BEFORE THE SECURITIES APPELLATE TRIBUNAL

MUMBAI

Appeal No.114/2002

In the matter of:

1. Clariant International Ltd.,

2. Ebito Chemiebeteiligungen AG Appellants

Vs.

Securities and Exchange Board of India Respondent

Appearance:

Shri Aspi Chinoy,

Senior Advocate

Shri Navroz Seervai

Advocate

Shri Anoj Menon

Advocate

I/b Crawford Bayley & Co., For Appellants

Shri Kumar Desai

Advocate

Ms. Rita Shivalkar,

Advocate

Ms. Daya Gupta

Advocate

I/b Maneksha & Sethna

Shri Vinay Chauhan,

Legal Officer,

SEBI For Respondent

ORDER

Colour Chem Ltd. (the target company) is an Indian company and its shares are listed on the Bombay Stock Exchange and National Stock Exchange. Clariant International Ltd.,(Clariant) is a Swiss company. It is a hundred per cent subsidiary of another Swiss company viz. Clariant AG. Hoechst AG (Hoechst) is a German company. Ebito Chemiebeteiligungen AG(Ebito) is a Swiss company in which Clariant held 49% shares and Hoechst held 51% shares. Pursuant to an agreement entered into in mid 1997 between Hoechst and Clariant, Hoechst's German specialty chemicals business was sold and transferred to Clariant. In terms of the said Agreement Hoechst and Clariant entered into negotiations for the purchase/transfer of 583708 equity shares of Rs.100/- each of the target company then held by Hoechst, which constituted 50.1% of the paid up capital of the target company. A Stock Purchase Agreement for the purpose was prepared on 21.11.1997. In this context Clariant sought exemption from the compliance of the requirement of making open offer to the shareholders of the target company in terms of the provisions of the Securities and

Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the Takeover Regulations). The exemption as sought for was not granted by the Respondent. Since Hoechst had exited from the specialty chemicals business, it was decided by Hoechst to sell off the shares of the target company held by it to Ebito, a company floated on 19..5.2000 as a special purpose vehicle. On 13.10.2000 Hoechst sold and transferred the shares to Ebito. It has been stated that as a consequence of the scheme of financial reorganisation/reconstruction effected, Ebito which held 50.1% of the share capital of the target company, became a 100% subsidiary of Clariant. It was in the said context the Respondent received a complaint alleging that the Appellants had violated the provisions of the Takeover Regulations as they acquired 50.1% shares/voting rights and control in the target company without making public announcement in accordance with the regulations. The Respondent responded to the complaint and conducted an enquiry into the matter. After the enquiry, the Respondent came to the conclusion that the Appellants had actually acquired the control over the target company on 21.11.1997. The impugned order dated 16.10.2002 was made in the light of said findings. After discussing the factual position and the relevant provisions of the Takeover Regulations it has been recorded in the order that "Thus, when the Acquirer, in the instant case, expressed its intention to acquire the 50.1% shares of the target company by way of entering into Purchase Agreement with Hoechst on 21.11.1997 it constituted an intention to acquire indirectly the control over the target company and thus triggered the Regulations and therefore, the obligation to make Public Announcement arose on that day which was to be made within four working days of 21.11.97, i.e. the date of entering into the said agreement." It has been further observed in the order that the "Acquirer (the Appellants) has violated regulations 10 and 12 read with sub regulations (1) and (3) of regulation 14 as the Acquirer had acquired 50.1% shares/voting rights and control in the target company, without making public announcement to acquire shares/voting rights or control of the target company in accordance with the said regulations." Having come to the said conclusion the Respondent vide its order dated 16.10.2002 directed the Appellants to make public announcement as required in terms of regulations 10 and 12 of the Takeover Regulations, taking 21.11.1997

as the reference date for calculation of offer price. The public announcement was directed to be made within 45 days of the date of the order. In the order it has also been stated that:

> "in terms of sub regulation (12) of regulation 22, the payment of consideration to the shareholders of the Target company has to be made within 30 days of the closure of the offer. The maximum time period provided in the said Regulations for completing the offer formalities in respect of an open offer, is 120 days from the date of public announcement. The public announcement in the instant case ought to have been made taking 21.11.97 as reference date and thus the entire offer process would have been completed latest by 21.3.98. Since no public announcement for acquisition of shares of the Target company has been made, which has adversely affected interest of shareholders of Target Company, it would be just and equitable to direct the Acquirer to pay interest @ 15% per annum on the offer price. The Acquirer is hereby accordingly directed to pay interest @ 15% per annum to the shareholders for the loss of interest caused to the shareholders from 22.3.98 till the date of actual payment of consideration for the shares to be tendered in the offer directed to be made by the Acquirer."

The Appellants claiming to be aggrieved by the said order filed the present appeal.. It is a limited purpose appeal as could be seen from the appeal that:

> "The Appellants whilst being aggrieved with the findings and conclusions arrived at by the said impugned order and whilst not admitting the correctness of the same, are filing a limited Appeal, inter alia, restricting the present Appeal to that part of the order which directs the Appellants to pay interest at the rate of 15% per annum on the offer price from 22nd March, 1998 till the actual payment of consideration for the shares to be tendered in the offer directed to be made by the Appellants."

Thus the scope of the present appeal is restricted to seeking relief against the direction to pay interest at the rate of 15% for the delay involved in making payment to the target company's shareholders who tender the shares in the public offer required to be made in terms of the regulations.

Shri Aspi Chinoy, learned Senior Counsel, appearing for the Appellants briefly explained the factual position considered relevant to the issues raised in the appeal. He referred to the impugned order in particular the summary of the findings and the direction to the Appellants to pay interest at the rate of 15% per annum on the offer price to the shareholders of the target company for the loss of interest caused to them from 22.3.1998 till the date of actual payment of consideration. Shri Chinoy submitted that as per the order it was on "just and equitable" grounds the Respondent wanted the Appellants to pay interest @ 15% to the shareholders to compensate the loss of interest due to delay involved in making public offer and the delay in making the payment. He submitted that as the Respondent has admitted that the direction to make payment of interest is on "just and equitable" grounds and the payment is intended to compensate the loss of interest suffered by the shareholders as a result of delay involved in receiving monetary consideration for the shares, from the Appellants. In this context Shri Chinoy submitted that thus it is clear from the order that the direction to pay interest is to compensate those who suffered and, therefore, those persons who were holding shares on 21.11.1997 and who were in a position to tender the shares held by them in case the Appellants had made a public offer, alone are entitled to be compensated for the loss of interest caused due to the delay. He submitted that a person who purchased the target company's shares in the year 2002, has not lost anything to be compensated due to delayed public offer which according to the Respondent was to be made on 21.11.1997. He submitted that those who held shares on the reference date alone are eligible to receive interest. In this context learned Senior Counsel referred to this Tribunal's decision in Rhodia SA V Securities and Exchange Board of India (2001) 34 SCL 597) and stated that wherein the Tribunal had observed that interest is to be paid by way of compensation and that "a person who was not holding shares and as a result not in a position to tender shares in a public offer which was

required to be made by 14.6.2000 (date is specific to Rhodia's case) should not be entitled for any compensation for the delay involved in making the public offer and the consequential delay in the payment of the purchase consideration. He was not in a position to tender shares in response to the public offer had the Appellant made the public offer at that point of time. Therefore, those persons who were holding shares of the Indian company as on 14.6.2000 and to continue to be share holders on the closure day of the public offer made in terms of the directions given by the SEBI vide the impugned order alone should be eligible to receive interest, in case the shares which he was holding on 14.6.2000 are tendered in response to the belated public offer." Shri Chinoy submitted that the principle laid down by the Tribunal in Rhodia as cited above is applicable to the present case and the Respondent's order be therefore, modified to the said effect. Countering the Respondent's submission that Rohdia's order has been challenged in appeal before the Hon'ble Bombay High Court, Shri Chinoy submitted that the Hon'ble High Court has not stayed the said order and, therefore, the order is valid and in fact it was incumbent on the Respondent to follow the said principle in the Appellant's case.

Shri Chinoy referred to this Tribunal's decision in BP Plc V Securities and Exchange Board of India ((2001) 33 SCL 570) and the Hon'ble Bombay High Court's order upholding that decision (2002) 37 SCL 771). He referred to the observation made by the Tribunal that "The interest is required to be paid for the delay involved in paying the consideration for the shares tendered by the shareholders in response to the public offer to purchase shares made by the Appellants. In fact it is nothing but a sale consideration payable by the Appellants to the shareholders. For the delay involved in receiving the payment of the consideration amount for the period from the date on which it was due till the date on which actual payment is made, the shareholder is entitled to receive interest." He submitted that in the said case the Counsel who appeared for the Respondent had argued that "direction to pay interest on a sum which is due to the shareholders is not a penalty ….that what is being asked to pay is the legitimate claim of the shareholders for the delay involved in making payment to them." Learned Senior Counsel submitted that the Respondent's stand in the present case stating that "the issue here is not who should receive the

interest" but "what must be the liability of the defaulter for having delayed the offer" goes contrary to the stand taken by it in BP Plc and the view held by the Tribunal and the Hon'ble Bombay High Court in the said case. He submitted that the Respondent has gone even to the extent of stating that the interest payment should not be restricted or determined in tune with the Tribunal's decision in Rhodia. Shri Chinoy referred to the following observation made by the Hon'ble High Court in BP Plc upholding the Tribunal's order that interest directed to be paid to the shareholders is compensatory in nature:

"Applying the principles regarding award of interest as has been held by the Apex Court in Secretary, Irrigation Department Vs. G.C. Roy (supra) to the effect "a person deprived of the use of money to which he is legitimately entitled to has a right to be compensated for the deprivation, call it by any name. It may be called "interest, compensation or damages," the investors are entitled to be compensated by way of interest for delayed payment. Under these circumstances we find no substance that there is no power to award such an interest."

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In regard to the direction to pay interest at the rate of 15% per annum Shri Chinoy submitted that the Hon'ble High Court's decision in BP Plc's case is specific to the facts of the case that it has not lay down any general principle to be followed in determining the rate of interest. In this context learned Senior Counsel submitted that the Hon'ble High Court had noted the BP Plc's submission that the Court has a right to award interest which is by way of an equitable right. He referred to the following observation by the Hon'ble High Court in the said order that – "Quantum of 15% interest in the facts and circumstances of the case can not be said to be unjust, exorbitant, arbitrary and in no way the same can be construed as amounting to penalty." Learned Senior Counsel submitted that 15% interest was found reasonable in BP Plc in the facts and circumstances specific to the case, and that the Hon'ble Court has not held that 15% interest is leviable in each and every case ignoring the facts relevant to each case.

Learned Senior Counsel submitted that the Respondent has failed to note that the interest rates have been steadily and sharply falling to the

range of 7% - 9%. He referred to the interest rates offered by 'x' nationalised bank on long term deposits (3 years) and submitted that the rate on 3 year deposits has come down from 13% in July 1996 to 7.50% in August 2002. In this context he submitted that it requires to be noted that the Hon'ble Supreme Court has linked the rate of interest payable by way of compensation with the interest rate offered by nationalised banks for Fixed Deposits, that at a time when nationalised banks were giving 9% on Fixed Deposits, the Hon'ble Supreme Court had, in several cases, either increased or decreased the rate of interest awarded by High Court to the level of 9%. In this connection Shri Chinoy referred to the observation made by the Hon'ble Supreme Court in Smt. Kaushnuma Begum V New India Assurance co. Ltd. (2001) 2 SCC 9) on the question of fixing up rate of interest, that "Earlier, 12% was found to be the reasonable rate of simple interest. With a change in economy and the poliicy of the Reserve Bank of India, the interest rate has been lowered. The nationalised banks are now granting interest at the rate of 9% on fixed deposits for one year. We, therefore, direct that the compensation amount fixed herein before shall bear interest at the rate of 9% per annum from the date of the claim made by the appellants."

He submitted that as set out in the reply of the Respondent, the Hon'ble Bombay High Court in the matter of BP Plc, had upheld payment of interest at 15% although the interest rate prevailing in the United Kingdom was at 5-6%, that the Hon'ble High Court however was not confronted with nor examined the interest rates prevailing in India at the relevant time, that in the present case, the Appellants have relied on the decisions of the Hon'ble Supreme Court, where interest has been awarded at the rate of 9%, that in view of the decisions of the Hon'ble Supreme Court on the issue of interest, the Tribunal should reduce the rate of interest, as prayed for by the Appellants. Learned Senior Counsel submitted that the Hon'ble Bombay High Court in the case of BP Plc did not consider the above judgement whilst passing its order dated 2nd May, 2001 directing payment of interest at 15% per annum, that the judgement of the Hon'ble High Court in BP Plc case cannot have application to the present case. He further submitted that Kaushnuma Begum's case was followed by the Hon'ble Supreme Court in H. S. Ahmed Hussain V Irfan Ahmed (2002) 6 SCC 52)

Shri Chinoy submitted that a direction to pay interest at the rate of 15% in the current economic environment is not fair. He submitted that in fact the Respondent has now recognised that the interest payable for delayed payment should be at the rate of interest payable by banks on fixed deposits, and this view has been incorporated in clause (i) of regulation 44. Learned Senior Counsel submitted that as the Respondent itself has now come to the conclusion that the rate of interest payable be the rate payable by banks on fixed deposits, it should not have directed the appellants to pay such a high rate of interest, and the 15% interest fixed need be reduced accordingly, that if there was any particular reason to consider the Appellants' case differently warranting any deviation, then the Respondent should have stated in its order the reasons for the same. He submitted that the impugned order was passed after the aforesaid amendment took effect, and any direction to pay penalty/interest should therefore be governed by the provisions of the amended Takeover Regulations, that presuming for the sake of argument that the earlier provisions apply, even so the requirement of new regulation to make payment of interest with refernce to the bank rate of interest, is very significant. He submitted that in fact the Respondent had fixed only 10% interest for the delay involved in making public offer in some cases and referred to the orders made in the cases of acquisition of shares of FAG Bearing India Ltd. and Widia India Ltd.

Learned Senior Counsel further submitted that as the Appellant has been directed to pay the interest "for just and equitable" reasons "to compensate the loss caused as a result of the delay in making the purchase consideration for the shares," it was incumbent on the part of the Respondent to take into consideration the pretax dividend received by the shareholders of the target company and the dividend amount received should have been deducted from the interest amount to be received as otherwise it would amount to unjust enrichment for such shareholders. He submitted that the direction to pay interest by way of compensation without taking into consideration the dividend amount received for the shares held, would in effect be penal and therefore ultra vires the law. He submitted that if the shareholders have as a matter of fact received dividend on the shares, it is a benefit which has accrued to them, which must be adjusted against the interest payable by the

Appellants.

Shri Kumar Desai, learned Counsel appearing for the Respondent submitted that the Appellants have sought only limited relief, i.e.(i) to restrict the persons to be entitled to receive the interest (ii) reduce the rate of interest from 15% to 10% and (iii) decide the quantum of interest payable by reducing the dividend paid by the target company to the shareholders.

Shri Desai submitted that in the light of Hon'ble Bombay High Court's decision in BP Plc (supra), there cannot be any dispute as to what should be the rate of interest payable to the shareholders to whom payment has been delayed as a result of the Acquirers default. In this context he referred to the observation made by the Hon'ble Bombay High Court in the said case that :

> " As far as the third issue is concerned whether the award of 15 per cent p.a. interest to be exorbitant or by way of penalty we do not find substance in the said contention inasmuch as the SEBI Regulations themselves in certain provisions, very clearly provide that in case of delay in refund 15 per cent p.a. interest can be awarded. Quantum of 15% interest in the facts and circumstances of the case cannot be said to be unjust, exorbitant, arbitrary and in no way the same can be construed as amounting to penalty. The prevalent rate of interest in the United Kingdom at 5-6 per cent has no relevance here and as such we do not find any substance in the third ground of objection directing the Appellants to pay the interest @ 15 per cent p.a."

Shri Desai submitted that 15% interest is not arbitrarily decided, that as the Hon'ble Bombay High Court held, the rate of interest was levied taking into consideration all the relevant facts including the rate prescribed in some of the SEBI Regulations for delayed payment to the investors in certain other situations. In this context he referred to regulation 35(4) of the SEBI (Mutual Funds) Regulations, 1996 and submitted that thereunder the interest prescribed to be paid for delayed repayment of the application money to the applicants is at the rate of 15% per annum. He also referred to the provision of clause 4 D in the

Companies (Central Government's) General Rules and Forms, 1956 and stated that as per the said clause the rate of interest presently payable in terms of section 73 of the Companies Act for delayed refund of application money to the applicants in a public issue is 15%. Learned Counsel submitted that if an applicant in a public issue is entitled to get interest @ 15% for delayed refund of the application money, for the same reason a person who has not been paid the entitled purchase consideration by the acquirer, should also be entitled to receive interest at the same rate of 15%. Shri Desai, with reference to the Appellants' contention that as per regulation 44(i) the rate of interest payable for the delay is that rate of interest payable by banks on fixed deposits, submitted that the Takeover Regulations does not put any upper limit on the interest payable, that the requirement is to levy interest at the rate not less than the applicable rate of interest payable by banks on fixed deposits, and that the Respondent has fixed 15 per cent in the instant case taking into consideration the attendant facts and circumstances, that the quantum so fixed is also in tune with the view held by the Hon'ble Bombay High Court in BP Plc. case. Shri Desai further submitted that for the purpose of determining the rate at which interest is payable by the Appellants, the rate of interest prevailing at the time when the interest became due from the Appellants for non payment of offer price to the shareholders is to be taken into consideration and not the present rate of interest. He submitted that in BP Plc case these issues were raised by the company and the Hon'ble Bombay High Court upheld the direction to pay interest at 15% taking into consideration those submissions. He submitted that the present case is in no way materially different from BP Plc and, therefore, the view held by the Hon'ble Court in BP Plc is in equal force applicable to the instant case.

With reference to the Respondent's direction to pay interest at the rate of 10% in the case of Widia India Ltd. and FAG Bearing India Ltd. referred to by the Appellants, Shri Desai submitted that by the order dated 23.10.2002 in the case of acquisition of shares in Widia India Ltd., the acquirers were directed to pay interest at the rate of 10% from 31.8.2002, and in the case of acquisition of shares of FAG Bearing India Ltd., the order dated 19.10.2002 required the acquirers to pay interest @ 10% with effect from 9.1.2002, that in both the cases interest

rate was decided taking into consideration the present falling rate of interest, that the said rate of 10% cannot be held to be the applicable rate of interest to a transaction relating to March, 1998. Shri Desai submitted that the rate of interest has been fixed at 15% in the Appellant's case taking into consideration the then prevailing interest rate in the market and the delay of about 4 years involved.

With reference to the question as to the eligibility of the persons to whom interest is to be paid, Shri Desai submitted that the persons who tenders shares in the public offer as and when made by the Appellants should be considered eligible to receive interest. He referred to regulation 16(vi) and submitted that as per the said regulation even those persons who own the shares, even if they are not registered shareholders, are entitled to participate in a public offer and that this position is also clear from the eligibility for accepting the public offer as stated in the standard letter of offer devised by the Respondent. Shri Desai submitted that all those persons who are entitled to participate in a public offer as and when made are entitled to receive interest. He submitted that the Takeover Regulations does not discriminate owners and registered shareholders for the purpose of participating in a public offer, that interest is payable on the amount.

Shri Desai submitted that the Tribunal's decision in Rhodia has been appealed against and the matter is pending before the Hon'ble Bombay High Court and that the Tribunal in BP Plc which preceded Rhodia, had not made any qualification as such to be entitled to receive interest, that the view held in Rhodia does not apply to the case of the Appellants. He submitted that it does not stand to reason to hold that the shareholders who have purchased the shares of the target company after the due date as specified by the Respondent in the impugned order will be entitled to offer the shares but not entitled to get interest. According to the learned Counsel, such shareholders might have purchased the shares factoring in the interest component and therefore they should not be denied the interest from the date as specified by the Respondent. He submitted that in the present case an obligation to make public offer by the Appellants has already arisen, that the Takeover Regulations does not have any provision for "record date" as in the case of entitlement for rights or bonus or dividend, that all holders of shares registered or

unregistered who hold shares at any time prior to the closure of the offer are eligible to participate in the open offer.

Learned Counsel submitted that the criteria for payment of interest is not attached to the person but to the amount payable on the shares tendered and accepted under the open offer i.e. interest is paid for delay in acquiring the shares and is paid to the holder of shares who had tendered the same in the public offer, that thus the liability of the Appellant is to pay interest on the shares to all persons who would tender the shares and whose tenders would be accepted in the proposed offer irrespective of the fact whether they were eligible to participate if the open offer was made in November, 1997.

With reference to the Appellants' submission that whilst directing the Appellants to pay interest, the Respondent ought to have taken into account the pretax dividend received by the shareholders from the target company and deducted the same from the interest payable, learned Counsel submitted that the obligation to pay dividend to the shareholders of the company as per the provisions of the Companies Act, 1956 and Securities Contracts (Regulation) Act, 1956 is on the target company and the Appellants cannot seek adjustment of payment of dividend paid by the target company to the shareholders in respect of the Appellant's obligation to make timely public announcement and consequent liability to make payment of the purchase consideration and interest directed to be paid for such delay, that the Appellants cannot seek reduction in their liability to pay interest to the shareholders of the target company by seeking to deduct the amount of pre-tax dividend payable by the target company to its shareholders who would tender their shares in the public offer.

I have noted that the Applicant's prayer in the present appeal is restricted to that part of the order which directs them to pay interest at the rate of 15 percent per annum on the offer price from 22.3.1998 till the date of actual payment of consideration for the shares to be tendered in the public offer directed to be made. They want the rate of interest to be reduced to the rate of interest now payable by banks on fixed deposits, and reduce from the interest so payable, the quantum of dividend already paid by the target company to the shareholders. They also want to restrict entitlement to receive the interest to only those

persons who were holding shares in the target company on 21.11.1997 and who are in a position to tender the same in case the Appellants make a public offer as directed by the Respondent. There is no dispute about the offer price or the period for which interest is to be paid.

The question as to whether the Respondent has the power to award interest in a case like this has been considered by the Hon'ble Bombay High Court in BP Plc (supra). A little light on the facts of the said case would help us to understand the relevance of the said decision to the present case. Two companies viz. BP Plc and Castrol Ltd. registered in United Kingdom had filed the appeal challenging this Tribunal's order dated 5.9.2001. It was in the said appeal the cited order was passed. Now the facts. Burma Petrol Plc. a company incorporated in United Kingdom became a wholly owned subsidiary of BP Plc. Burma Castrol Plc has a subsidiary company viz. Burma Castrol Holdings Ltd. which in turn has a subsidiary viz. Castrol Ltd. The said Castrol Ltd. has a subsidiary company in India viz. Castrol India Ltd, with 51% shareholding therein. In the light of the facts relating to the change in ownership of the companies as aforesaid Securities and Exchange Board of India (SEBI) viewed that as a result of Burmah Castrol Plc becoming a subsidiary of BP Plc there was a change in control over the Indian company i.e. Castrol India, and the said change in control warranted BP Plc to make a public offer to purchase atleast 20% of the shares held by the shareholders in the said company, as per the requirements of the Takeover Regulations. In that context SEBI had directed BP Plc to make a public offer taking 14.3.2000 as the relevant date for fixing the offer price and to pay interest at the rate of 15 per cent per annum on the open offer price for the period from 14.3.2000 till the actual date of payment of consideration to the target company's shareholders, under the public offer. The said order was challenged in an appeal before this Tribunal. The Tribunal upheld the order, with slight modification. The matter went in appeal to the Hon'ble Bombay High Court. The Hon'ble High Court vide its order dated 2.5.2002 dismissed the appeal. The main challenge to the Tribunal's order in the said appeal was on three grounds that (i) the SEBI has no express statutory power to award interest; (ii) the interest if at all justified, could not have been awarded from 14.7.2000 but only from 7.11.2000 (iii) the award of interest at the rate of 15% p.a. is exorbitant and ought

to be at 5-6% as prevalent in United Kingdom. Hon'ble High Court after considering the rival contentions of the parties passed the order. On the question whether the Respondent has the statutory power to award interest the Hon'ble Court observed as follows:

> "whether SEBI has statutory power to award interest or not one has to see the main objective of the said Act which is to protect the interest of the investors in securities and also to promote the development of and to regulate the securities market. Section 11(1) of SEBI Act clearly provides that it is the duty of the Board to protect the interest of investors in securities and they have been empowered to take such measures and regulations as it thinks fit. Section 11(2) also makes it clear that without prejudice to the generality of the above provisions in Section 11(1) certain measures have been mentioned in Section 11(2). This is to say Section 11(2) does not preclude SEBI from taking such measures as and when need arises. If one were to read Section 11(2) with Regulation 44 it is clear that SEBI has ample power to award such interest when SEBI's main duty is to protect the interests of the investors. There is no regulation or statutory provision which debars SEBI from awarding such an interest. Section 11(1) r/w Regulation 44, it is abundantly clear that SEBI has inherent power to award such an interest.
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> This is all the more clear from the Division Bench Judgement of our High Court in Anand Rathi V SEBI (supra) which mentions that the Court has to interpret the provisions in consonance with the legislative intention so as to give lift to the said legislation. Over and above, the Appellants were held liable to pay the investors as per our judgement in First Appeal No.582 of 2001 in SEBI Appeal No.11 of 2001 which judgement was not challenged by the Appellants in the Supreme Court and the Appellants have acted on the same."

Thus it is clear that the Respondent is empowered to award interest, as a measure to protect the interest of investors. The object of awarding interest is thus clear. In this context it is also to be noted that, the Hon'ble High Court has held in the said case that "a person deprived of

the use of money to which he is legitimately entitled has the right to be compensated for the deprivation, call it by any name. It may be called "interest", "compensation" or "damages", the investors are entitled to be compensated by way of interest for delayed payment". In the light of the view held by the Hon'ble High Court, it has to be noted that the interest in the case was required to be paid by way of compensation for delayed payment. It is in the said view of the matter, the relevance of the rate of interest payable, the period for which it is payable, and the person who is to be compensated, is to be decided. There is no question of paying interest by way of compensation to a person who has no cause to be compensated. Similarly the rate of interest should be reasonably sufficient to meet the loss or damage suffered by the person because of the delay involved in making the payment. Undoubtedly the assessment of the same so as to be not arbitrary should be relatable to certain acceptable parameters- say the rate of interest payable on fixed deposits by banks.

On the question as to who is entitled to be paid interest as compensation, the Appellants have taken the stand that only those persons who were holding shares on 21.11.1997 and who were in a position to tender the shares in case the Appellants make public offer should be entitled. But the Respondent is of the view that any shareholder who tenders shares in the public offer when made should be paid interest. This Tribunal in Rhodia (supra) has considered the question of eligibility to receive interest in case the public offer is delayed and as a result payment is also delayed to the shareholders. The said case was also with reference to acquisition of shares/control attracting the provisions of Takeover Regulations. In the said case the Respondent had directed the Acquirer to pay interest @ 15% from the due date for making payment of the money (14.7.2000) to the shareholders till the date of actual payment of consideration for the shares tendered in response to the offer. It was observed in the order:

> "The learned Senior Counsel had pointed out that in the said order (i.e. BP Plc case) the Tribunal had viewed that interest is the return or compensation for the use or retention by one person of money belonging to another, and in this view of the matter the requirement of payment of interest should be only

> to those persons who were holding shares on 14.6.2000 and in a position to tender the same in case the Appellant makes a public offer as directed by SEBI. The learned senior Counsel submitted that those who purchased shares after the due date for closure of the offer as specified by the SEBI have not suffered any such loss and any direction to pay interest to those shareholders also on those shares purchased after 14.6.2000, and tendered in an offer as required to be made by the impugned order would amount to unjust enrichment of those shareholders. I find some force in this argument. A person who was not holding shares and as a result not in a position to tender shares in a public offer which was required to be made by 14.6.2000 should not be entitled for any compensation for the delay involved in making the public offer and the consequential delay in the payment of the purchase consideration. He was not in a position to tender shares in response to the public offer had the Appellant made the public offer at that point of time . Therefore, those persons who were holding shares of the Indian company as on 14.6.2000 and continue to be shareholders on the closure day of the public offer made in terms of the directions given by SEBI vide the impugned order alone should be eligible to receive interest, in case the shares which he was holding on 14.6.2000 are tendered in response to the belated public offer."

The purpose of directing the Appellants to pay interest to the shareholders in such cases involving delay in making payments is to compensate the loss sustained by them. As observed by the Hon'ble Bombay High Court in BP Plc cited above, the investors are undoubtedly entitled to be compensated by way of interest for delayed payment. The question of delayed payment comes when ? It arises when the payment is not made on the date on which the amount was due to be paid. In the instant case when was the amount due to be paid ? According to the Respondent's order the due date for making payment was 22.3.1998. If the due date was 22.3.1998 to whom that payment was due ? To this the answer is that who was entitled to receive the amount (or his legal heirs) on 22.3.1998. This entitlement is

linked to the shares which one would have offered in the public offer made by the acquirers closed on 22.2.1998. Therefore, it is difficult to accept a proposition that anybody who purchased shares after the said due date, say on 22.2.2002, and tendered the shares so purchased in the public offer to be made by the Appellants as per the directions of the Respondent, should be paid interest from 22.2.1998 though there was no payment due to him. He has not suffered any loss to be compensated. A person who has not suffered any loss, but is still found entitled to receive interest by way of compensation, that would be a case of giving him undue benefit The Respondent's submission in this regard in its written reply (para 4) that "the issue here is not 'who should receive the interest" but "what must be liability of the defaulter for having the delayed offer" goes contrary to the principle laid down by the Hon'ble Bombay High Court in BP Plc. It appears that the Respondent in its reply filed is harping more on the liability of the person making offer than on the right of offeree to be compensated . It is to be noted that the interest is proposed to be paid as a compensatory measure to benefit the shareholders and not as a measure of penalty to penalise the acquirer for the default committed by him. There are penal provisions in the SEBI Act to take care of such defaults. If a view is taken that interest is required to be paid as a penal consequence for the delay involved in making the payment, the direction to pay interest on that ground would partake the nature of penalty and in that case the direction will be ultravires the law. In any case the written reply filed by the Respondent can not change the impugned order. In the impugned order it has been clearly stated that the Appellants are directed to pay interest to the shareholders for the loss of interest caused to them. In this context it is to be noted that acquisition referred to in the impugned order relates November 1997, the due date for closing the public offer was 22.2.1998 and still to hold that a person who was nowhere in the picture, at that point of time and has not suffered any loss as a result of the default on the part of the acquirer to make a public announcement making public offer on 21.11.1997, should be compensated, defies logic. The absurdity of such argument in support to pay interest can be shown by an illustration. A company registered on 1.1.2002 purchases shares on 22.2.2002 and tenders those shares in a public offer subsequently made by an acquirer. If one is to go by the Respondent's submission, that company who tendered shares

in the public offer is entitled to be compensated even though it was not in existence at the relevant point of time. The purpose to pay compensation to a shareholder is not to unjustly enrich him but to compensate his genuine loss. The Appellants' argument that there is no "record date" and as such any one acquiring shares is entitled to tender the same is extraneous to the issue. We are not now on the question of the eligibility of a person to participate in a public offer. The issue is on the entitlement to receive interest by way of compensation. The Respondent had argued that in BP Plc no such qualification was put to receive interest, that all the shareholders were recognised. It is to be understood that in the BP Plc, the said issue was not raised and therefore, the Tribunal did not consider the same. BP Plc case was decided by the Tribunal on 5.9.2001. The question as to the person 'who is entitled to receive' interest in delayed public offer was raised for the first time before the Tribunal in Rhodia and the question was decided by the Tribunal on 7.11.2001. Therefore, the Respondent's submission that based on the decision in BP Plc, the Respondent's direction to pay interest to all those shareholders offering shares in the public offer should be upheld is not tenable. The Respondent had advanced an argument that those who purchased shares after 22.3.1998 might have factored in interest component in the purchase price and as such those who purchased shares even after the closure date of the public offer should be considered eligible to receive interest is also untenable for the reason that, it was on 16.10.2002 the Respondent for the first time directed the Appellants to make a public offer and pay interest @ 15% for the delay involved. It is impossible to believe that anyone would have though of such an order and factored in the interest when he purchased shares before the said date. Further the said order was challenged by filing an appeal on 6.12.2002 and in the appeal relief was sought against the direction to pay interest and also on the eligibility of the shareholders entitled to be compensated. Since the matter was under dispute in a litigation no prudent person would factor in such an uncertain factor to the purchase price of the shares. The Respondent's submission that the right to participate in a public offer is not restricted to the registered shareholder is not an issue under consideration in this appeal. In the Rhodia case this Tribunal had not held that only registered shareholders are entitled to tender shares and not others, in a public offer. The Tribunal had held in its order in

Rhodia that "those persons holding shares ……. and continue to be shareholders…….alone should be eligible to receive interest." There is not even a suggestion in the order that only registered shareholders are entitled to participate in an offer. The Appellants' contention that the order in Rhodia is under challenge and therefore, need not be followed has no force. It was stated across the bar by the learned Counsel that the operation of the said order has not been stayed. Therefore, in the identical set of facts, and in the absence of any authorities contrary to the said decision having been brought to my notice, I do not see any reason to take a different view in this case than the one taken in Rhodia in regard to the eligibility of persons to receive interest by way of compensation from the Appellants. As per regulation 22, date of opening of the offer shall not be later than 60 days from the date of public announcement and the offer is required to be kept open for a period of 30 days. In the instant case public announcement, as per regulation 14 was to be made on 25.11.1997 Therefore, it is held that those persons who were holding shares of the target company on 24.2.1998 and continue to be shareholders on the closure day of the public offer to be made in terms of the directions given by the Respondent vide the impugned order alone shall be eligible to receive interest, in case the shares which they were holding on 24.2.1998 are tendered in response to the public offer to be made in terms of the impugned order and accepted by the Appellants.

With reference to the sustainability of the rate of interest of 15%fixed by the Respondent, the Appellants had raised several points. In this context, before proceeding further, it is felt necessary to note the observation made by the Hon'ble Bombay High Court in BP Plc. Hon'ble Court had observed that "Whether the award of 15% p.a. interest to be exorbitant or by way of penalty we do not find substance in the said contention in as much as the SEBI Regulations themselves in certain provisions, very clearly provide that in case of delay in refund 15% p.a. interest can be granted. Quantum of 15% interest in the facts and circumstances of the case cannot be said to be unjust, exorbitant, arbitrary and in no way the same can be construed as amounting to penalty. The prevalent rate of interest in the United Kingdom at 5-6% has no relevance here and as such we do not find any substance in the third ground of objection directing the Appellants to

pay the interest at the rate of 15% p.a." (emphasis supplied) In this connection it is to be noted that the Hon'ble Court has come to the conclusion that the rate of interest at 15% is not "unjust exorbitant or arbitrary" in the facts and circumstances of the case. This Tribunal while holding SEBI's decision directing BP Plc to pay interest had noted the submissions of the Counsel for both the parties. Their submissions have been recorded in the order which was before the Hon'ble High Court. BP Plc's Counsel's submission as recorded in the Tribunal's order was that – "Shri Setalvad, referring to the rate of interest of 15 percent levied, stated that it is unjustified as the alleged rationale for directing payment of interest is that the Appellants have used the amount payable under the open offer and deprived the shareholders the use thereof. He submitted that the interest rates prevalent in the United Kingdom are in the region of 5-6 per annum; that even in India interest rates over a one year period range between 9-10 per cent." In reply to the said submission, learned Advocate General of Maharashtra, who appeared for SEBI had submitted that "the rate of interest @ 15% per annum has been arrived at by the Respondent taking into consideration the Indian scenario. He had submitted that the interest rates prevalent in UK are of no relevance in the context as the matter relates to the interests of the minority shareholders in India and the 15 per cent interest rate is not high or unreasonable." It is noted that the Respondent's Counsel had also submitted before the Hon'ble High Court in the said appeal that "What one has to see is the conditions in India and not UK and the award of interest at the rate of 15% p.a. is not at all exorbitant and nothing penal about the same." In this context it is noted that in the said case, BP Plc was referring to the interest rate in United Kingdom and therefore, there is every reason to believe that the reference to Indian conditions made by the Respondent's Counsel covered the prevailing interest rate in India and the Hon'ble Court had taken cognizance of the prevailing rate of interest in India while upholding the direction to pay interest @ 15%. It is noted that in BP Plc the Respondent had passed the order on 23.7.2001 directing the acquirer to pay interest at the rate of 15% p.a. with effect from 14.3.2000 as against the then prevailing bank interest on fixed deposit, which was around 9%. But the Hon'ble Court felt that "in the facts and circumstances of the case" rate of interest fixed at 15% by the Respondent as reasonable.

Shri Chinoy had referred to the direction of the Respondent in Widia India Ltd., and FAG Bearing India Ltd. to show that the Respondent had directed the acquirers to pay interest at the rate of 10% in these cases and therefore in the Appellants' case also the interest rate should be brought to 10% or "the interest at the rate payable by banks on deposits as per sub regulation (i) of regulation 44."

In this context it would be useful to have a look at the said regulation 44(i) which was incorporated in the Takeover Regulations with effect from 9.9.2002. The said regulation is as follows:

"44. Without prejudice to its rights to initiate action under Chapter VI A and section 24 of the Act, the Board may in the interest of securities market or for protection of interest of investors, issue such directions as it deems fit including;

Xxxxx

Xxxxx

Xxxxxx

i. directing the persons concerned, who has failed to make a public offer or delayed the making of a public offer in terms of these regulations, to pay to the shareholders, whose shares have been accepted in the offer made after the delay, the consideration amount alongwith interest at the rate not less than the applicable rate of interest payable by banks on fixed deposits.

Shri Chinoy's submission is that this new provision is only a dejure recognition of the defacto position It is true that the new sub regulation provides a bench mark to decide the rate of interest payable for delayed payments. This helps to avoid arbitrariness in fixing the rate of interest. It has to be noted that the said regulation does not stipulate that the rate of interest shall be the same rate of interest payable by banks on fixed deposits. The ban is on fixing rate of interest less than the bank interest rate. It is therefore clear that the Respondent is free to fix higher rate of interest for justifiable reasons.

In the Widia India case, the direction was to pay interest @ 10% p.a. from 31.8.2002 and in the case of FAG Bearing India Ltd., also the direction was to pay interest @ 10%, but from 10.1.2002. In August 2002 the rate of interest payable by nationalised banks on deposit of money for three years was around 7.50% and still the acquirers were directed to pay interest at the rate of 10%. In January, the interest rate payable was around 8.50%. Still in the case of FAG Bearing India's case, the acquirers were directed to pay 10% interest. Thus it is clear that the Respondent had in these cases also fixed the rate of interest higher than the rate of interest payable on deposits by banks.

Shri Chinoy had submitted that in BP Plc, in the proceedings before the Hon'ble Bombay High Court resulting in the Court holding that the interest rate of 15% p.a. is just and reasonable, the Hon'ble Supreme Court's decision in Kaushnuma Begum was not cited and considered. He submitted that the Hon'ble Supreme Court has held in that case that since the nationalised banks are now granting interest at the rate of 9% on fixed deposits for one year, the compensation amount fixed (under Motor Vehicles Act) shall bear interest at the rate of 9% per annum and therefore, the applicable interest rate now is around 9% It is to be noted that the Hon'ble Supreme Court's observation appears to relate the rate of interest to the interest payable by the nationalised banks on fixed deposits. Even on applying the said test, it does not appear to me that the 15% interest directed to be paid to the shareholders as compensation for the delay involved in making the payment in the Appellants' case is unjust. In this context it is to be noted that the payment was to be made, in case the offer had been made according to the provisions of the Takeover Regulations, by 22.3.1998 and the amount to be so paid remains unpaid till date. Therefore, in my view the interest rate applicable should be that rate which was prevailing on 22.3.1998 and not the one prevailing on the date of the impugned order. According to the information furnished by the Appellants the rate of interest payable on deposits for a period of 3 years and above by nationalised banks was around 12% at that point of time. In this context one should not fail to note that the interest is directed to be paid to the shareholders to compensate the loss. Had the shareholder received the money on due date, in the normal course what return he would have received by effectively investing that money has to be taken into

consideration. The amount was due on 22.3.1998. The then existing rate of 12%, if calculated on quarterly rest basis, at the end of 2002 works out to more than 15% and therefore, even if the interest is worked out in relation to the rate of interest payable on deposits by nationalised banks, the rate of interest payable by the Appellants fixed at 15% p.a. by the Respondent in the instant case cannot be considered unjust, and the same is also not contrary to the view held by the Hon'ble Supreme Court in Kaushnuma Begum's case or against the provisions of regulation 44 (i). Therefore, taking into consideration the facts and circumstances of the case, I am not inclined to agree with the Appellants' submission that the direction to pay interest at the rate of 15% is unjust and need be modified. The direction to pay interest at the rate of 15% in the facts and circumstances of the case is to be sustained.

The next contention of the Appellants is that whilst ordering and directing them to pay interest, the Respondent ought to have taken into account the pretax dividend received by the shareholders of the target company and directed that the amount of pretax dividend received be deducted from the interest payable. In this context it need be noted that the direction to pay interest is on the Appellants. The reason for directing the Appellants to pay interest is that it was due to their failure, to make timely payment the shareholders suffered. The interest was directed to be paid to make good the loss of interest caused to the shareholders by the Appellants. Thus it is clear that the obligation to pay interest to the shareholders, as per the order is on the Appellants. No obligation has been cast on the target company and rightly so. The Dividend is paid by the target company. It has nothing to do with the obligation of the Appellants to make payment for the shares acquired by them or for making payment of interest for the delay involved in making the payment. It is also to be noted that interest and dividend are not one and the same. Interest is paid to a person deprived of the use of money to which he is legitimately entitled as he has a right to be compensated for the deprivation. Dividend in its ordinary connotation means the sum paid to or received by a shareholder proportionate to his shareholding in a company out of the sum total of profit distributed. Dividend is not paid as a compensation. Dividend is a participatory benefit available to the shareholder in a company. The Appellants' argument that to the extend the shareholders have received the dividend

during the delayed period by virtue of their retaining the shares, and therefore, they need not be compensated by paying interest is untenable.

It has to be noted that the claim of interest arises on account of the delay involved in making payment by the acquirer and the obligation to pay interest is on the acquirer. The acquirer cannot escape from his obligation claiming that the shareholder has been paid dividend by the target company. In my view payment of dividend by the target company is not compensatory in nature and it cannot be considered as a payment in lieu of the interest due to the shareholders from a third party for the transaction to which the target company is not even a party. The argument that the shareholders of the target company have, as a matter of fact, received dividend on the shares and the same being a benefit accrued to them must be adjusted against the interest payable by the Appellants, in my view is untenable, taking into consideration the distinct nature of interest and dividend. It does not stand to reason to say that since the shareholders have enjoyed participatory benefit in the company and., therefore, shareholders are not to be compensated for an entirely different cause of action in the hands of the Appellants. For the reasons stated above the Appellants' contention that the pretax dividend should be adjusted against the interest payable to the shareholders, is rejected.

For the reasons stated above it is held that:

i. Those persons who were holding shares of the target company on 24.2.1998 and continue to be shareholders on the closure day of public offer to be made in terms of the directions given by the Respondent vide the impugned oroder alone shall be eligible to receive interest in case the shares which they were holding on 24.2.1998 are tendered in response to public offer made in terms of the impugned order, and accepted by the Appellants.

ii. The interest payable by the Appellants shall be at the rate of 15% as directed by the Respondent in its order dated 16.10.2002.

iii. The dividend paid by the target company to its shareholders not required to be deducted from the interest payable to the shareholders by the Appellants.

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The appeal is disposed of in the above lines.

Sd/[

(C.ACHUTHAN)

PRESIDING OFFICER

Place: Mumbai

Date: February 21, 2003.