''s contention on behalf of respondent No. 5 that the petitioner has lost his locus to maintain the petition on account of the fact that during the pendency of the petition, the petitioner has ceased to be a shareholder of SESA Goa and as such, it also appears to be the contention of MITSUI that by reason of the fact that the petitioner ceasing to be a shareholder of SESA Goa during the pendency of the petition, the relief sought in prayer Clause (c) that the acquirer be directed to make a public offer to the existing shareholders cannot survive; and that being so, no reliefs can be granted to the petitioner. It is submitted that on the date of the acquisition of voting rights in SESA Goa by MITSUI and on the date of presentation of the petition, the petitioner and his family held 13,53,559 equity shares of SESA Goa equivalent to 14.09% of its Indian shareholding and constituting 6.9% of its total issued, subscribed and paid up share capital of SESA Goa. The petitioner was, thus, the largest Indian individual shareholder of SESA Goa, and his two sons continue to be shareholders of SESA Goa to the extent of 100 shares. The petitioner has tried to explain that between 1997 and 1999, the petitioner''sshares were sold partly by the pledgees to whom the shares were pledged, which transaction is under challenge by the petitioner, who has filed suits against the pledgees, i.e., against Reliance Capital Ltd. and Standard Chartered Bank Ltd., seeking return of the shares. According to the petitioner, in the case of Creative Outerwear Ltd., there is no dispute with that party that the petitioner is entitled to 8000 shares. The only dispute is with regard to the identity (distinctive numbers) of those shares, and, therefore, according to the petitioner, on the date the Court issued Rule in the matter, i.e., 19th March, 1998, the petitioner did hold substantial shares in SESA Goa. Therefore, reliance was placed on the decision of the Supreme Court rendered in the case of Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others, , wherein it was held that the validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation.

61. It is submitted that the aforesaid principle was laid down by the Supreme Court in a case u/s 153C of the Companies Act, 1913 (corresponding to Section 397 of the Companies Act, 1956). Therefore, according to the petitioner, for the purposes of Section 153C, it was a precondition to the maintainability of a petition that it had to be filed by persons who were more than 1/10th of total number of members or held more than 10% of the share capital of the company. The Supreme Court in the above cited case held that though some of the petitioning members had subsequently withdrawn their consent to the petition (during its pendency) and thereby the continuing petitioners ceased to fulfil the precondition, nonetheless, the petition was maintainable and was required to be heard on its merits; and it is in this context that the Supreme Court laid down the principles enunciated above and proceeded to hold further that "in our opinion, the withdrawal of consent by 13 of the members, even if true, cannot affect either the right of the applicant to proceed with the application or the jurisdiction of the Court to dispose it of on its own merits". It is submitted that this judgment of the Supreme Court has been followed by the Madras High Court in the case of S. Varadrajan v. Venkateswara Solvent Extraction & Ors. (1994) 80 Comp. Cas 693 and L. RM. K Narayanan v. Pudhuthotam Estates (1992) 74 Comp. Cas 30; and, therefore, according to the petitioner, it is the settled legal position that the devolution of interest of a party plaintiff / petitioner during the pendency of the proceedings cannot and does not affect the continued trial of the action and does not render the proceedings infructuous, as contrasted to a case of the death of the plaintiff, in which case the proceedings would be put to an end if his legal representatives were not brought on record.

62. The learned Counsel appearing for the petitioners therein also placed reliance on the decision of the Supreme Court in the case of Dhurandhar Prasad Singh Vs. Jai Prakash University and Others, while dealing with the rights of the parties as specified under Order 22, Rule 10, of the Code of Civil Procedure, 1908. The Supreme Court held:

...Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of suit is devolved upon another during its pendency but such a suit may be continued with the leave of the Court by or against the person upon whom such interest has devolved. But, if no such a step is taken, the suit may be continued with the original party and the persons upon whom the interest has devolved will be bound by and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse to the party upon whom interest had devolved.

In the same paragraph, the Supreme Court also held

...legislature has not prescribed any such procedure in the event of failure to apply for leave of the Court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the legislature was conscious of this eventuality and yet has not prescribed that the failure would entail dismissal of the suit as it was intended that the proceeding would continue by...the original party although he ceased to have any interest in the subject of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on record.

63. It is, therefore, submitted that the aforesaid legal principle is applicable to the facts of the present case, and that in any event, on analogous principles, the present petitioner is entitled to continuance of the proceedings even after the transfer of shares in SESA Goa. In the alternative, it is submitted that the holding of shares of SESA Goa was not a prerequisite for filing a complaint before SEBI; and hence, can never be said to be a prerequisite for the petition continuing to be maintainable. The petitioner has also placed reliance on another case, which was decided by the Andhra Pradesh High Court, Somulu v. Appalanaidu AIR 1958 A.P. 507.

64. It is submitted by Mr. D''Vitre, learned Senior Advocate for the petitioner, that as regards locus, the Supreme Court in the decision rendered in the case of M.S. Jayaraj Vs. Commissioner of Excise, Kerala and Others, has recognized that there has been a change in the earlier interpretation regarding locus standi and that "a much wider canvass has been adopted in later years regarding a person''sentitlement to move to the High Court involving the writ jurisdiction"; and has recognized three categories of persons visavis locus standi (1) a person aggrieved, (2) a stranger and (3) a busy body or a meddlesome interloper. Therefore, it is the case of the petitioner that he is a person aggrieved, and the impugned order of S.E.B.I. dated 6th March, 1997 and that of the Appellate Tribunal dated 15th December, 1997 continue to operate against the petitioner, and, therefore, he is entitled to maintain the petition to have the said orders set aside and can very much seek an appropriate writ from this Court under Article 226 of the Constitution of India to set aside the impugned decisions and seek a declaration that the take over by MITSUI of FINSIDER constituted a take over which attracted and requires compliance of the provisions of the SEBI Takeover Regulations, 1994 and Clauses 40A and 40B of the Listing Agreement. It is submitted that even in the case of Clariant International (supra), it was held that the open offer to be made once the Regulations were triggered was to be made to and interest would be paid to "such persons who were shareholders of the target company as on a triggering date". It was also held that a shareholder "...must be one who was a shareholder on the triggering date"; and, therefore, according to the petitioner, he was undoubtedly a shareholder on the triggering date, had there been an open offer as required by the 1994 Regulations.

65. It is fairly conceded that due to passage of time, it may not be expedient to press for or be granted prayer (c) of the petition, i.e., the requirement for the acquirer to

make an open offer, as the pendency of the petition for the last 9 years in this Court is due to no fault of the petitioner, and that though the petitioner, time and again, tried to get the hearing of the petition expedited, the petition could not be taken up for final hearing. Therefore, it is submitted that the petitioner''smain grievance relates to breach of a regulatory statute, which operates in a broad public field, i.e., the securities market, and hence, under the Securities and Exchange Board of India Act, 1992 and the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, S.E.B.I. performs the role of a market regulator, and is empowered to take measures for investor protection and for the regulation of the securities market. Under Regulation 39 of the 1994 Regulations and Regulation 44 of the later Regulations, as also u/s 11(B) of the Securities and Exchange Board of India Act, 1992, S.E.B.I. has very wide powers to take action against errant companies like MITSUI who act in breach of the Regulations. These powers include, for instance, the power to direct the acquirer to sell the acquired shares / voting rights to persons nominated by S.E.B.I. or to prevent the sale of such shares. S.E.B.I. may also, for instance, as a measure of investor protection, direct the errant company to transfer any proceeds or securities to the Investor Protection Fund of a recognized Stock Exchange. It is submitted that once reliefs are granted in terms of prayer Clauses (a) and (b) of the present petition, this Court ought to direct S.E.B.I. to take appropriate action in accordance with law.

66. On the other aspect canvassed by the respondents that during the pendency of the petition, the voting rights of SESA Goa have also been sold to Vedanta, and hence, the grant of any reliefs is infructuous, it is submitted that MITSUI having sold the shares of Vedanta, MITSUI has transferred the acquired shares / voting rights of SESA Goa to Vedanta, and, therefore, the grant of any relief is infructuous, cannot be tenable, as the said transaction is the subject matter of pending SLP filed by the petitioner in the Hon''ble Supreme Court, being SLP (Civil) No. 7962 of 2007; and that on 27th April, 2007, the Hon''ble Supreme Court has passed an order ''Issue notice''. It is directed that if henceforth the sale is conducted, the same shall be subject to the result of this Petition." Further, MITSUI''s contention that the sale of shares to Vedanta is completely untenable having regard to the fact that by law, no such sale can be completed until the public offer is made under the prevailing regulations. It is submitted that the contention of MITSUI in their surrejoinder that the petition is not maintainable on the ground of inordinate delay also cannot be accepted, as the facts of the case relied upon by MITSUI i.e., General Manager, Eastern Rly and Another Vs. Kshirode Chandra Khasmobis, is wholly untenable to the facts of the present case. In the present case, the petitioner filed the present petition in 1998 itself, immediately after the Appellate Tribunal passed the impugned order, and the petitioner has been vigilant in prosecuting the matter; and, therefore, the petition survives insofar as grant of reliefs in terms of prayer Clauses (a) and (b) is concerned, and a relief be granted that S.E.B.I. be directed to take appropriate steps against respondent Nos. 3, 4 and 5 in accordance with law.

67. In our view, the issue of maintainability of the petition, which is raised by the respondents, i.e., it cannot be sustained by reason of events subsequent to its presentation need not refrain us from addressing the key issue raised in the petition, which does deserve consideration. The Appellate Authority, while dealing with the matter, also expressed, apart from the fact that the respondents did not raise this as a preliminary issue before S.E.B.I. or the Appellate Authority. The Appellate Authority, while disposing of the appeal, though upheld the order of S.E.B.I., did make concluding remarks:

We would, however, like to state that the issues brought out in the appeal can have far reaching implications and they will need to be addressed on a suitable occasion by SEBI in the context of the new take over code.

Therefore, we propose to examine the case in a broader context, particularly in reference to the acquisition of shares of FINCO by MITSUI, which was the holding company of SESA Goa was proper during the currency of the Takeover Regulations of 1994 in the context of Sections 9(1) and 9(2) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 and Sections 10, 11(1) and 12 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

68. Mr. Rafiq Dada, learned Senior Counsel appearing for S.E.B.I., submitted that in the facts of the present case, MITSUI (a foreign company registered in Japan), the holding company of the acquirer EARLY GUARD (also a foreign company registered in U.K.) had acquired all the shares of FINCO (also a foreign company registered in U.K.). FINCO became the Target Company.

MITSUI through EARLY GUARD having acquired 100% shares of FINCO had, in effect, taken over control of FINCO from the RIVA Group. FINCO is not an Indian Target Company, i.e., a Company listed on a Stock Exchange in India and consequently, the 1994 Regulations were not triggered.

69. According to S.E.B.I., since FINCO held 51% shares in SESA Goa, FINCO was in control of SESA Goa. MITSUI through its 100% subsidiary EARLY GUARD having taken over FINCO, had indirectly taken over control of SESA Goa. Further, neither MITSUI nor EARLY GUARD nor FINCO are listed on any Stock Exchange in India nor had any of them acquired any shares in SESA Goa (which is a company listed on a Stock Exchange in India) and consequently, the provisions of Chapter III of the 1994 Regulations were not triggered.

70. Therefore, neither MITSUI nor EARLY GUARD nor FINCO has acquired or agreed to acquire any shares in such Company, i.e., an Indian Target Company (SESA Goa Ltd.) and consequently, the provisions of the Takeover Chapter, i.e., Chapter III, were not triggered. The only shares that have been acquired are the shares of FINCO (not an Indian Target Company) by EARLY GUARD (also not an Indian Target Company).

71. It is submitted that unless there is an acquisition of shares in a target company, the 1994 Regulations are not triggered. It is submitted that neither change in control nor indirect acquisition triggers the provisions of the 1994 Regulations. In the case of Shirish Finance and Investment (P) Ltd. v. M. Sreenivasulu Reddy and Ors. (Herbertsons case) reported in (2002) 2 Comp LJ 386 (Bom), the Court found that there was acquisition of shares in the target company and the Appellate Bench of the High Court found that the parties who acquired shares in the target company were also acting in concert. It is on this basis that the Court accepted the violation prima facie of the 1994 Regulations. SESA Goa''s case was in terms referred to by the learned Judges of the Division Bench and was held to be distinguishable from the Herbertsons case.

72. It is submitted that change in control / management of a target company simpliciter is not covered under the provisions of the 1994 Regulations. Admittedly, there has been no change in the shareholding pattern of SESA Goa Ltd. but there has been a change of control of SESA Goa. Since change in control is not covered by the 1994 Regulations, no action could be taken under the 1994 Regulations in respect of change in control / management of SESA Goa.

73. It may be further noted that by an amendment to the Companies Act, Section 55A was introduced with effect from 13th December, 2000 which spelt out the powers of S.E.B.I. and in effect, restricted S.E.B.I.''s powers to the provisions contained in the section mentioned therein to issues relating to transfer of securities and nonpayment of dividend in cases of listed public companies and in cases of public companies which intend to get their securities listed on a recognized stock exchange.

74. S.E.B.I. has at all times submitted that in the event of there being any ambiguity in any section, rule or regulation, a purposive interpretation should be given to the section, rule or regulation. One of the elements of purposive interpretation is to give effect to the intention of the maker of the Act, Rule or Regulation. S.E.B.I. has filed an affidavit setting out the true intent of the 1994 Regulations and that a lacuna was discovered by S.E.B.I. some time in October, 1995 pursuant to which S.E.B.I. constituted the Bhagwati Committee to go into the deficiencies in the 1994 Regulations and recommend suitable amendments.

75. It is the case of S.E.B.I. that the difference between the two cases of acquisition as referred to by the petitioner can be distinguished:

75.1 In the case of acquisition of shares of GE Capital Transportation Finance Ltd. (formerly known as "SRF Finance Ltd.") (target company) by GE Capital (Mauritius) Investments Company Ltd. (the acquirer). The open offer was made by the acquirer pursuant to an acquisition of 50.05% equity shares of the target company vide Agreement entered in January, 1997 with the promoters (SRF Promenade Holdings Ltd., SRF Cgary Holdings Ltd., SRF Superior Holdings Ltd., SRF Transnational Ltd. and

their associates) of the target company. The acquisition was a direct acquisition of the shares in the listed Indian company and, therefore, the open offer was made in terms of the Takeover Regulations, 1994.

76. In the case of acquisition of shares of Sterling Computers Ltd. (SCL) (target company) by Essar Investments Ltd. (EIL) (acquirer). SCL was a listed company whose 80% of the voting capital was held by three private limited investment companies. Originally, the entire capital of these three companies was held by M/s. C. Sivsankaran & Associates (Shiva group). EIL acquired these three investment companies from Shiva Group. Pursuant to the said acquisition of these three companies, EIL introduced its nominee directors on the Board of Target Company. It is understood that by the acquisition of shares in unlisted companies, there has been take over of management control of the target company. However, the acquisition of shares in unlisted company was outside the purview of the takeover Regulations, 1994 and also Clause 40A and 40B of the Listing Agreement.

77. However, the acquirer made a voluntary open offer for acquiring 20% equity shares of the target company which was allowed in the interest of the shareholders of the target company.

78. In order to appreciate the key issue, which we have spelt out in paragraph 16 of the judgment, and to appreciate the rival contentions of the parties, we have made reference to some of the excerpts from the Report of the Committee on Substantial Acquisition of Shares and Takeovers constituted under the chairmanship of Justice P.N. Bhagwati in paragraph 28, and also have made, in the light of the Report of the Committee, for our purpose, a comparative chart of the Regulations highlighting vital and essential distinctions in the 1994 Takeover Regulations and the 1997 Takeover Regulations in paragraph 29. Therefore, considering the various decisions cited before us, we find that the emphasis is laid upon by the learned Counsel for the petitioner so as to bring the indirect takeover of the Company within the ambit of the provisions of the SEBI Takeover Regulations, 1994 and the Listing Agreement. Much reliance has been placed on the two decisions, i.e., Swedish Match AB and Anr. v. SEBI (S.C.) (2004) 122 Comp Cases 83 and Standard Chartered Bank v. Directorate of Enforcement and Ors. (2005) 125 Comp Case 513, particularly in the context of the principles of interpretation. In the two cases, the Hon''ble Supreme Court has not only taken into consideration the implications of the various Regulations, but has also dealt with them in the context of their applicability and implication; and several decisions have been referred for their correct and proper interpretation. The findings in the two decisions squarely covered the field as to the purpose and object of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997; but, with all humility at our command, we may observe that the two decisions, on which reliance is placed by the learned Counsel for the petitioner, do not help the petitioner, in any manner, to support his case that the take over by MITSUI of FINSIDER constituted a takeover which attracted and

required compliance of the provisions of the SEBI Takeover Regulations, 1994 and Clauses 40A and 40B of the Listing Agreement. The learned Counsel appearing for the petitioner has made submissions by laying emphasis on the Regulations of 1997, which have brought about drastic change in the Regulations of 1994, which were, at the relevant time, governing the field by contending that the provisions of the Regulations of 1997 can be read into the Regulations of 1994; and that such a legislation must be construed in a purposive manner having regard to the object, purpose and also underlying the legislation; and submitted that the Securities and Exchange Board of India Act, 1992 and the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994, being regulatory in nature, therefore, in construing a regulatory statute, the principle of purposive interpretation must be adopted. According to him, what has been introduced in the subsequent Regulations of 1997 is nothing but explanatory, and the Court takes view that indirect acquisition will have to be read with the Regulations of 1994, which have been further clarified by repealing the same and introducing radical changes in the 1997 Regulations. The main thrust of the petitioner that the 1994 Regulations are repealed by the 1997 Regulations and that the 1997 Regulations contain the provisions which improve the provisions of the 1994 Regulations is not of much relevance, merely because an indirect acquisition was explicitly covered by the 1997 Regulations; and that would not lead to the conclusion that such an indirect acquisition was not covered by the 1994 Regulations.

79. If one examines the provision of the 1994 Regulations, particularly Regulation 3(d) of the provisions of Chapter III of the 1994 Regulations, including Regulation 9, it does not apply to the impugned acquisition. Regulation 3(d) expressly provides that nothing contained in Chapter III of the 1994 Regulations shall apply to the acquisition of shares in companies which are not listed on any stock exchange (in India). As such, its acquisition by MITSUI''s subsidiary, EARLY GUARD, another foreign unlisted company, cannot trigger the provisions of the 1994 Regulations by virtue of the express exclusion in Regulation 3(d). A similar issue had arisen for consideration of this Court in the case of Shirish Finance v. Sreenivasulu Reddy (the Herbertsons case) (2002) 2 Comp LJ 386 (Bom). In fact, the orders of SEBI as well as the Appellate Authority which are impugned in the present petition were considered by this Court in that case. In the Herbertsons case, the Division Bench of this Court categorically held that in view of Regulation 3(d) of the 1994 Regulations, Chapter III of the 1994 Regulations did not apply to the acquisition of shares in companies which were not listed on any stock exchange. The Division Bench further held that Regulations 10 and 12 of the 1997 Regulations would apply to the acquisition of the shares in unlisted companies enumerated in the Explanation to which the 1994 Regulations would not have applied, such as the SESA Goa case. The Herbertsons case is analysed in detail below. One of the aspects considered by the Division Bench was whether the indirect acquisition of shares of Herbertsons Limited by

Kishore Chhabria by acquiring shares of companies which were not listed on any stock exchange but which held share of Herbertsons Limited was in violation of the 1994 Regulations. It will be recalled that in Herbertsons, this Court made several key findings of fact as follows:

(a) Acting under the direction and funding of one controlling mind (the Chhabria Group), various companies participated in a clandestine scheme to acquire shares in Herbertsons;

(b) Herbertsons was a listed company;

(c) The defendants'' collective shareholding in Herbertsons changed (and did so significantly, increasing by over 25%) as a result of the various transactions i.e. the shareholding pattern of Herbertsons changed as a result of the scheme; and

(d) The scheming companies had, together, owned shares in Herbertsons before they undertook their scheme to acquire further shares.

It is instructive to see what the Division Bench had to say about SESA Goa and for convenience, the following paragraphs of the judgment are extracted:

94. ...Mr. Chidambaram next submitted that the acquisition of shareholding of defendant Nos. 3 to 5 by Seven Star and defendant No. 11 did not violate the Regulations because of the express provisions in Regulation 3(d) of the 1994 Regulations. Regulation 10 has no application when shares of unlisted companies are acquired by virtue of Regulation 3(d). Defendant Nos. 3 to 5 not being listed companies, their acquisition did not attract Regulation 10. He relied on the decision of the SEBI in the case of Sesa Goa...which was affirmed by the appellate authority. Mr. Nariman, on the other hand, submitted that Regulation 3(d), no doubt, makes the provisions of Chapter III of the Regulations inapplicable to acquisition of shares ''in companies whose shares are not listed on any Stock exchange''.He emphasised the words ''incompanies''and submitted that the words used are not ''through companies''. According to him, if it was a simple transaction of take over of an unlisted company, Regulation 10 may not be attracted, but in the facts of this case, since the defendants were acting in concert with each other, the complexion of the case changes, and it must be held that the acquisition of these companies in the manner they were acquired was also a part of the scheme designed by defendant Nos. 1 and 11 in concert with the other defendants to acquire the shares of Herbertsons Ltd., defendant No. 12. The real purpose was not the acquisition of the three unlisted companies viz., defendant Nos. 3 to 5, but to acquire shares which were held by these companies and purchased with the help of funds provided by the defendant Nos. 1 and 11 and the companies controlled by them. If it is held that the Defendants were acting in concert, it must be held logically that even when the defendant Nos. 3 nd 5 acquired the shares of Herbertsons, the acquisition was in concert with the defendant Nos. 1 and 11 as well as the other defendants. In other words, defendant Nos. 3 to 5 acquired the shares of Herbertsons directly, while

acting in concert with the other defendants, some of whom provided the funds for such acquisition.

95. It is true that in view of Regulation 3(d), Chapter III of the Regulations does not apply to acquisition of shares in companies whose shares are not listed on any stock exchange. Defendant Nos. 3 to 5 companies, undoubtedly, are companies whose shares were not listed on any stock exchange. It would, therefore, follow that, if without anything else, the shares of these companies were acquired by the defendant No. 11, the acquisition of these companies by him may not come within the purview of Regulation 10. But the facts of the case give a different picture altogether. It was not as if defendant Nos. 3 to 5 had acquired the shares of Herbertsons Ltd., on their own. These companies were controlled by persons known to defendant Nos. 1 and 11, and in fact, related to them though not within the meaning of Section 6. These companies did not have the capacity to make such huge investments in share of Herbertsons Ltd. According to the plaintiffs, and indeed admitted by the defendants, the funds were made available to them by defendant Nos. 1 and 11 through the companies under their control. The plaintiffs, therefore, contend that all the defendants, which include defendant No. 1, defendant No. 11 and the defendant companies under their control, were acting in concert with each other. A concerted plan had come into existence much before the acquisition of these three companies by the defendant No. 11, and it was in pursuance of such a common plan that funds were made available to the three unlisted companies who acquired the shares of Herbertsons Ltd., and later, handed over those companies to the defendant No. 11. Since an acquirer by definition includes any person acting in concert with the acquirer, the acquisition by these three unlisted companies of the shares in Herbertsons Ltd., were in fact acquisition by the acquirers within the meaning of Regulation 10. When two or more persons acquire shares in a company, acting in concert with each other, each one of them is an acquirer within the meaning of Regulation 2(b) of the 1994 Regulation. If this Court ultimately finds that the defendants were acting in concert with each other pursuant to a common plan to acquire substantial shares of Herbertsons Ltd., the acquisition of these unlisted companies by the defendant No. 11, at a later stage, would not help the defendants because the initial acquisition by the aforesaid three unlisted companies would itself be an acquisition of shares by an acquirer in breach of the prohibition contained in Regulation 10.

96. So far as the judgment of the SEBI and the appellate authority in Sesa Goa is concerned, the facts of that case are distinguishable. The acquisition of Sesa Goa Co. Ltd by Mitsui & Co., Japan through Finsider International Co. Ltd., was alleged to be in violation of the SEBI Regulations, and in violation of the provisions of Clauses 40A and 40B of the listing agreement. In that case, it was found that after the Regulations came into force, no acquisition of shares in Sesa Goa took place. It was in this context that the following observations were made in the order:

''Assuming that what the petitioners have contended is correct and Mitsui, Early Guard and Finco are persons acting in concert under the Regulations, the fact remains that no shares of Sesa Goa have been acquired either by Finco, Mitsui or Early guard. Sesa Goa is the company which is said to have been taken over. However, this change in control, if at all, has taken place without acquiring any shares. Even if interpretation of the petitioner is accepted, the provisions of the Regulations dealing with substantial acquisition of shares could not be applicable in the facts of the case. It is worth mentioning that the Regulation does not have any concept of change in the control of management requiring public offer. Therefore, the question of violation of Regulations does not arise. It may be mentioned that these Regulations have now been repealed by SEBI and new Regulations have been notified on February 20, 1997. Only in the new Regulations, the concept of control triggering off public offer has been introduced.''

97. So far as the instant case is concerned, the acquisition of shares of Herbertsons Ltd., defendant No. 12, took place while the 1994 Regulations were in force. The decision of the SEBI and the appellate authority in Sesa Goa must, therefore, be understood in the facts and circumstances of that case, because the question of acquisition of shares in breach of Regulation 10 did not arise in that case.

98. As noticed earlier, Mr. Nariman also agrees that the provisions of the 1994 Regulations must be understood on their own, and in fact, he went to the extent of submitting that the aid of a subsequent law cannot be taken for interpreting an earlier law. He, therefore, submitted that one need not look at the Regulations of 1997. Even without the aid of the 1997 Regulations, it must be held that under the Regulations of 1994, an acquirer need not be a registered shareholder and a holder of shares on the basis of blank transfer with a right to get his name registered was included in that term. On the question of indirect acquisition and control, he submitted that in the facts and circumstances of this case, that was not relevant in view of the fact that the defendants were acting in concert with each other, and, therefore, on a purposive interpretation, whether the acquisition was direct or indirect is immaterial.

99. We are inclined to agree with Mr. Nariman. We have already recorded our conditions earlier. As far as indirect acquisition is concerned, in the facts and circumstances of this case, if it is held that the defendants were acting in concert with each other, each one of them must be deemed to be an acquirer, and the question of direct or indirect acquisition does not arise.

101.1 We agree with Mr. Nariman in view of the findings already recorded by us, but we may only add that so far as acquisition of unlisted companies is concerned, under the Regulations of 1997, Regulations 10 to 12 thereof will apply to the acquisition of shares in unlisted companies in the category of cases enumerated under the Explanation to which the Regulations of 1994 may not have applied, such as Sesa Goa (1997 12 SCL 31 (Bom). However, it is not necessary for us to delve into

this question further as this issue does not arise in this case." per B.P. Singh, CJ.

It is clear, therefore, that the Division Bench of this Court, in the Herbertsons case, accepted that in the case of Sesa Goa:

• No shares of a listed company (i.e. Sesa Goa) had been ''acquired'' pursuant to the 1994 Regulations;

• The acquisition did not trigger the 1994 Regulations;

• No change in SESA Goa''sshareholding pattern occurred in the present case: FINCO held 51% of SESA Goa''s shares before its acquisition; it held exactly the same after its acquisition by EARLY GUARD. Neither respondent No. 4 nor respondent No. 5 ''acquired''any shares in SESA Goa as a result of EARLY GUARD''s acquisition of FINCO. Indeed, looking outward qua SESA Goa, nothing changed as a result of this transaction.

80. It is clear that for the 1994 Regulations to apply, shares in SESA Goad had to be acquired. However, the undisputed fact is that no shares in SESA Goa were acquired. EARLY GUARD, a U.K. Subsidiary of respondent No. 5 (which has not been made a party to these proceedings) merely acquired another U.K. Company, respondent No. 4, FINCO. Regulation 9 of the 1994 Regulations requires the acquisition of shares / securities in the target company. In the present case, no shares / securities were acquired in SESA Goa by any entity, only the ownership of FINCO changed. FINCO held the same number of shares in SESA Goa after the transaction as it held before the transaction. As regards the argument by the petitioner that FINCO''sshareholding in SESA Goa was indirectly acquired by respondent No. 5, or that control of SESA Goa changed, these are matters that were not covered by the 1994 Regulations.

81. Respondent No. 5''s primary submission is that no shares in SESA Goa were acquired, hence exclusion of Regulation 3(d) applies and the 1994 Regulations do not cover the transaction in question. The contrived nature of the petitioner''s argument is none the more apparent than in the game of statutory leapfrog that he plays in his contention that Regulation 9(3) of the 1994 Regulations applies to the present case. From Regulation 9(3) of the 1994 Regulations, he leaps [via Regulations 2(1)(b) and 2(2) of the 1994 Regulations] to the definition of ''securities''contained in Section 2(h) of the Securities Contract (Regulation) Act, 1956 and "body corporate" in the Companies Act, 1956. The expression ''securities'' in Regulation 9(3) clearly and obviously refers to securities of the target company and not securities of a company which holds shares in the target company. The expression ''securities''has been used in contradistinction to the expression ''shares''in Regulations 9(1) and 9(2) so as to cover a case where an acquirer acquires voting rights in a company by acquiring securities other than shares which may entitle the acquirer to such voting rights. It is not as if the expression ''securities''was meant to cover the acquisition of shares of an unlisted holding

company.

82. In 1995, SEBI asked Justice PN. Bhagwati (Retd.) to lead a committee of experts in reviewing the 1994 Regulations. The contents of the Bhagwati Committee Report dated 18th January, 1997 clearly demonstrate the views of that expert committee that the 1994 Regulations did not apply to indirect acquisitions:

...

ix. ...The terms of reference of the Committee were:

...To examine the areas of deficiencies in the existing Regulations; and

...To suggest amendments to the Regulations....

2. Definitions....

2.2 The Committee noted that some of the difficulties encountered by SEBI in the interpretation and implementation of the existing Regulations arose either on account of lack of clarity in the existing definitions of certain terms or for want of definitions in the text of the existing Regulations. For example, the existing definition of "acquirer" did not cover the concept of indirect acquisition of a company, through acquisition of unlisted investment companies which is a possible route of acquisition of a listed company under certain circumstances. Besides the way the existing definition of acquirer is worded, it covers only acquisition of shares, but not of control of the company....

2.21 Definition of ''Acquirer'' The Committee also noted that in any case, SEBI has been taking notice of situations involving change in control and has been directing acquirers to make public offer in the interest of investors, by relying on Clause 40A & B, which continued to be in force. There have also been other cases before SEBI in which indirect acquisition of a listed company has taken place by acquiring unlisted holding or investment companies, which in turn held a majority stake in the listed company, or by acquiring voting rights in a listed company from the present promoters through power of attorney or by entering into covert voting arrangements. It is beyond doubt that as shareholder interest is involved in such cases too these must be covered by the Regulations by incorporating them in the definition of acquirer.

The Committee recommends that

* Not only acquisition of shares but also voting rights in a company or control over a company, howsoever such control can be exercised -directly or indirectly -must be covered under the Regulations and the present definition of ''acquirer''expanded to include these situations.

* The term ''control''be defined to include the right to appoint majority of the directors or to control the management or policy decisions, exercisable by persons

or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements, or in any other manner. 3.34 Indirect acquisition

The Committee had noted that there exists a lacuna in the existing regulations which would allow persons to acquire indirect control of a listed company by acquiring the holding company or a set of investment companies which has block holding and which may be unlisted, because the scope of the Regulations apply only to acquisitions of shares in listed companies. The Committee thought it fit to clarify by way of an explanation that acquisition of an unlisted company would not be exempted if by virtue of such acquisition, or change in control of the unlisted company whether in India or abroad, there is brought about a change in control of the listed company or control over the voting rights of the listed company.

The Committee recommends that:

Concept of indirect acquisitions be brought in. This has been done in the definition of acquirer in Clause (b) of sub regulation (1) of regulation 2; in the definition of persons acting in concert in subclause (1) of Clause (e) of sub regulation (1) of regulation 2; further while excluding unlisted companies from the purview of the Regulations in Clause (k) of sub regulation (1) of regulation 3.

3.35 Chain principle Occasionally, a person or group of persons acquiring statutory control of a company (which need not be a company to which the Regulations apply) will thereby acquire control of a second company because the first company itself holds a controlling block of shares in the second company.... The Committee felt that an offer should be made in these circumstances if

* the shareholding in the second company constitutes a substantial part of the assets of the first company; or

* One of the main purposes of acquiring control of the first company was to secure control of the second company....

83. It is apparent from the above sections of the Bhagwati Committee Report that the Committee recognised that:

(a) Indirect acquisitions were not covered by the 1994 Regulations (hence its reference to a ''lacuna'');

(b) The trigger for the 1994 Regulations was the acquisition of shares in a listed company, not the acquisition of control of a company.

(c) The 1994 Regulations did not cover the transaction in the present case. The examples cited by the Committee in paragraphs 3.34 and 3.35 of the Committee Report describe precisely the circumstances of the present case. The Committee''sview was that such cases should be "brought within the scope of the revised Regulations. In other words, the Committee acknowledged that such cases

were not covered by the 1994 Regulations.

84. SEBI as well as the Appellate Authority, therefore, considered the issue in its proper perspective when they arrived at a finding and concluded that indirect acquisitions are not covered by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994. Regulation 3 of the 1994 Regulations deals with application of the said Regulations. Regulation 3 is couched in the negative i.e. to say that Chapter III of the 1994 Regulations (which deals with substantial acquisition of shares and takeovers) would not be triggered in the circumstances set out therein. Use of the negative language in Regulation 3 clearly implies that the framer of the said Regulation (SEBI) intended that the provisions of the said Regulation 3 are mandatory in character and are to be strictly construed. Regulation 3(d), inter alia, provides that nothing contained in Chapter III of these Regulations shall apply to acquisition of shares in companies whose shares are not listed on any stock exchange.

85. Regulation 2(1)(i) of the 1994 Regulations defines ''shares''to mean "shares in the share capital of a Company carrying voting rights and include any ''security''which would entitle the holder to receive shares with voting rights". Regulation 2(1)(h) defines a Stock Exchange to mean a stock exchange which has been granted recognition u/s 4 of the Securities Contract and Regulations Act, 1956 (SCRA). The words ''company''or ''companies'' is not defined in the 1994 Regulations; but Regulation 2(2) of the 1994 Regulations provides that all other expressions unless defined herein shall have the same meaning as have been assigned to them under the SEBI Act or the Companies Act, 1956, or the SCRA, as the case may be.

86. The SEBI Act does not define the expression ''company'' or ''companies''. Section 2(10) of the Companies Act, 1956 defines a company as being a company defined in Section 3. Section 3 of the Companies Act, 1956 in essence defines a company as "a company formed and registered under this Act or previous Companies Acts. Therefore, the word ''companies''in Regulation 3(d) and Regulation 2(1)(i) of the 1994 Regulations would mean a company formed and registered under the Companies Act, 1956 or earlier Companies Acts. Thus, Chapter III of the 1994 Regulations does not apply to acquisition of shares of Companies (formed and registered under the Companies Act, 1956 or earlier Companies Acts) which are not listed on any Stock Exchange (recognized u/s 4 of the SCRA.) In other words, the acquisition of shares must be of a company not only formed and registered under the Companies Act, 1956 or earlier Companies Acts but also shares of such company should be listed on a stock exchange in India, for the provisions of Chapter III of the 1994 Regulations relating to Takeovers to become applicable. If there is no acquisition of shares in a target company the provisions of Chapter III of the 1994 Regulations do not get triggered.

87. As already observed by us, in November, 1995, SEBI set up a Committee under the chairmanship of Justice P.N. Bhagwati, former Chief Justice of India, to review

the 1994 Regulations and to examine the areas of deficiencies therein and to suggest amendments in the 1994 Regulations with a view to strengthening the Regulations and making them more fair, transparent and unambiguous. The Committee, vide its report dated 18th January, 1997, noted that there existed a lacuna in the 1994 Regulations which would allow persons to acquire indirect control of a listed company by acquiring the holding company or a set of investment companies which have block holding and which may be unlisted, because the scope of the 1994 Regulations applies only to acquisitions of shares in listed companies. The Committee recommended that the concept of indirect acquisitions be brought in.

88. After considering the recommendations of the Committee, the 1994 Regulations were repealed by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, which came into force on February 20, 1997 and which does not apply in the present case. Regulation 3(1)(k) of the 1997 Regulations also provides for the same provision as contained in Regulation 3(d) of the 1994 Regulations, except that an explanation has been added which reads: "The exemption under Clause (k) above shall not be applicable, if by virtue of acquisition or change in control of any unlisted company whether in India or abroad the acquirer acquires shares or voting rights or control over a listed company".

89. The word ''control''was also defined in Regulation 2(1)(c) of the 1997 Regulations to include direct or indirect control. The Explanation to Regulations 10 and 11 of the 1997 Regulations provided that the acquisition under Regulations 10 and 11 shall mean and include

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

(b) indirect acquisition by virtue of acquisition of holding companies, whether listed or unlisted, whether in India or abroad. Therefore, it is quite evident that the concept of indirect acquisition of shares or change in control has been introduced for the first time by the 1997 Regulations.

90. Mr. Chagla has placed reliance on the decision rendered by the Hon''ble Supreme Court in Raghunath Rai Bareja and Another Vs. Punjab National Bank and Others, so as to demonstrate how and in what manner a statute has to be interpreted and that ordinarily, Courts should not depart from the literal rule that would really be amending the law in the garb of interpretation, which is not permissible; and that departure from the literal rule be only done in very rare cases, and the Court cannot attend to the principles of interpretation other than literal rule where the words are absolutely clear and unambiguous; and, therefore, the literal rule of interpretation, for example, Heydon''s mischief rule, the purposive interpretation, etc., can only be resorted to when the words of statute are ambiguous or lead to so unintelligible result or to nullify the very object of the

statute, and that literal interpretation has to be followed even if it results in hardship or inconvenience. The Hon''ble Supreme Court, while dealing with the case, resorted to various decisions and has also observed as under:

"The rules of interpretation other than the literal rule would come into play only if there is any doubt with regard to the express language used or if the plain meaning would lead to an absurdity. Where the words are unequivocal, there is no scope for importing any rule of interpretation vide Pandian Chemicals Ltd. Vs. Commissioner of Income Tax, ... No doubt in some exceptional cases departure can be made from the literal rule of interpretation e.g. by adopting a purposive construction, Heydon''smischief rule, etc., but that should only be done in very exceptional cases. Ordinarily, it is not proper for the court to depart from the literal rule, as that would be amending the law in the garb of interpretation, which is not permissible...." Per Markandey Katju, J.

If the present case is examined on the basis of principles laid down in Raghunath Bareja''s case, it is quite clear that there is no equivocality, but there is difficulty to see how the words are incorporated in Regulation 3(d) of the 1994 Regulations:

Nothing contained in Chapter III of these Regulations shall apply to acquisition of shares in companies whose shares are not listed on any stock exchange.

91. The Hon''ble Supreme Court, in the aforesaid case, also observed:

...once we depart from the literal rule, then any number of interpretations can be put to a statutory provision. Each judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people.... Hence departure from the literal rule should be only done in very rare cases, and ordinarily there should be judicial restraint in this connection....

In Jinia Keotin and Others Vs. Kumar Sitaram Manjhi and Others, , this Court observed that the court cannot legislate under the garb of interpretation. Hence there should be judicial restraint in this connection, and the temptation to do judicial legislation should be eschewed by the Courts. In fact, judicial legislation is an oxymoron.

92. We, therefore, do not find that both SEBI and the Appellate Authority were in error when they concluded that the transaction did not come within the ambit of the provisions of the 1994 Regulations and no public offer was required to be made.

93. Recently, followed by the decision in Raghunath Bareja''s case, the Hon''ble Supreme Court had another occasion to deal with the issue in the decision rendered by it in the case of Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, . The Hon''ble Apex Court dealt with the issue of purposive construction and restriction of operation of repeal clause in context with

the State of Tamil Nadu having passed a number of Notifications u/s 13 of the T.N. Electricity (Taxation on Consumption) Act, 1962 granting exemption from payment of tax to many of the appellants and based on which exemptions, the appellants established their various industrial units; and in many cases, applied for high tension energy connection in the year 1998 and set up captive power plants in 2000 and started drawing energy from their captive power plants only from the year 2000 and took various measure based on such exemptions and on the expectation that the exemptions would continue for the term that they were granted. In the meantime, the 1939 Act and the 1962 Act were repealed by the Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 ("the 2003 Act"). The 2003 Act was not to consolidate and amend the levy of tax on consumption or sale of electricity but to consolidate and rationalise the same. Validity of the provisions of the 2003 Act and / or application thereof in respect of the generating companies, as also the consumers of electrical energy being purchasers from the Tamil Nadu Electricity Board, came to be questioned before the High Court in a large number of writ petitions; and that is how the matter came before the Hon''ble Supreme Court and the main contention was that applicable exemptions u/s 12 and under the above said Exemption Notification passed u/s 13 of the 1962 Act had remained valid and in force despite enactment of the 2003 Act, as provided for u/s 20(1) of the 2003 Act. The Hon''ble Supreme Court dealt with the issue on the touch stone of various principles like doctrine of promissory estoppel, legitimate expectation; and it found that primacy will have to be given to the interpretation of statutes, particularly statutes of provisions which are in the nature of consolidating statutes and repeal thereof and how they will have effect of the existing law, and observed in paragraphs 77 to 106 of the reported judgment as under:

77. We are not unmindful of the fact that the 2003 Act was enacted not only to consolidate but also to rationalise the Act. Mr. Nariman [learned Senior Advocate for the Appellant] takes us to various authorities in regard to the construction of a consolidating statute including IRC v. Hinchy 1960 AC 748, Beswick v. Beswick 1968 AC 58, Director of Public Prosecutions v. Schildkamp 1971 AC 1, Maunsell v. Olins 1975 AC 373 and Farrell v. Alexander 1977 AC 59, to suggest that a consolidating statute is not meant to alter the law. But, in these decisions, it has also been suggested that a consolidating statute may also be an amending Act.

78. It is one thing to say that where the words or expressions in a statute are plainly taken from an earlier statute in pari materia, which have received judicial interpretation, it must be presumed that Parliament was aware thereof and intended it to be followed in the latter enactment. But, it is another thing to say that it is necessary or proper to resort to or consider the earlier legislations on the subject only because the consolidating Act reenacts in an orderly form the various statutes embodying the law on the subject. (See Williams v. Permanent Trustee Co. of New South Wales 1906 AC 249, AC at p. 252 and N.S. Bindra''s Interpretation of Statutes, 10th Edn., pp. 107172.)

79. The words ''consolidate and amend''furthermore often occur in a statute in repealing provision. Such a statute is not intended to alter the law. 80. In Union of India (UOI) Vs. Mohindra Supply Company, this Court observed: (AIR pp. 26061, para 7)

7. ...The Arbitration Act of 1940 is a consolidating and amending statute and is for all purposes a code relating to arbitration. In dealing with the interpretation of the Indian Succession Act, 1865, the Privy Council in Norendra Nath Sircar v. Kamalbasini Dasi (1895) 23 IA 18 observed that a code must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered. The Judicial Committee approved of the observations of Lord Herschell in Bank of England v. Vagliano Bros. (189194) All ER Rep. 93(HL) to the following effect: (All ER p. 113 EG)

I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions....

The Court in interpreting a statute must therefore proceed without seeking to add words which are not to be found in the statute, nor is it permissible in interpreting a statute which codifies a branch of the law to start with the assumption that it was not intended to alter the preexisting law; nor to add words which are not to be found in the statute, or ''for which authority is not found in the statute''. But we do not propose to dispose of the argument merely on these general considerations. In our view, even the legislative history viewed in the light of the dictum of the Privy Council in Hurrish Chunder case Hurrish Chunder Chowdry v. Kali Sundari Debia (1882) 10 IA 4 does not afford any adequate justification for departing from the plain and apparent intendment of the statute.''

Such construction is to be put only when it is a pure consolidating statute but there cannot be any doubt whatsoever that the same has to yield to plain words to the contrary. [See Beswick and Grey v. IRC 1960 AC 1

81. However, there is no constitutional or statutory embargo that a consolidating Act must also be an amending Act. When different terms are used in the new Act, it

would not be proper for the Court to refer to the provisions of a repealed statute.

82. We may furthermore notice that the distinction between consolidating statute and other statutes is no longer valid. It is only in certain exceptional situations that the language used in the earlier Act can be resorted to. In G.P. Singh''s Principles of Statutory Interpretation, 10th Edn., pp. 31516, it is stated:

The distinction between consolidating statutes and other statutes for purposes of interpretation is being obliterated. Recent decisions have emphasised that a consolidation Act should be interpreted according to normal canons of construction and recourse to repealed enactments can be taken only to solve any ambiguity, for the process of consolidation would lose much of its point if, whenever a question as to construction of a consolidating Act arose, reference had to be made to the statues which it has consolidated and repealed. The primary rule of construction of a consolidation Act is to examine the language used in the Act itself without any reference to the repealed statutes. It is only when the consolidation Act gives no guidance as to its proper interpretation that it is permissible to refer to the repealed enactments for guidance and it is never legitimate to have recourse to repealed enactments to make obscure or ambiguous that which is clear in the consolidation Act. It is only when there is a real or substantial difficulty or ambiguity that the court is to attempt to resolve the difficulty or ambiguity by reference to the legislation which has been repealed and reenacted in the consolidation Act. This rule applies to all types of consolidation Acts which are now three:
(1) pure consolidation i.e. Reenactment,

(2) consolidation with correction and minor improvement, and (3) consolidation with Law Commission amendments. But when ''the provisions of the Act itself invited reference to the earlier law and in some cases were unintelligible without them'' recourse to the earlier law for construing the Act becomes inevitable.''

Repeal issue

83. Section 20 of the 2003 Act repeals the 1962 Act as well as the 1939 Act. The effect of ''repeal''is well known wherewith there does not appear to be any general controversy. Thus, before proceeding to advert to the rival contentions of the parties, as noticed hereinbefore, we may notice certain precedents of this Court operating in this behalf.

84.In State of Punjab v. Mohar Singh Pratap Singh AIR 1955 SC 84 this Court has stated: (AIR p. 88, para 8)

Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the

new Act, but only for the purpose of determining whether they indicate a different intention.

The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case.''

85. In Jayantilal Amrathlal Vs. The Union of India (UOI), this Court held: (SCC pp. 17778, para 8)

''The above contention is untenable. There are no provisions in the Gold (Control) Act, 1968 which are inconsistent with Rule 126(1)(10) of the Rules. That being so, action taken under that rule must be deemed to be continuing in view of Section 6 of the General Clauses Act, 1897. It is true that Gold (Control) Act, 1968 does not purport to incorporate into that Act the provisions of Section 6 of the General Clauses Act. But the provisions therein are not inconsistent with the provisions in Section 6 of the General Clauses Act. Hence the provisions of Section 6 of the General Clauses Act are attracted in view of the repeal of the Gold (Control) Ordinance, 1968. As the Gold (Control) Act does not exhibit a different or contrary intention, proceedings initiated under the repealed law must be held to continue. We must also remember that by Gold (Control) Ordinance, the Rules were deemed as an act of Parliament. Hence on the repeal of the Rules and the Gold (Control) Ordinance, 1968 the consequences mentioned in Section 6 of the General Clauses Act follow. For ascertaining whether there is a contrary intention, one has to look to the provisions of the Gold (Control) Act, 1968. In order to see whether the rights and liabilities under the repealed law have been put an end to by the new enactment, the proper approach is not to enquire if the new enactment has by its new provisions kept alive the rights and liabilities under the repealed law but whether it has taken away those rights and liabilities. The absence of a saving clause in a new enactment preserving the rights and liabilities under the repealed law is neither material nor decisive of the question. See State of Punjab v. Mohar Singh Pratap Singh AIR 1955 SC 84 and T.S. Baliah Vs. T.S. Rengachari, .''

86. In India Tobacco Co. Ltd. Vs. The Commercial Tax Officer, Bhavanipore and Others, this Court has held: (SCC pp. 51718, paras 1517)

''15. The general rule of construction is that the repeal of a repealing Act does not revive anything repealed thereby. But the operation of this rule is not absolute. It is

subject to the appearance of a ''different intention''in the repealing statute. Again such intention may be explicit or implicit. The questions, therefore, that arise for determination are: Whether in relation to cigarettes, the 1941 Act was repealed by the 1954 Act and the latter by the 1958 Act? Whether the 1954 Act and 1958 Act were repealing enactments? Whether there is anything in the 1954 Act and the 1958 Act indicating a revival of the 1941 Act in relation to cigarettes?

16. It is now well settled that ''repeal''connotes abrogation or obliteration of one statute by another, from the statute book as completely '' as if it had never been passed''; when an Act is repealed, ''it must be considered (except as to transactions past and closed) as if it had never existed''.[Per Tindal, C.J. In Kay v. Goodwin (1830) 6 Bing 576 and Lord Tenterdon in Surtees v. Ellison (1829) 9 B&C 750 cited with approval in State of Orissa Vs. M.A. Tulloch and Co.,]

17. Repeal is not a matter of mere form but one of substance, depending upon the intention of the legislature. If the intention indicated expressly or by necessary implication in the subsequent statute was to abrogate or wipe off the former enactment, wholly or in part, then it would be a case of total or pro tanto repeal. If the intention was merely to modify the former enactment by engrafting an exception or granting an exemption, or by super adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to a repeal [see Craies on Statute Law, 7th Edn., pp. 349, 353, 373, 374 and 375; 111

Maxwell''sInterpretation of Statutes, 11th Edn., pp. 164, 390 based on Mount v. Taylor (1868) LR 3 CP 645; Southerland''s Statutory Construction, 3rd Edn. Vol. I, paras 2014 and 2022, pp. 468 and 490].

87. In T.S. Baliah v. ITO this Court held: AIR p. 705, para 5

The principle of this section is that unless a different intention appears in the repealing Act, any legal proceeding can be instituted and continued in respect of any matter pending under the repealed Act as if that Act was in force at the time of repeal. In other words, whenever there is a repeal of an enactment the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says a different intention appears in the repealing statute. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject the Court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The question is not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. Section 6 of the General Clauses Act therefore will be applicable unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant

provisions of the new statute and the mere absence of a saving clause is by itself not material. In other words, the provisions of Section 6 of the General Clauses Act will apply to a case of repeal even if there is a simultaneous reenactment unless a contrary intention can be gathered from the new statute.

88. In Gajraj Singh etc. Vs. The State Transport Appellate Tribunal and others etc., this Court held: (SCC pp. 66566, para 24)

When there is a repeal and simultaneous reenactment, Section 6 of the GC Act would apply to such a case unless contrary intention can be gathered from the repealing Act. Section 6 would be applicable in such cases unless the new legislation manifests intention inconsistent with or contrary to the application of the section. Such incompatibility would have to be ascertained from all relevant provisions of the new Act. Therefore, when the repeal is followed by a fresh legislation on the same subject, the Court would undoubtedly have to look to the provisions of the new Act only for the purpose of determining whether the new Act indicates different intention. The object of repeal and reenactment is to obliterate the repealed Act and to get rid of certain obsolete matters.

89. We may at this juncture also notice that whereas Section 6 of the General Clauses Act provides for effect of repeal, Section 24 thereof provides for continuation of orders issued under the enactments repealed and reenacted.

They read as under:

6. Effect of repeal.Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not

(a) revive anything not in force or existing at the time at which the repeal takes effect; or 113

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

***

24. Continuation of orders, etc., issued under enactments repealed and reenacted.

Where any Central Act or Regulation is, after the commencement of this Act, repealed and reenacted with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or byelaw, made or issued under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions reenacted, continue in force, and be deemed to have been made or issued under the provisions so reenacted, unless and until it is superseded by any appointment, notification, order, scheme, rule, for or byelaw, made or issued under the provisions so reenacted and when any Central Act or Regulation, which, by a notification u/s 5 or 5A of the Scheduled Districts Act, 1874 (14 of 1874) or any like law, has been extended to any local area, has, by a subsequent notification, been withdrawn from and re extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and reenacted in such area or part within the meaning of this section.''

90. What, however, is the matter of moment would be that the expression ''unless a different intention appears'' occurring in Section 6 of the General Clauses Act, 1897 has not been inserted in subsection (1) of Section 20 of the 2003 Act. Subsections (1) and (2) of Section 20 of the 2003 Act, thus, operate in different situations. Whereas the proviso appended to subsection (1) of Section 20 of the 2003 Act provides for the consequences flowing from the repeal of the 1939 Act and the 1962 Act, Section 20(2) provides for a legal fiction for continuation of certain things / proceedings on the premise as if the said Acts had not been repealed. Repeal of the 1939 Act and the 1962 Act would lead to repeal of notifications issued thereunder also. The proviso appended to subsection (1) of Section 20 of the 2003 Act, however, carves out an exception in regard to the consequences flowing therefrom.

91. If subsections (1) and (2) of Section 20 of the 2003 Act operate in different fields, as we have held, the marginal note of Section 20 viz. repeal and savings, in our opinion, would not be material. If both the subsections of Section 20 of the 2003 Act are not dependent on each other and in particular having regard to the phraseology used therein, they need not be read together. One cannot proceed on the basis while reading the provisions of the statute that anomaly would be created and then urge that they should be read together.

92. Submission of Mr.Andhyarujina (learned Senior Advocate for the respondents) that this Court must read the words ''unless a different intention appears''in subsection (1) of Section 20 of the 2003 Act, in our opinion, is impermissible in law. We have rejected a similar contention of Mr. Nariman urging us to read down and apply the purported rule of purposive construction while construing Section 14 of the 2003 Act. We do not intend to apply different tests in the matter of construction of Section 20 of the 2003 Act. Omission of words in a particular statute may play an important role. The intention of the legislature must be, as is well known, gathered from the words used in the statute at the first instance and only when such a rule

would give rise to anomalous situation, may the Court take recourse to purposive construction. It is also a well settled principle of law that casus omissus cannot be supplied. [See J. Srinivasa Rao v. Govt. of A.P. (2006) 12 SCC 607.

93. The proviso appended to subsection (1) of Section 20 of the 2003 Act although for all intent and purport incorporates Section 6 of the General Clauses Act but a significant departure therefrom must be borne in mind. If the legislature has used different words, or has omitted certain words, in our opinion, the same cannot be read as containing the words ''unless a different intention appears''. It may be that the provisions of the 2003 Act are demonstrably different from the 1962 Act but we must assume that the legislature did so deliberately. The intention of the legislature by making a distinction between subsection (1) and subsection (2) of Section 20 of the 2003 Act, in our opinion, is obvious. The fact that the significant words ''unless a different intention appears'' or the Act does not contain a provision inconsistent therewith were known to the legislature. Whereas in subsection (1) of Section 20 of 116 the 2003 Act they did not introduce any such thing, they did so while enacting subsection (2) thereof.

94. While construing the said words, we may require to construe Section 14 of the 2003 Act at the outset. The word ''corresponding''may mean ''to be in harmony with or to be similar or analogous to or to be identical with'' as has been held in H.V. Mathai Vs. The Subordinate Judge, Kottayam and Others, .

95. The word ''correspond''as contained in Stroud''s Judicial Dictionary, 2nd Edn., Vol. I, p. 355, is to mean ''to harmonise with'' or ''to be identical with''. 96. But, we may notice that whereas the 1939 Act did not contain any provision for exemption from payment of tax in respect of sale of electrical energy, Section 13 of the 1962 Act dealing with taxation on consumption of electrical energy expressly provided therefor. Section 14 of the 2003 Act, on the other hand, makes a provision for grant of exemption in respect of sale of energy as contradistinguished from the provisions of the 1939 Act. It takes away the power of exemption on consumption of electrical energy which had been expressly provided under the 1962 Act. Can the 1939 Act and the 1962 Act, on the one hand, and the 2003 Act, on the other, be said to be containing similar or identical provisions? The answer thereto must be rendered in the negative. Once Section 14 of the 2003 Act is held to be not containing any provision ''corresponding''to the relevant provisions of the 1939 Act and the 1962 Act, subsection (2) of Section 20 of the 2003 Act, in our opinion, will have no application. If subsection (2) of Section 20 of the 2003 Act would have no application, subsection (1) of Section 20 would apply. Once subsection (1) of Section 20 of the 2003 Act is found to have application, the absence of the words ''unless a different intention appears''will assume great significance. If that be so, then there is no conflict 117 between the proviso appended to subsection (1) of Section 20 and subsection (2) thereof. In that view of the matter, subsection (2) of Section 20 of the 2003 Act would prevail.

97. The High Court, therefore, in our opinion, committed a manifest error in opining that both the provisions relate to the same scenario. Furthermore, subsection (2) of Section 20 of the 2003 Act uses the expression ''notwithstanding such repeal''and, thus, the same cannot be construed to be notwithstanding anything contained in subsection (1) of Section 20 thereof.

98. Once the aforementioned conclusion is arrived at, it would not be necessary to construe the proviso appended to subsection (1) of Section 20 in its own language. Proviso, as is well known, has four functions, as has been noticed by this Court in S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others, , in the following terms: (SCC p. 610, para 43) ''43.(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.''

[See also Swedish Match AB and Another Vs. Securities and Exchange Board, India and Another,]

In a case of this nature, the proviso restricts the operation of the repeal clause. It seeks to protect the matter specified thereunder despite such repeal. Section 6 of the General Clauses Act seeks to achieve the same purpose, subject of course, to the repealing Act having no provision inconsistent with the repealed Acts. The 1962 Act provided for grant of exemption from payment of electricity tax levied on consumption of electricity. When a notification was issued by the appropriate authority, the same had to be given a purpose. A notification issued thereunder could be an act which would come within the purview of the words ''anything duly done''

99. In our opinion, it would not be correct to contend that only because subsection (2) of Section 20 of the 2003 Act refers to notification, the same would not (sic) mean that wherever the word notification has been issued, subsection (1) thereof will have no application.

100. We are also unable to agree with Mr. Andhyarujina that exemption from tax is a mere concession defeasible by the Government and does not confer any accrued right to the recipient. Right of exemption with a valid notification issued gives rise to an accrued right. It is a vested right. Such right had been granted to them permanently. ''Permanence''would mean unless altered by statute. Thus, when a

right is accrued or vested, the same can be taken away only by reason of a statute and not otherwise. Thus, a notification which was duly issued would continue to govern unless the same is repealed.

101. Mr. Andhyarujina, however, would submit that reference to the words ''anything duly done''should be given a restrictive meaning. He referred to Statutory Interpretation- A Code by F.A.R. Bennion, 3rd Edn., p. 229, wherein it was stated:

''Paragraph (ii).This derives from the Interpretation Act, 1978, Section 16(1)(b). The reference to ''anything duly done''avoids the need for procedural mattes, such as the giving of notices, to be done over again.

Example 89.3.The Interpretation Act, 1978, Section 16 preserved the effect of a noise nuisance notice served under the Control of Pollution Act, 1974, Section 58(1) before its repeal and replacement by the Environmental Protection Act, 1990, Sections 162 and 164(2) and Schedule 16 Part III.''

The treatment of the law, in our opinion, is not exhaustive as different consequences are required to be taken into consideration and applied having regard to the nature of the statutory provision.

102. Mr. Andhyarujina also relied upon Maxwell on the Interpretation of Statutes, 12th Edn., p. 18, wherein it was stated:

When an Act is repealed, any delegated legislation made under the Act falls to the ground with the statute unless it is expressly preserved. Where the subordinate legislation is continued in force, however, the general rule is that its scope and construction are determined according to the repealed Act under which it was made.

The statement of law therein does not militate against our findings aforementioned. Construction would vary from statute to statute.

103. It is profitable to notice at this stage a decision of this Court in Universal Imports Agency and Another Vs. The Chief Controller of Imports and Exports and Others, . In that case under the Indo French Agreement entered into by and between the two nations on 1111954, the entire administration of French settlement vested in the Government of India. The territory of Pondicherry, thus, became a free port without any restriction in case of most imports. However, by reason of a notification dated 30101954, the importers in Pondicherry were required to obtain validation of licences held by them to import goods as the petitioners thereof did not have any merchandise imported by them which stood confiscated.

Clause 6 of the Agreements reads thus: (AIR pp. 4445, para 12)

Unless otherwise specifically provided in the Schedule, all laws in force in the French Establishments immediately before the commencement of the Order, which correspond to enactments specified in the Schedule, shall cease to have effect, save

as respect things done or omitted to be done before such commencement.

Analysing the said provision, this Court held: (AIR p. 46, para 16)

The words "things done"in para 6 must be reasonably interpreted and, if so interpreted, they can mean not only things done but also the legal consequences flowing therefrom. If the interpretation suggested by the learned Counsel for the respondents be accepted, the saving clause would become unnecessary. If what it saves is only the executed contracts i.e. The contracts whereunder the goods have been imported and received by the buyer before the merger, no further protection is necessary as ordinarily no question of enforcement of the contracts under the preexisting law would arise. The phraseology used is not an innovation but is copied from other statutory clauses. Section 6 of the General Clauses Act (10 of 1897) says that unless a different intention appears, the repeal of an Act shall not affect anything duly done or suffered thereunder.

Thus, a liberal and extensive construction was given by this Court.

104. To the same effect is also a decision of this Court in Shri Ram Prasad (Deceased) by his Legal Representative Vs. The State of Punjab, wherein power to make rule was held to be a thing done within the meaning of Article 357(2) of the Constitution of India.

105. In State of Punjab Vs. Harnek Singh, this Court held: (SCC p. 490, para 16)

The words "anything duly done or suffered thereunder" used in Clause (b) of Section 6 are often used by the legislature in saving clause which is intended to provide that unless a different intention appears, the repeal of an Act would not affect anything duly done or suffered thereunder. This Court in Hasan Nurani Malak Vs. Assistant Charity Commissioner, Nagpur and Others, has held that the object of such a saving clause is to save what has been previously done under the statute repealed. The result of such a saving clause is that the preexisting law continues to govern the things done before a particular date from which the repeal of such a preexisting law takes effect. In Universal Imports Agency v. Chief Controller of Imports and Exports (supra) this Court while construing the words "things done" held that a proper interpretation of the expression "things done"was comprehensive enough to take in not only the things done but also the effect of the legal consequence flowing therefrom.

106. Furthermore, exemption from payment of tax in favour of the appellants herein would also constitute a right or privilege. The expression "privilege"has a wider meaning than right. Nature of such a right would depend upon and also vary from statute to statute. It has been so held by this Court, while construing Section 6 of the General Clauses Act, in M/s. Gurcharan Singh Baldev Singh Vs. Yashwant Singh and others, in the following terms: (SCC p. 432, para 3)

The objective of the provision is to ensure protection of any right or privilege acquired under the repealed Act. The only exception to it is legislative intention to the contrary. That is, the repealing Act may expressly provide or it may impliedly provide against continuance of such right, obligation or liability.

94. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 contain the following Regulation as regards repeal and saving. Regulation 47 reads as under:

Repeal and Saving

(1) The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 are hereby repealed. 123

(2) Notwithstanding such repeal:(a) Anything done or any action taken or purported to have been done or taken including approval of letter of offer, exemption granted, fees collected, any adjudication, enquiry or investigation commenced or show cause notice issued under the said Regulations shall be deemed to have been done or taken under the corresponding provisions of these Regulations;

(b) Any application made to the Board under the said Regulations and pending before it shall be deemed to have been made under the corresponding provisions of these Regulations.

(c) Any appeals preferred to the Central Government under the said Regulations and pending before it shall be deemed to have been preferred under the corresponding provisions of these Regulations.

A plain reading of this Regulation clearly indicates that the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 stand repealed and the only saving is in respect of what has been provided in sub regulation (2) (a), (b) and (c). Further, Regulation 47 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 nowhere provide for retrospective application of these Regulations.

Therefore, Regulation 47, which provides for repeal and saving, is in consonance with the usual provisions which are required to be incorporated u/s 6 of the General Clauses Act, i.e., it merely qualifies that anything done or any action taken or purported to have been done or taken, including approval of letter of offer, exemption granted, fees collected, any adjudication, enquiry or investigation commenced or show cause notice issued under the said Regulations shall be deemed to have been done or taken under the corresponding provisions of these Regulations; and so also in respect of any application made to the Board under the said Regulations and pending before it shall be deemed to have been made under the corresponding provisions of these Regulations; and so also in case of appeals preferred to the Central Government.

95. To sum up, the law is well settled from catena of decisions, including those cited and discussed in this judgment. The 1994 Regulations, on being repealed by the 1997 Regulations, will be restricted to their operation as given in Regulation 47, which provides for repeal and savings, but insofar as the changes introduced by the 1997 Regulations are concerned, particularly those provisions, which are substantive in nature and did not exist in the 1994 Regulations as spelt out in the comparative table in paragraph 29 of the aforesaid judgment, will have to be read in the context of the Regulations which stand substituted.

96. The Supreme Court, in the case of Mahadeolal Kanodia Vs. The Administrator-general of West Bengal, , stated the principles applicable to pending proceedings on amendment of an Act as under:

(8) The principles that have to be applied for interpretation of statutory provisions of this nature are well established. The first of these is that statutory provisions creating substantive rights or taking away substantive rights are ordinarily prospective; they are retrospective only if by express words or by necessary implication the Legislature has made them retrospective; and the retrospective operation will be limited only to the extent to which it has been so made by express words, or necessary implication. The second rule is that the intention of the Legislature has always to be gathered from the words used by it, giving to the words their plain, normal, grammatical meaning. The third rule is that if in any legislation, the general object of which is to benefit a particular class of persons, any provision is ambiguous so that it is capable of two meanings, one which would preserve the benefit and another which would take it away, the meaning which preserves it should be adopted. The fourth rule is that if the strict grammatical interpretation gives rise to an absurdity or inconsistency such interpretation should be discarded and an interpretation which will give effect to the purpose the Legislature may reasonably be considered to have had will be put on the words, if necessary even by modification of the language used.

97. It is also well settled that in interpreting a repealed statute, four things are to be considered: (1) what was the prevailing enactment governing the field, (2) what was the mischief and defect for which it did not provide, (3) what remedy (the Bhagwati Committee in the present context) has been resolved and appointed to cure the disease; and (4) the true reason of the remedy. AND all statutes, except declaratory or procedural on matter of evidence, are prospective. No retrospective effect is to be given unless statute, by express words or implication, indicates it.

98. Therefore, we have no hesitation to hold that the impugned order passed by the Securities and Exchange Board of India dated 6th March, 1997 and the impugned order of the Appellate Authority dated 15th December, 1997 do not call for any interference.

99. Petition is dismissed with no order as to costs. Rule is discharged.

100. Consequently, Notice of Motion does not survive, and the same is dismissed accordingly.