BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No.140 of 2009

Date of Decision: 28.8.2009

Mr. Deepak Mehra
16/26 Navjivan Society,
Lamington Road, Mumbai ….. Appellant

Versus

1. Securities and Exchange Board of India
   Plot No.C4-A, 'G' Block,
   Bandra Kurla Complex,
   Bandra (East), Mumbai

2. Bharti Airtel Limited
   Aravali Crescent, 1Nelson Mandela Road,
   Vasant Kunj, Phase-II,
   New Delhi

3. MTN Group Limited
   Innovation Centre, 216-14th Avenue,
   Fairland, Roodepoort, 2195,
   Private Bag 9955,
   Cresta 2118, South Africa .....Respondents

Mr. Janak Dwarkadas, senior Advocate with Mr. Birendra Saraf and Mr.Anupam Dighe, Advocates for the Appellant.

Mr. Darius Khambata, Additional Solicitor General with Mr. Jayesh Ashar, Solicitor, Mr. Mihir Mody and Mr. Kersi Dastoor, Advocates for Respondent no1.

Mr. Virendra Tulzapurkar, senior Advocate with Mr. Ajay Bahl, Mr. Nikhil Sakhardande, Mr. Rajendra Barot, Mr. Shailesh Shukla, and Mr. Gautam Saha, Advocates for Respondent no.2.

Mr. I.M. Chagla, senior Advocate with Mr. M.P. Bharucha, Mr. P. Modi, Mr. Zal Andhyarujina, Mr. Krishnayan Sen, and Mr. Charles Dezouza Advocates for Respondent no.3.

CORAM : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member

Per : Justice N.K. Sodhi, Presiding Officer (Oral)

Challenge in this appeal is to the communication dated June 22, 2009 issued by the general manager of the Corporation Finance Department – a Division of Corporate Restructuring of the first respondent in response to the request made by Bharti Airtel Limited (Bharti) seeking informal guidance from the former regarding the issuance of

Global Depository Receipts by Indian listed companies and the applicability of Regulation 3(2)of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the takeover code) under the Securities and Exchange Board of India (Informal Guidance) Scheme, 2003 (hereinafter called the Scheme).

2. Bharti is proposing to enter into partnership with MTN Group Limited (for short 'MTN') and the proposal contemplates issuance of Global Depository Receipts (GDRs) by Bharti to MTN and its shareholders. In accordance with the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993, the shares underlying the GDRs would be issued to the overseas depositary bank and shall rank pari passu with other issued shares of Bharti. The proposal also envisages that Bharti would acquire 49 per cent shares of MTN through a combination of subscription of fresh shares issued by MTN and sale of MTN shares by existing shareholders of MTN to Bharti. In consideration of acquiring the shares of MTN, MTN would receive GDRs which, if exchanged for underlying ordinary shares of Bharti, would constitute approximately 25 per cent of the share capital of Bharti. Further, the public shareholders of MTN would receive GDRs which, if exchanged for underlying ordinary shares of Bharti, would constitute approximately 11 per cent of the share capital of Bharti. While the matter is still at the proposal stage, Bharti by its letter dated June 18, 2009 sought an informal guidance from Respondent no.1 as to whether in the light of the exemption under Regulation 3(2) of the takeover code, MTN and/or its shareholders would be required to comply with the requirements of Chapter III of the takeover code. In other words, Bharti wanted a clarification as to whether MTN would be exempt from having to make an open offer to Bharti shareholders in the event of the proposal going through. In response to this request from Bharti, the general manager issued the impugned communication informing the former that under Regulation 3(2) read with Regulation 14(2) of the takeover code, MTN and/or its shareholders would be required to comply with the requirements of Chapter III of the takeover code only upon conversion of the GDRs into equity shares with voting rights. Bharti was further informed that the said exemption would not be available under Chapter II of the takeover code and that the requirements of that chapter shall have to be complied with. Bharti was specifically

informed that the impugned communication did not express a decision of the Board on the questions referred to therein. It is not in dispute that this informal guidance given by a department of the first respondent was put up on its website on July 7, 2009.

3. The appellant, who holds 100 shares of Bharti which were acquired by him only on July 10, 2009, feels aggrieved by the impugned communication and contends that the view taken in the said communication is ex-facie contrary to the provisions of the takeover code and that it would adversely affect the rights of the shareholders of Bharti who may not get the right to exit to which they are entitled to under the takeover code. The two companies are discussing a proposal that will have MTN acquiring a chunk of Bharti shares and, according to the appellant, it should necessitate an open offer under the takeover code. The respondents, on the other hand, have not only challenged the bonafides of the appellant but have also raised by way of a preliminary objection, the question of maintainability of the appeal. It is their case that the impugned communication is only an informal guidance given by a department of the first respondent and that it does not constitute an "order" within the meaning of section 15T of the Securities and Exchange Board of India Act, 1992 (for short the Act). According to the respondents, the Board has not taken a final decision and has passed no order so as to entitle any one to file an appeal.

4. We have heard the learned senior counsel on both sides and are of the view that the appeal is premature. The proposal in regard to which Bharti sought an informal guidance from the first respondent has not yet been consummated and is still a proposal which has yet to be finalized. The impugned communication is only an interpretative letter providing under the scheme an interpretation of the provisions of the takeover code as was sought by Bharti pending finalisation of the proposal which may or may not come through. Clause 12 of the scheme makes it clear that an interpretative letter issued by a department of the Board constitutes the view of the department but will not be binding on the Board, though the Board may generally act in accordance with such a letter**.** Clause 13 thereof also makes it clear that a letter giving an informal guidance by way of interpretation of any provision of law or fact should not be construed as a conclusive decision or determination of those questions and that such an interpretation cannot be construed as an order of the Board under section 15T of the Act. While giving its

informal guidance to Bharti, the general manager of the Corporation Finance Department of the Board had also made it clear that the view expressed therein is not a decision of the Board on the questions referred to by Bharti. It is, thus, clear that the views expressed in the impugned communication are the views of the corporate finance division of the first respondent and they shall not bind the said respondent. It is further clear that the first respondent has not taken any final decision in the matter and has passed no order which could said to be adversely affecting the rights of the appellant or any other shareholder of Bharti. The informal guidance given by the general manager is not an "order" which could entitle any one to file an appeal. The word "order" is defined in Black's Law Dictionary (Eight Edition) as "1.A command, direction, or instruction. 2. A written direction or command delivered by a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands." In the case before us, the first respondent has not issued any command or direction. An occasion to issue a direction or pass an order may arise, if and when, the proposal that is being discussed between the two companies is finalised. If and when, such a direction is issued or any order passed, it shall be open to any person who feels aggrieved by that order or direction to come in appeal before the Tribunal.

5. As regards the question of bonafides of the appellant, we are inclined to agree with the learned senior counsel appearing for Respondents 2 and 3 that his bonafides are suspect. The interpretative letter which is now impugned in the present appeal was put on the website of the respondent Board on July 7, 2009 and it would, therefore, be deemed to be notice atleast to all the market players. The appellant, admittedly, acquired the shares only on July 10, 2009 may be with a view to make himself eligible to file the present appeal. Moreover, in the memorandum of appeal, the appellant has no where disclosed the date on which he acquired the shares and became a shareholder of Bharti. In this background, we are not inclined to entertain the appeal.

6. Before concluding, we may notice another submission made by the learned senior counsel appearing for the appellant. He pointed out that the appellant had made a detailed representation to the first respondent pointing out that the view taken by its general manager of the Corporation Finance Department was ex-facie contrary to the provisions of the takeover code and that the impugned communication was liable to be

withdrawn. The grievance of the appellant is that this representation has not been considered by the Board so far and the prayer now made is that a direction be issued to the Board to deal with the said representation and pass an order thereon in accordance with law. We are afraid that such a grievance cannot be entertained by this Tribunal. Section 15T of the Act provides for an appeal by any person aggrieved by an "order" made by the Board or by an adjudicating officer. Admittedly, the Board has not passed any order on the representation made by the appellant and such inaction on the part of the Board cannot be the subject matter of an appeal under section 15T of the Act. The remedy, if any, lies elsewhere. It is only against an order passed by the Board that an appeal lies and not against its inaction. Be that as it may, no prayer has been made in the memorandum of appeal for the issuance of a direction to the Board to consider the representation filed by the appellant. Not only this, the appellant has made no grievance in the memorandum of appeal that his representation has not been disposed off by the respondent Board. In this view of the matter, we cannot accept the contention made by the learned senior counsel for the appellant.

In the result, the appeal fails and the same is dismissed as not maintainable leaving the parties to bear their own costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

28.08.2009
RHN