BEFORE THE SECURITIES APPELLATE TRIBUNAL

MUMBAI

In the matter of:

Appeal No.99/2002

M.A. Sumathi **Appellant**

Vs.

1. **Securities & Exchange Board of India**
2. **Bayer Cropscience AG**
3. **Aventis Cropscience India Ltd.,**
4. **Ambit Corporate Finance Pvt. Ltd.,** **Respondents**

Appeal No.100/2002

P. Gopinath **Appellant**

Vs.

1. **Securities & Exchange Board of India**
2. **Bayer Cropscience AG**
3. **Aventis Cropscience India Ltd.,**
4. **Ambit Corporate Finance Pvt. Ltd.,** **Respondents**

Appeal No.101/2002

India Syntans Investments Pvt. Ltd Appellant

Vs.

1. Bayer Cropscience AG

2. Aventis Cropscience India Ltd.,

3. Securities & Exchange Board of India Respondents

Appeal No.103/2002

Suresh V. Gala Appellant

Vs.

1. Securities & Exchange Board of India

2. Bayer Cropscience AG

3. Aventis Cropscience India Ltd.,

4. Ambit Corporate Finance Pvt. Ltd., Respondents

Present:

Shri R. Subramanian

Advocate for Appellants in appeal nos.99/2002 & 100/2002

Shri M.P. Barucha

Advocate for Appellant in appeal no.101/2002

Shri J.J. Bhatt

Advocate for Appellant in appeal

no.103/2002

Shri Janak Dwarkadas

Senior Advocate **for Respondent**

(Bayer Cropscience AG)

Shri Rafique Dada

Senior Advocate **for Respondent (SEBI)**

Shri Navroz Seervai { **for Respondents**

Advocate { **(Aventis Cropscience**

{ **India Ltd and**

Shri Virendra Tuljapurkar { **Ambit Corporate Finance**

Advocate { **P. Ltd)**

INTERIM ORDER

Ambit Corporate Finance Pvt. Ltd., Respondent in Appeal Nos.99/2002, 100/2002 and 103/2002 (the merchant banker), on behalf of Bayercrop Science AG Respondent in all the present appeals, (Bayer) issued a public announcement in terms of regulation 10 and 12 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the 1997 Regulations). Bayer is a 100% subsidiary of Bayer AG. Both these companies are registered under the laws of Germany with their registered offices in Germany. The public announcement was addressed to the shareholders of 'Aventis Cropscience India Ltd., Respondent in all the present appeals, (the target company) offering to purchase 45,98,312 fully paid up equity shares of Rs.10/- each, representing 32.92% of the equity share capital of the target company, at a price of Rs.157/- per share. The shares of the target company are listed on the Stock Exchange, Mumbai (BSE) and the National Stock Exchange of India Ltd., (NSE). The public announcement was first made on 7.6.2002.

The background of the public offer has been explained in the public announcement. According to the version stated therein, on 3.6.2002, Bayer had acquired 100% of the share capital of Aventis Cropscience Holding SA (renamed Bayer Cropscience Holding SA) pursuant to an agreement entered into by Bayer AG with Aventis and Schering, on 2.10.2001. Aventis Cropscience Holding SA was the global holding company for the Cropscience business of Aventis. As per the terms of the agreement, the acquisition was subject to certain closing conditions, including anti trust clearance by the EU Commission and the US Federal Trade Commission. These conditions having been fully met on 3.6.2002, the global acquisition deal closed on 3.6.2002. Bayer Cropscience Holding SA indirectly holds 67.08% stake in the target company through its wholly owned subsidiaries. Bayer Cropscience SA, and Aventis Cropscience Gmb H and Bayer, therefore had indirectly acquired 67.08% of the share capital of the target company. The offer at present made through the public announcement is to acquire

the remaining 32.92% of the share capital of the target company from public shareholders.

In terms of regulation 13 of the 1997 Regulations before making any public announcement of offer referred to in regulations 10 or 11 or 12, the acquirer is required to appoint a category I merchant banker, holding a certificate of registration granted by the Securities and Exchange Board of India (Respondent in all the appeals (SEBI). In terms of the said requirement, Bayer appointed Ambit Corporate Finance Pvt. Ltd. as the merchant banker. Regulation 14 stipulates the timing of the public announcement of the offer, regulation 15 details the extent of publicity required to be given to the public announcement, and the requirement of informing stock exchanges, target company and SEBI, regulation 16 details the particulars to be stated in the public announcement and regulation 17 prohibits furnishing of misleading information in the public announcement. In terms of regulation 18(1) within 14 days from the date of the public announcement, the acquirer through its merchant banker, is required to file with SEBI, the draft of the letter of offer, containing the requisite disclosures. As per sub regulation (2) of regulation 18, if within 21 days from the date of submission of the said draft letter of offer, SEBI specifies any changes, those changes are required to be carried out in the letter of offer before despatching the same to the shareholders. SEBI in the instant case on receiving the draft letter of offer from the merchant banker examined the same and specified certain changes vide its letter dated 18.10.2002 addressed to the merchant banker. Full text of the said communication is extracted below:

October 18, 2002

"Ambit Corporate Finance Pte Ltd.,

109-112 Dalamal Towers

Nairman Point

Mumbai – 400 021.

Dear Sirs,

Sub: Public offer for acquisition of 32.92% of the equity share capital of Aventis Cropscience India Ltd (ACSI/Target Company) by Bayer Cropscience AG (Acquirer), Bayer AG, Bayer Cropscience SA, Bayer Cropscience GmbH (PACs)

Please refer to your letter dated June 20, 2002 forwarding therewith the draft letter of offer and other correspondence exchanged, on the captioned subject.

As a merchant Banker, you are advised to ensure that any statement made to the press or any other media by way of advertisement, press release, interview etc. either by you or by the acquirers should only be based on disclosures contained in the offer document.

In terms of provisions to regulation 18(2) we convey our comments on the draft letter of offer for the proposed offer as under which should be incorporated in the Letter of Offer.

I Comments on revised Draft Letter of Offer.

1) Schedule of Activity

i) The letter of offer may be dispatched within 10 days from the date of our letter, conveying comments/changes and offer may open within 5 days thereafter, suitable amendment regarding the revised activity schedule and consequential

effects/compliance on other obligation like escrow etc. be made in the offer document, wherever required Accordingly, change schedule of activities.

ii) The original and revised schedule (days and dates) of activities. As a result of change in the existing schedule while complying with regulation 22(4) and 22(5) ensure that the date of opening and closing of the offer does not fall on a Sunday or a holiday. Also disclose the modified last date for revision of offer price in terms of regulation 20(4) and 26. Accordingly, disclose this date (and day) at other relevant places.

2. Definitions

Define "Schering"

3. Background of the offer

i) Disclose the reasons for the delay in making the offer i.e. receipt of complaints by SEBI from shareholders of ACSI, the main issues raised by the complaints, the matter having been examined by SEBI and date of final comments from SEBI.

ii) Ref Para 2-1-3: Update the disclosure – "Aventis Cropscience Gmbh (in future Bayer Cropscience Gmbh)" and effective date of change in name at the relevant place in the letter of offer.

iii) In terms of the Regulations the acquirer ought to have made the public announcement with October .2, 2001 as the reference date, i.e. the date on which the agreement was entered between the acquirer, Aventis and Schering. Had the public announcement being made taking October 2, 2001 as the reference date the payment to the shareholders would have been made by January 30, 2002 (the

maximum period of 120 days in terms of the Regulations). Therefore, the acquirer is liable to pay interest @ 15% p.a. on the offer price from January 31, 2002 upto the actual date of payment of consideration to the shareholders. Make suitable disclosures in this regard on the line mentioned in your letter dated July 15, 2002.

iv) Disclose the name of the Court, which approved the scheme of Amalgamation for merger of Aventis Cropscience Pvt. Ltd., with ACSI.

4. **Details of Proposed offer**

Para 2.2.5: Disclose the number of shares acquired by the acquirer or PACs, if any, after the date of public announcement till the date of letter of offer and confirm compliance with regulation 22 (17).

5. **Details of Acquirer and PACs**

i) Disclose the composition of the Supervisory Board of the acquirer, Bayer AG as on the date of public announcement.

ii) Ensure that audited financials of the acquirer and PACs have been disclosed after making the adjustments given at Para 3.1.11 of Annexure I of the standard letter of offer available @ sebi.gov.in wherever quantification is possible.

iii) Disclose the subsequent certified financial data (after 31.12.2001) so that the financials are not older than 6 months from the public announcement date.

6. **Details of the target company**

Para 4.9- disclose that the Indian Promoters of ACSI are eligible to participate in the offer in terms of the Regulations.

7. **Justification of offer price.**

i) While stating that the criterion of negotiated price is 'not applicable' make suitable disclosures as mentioned in your letter dated July 15, 2002 specifically covering the following-

- No due diligence, in particular financial due diligence, was carried out with respect to ACSI
- No valuation of ACSI had taken place at any time in the course of valuation of Aventis Cropscience globally
- The revenue (sales), assets and net profit of ACSI in proportion to that of Aventis Cropscience global business for the F. Y. 2001 and FY 2000 as mentioned in your letters dated 15.7.2002 and 30.7.2002.
- Suitable qualifications may be given wherever required.

ii) Disclose the trading and price data upto June 6, 2002 for BSE only.

iii) Make suitable disclosures regarding the offer price with reference date as Oct. 2, 2001 and interest liability @ 15% p.a. from January 31, 2002 till the date of actual payment of consideration for the delay in making the public announcement as mentioned under para 3(iii) "Background of the offer" of this letter.

8. **Financial Arrangement**

i) Disclose the updated status of the permission from RBI regarding the cash deposit in the escrow account.

ii) Ensure that the bank guarantee is valid at least for 30 days after closure of the offer as per the revised schedule

iii) Ensure that bank guarantee is sought from a bank who is not associate of or group of the acquirer or target company**.**

9.Terms & Conditions of the open offer.

i) Disclose the status approval from FIPB & RBI

ii) Disclose the revised date for payment of consideration.

10.Documents for inspection.

Confirmation from the General Counsel of the acquirer regarding no due diligence having been undertaken for ACSI submitted to us may be kept as the document for inspection by the shareholder and disclosure in this respect shall be made in the letter of offer.

II. **Corrigendum to Public Announcement**

A revised PA (corrigendum) including the following shall be made in the same newspaper in which the original P.A. appeared-

1. The original and revised schedule (days and dates) of activities.

2. Reasons for delay in the offer

3. Offer price with October 2, 2001 as relevant date and interest liability @ 15% p.a. from January 31, 2002 till the date of actual payment of consideration.

4. Suitable disclosures regarding 'justification of offer price' as mentioned under comments on draft letter of offer.

5. Procedure for acceptance by unregistered shareholders, and persons who have sent their shares for demat/transfer. Incorporate suitable disclosures regarding the instructions in paras 7.12 and 7.13 of the draft letter of offer regarding things to be ensured by persons who have sent the shares for transfer or demat.

6. Documents can be sent by registered post to ……..as mentioned in para 7.1 of the draft letter of offer.

III Miscellaneous

1. You shall submit 5 hard copies and a soft copy (on 1.44 MB floppy disk in HTML format) of the printed offer document incorporating the above mentioned changes for the purpose of our records and for making the same available at our web suite respectively, atleast 5 days before the issue opening date The soft copy shall be accompanied with the duly filled in checklist. In one of the hard copies of printed offer document, the above mentioned changes should be duly highlighted It shall also be certified that contents of soft copy are exactly identical as that of printed offer document. The covering letter should specify how each of our comments mentioned in this letter have been dealt with, giving reference to the relevant page nos. of printed offer document. Also indicate the market prices (opening and closing prices) of shares of Target company, if traded on date of PA (Indicate name of stock exchange (s) also).

2. A final return, in **duplicate** shall be filed with SEBI within 45 days from the date of the closure of the offer as per the format available at our web-site, www.sebi.gov.in. Also indicate market prices (opening and closing prices) of shares of Target company, if traded, on the following dates (Indicate name of stock exchange(s) also)

- as on Offer opening date
- as on Offer closing date
- the average of the weekly high and low of the closing prices of the shares during the period from the date of PA till closure of the offer.

Please note that failure to carry out the suggested changes in the offer document as well as violation of provisions of the Regulations would entail appropriate action. Please ensure and confirm that apart from above, no other changes are carried out in the draft offer document submitted to us.

Yours faithfully,

Sd/-

Ruchi Chojer

Asstt. General Manager"

The Appellants claiming to be aggrieved by the communication referred to above have filed the present appeals. Though the substantive prayer in these appeals is to set aside the "impugned order" dated 18.10.2002 they have prayed for an interim order staying the open offer by Bayer, pending disposal of the appeals.

Taking into consideration that in all the four appeals, under challenge is the SEBI's letter dated 18.10.2002 and the reliefs sought are also substantially identical, it was decided with the consent of the parties to hear all the appeals together. The Appellants had prayed for

interim order pending disposal of the appeals. When the Appellants' prayer for interim order for stay was taken up, the Respondents while opposing the same, raised the question of the maintainability of the appeals.

Shri Janak Dwarkadas., learned senior Counsel appearing for Bayer submitted that in terms of section 15T of the Securities and Exchange Board of India Act, 1992 (the Act) only an order made by SEBI or Adjudicating Officer is appealable to the Tribunal and that the right of appeal is available only to the person aggrieved by such an order. He also referred to regulation 46 of the 1997 Regulations and submitted that as per the said regulation 'any person being aggrieved by an order of the Board" under the Regulations is entitled to prefer an appeal. Learned senior Counsel submitted that the prerequisite to file an appeal in terms of section 15T and regulation 46 is the existence of an order, that what is under challenge in the present appeals is a letter dated 18.10.2002 from an Assistant Manager of SEBI, to the merchant banker conveying in terms of the proviso to regulation 18(2), the comments of SEBI on the draft letter of offer for the proposed public offer for the acquisition of 32.92% of the equity share capital of the target company, that the said letter is neither an order as envisaged under the Act or the 1997 Regulations, nor does it purport to be an order issued by SEBI.. Learned senior Counsel submitted that Chapter V of the Regulations provides for various orders that may be passed by SEBI to the concerned party in the interest of the securities market or for protection of interest of investors. In this context he referred to the impugned letter dated 18.10.2002 and stated that in terms of the first proviso to regulation 18(2) on receipt of the draft letter of offer all that SEBI required to do is to specify changes, if any, required in the letter of offer and there is no requirement of passing any "order". He submitted that the impugned communication only conveys the comments of SEBI. In this context he referred to the following portion in the said communication that "In terms of regulation 18(2) we convey our comments on the draft letter of offer for the proposed offer as under, which shall be incorporated in the letter of offer" and stated that thus SEBI had only conveyed its 'comments

on the draft letter of offer'. He also referred to para 7 of the communication in support of his contention wherein it has been stated that "while stating that the criterion of negotiated price is "not applicable" make suitable disclosures". He also referred to the concluding portion of the letter and stated that the merchant banker was only 'requested' to carry out the changes in the draft offer document, that from the tenor of the letter it is clear that it is not an order as envisaged under section 15T or under regulation 46.

Learned senior Counsel also referred to the averments in para Y, Z and AA in appeal no. 101/2002 and submitted that these averments constitute a candid admission by the Appellant that the letter dated 18.10.2002 is not an order, that the Appellants' grievance is that SEBI did not order an investigation under chapter V of the Regulations on the complaints filed by the Appellants and thereby SEBI had failed to exercise its powers, that it has also been conceded in the present appeals that by not ordering an investigation culminating in an order, SEBI had deprived the Appellants of their right to appeal under regulation 46. He submitted that thus the Appellants themselves have admitted that there was no appelable order.

Shri Dwarkadas submitted that in effect the grievance of the Appellants is the alleged refusal or failure on the part of SEBI to exercise the power and jurisdiction conferred upon it under chapter V, which power and jurisdiction if exercised, would culminate in an order appealable under the Act and the Regulations. He submitted that such a grievance can only be agitated in a writ petition in the appropriate High Court under Article 226 of the Constitution of India seeking a Writ of Mandamus and not in an appeal under section 15T or regulation 46.

Learned senior Counsel submitted that the Appellants have alleged that there was failure on the part of SEBI to follow the requirements under chapter V in respect of their complaints in the matter. In the said context Shri Dwarkadas referred to Chapter V in the

Regulations and in particular regulation 38 and stated that the regulation inter alia provides for appointment of an investigating officer by SEBI to investigate into the complaints received from investors etc. on any matter having a bearing on the allegations of substantial acquisition of shares and takeovers. He submitted that the Appellants had complained to SEBI in the matter, and SEBI considered the complaints and decided that there was no need to investigate the matter, that since SEBI had decided not to investigate the matter, the remaining provisions of Chapter V was not necessary to be followed and no order was required to be issued under regulation 42. He submitted that the impugned letter is also not in the nature of a direction which SEBI is empowered to issue under regulation 44, enabling the Appellants to file an appeal under regulation 46. Learned Senior Counsel submitted that SEBI is empowered to issue orders only under Chapter V of the Regulations and there is no provision to issue any order under regulation 18. He submitted that in terms of regulation 18(2) in case SEBI does not communicate any comments within the stipulated 21 days, then the offeror is free to go with the offer as there is a deemed approval from SEBI, and such a deemed approval can not be a mandatory one. He submitted that if the acquirer violates any of the requirements of the Regulations, consequences provided in the Act and the Regulations, would be attracted and the failure, if any, to carry out investigation can not be construed as an order. In this context he referred to the provisions of regulations 38, 41, 42 and submitted that if SEBI is of the view that in a particular complaint there is nothing to investigate, that decision is not appelable, that only an order affecting the rights of the parties passed in an adjudication alone is appealable. He reiterated the contention that what is conveyed by SEBI is only "comments" and not an "order" as envisaged under section 15T or regulation 46, that the Respondent has complied with the disclosure requirements as communicated by SEBI.

Learned senior Counsel submitted that it has been held by the Hon'ble Supreme Court and by the Hon'ble Bombay High Court that even where a statute provides a right of appeal against an order passed by an adjudicating authority inter locutory orders not affecting the

rights of parties are not appealable. He referred to the decision of the Hon'ble Bombay High Court in Harinarayan Bajaj Vs. Securities Appellate Tribunal wherein the Hon'ble court whilst interpreting the provisions of section 15Z and 15T of the Act had held that inter locutory orders not affecting the rights of parties would not be appelable and that the phrase 'any order' has to be interpreted to mean either a final order which finally adjudicates and determines the rights of the parties, or an interim order which, though not finally determining the entire matter, determined the rights of the parties, and is not a procedural order. He submitted that in fact in Bajaj's case there was a speaking order from SEBI which was challenged in the Tribunal and Tribunal had also passed a detailed speaking order, whereas there is not even an order in the instant case. He also referred to the decision of the Hon'ble Supreme Court in Konkan Railway Corporation Ltd., V Rani Constructions P. Ltd. (2002) (5) Bombay CR 313) where in the Hon'ble Court whilst deciding the nature of an order passed under section 11 of the Arbitration and Conciliation Act, 1996, for appointment of an arbitrator had held that such an order is not amenable to appeal under Article 136 of the Constitution of India, since it is not an adjudicatory order. He submitted that the Apex Court even with wide powers available under Article 136 of the Constitution did not entertain an appeal against an order which is not an adjudicatory order. He further submitted that under section 15T/regulation 46 an appeal against an order lies only if it is an order passed by the "Board" that the 'Board' has been defined in the Act. He submitted that the impugned letter is one written by an Assistant Manager and not by the Board.

Shri Dwarkadas referred to the authorities cited by the Respondents' Counsel and submitted that ratios in those cases are not applicable to present case in view of the clearly distinguishable features of the case from the other cases. He submitted in particular that in Grasim Industries Ltd. V SEBI (2002) 51 CLA 297) and Eider Commerce Ltd. V SEBI(2001) 40 CLA 203)what was challenged was SEBI's orders effectively stalling public offers and not interim orders. He reiterated the version that in the instant case there was no order either

interim or final.

Shri Rafique Dada, Learned senior Counsel appearing for SEBI submitted that the appeal is not maintainable as SEBI has not issued any order in the matter. He referred to regulation 18(1) and 18(2) and in particular relied on the 2nd proviso to regulation 18(2) according to which "if the disclosures in the draft letter of offer are inadequate or the Board has received any complaint or has initiated an enquiry or investigation in respect of the public offer, the Board may call for revised letter of offer with or without rescheduling the date of opening or closing of the offer and may offer its comments to the revised letter of offer within seven working days of filing of such revised letter of offer". He submitted that thus SEBI's role under regulation 18(2) has been clearly laid down that it is confined to offering comments and there is no provision for issuing any order thereunder. He submitted that SEBI received few complaints in the matter of acquisition of shares of the target company and SEBI examined the complaints and suggested few changes in the offer document in terms of the 2nd proviso to regulation 18(2). In this context he referred to SEBI's letter dated 18.10.2002 under challenge in the present appeals and submitted that the suggestions made by SEBI therein can not be a matter of grievance. Shri Dada submitted that on 15.11.2002 SEBI had written a letter to the Advocates' firm representing the Appellant in appeal no.101/2002 clearly explaining the position. He read out the portion from the letter relied on by him that "We advise that pursuant to the complaints received from shareholders that the offer price of Rs.157/- per share was not justified, in terms of the provisions of the captioned regulation, the matter was taken up with the acquirer through M/s. Ambit Corporate Pte Limited, Manager to the offer (Ambit). The contentions of the complaints vis-à-vis the submissions of Ambit were examined by us. It was observed that the said offer price is in conformity with the applicable provisions of the captioned Regulation. Accordingly, SEBI vide letter dated 18.10.2002 conveyed comments in terms of proviso to Reg. 18(2) of the captioned Regulations stating, inter alia to make suitable disclosures regarding the offer price in the letter of offer and issue a revised public

announcement which have been made in the letter dated 24.10.2002 and revised public announcements dated 30.10.2002 and 13.11.2002.

It is further clarified that SEBI has neither approved the offer price nor contents of the letter of offer/public announcement/s or passed any order in this regard …."

Shri Dada also referred to SEBI's letter dated 7.11.2002 addressed to the merchant banker on the subject and stated that SEBI had clearly stated therein its stand in the matter in the following words:

"Please refer to your letter dated 26.10.02 and 30.10.02 forwarding the printed letter of offer and the revised public announcement respectively.

(2) It is mentioned in para 2.1.7 at page 4 of the LOO that SEBI has approved inter alia, the originally announced offer price of Rs.157/- per share. The same disclosure is also made at para 1 of the revised public announcement.

(3) As per the disclaimer clause at para 1 of page 3, SEBI neither clears nor vets or approves the letter of offer. Therefore, the aforesaid disclosure is incorrect.

(4) You are, therefore, advised to issue a revised public announcement immediately in all the newspapers in which the original public announcement was made stating clearly that SEBI has not granted any approval for the offer price and that SEBI vide letter dated 18.10.02 has conveyed its comments on the draft letter of offer in terms of proviso to Regulation 18(2) of the Takeover Regulations 1997."

Shri Dada referred to the "disclaimer clause" in the draft letter of offer to show that SEBI has not passed any order in the matter. He submitted that the Appellants' point of view that SEBI ought not to have done this or that is not a cause to be agitated by filing an appeal before the Tribunal. In this context he referred to the prayer in the appeal (appeal no 99/2002) and stated that it is (i) to set aside the impugned order dated 18.10.2002 passed by SEBI, (ii) to determine and fix the offer price as per the negotiated price in terms of the 1997 Regulations and to direct Bayer to revise the price from Rs.157/-, are not relatable to any order passed by SEBI and that the proper course for seeking such reliefs is to resort to invoking the writ jurisdiction of High Court and not the appellate jurisdiction of this Tribunal.

Shri Navroze Seervai, learned Counsel appearing for the merchant banker and the target company also submitted that the appeals are not maintainable under Section 15T as what is being challenged by the Appellants is only a communication conveying the comments of SEBI on a draft letter of offer, in terms of regulation 18(2). He referred to the said letter and stated that what is stated therein are comments is borne out of the text of the letter itself and communication of such a nature do not constitute an order under section 15T.

Shri Seervai stated that the Appellant (in appeal no.101/2002) filed a complaint with SEBI; SEBI forwarded the same to the merchant banker for its comments; the merchant banker promptly responded to the same by furnishing the comments and SEBI examined the same and decided not to investigate the matter. He referred to the chain of correspondence in this regard forming part of the appeal (i.e. appeal 101/2002). Shri Seervai submitted that the Appellants' grievance against SEBI is on the ground that SEBI did not exercise its jurisdiction under Chapter V of the Regulations by not appointing any investigating officer to enquire into the complaints filed by the Appellants. Learned Counsel submitted that if SEBI has failed to comply with its statutory duties, the remedy is to seek a writ of mandamus by filing a writ

petition in the appropriate High Court.

With reference to appeal no.101/2002 Shri Seervai submitted that the merchant banker to whom SEBI has addressed its communication has not been arrayed as a necessary party and as such the appeal can not be entertained. He submitted that in its complaint before SEBI the Appellant had joined the merchant banker as one of the opposite parties, that the appeal inter alia seeks the relief of quashing and setting aside the "impugned order" dated 18-10-2002 of SEBI, that the said 'order' is addressed to the merchant banker, that any relief that may be granted by the Tribunal to the Appellant in appeal no.101/2002 will gravely prejudice the said merchant banker. He submitted that in the absence of the said merchant banker as a party Respondent in the appeal, not only can any relief be granted to the Appellant, but the appeal must necessarily be dismissed in limini for non rejoinder of a necessary party. He submitted that the said merchant banker was a party before SEBI and SEBI has communicated its decision to the said Respondent and as such it is not possible to set aside such an order without impleading the said merchant banker as a necessary party. He submitted that the Appellants have not made good the said fatal defect and no reasoning for exclusion of the merchant banker has been provided even in the rejoinder filed by the Appellant. Learned Counsel submitted that on this fact itself the appeal is liable to be dismissed.

Shri M. P. Bharucha, learned Counsel appearing for the Appellant in appeal no.101/2002 opposed the Respondent's contention that the appeals are not maintainable.

Learned Counsel submitted that an arrangement was entered into by Bayer AG with Aventis SA and Schering AG on 2.10.2001 and the acquisition deal for the shares and

controlling interest of Aventis Cropscience Holdings SA was closed on 3.6.2002, that the said Aventis Cropscience Holdings SA held 67.08% of the share capital and controlling interest in its Indian subsidiary i.e. the target company, that pursuant to the said acquisition Bayer acquired 67.08% stake and controlling interest in the target company. He submitted that as per the requirement of the 1997

Regulations, Bayer is under statutory obligation to make a public offer to acquire not less than twenty per cent of the voting capital of the target company, and accordingly a public announcement to the shareholders of the target company offering to acquire 32.92% of the target company's outstanding paid up capital @ Rs. 157/- per share was made through the merchant banker on 7.6.2002. Shri Bharucha referred to para 48 of the said public announcement wherein the calendar of action pursuant to public announcement has been catalogued. He submitted that the offer price has been arrived at by the Respondents taking the average market price calculated as per regulation 20(2) during the 26 week period preceding the date of public announcement. He submitted that the several dates relied on by the Respondents are crucial as far as the Appellants' interest is concerned and also for deciding the question of maintainability of the appeals raised by the Respondents. Learned Counsel submitted that the public announcement is dated on 7.6.2002, that on 10.6.2002, the Appellants filed a complaint with SEBI with details stating that the offer price made by Bayer is not arrived at in accordance with the provisions of the 1997 Regulations and requested SEBI to intervene in the interest of investors and the securities market by issuing appropriate directions to raise the offer price as stated in the complaint. In this context he referred to the complaint dated 10..6.2002 annexed to the appeal and in particular to the prayer portion therein and the request to provide an opportunity of being heard before anay orders are passed.

Shri Bharucha also referred to the "Corrigendum to the Public Announcement to the shareholders of Aventis Cropscience India Ltd.," issued on 30.10.2002 by the merchant banker on behalf of Bayer, which inter alia had stated "After the PA of the offer, SEBI received

complaints from some share holders of ACSI claiming, inter alia that the offer price has not been calculated correctly and it should be higher than Rs.157/- It was also mentioned therein that the negotiated price for ACSI should be calculated based on the sales multiple for the Global transaction. SEBI called for various clarifications from Ambit and also advised not to proceed further with the offer till the issuance of final comments by SEBI and the draft LOO filed with SEBI by Ambit on June 20, 2002. Thereafter SEBI has examined the complaints received from the ACSI shareholders and the submissions made by Ambit and issued final comments on the draft LOO on October 18, 2002 approving inter alia the originally announced offer price of Rs.157/-" Learned Counsel submitted that the said public announcement was made in the context of SEBI's decision granting approval of the public offer.

Shri Bharucha referred to the provisions of regulations 10, 11 and 12 and submitted that the regulations require the acquirer to make a public announcement to the share holders of the concerned target company to acquire shares from them in accordance with the regulations, that this public offer to acquire shares from the other shareholders is a requirement to protect the interest of the investors in the target company. An acquirer who proposes to acquire shares/voting rights beyond a stipulated level or acquires control over a company is required to make the public announcement and in the process regulation 18 is very relevant. In this context he referred to the requirements under the said regulation 18 that:

"Submission of Letter of offer to the Board

18(1) Within fourteen days from the date of public announcement made under Regulation 10, Regulation 11 or Regulation 12 as the case may be, the acquirer shall through its merchant banker, file with the Board, the draft of the letter of offer, containing disclosures as specified by the Board

(2) The letter of offer shall be despatched to the shareholders not earlier than 21 days from its submission to the Board under sub-regulation (1).

Provided that if, within 21 days from the date of submission of the letter of offer, the Board specifies changes, if any, in the letter of offer (without being under any obligation to do so) the merchant banker and the acquirer shall carry out such changes before the letter of offer is despatched to the shareholders.

Provided further that if the disclosures in the draft letter of offer are inadequate or the Board has received any complaint or has initiated any enquiry or investigation in respect of the public offer, the Board may call for revised letter of offer with or without rescheduling the date of opening or closing of the offer and may offer its comments to the revised letter of offer within seven working days of filing such revised letter of offer.)emphasis placed)"

Shri Bharucha submitted that the direction to the merchant banker and the acquirer to carry out the changes specified by SEBI is mandatory and failure to comply with the same would attract serious consequences including prosecution under section 24 of the Act.

With reference to the contention raised by Shri Janak Dwarkadas that the communication dated 18.10.02 issued by the Respondent is not an order under Chapter V, that there is no provision anywhere in the Regulations except under Chapter V to issue an order or direction which could be challenged in an appeal under section 15T of the Act, learned Counsel submitted that the said Chapter V is a stand alone chapter. He referred to the powers and functions of SEBI and submitted that SEBI is mandated to "protect the interests of investors in securities and to promote the development of, and to regulate, the securities market" and any

decision taken or order made by SEBI is in discharge of said duties and if a person is aggrieved by such a decision or order by SEBI, he is entitled to challenge the decision or order in an appeal before the Securities Appellate Tribunal. In this context he referred to section 11 (2) (h) of the Act empowering SEBI to take measures for regulating substantial acquisition of shares and takeover of companies and submitted that in exercise of the said specific power SEBI has framed the 1997 Regulations. He also referred to section 11B empowering SEBI to issue directions for achieving the objectives which it is mandated to accomplish. Shri Bharucha referred to regulation 46 and submitted that as per the said regulation "any person aggrieved by an order of the Board under these Regulations may prefer an appeal", that the appellate relief available in terms of section 15T is not confined only to the orders passed in exercise of the powers available to SEBI under Chapter V of the Regulations but to any order of SEBI under the Regulations.

Shri Bharucha submitted that the expression "order" has not been specifically defined in the Act or in the Regulations and as such one has to go by the standard meaning as available in the dictionaries. In his attempt to explain the scope of the expression "order" he referred to the observation made by the Hon'ble Calcutta High Court in Mahabir Singh and Anr V Emperor (AIR (31)1944 Cal 17 that "an order covers commands or directions that something shall be done, discontinued or suffered" that in the light of the said judicial interpretation of the expression "order" SEBI's letter dated 18.10.2002 is nothing but an order. Shri Bharucha also relied on a decision of the Queen Bench in R. V. Nottingham County Court (1985) 1 All ER 735, in which the court while considering the question as to the decision of the registrar of Nottingham County Court refusing to issue a certificate under section 48 of the Matrimonial Causes Rules, 1977, was an appealable order, it was viewed—"When the registrar refuses the certificate no piece of paper emerges prescribed as an order. What emerges in form is described as a 'Notice of refusal of registrar's certificate'. But in substance he has judicially considered the matter and judicially determined that there be no grant of certificate. The paper

could just as appropriately be described as 'Notice of registrar's order refusing certificate'. It must, I think be a matter of impression to some extent, but, in my judgement in substance though not in name the registrar makes an order in these circumstances and does so also if he grants the certificate." Shri Bharucha submitted that the test to be applied to identify an order is not the form or words, but the effect of the communication, that the communication dated 18.10.2002 has an adverse effect on the shareholders of the target company and that in substance it is an order and hence appealable. He submitted that the observation made by the Hon'ble Supreme Court in the Konkan Railways case has no application to the instant case as the decision therein was in the context of an appeal under Art. 136 requiring the Hon'ble Court to determine whether the order of the Hon'ble Chief Justice or his designate under section 11 of the Arbitration and Conciliation Act, 1996 is a judicial order or an administrative order and its eligibility to be appealed under Art..136, that the decision in the said case has no application to the instant case in view of the clear provisions of section 15T of the Act enjoining a right on person to file appeal against an order by which he is aggrieved.

Shri Bharucha referred to Jaswant Sugar Mills Ltd. V. Lakshmi Chand & others (AIR 1963 SC 677) referred in the Konkan Railway case cited by Shri Dwarkadas and submitted that it was also in the context of the maintainability of appeals to the Hon'ble Supreme Court under Art. 136 of the Constitution.

With reference to the Harinarayan Bajaj case (supra) relied on in support by Shri Dwarkadas, learned Counsel submitted that the Hon'ble High Court had expressed the views in the context of challenge made by Shri Bajaj against an interim order passed by SEBI during the course of an investigation and that as the final order was appealable, the court did not want to interfere in the interim stage of the investigation, that the impugned order herein is a final order and if it is allowed to go unchallenged, the Appellants would suffer and the damage so inflicted

is irreversible. He submitted that as a result of the impugned decision of SEBI, the Appellants' right to get a reasonable price to the shares held by them and exit from the target company has been denied and on that count the Appellants are aggrieved and therefore, entitled to file the present appeals. Learned Counsel submitted that the order impugned in the appeal affects the rights and interests of the Appellant and, therefore, the Appellant is aggrieved. He submitted that the impugned order is neither a procedural order nor a procedural direction. With reference to the Respondent's submission that the grievances of the Appellant can only be agitated in a writ petition under Article 226 of the Constitutions of India, learned Counsel submitted that it is settled law, that the writ petition is of no use to seek relief in a case where an alternative remedy is available and in the present case the legislature has provided for the alternative remedy by providing a right of appeal in section 15T of the Act.

Shri Bharucha submitted that Shri Seervai's argument that the appeal is not maintainable on the ground that the merchant banker to the public offer, has not been impleaded as a party, is untenable as the merchant banker is not a necessary party in the present appeal proceeding, as the appeal is in relation to the public announcement made by Bayer, that the appeal does not in any manner, affect adversely or otherwise the merchant banker. Shri Bharucha submitted that if for any reason this Tribunal holds that the merchant banker also should be impleaded, the Appellant will take requisite steps for the purpose.

Shri R. Subramaniam, learned Counsel appearing for the Appellants in appeal nos. 99 and 100 submitted that he is adopting the submissions made by Shri Bharucha and stated that he would supplement the same with few submissions. Shri Subramaniam submitted that SEBI is a public authority mandated to protect the interests of investors and, therefore, SEBI is expected to administer the regulatory provisions in position in correct perspective. He submitted that the legislature while mandating SEBI to protect the interest of the investors has specifically

provided to take measures by SEBI to regulate substantial acquisition of shares and takeovers, that this specific requirement provided in clause (h) of sub section (2) of section 11 has to be seen in the context of the general provision mandating SEBI to protect the interests of investors in securities. Shri Subramaniam submitted that any decision/communication conveying such a decision affecting the interests of investors is an order for the purpose of Section 15T and any person aggrieved by such an order is a person entitled to prefer an appeal before the Tribunal. He referred to the provisions of regulation 18(2) and submitted that the decision taken by SEBI on the draft letter of offer submitted to it by the merchant banker has considerable effect on the investors. In this context, learned Counsel referred to a letter dated 15.11.2002 from SEBI to the Appellant in appeal No.99/2002 inter alia stating that "The contentions of the complaints vis-à-vis the submissions were examined by us. It was observed that the said offer price is in conformity with the applicable provisions of the captioned Regulations." He referred to para (3) of the said letter wherein it has been "clarified" that "SEBI has neither approved the offer price nor the contents of the letter of offer/public announcement/s or passed any order in this regard" According to the learned Counsel the said declaimer is meaningless in view of the positive finding that the offer price is as per the regulations and to accept such a disclaimer would in effect mean negating the very role SEBI is expected to play when the draft letter of offer is submitted to it and especially in the context of the investor protection duties cast on it by the Act. Learned Counsel submitted that the Appellants came to know about Bayer's public offer terms and conditions as approved by SEBI only when the public announcement making public offer appeared in the newspaper on 30.10.2002, that on 7.11.2002 the Appellant wrote to SEBI referring to its earlier complaint dated 20.6.2002 reiterating the allegation that Bayer is making the open offer at a very unfair price of Rs.157/- as against the substantially higher price paid to the European promoter of the target company. He submitted that though the Appellants requested SEBI to furnish a copy of SEBI's order in this regard SEBI did not furnish the same and it was in the said context the Appellants filed the present appeals on 11.11.2002. Shri Subramaniam submitted that the Respondent's submission that the communication dated 18.10.2002 is not an order is untenable as from the substance of the said

communication it is clear that it is an order and that its effect is adverse to the interest of the other shareholders of the target company.

Shri Subramaniam cited this Tribunal's observation in Grasim Industries Ltd. V SEBI (2002) 51 CLA 297 (Sat) in support of his contention that the impugned letter is an "order" and hence appelable in terms of Section 15T. He submitted that the provisions of section 15T and regulation 46 of the 1997 Regulations have to be read together. Learned Counsel submitted that it is clear from the tenor of the impugned communication that it is not an interim decision or that it is of no effect on the right of the shareholders, to be excluded from the purview of Section 15T and regulation 46, applying the principle laid down in Harinarayan Bajaj's case. He submitted that the appeals are maintainable and the same be taken on record and the prayer therein be granted.

Shri J. J. Bhatt, learned Advocate, appearing for the Appellant in appeal no.103/2002 submitted that he is adopting the submissions made by Shri Bharucha.

I have very carefully considered the submissions made by counsel for parties on the maintainability of the appeals and also on the prayer for interim order. The Respondent's version is that the communication dated 18.102002 is a letter simplicitor as it has only conveyed the comments of SEBI in terms of regulation 18(2) on the draft letter of offer submitted to it by Bayer, that the said letter does not adversely affect the rights and interests of the Appellants to claim as aggrieved persons entitling them to file the present appeals.

As already stated in the earlier part of this order, Bayer submitted the draft letter of offer to SEBI through the merchant banker in terms of regulation 18 in the context of making a public offer to the

shareholders of the target company to acquire their shareholding, in the wake of Bayer having acquired 100%
of the share capital of Bayer Cropscience Holding SA, which is the holding company of the target company. Having regard to the acquisition, Bayer was obliged under the regulations to make a public offer to the remaining share holders of the target company to acquire a minimum of twenty percent shares at not less than an offer price to be determined in accordance with the Regulations. Bayer made a public announcement offering to acquire 32.92% of the outstanding paid up capital of the target company at a price of Rs.157. The said price, according to the Appellants is substantially lower than the price Bayer should have offered, as per the Regulations.

In this context SEBI's decision clearing the offer document and thereby impliedly approving the offer price of Rs.157/- has become contentious. The challenge is on the purchase price offered by Bayer to the shareholders of the target company, allegedly approved by SEBI. Therefore, the main issue that need be considered while deciding the maintainability of the appeals is as to whether the 'comments' given by SEBI under regulation 18(2) is an appelable order in terms of section 15T and regulation 46 of the 1997 Regulations. In this context, it is felt necessary to have an idea of the objective of the 1997 Regulations as that would provide some assistance in interpreting the provisions of regulation 18(2) and SEBI's role:

SEBI is mandated to protect the interests of investors in securities and to promote the development of and to regulate the securities market by such measures as it thinks fit. One of such specific measures is regulating substantial acquisition of shares and take over of companies (Section 11(2)(h)) . To accomplish this mission, SEBI had put in position a set of regulations titled the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 through a notification dated 4.11.1994. Since the said Regulation was found wanting in several aspects, an expert Committee under the Chairmanship of Justice P.N.Bhagwati was constituted in November,

1995 " to examine the areas of deficiencies in the 1994 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". The Committee, viewed that the Regulations for substantial acquisition of shares and takeovers should operate principally to ensure fair and equal treatment of all shareholders in relation to substantial acquisition of shares and takeovers. In the Committee's words "The Committee also recognised that the process of take over is complex and is inter related to the dynamics of the market place. It would therefore be impracticable to devise regulations in such detail as to cover the entire range of situations, which could arise in the process of substantial acquisition of shares and takeovers . Instead there should be a set of General Principles which should guide the interpretation and operation of the Regulations , especially in circumstances which are not explicitly covered by the Regulations. These principles are:

(i) Equality of treatment and opportunity to all the shareholders

(ii) Protection of interests of share holders

…….

……..."

The Committee further stated that " in the event of any ambiguity or doubt as to the interpretation of the regulation, the concerned authority shall pay adequate attention to and be guided by any one or more of the aforesaid general principles having a bearing on the matter"

After taking into consideration the recommendations of the Committee a new set of regulations namely Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 was brought in position with effect from 20.2.1997 repealing

the 1994 Regulations. The Regulation was amended again thereafter based on the recommendations subsequently made by Justice Bhagwati Committee.

From the scheme of the Regulations and the background of the same, it is clear that it is a piece of beneficial legislation directed to protect the interests of shareholders in the context of substantial acquisition of shares and takeovers. The Regulation is meant to protect the interests of all the shareholders and not any particular class or category, at the cost of another. Therefore interpretation of the provisions of the Regulation should be done taking into consideration its broad objective and also the general principles formulated by the Committee.

According to Regulation 10 "no acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him) entitle such acquirer to exercise fifteen percent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations"

According to Regulation 12 "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 acquire such shares in accordance with the Regulations"

It is in the context of the requirements of regulation 10 and 12 Bayer made the public announcements. In terms of regulation 21 (1) the acquirer is required to make a public offer for a minimum of twenty per cent of the voting capital of the target company. Against the said minimum of 20%, Bayer offered to purchase 32.92% of the outstanding paid up capital of the

target company. The manner in which the minimum price is required to be computed has been elaborately provided in regulation 20. The price offered by Bayer to the shareholders in the public offer is the bone of contention.

According to Regulation 18:

> (1) Within fourteen days from the date of public announcement made under Regulation 10, Regulation 11 or Regulation 12 as the case may be, the acquirer shall through its merchant banker, file with the Board, the draft of the letter of offer, containing disclosures as specified by the Board
>
> (2) The letter of offer shall be despatched to the shareholders not earlier than 21 days from its submission to the Board under sub-regulation (1).
>
> Provided that if, within 21 days from the date of submission of the letter of offer, the Board specifies changes, if any, in the letter of offer (without being under any obligation to do so) the merchant banker and the acquirer shall carry out such changes before the letter of offer is despatched to the shareholders.
>
> Provided further that if the disclosures in the draft letter of offer are inadequate or the Board has received any complaint or has initiated any enquiry or investigation in respect of the public offer, the Board may call for revised letter of offer with or without rescheduling the date of opening or closing of the offer and may offer its comments to the revised letter of offer within seven working days of filing such revised letter of offer.

3. xxxxxx"

The objective behind the requirement of filing a copy of the draft letter of offer with

SEBI has been explained in the Bhagwati Committee report (1997) _ in the following words—"The Committee desired that the merchant banker should assume greater responsibility for ensuring proper disclosures and SEBI, should give up the requirement of prior approval of offer documents and move into a filing oriented system. Once an offer document is filed with SEBI, it would be upto SEBI to offer comments, if any, within a specified time period of say twentyone days. If comments are offered by SEBI those comments are to be taken note of and in cases requiring refiling, the twenty one days period will commence once again from the date of refiling. This will bring discipline among the acquirers and merchant bankers to do the necessary due diligence with utmost care without SEBI undertaking any responsibility in that behalf." The Bhagwati Committee report (2002) while retaining the existing provisions of regulation 18 had observed that SEBI should also have the power to reschedule date of opening/closure in cases where the offer becomes subjudice or involves some investigation by SEBI etc. or as a consequence of any revised submission". It is to be noted that the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 in regulation 17 provided that the merchant banker "submit the draft of a letter of offer to the Board for its approval". This prior approval requirement has been done away with in regulation 18 of the 1997 Regulations. But SEBI's power to regulate public offer has not been taken away, but has only been strengthened. In this context the Committee's observation that "SEBI should also have the power to reschedule …" is noteworthy. This is an additional power. The new regulation empowers SEBI to direct the acquirer to carry out such changes in the offer documents, which SEBI considers necessary in the interest of investors and with a view to avoid unnecessary delay in the hands of SEBI for the purpose of approval, the regulation has provided a time frame to SEBI to act – i.e. 21 days. If within 21 days, SEBI has not communicated any specific changes to be carried out in the letter of offer, the inescapable inference is that SEBI has considered the disclosure made in the offer document adequate. No doubt SEBI does not vouch the authenticity of all the material disclosed therein and the acquirer/merchant banker is liable for any false or misleading statements made in the offer document. Certainly SEBI is expected to ensure that the public offer is made as per the regulations. There is no escape from

this obligation. The disclaimer by SEBI does not in any way alter its position in regulating substantial acquisition of shares and takeovers.

As already stated, SEBI's role under regulation 18 has to be seen in the overall context of the mandate on it to protect the interests of investors. In that context it is difficult to hold that SEBI has no power to issue an order or a direction to the acquirer under regulation 18. The fact that SEBI has power to make orders with reference to matters covered in regulation 18 has been demonstrated by SEBI by its own conduct. It is noted from the disclosure made in the public announcement dated 30.10.2002 made by Bayer that SEBI has directed Bayer 'not to proceed further with the offer till the issuance of final comments' by it. This is not an advice or a comment, but a command. Could Bayer ignore it and proceed further with impunity ? SEBI knows its power , otherwise it would not have ordered Bayer to keep on hold the public offer. This tribunal had occasion to examine SEBI's role under regulation 18 in Eider Commerce Ltd. V SEBI (2001) 29 SCL 283 and Grasim Industries Ltd. V SEBI (2002) 51CLA 297 and come to the conclusion that SEBI is empowered to issue appropriate orders with reference to the letter offer submitted to it and the order so passed are orders appealable in terms of regulation 15 T of the Act. The deciding factor as to whether it is only a communication simplicitor or an order would depend upon the substance. The fact that the communication is couched in a letter form does not matter much. The signatory of the letter, one has to believe, in the absence of contrary evidence, is a person authorised by SEBI in terms of section 19 of the Act and, therefore, the decision communicated under that person's signature is that of SEBI and not that of the person who had put the signature on the letter. What is relevant for the purpose is to come to the conclusion as to whether the impugned communication is an order coming within the purview of section 15T and regulation 46. In this context what is required to be considered is the purport of the communication and not the format in which it is made. An order is primarily a decision which has the effect of a command whether called by such name or not and is distinguished from an advice or request, by the

nature of the consequences that may flow from the non implementation of the same. If one is to believe that what SEBI has communicated vide its letter dated 18.10.2002 is only an advice or request, Bayer is not under obligation to accept the same and it can not be proceeded against for not complying with SEBI's request or advice. That means it is optional to the acquirer to accept or ignore the said advice or request. But this proposition can not survive for the reason that such a view would negate the very purpose of submitting a copy of the draft letter of offer to SEBI and the requirement would serve only as a ceremonial ritual of no consequence. To reduce the requirement to such a matter of no consequence would be disastrous from the investor protection angle. In that context regulation 18 itself will be redundant. The regulation in my view, gives little option to the acquirer but comply with SEBI's decision. Regulation 18(2) is clear in this regard. As per the said regulation, if SEBI specifies any changes in the draft letter of offer, "the merchant banker and the acquirer shall carry out such changes before the letter of offer is despatched to the share holders." "shall carry out such changes" is a command. An advice or request as such is not enforceable under the Regulation/Act. What is enforceable under the Regulation/Act is a decision, order or direction from SEBI. The regulation cast a mandatory obligation on the merchant banker/acquirer. For the failure to comply with the said requirement penalty has been provided in regulation 45. According to sub regulation (1) of the said regulation 45 any person violating any provisions of the Regulations shall be liable for action in terms of the Regulations and the Act. The penalty referred to herein as per sub section (6) includes – (a) criminal prosecution under section 24 of the Act, (b)monetary penalties under section 15H of the Act and (c) directions under the provisions of section 11B of the Act.

It is, therefore clear that the merchant banker/acquirer is bound to carry out SEBI's "suggestions" and if these 'suggestions' are not orders, it would not have been enforceable and for the failure penal consequences would not have been provided in the Act.

This Tribunal in Suman Motels Ltd. V. SEBI (2000 27 SCL 441) had made the following observation as to the type of orders which are appelable under Section 15T.

" On a perusal of the said Section 15T it could be seen that an appeal lies only against an order of the Board (SEBI) or the Adjudicating Officer. What is an order? There is no definition on this expression in the Act. So it has to be understood in its generally accepted sense in the context in which it is used. As per the scheme of the Act it is clear that an order thereunder covers commands or directions that something shall be done, shall not be done, discontinued or suffered. In any case a simple expression, opinion or a piece of advice or guidance can not be considered as an order for the purpose of the Act.".

According to Section 15T:

(1) Save as provided in sub section 2, any person aggrieved,--

(a) by an order of the Board made, on and after the Commencement of the Securities Laws (Second Amendment) Act, 1999 under this Act or the rules or regulations made thereunder; or

(b) by an order made by an adjudicating officer under this Act;

may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

Xxxx

Xxxxx

Xxxxxx …." (emphasis supplied)

In this context the following observation made by this Tribunal in B. P Kanani V SEBI (2000) 39 CLA 1 (Sat) is also considered relevant:

"According to section 15T (a)(a) any person aggrieved by an order of the Board made, on and after the Second Amendment Act, 1999, under the Act or the rules or regulations made thereunder may prefer an appeal to the Securities Appellate Tribunal. On a careful perusal of the said section 15T it could be seen that an appeal can be preferred against an order of the Board by any person aggrieved by that order. So it is clear that there should be an order to start with. Then comes the impact of the order. If a person is aggrieved by that order, he is entitled to file an appeal. Since the section uses the wide expression "any person" right of appeal is not restricted only to the parties before the Board in the proceedings. Anybody, whether he was a party or not, before the Board, is entitled to prefer an appeal, provided he is aggrieved by that order. Thus the first test is the existence of an order and then the impact of the order of a person."

The argument that only those orders passed in terms of the provisions contained in Chapter V of the Regulation alone are appealable under regulation 46 is contrary to the scope and scheme of the Regulations Chapter V, as Shri Bharucha submitted, is a stand alone chapter. Any order made under the Regulations, as stated in regulation 46 is an appealable order and any person aggrieved by such an order is entitled to file an appeal. SEBI's power to pass orders is not confined to chapter V only.

Having come to the conclusion that it is not only the order passed by the Board under Chapter V of the Regulations but any appropriate order made by the Board under relevant regulation is appleable, the question that requires to be answered is that as to what is communicated by SEBI to the merchant banker on 18.10.2002 is a decision/order appelable

under regulation 46/section 15T. As stated earlier in this order, answer to this lies on the substance of the communication.

Text of the communication dated 18.10.2002 has been extracted in the earlier part of this order. In the offer document the acquirer had disclosed an offer price of Rs.157/- SEBI has not considered it necessary to make any changes in the said offer price. The offer price is relatable to several factors . How the offer price is to be determined has been detailed in regulation 20. But by not commenting any change on the offer price stated in the letter of offer submitted to it, there is an implied approval by SEBI of the price of Rs.157/- offered by the acquirer. Otherwise SEBI would have asked the acquirer to recalculate the offer price as per some other yardstick provided in regulation 20. In this context the following suggestion made by SEBI in para 7 of its letter dated 18.10.20002 strengthens this view:

7(i)While stating that the criterion of negotiated price is 'not applicable' make suitable disclosures as mentioned in your letter dated July 15, 2002 specifically covering the following-

- No due diligence, in particular financial due diligence was carried out with respect to ACSI
- No valuation of ACSI had taken place at any time in the course of valuation of Aventis Cropscience globally
- The revenue (sales), assets and net profit of ACSI in proportion to that of Aventis Cropscience global business for the Financial Year 2001 and FY 2000 as mentioned in your letters dated 15.7.2002 and 30.7.2002.
- Suitable qualifications may be given wherever required.

(ii) Disclose the trading and price data upto June 6, 2002 for BSE only.

(iii) Make suitable disclosures regarding the offer price with reference date as October 2, 2001 …….".

The fact that SEBI had come to the conclusion that the offer price of Rs.157 was in conformity with the applicable provisions of the Regulations is evidenced by SEBI's own version as contained in its letter dated 15.11.2002 addressed to the Appellants (in appeal no.99/2002) and to the Solicitors of the Appellant in appeal no.101/2002. The said letter is as follows:

November 15, 2002.

"Dear Sirs,

Sub: Public offer for acquisition of shares of Aventis Cropscience India Ltd. by Bayer Croscience AG (acquirer)And PACs – Offer price – SEBI (Substantial acquisition of Shares and Takeovers) Regulations, 1997 (Regulations)

Please refer to your letters…on the captioned subject requesting for a copy of the order passed by SEBI in this regard.

2. We advise that pursuant to the complaints received from shareholders that the offer price of Rs.157/- per share was not justified in terms of the provisions of the captioned Regulations, the matter was taken up with the acquirer through M/s. Ambit Corporate Finance Pte Ltd. Manager to the offer (Ambit). The

contentions of the complaintants vis-a-vis the submissions of Ambit were examined by us. It was observed that the said offer price is in conformity with the applicable provisions of the captioned Regulations. Accordingly SEBI vide letter dated 18.10.2002 conveyed comments in terms of proviso to Reg 18(2) of the captioned Regulations, stating inter alia to make suitable disclosures regarding the offer price in the letter of offer and issue a revised public announcement, which has been made in the letter dated 24.10.02 and revised public announcement/s dated 30.10.02 and 13.11.2002.

3. It is further clarified that SEBI has neither approved the offer price nor contents of the letter of offer/public announcement(s) or passed any order in this regard. Shareholders are, therefore, advised to refer to the letter of offer/revised public announcement(s) for further clarification, if any, on the same, which are available on our Website…."

Shri Rafique Dada, learned Senior Counsel, to show that SEBI had not issued any order, had placed considerable reliance on para 3 of the letter extracted above and also on SEBI's letter dated 7.11.2002 to the merchant banker wherein it was stated that SEBI has not granted any approval for the price and asked the merchant banker to disclose the said fact properly in the offer document. In my view such disclaimer, does not in any way change the "meat of the order". It is evident from SEBI's letter dated 15.11.2002 that SEBI had examined the rival contentions regarding the offer price and had come to the decision (conclusion) that the offer price of Rs.157 "is in conformity with the applicable provisions of the capitoned Regulation" and the "communication dated 18.10.2002" inter alia conveyed the said decision. The said offer price according to the Appellants is substantially lower than the price required to be given in terms of regulation 20. According to the Appellants, the value of each share of the target company need be valued on the same "negotiated basis" as the valuation of the agricultural business of ACS – SA of which the target company was an integral part, that it was in the region of Rs.556/-. Thus the price factor is undoubtedly, a matter of considerable

significance to the Appellants. SEBI's decision endorsing the price of Rs.157/- per share offered by the acquirer, in the said context if viewed as of no consequence and the Appellants can not be considered to be aggrieved by such a decision and, therefore, the said decision can not be challenged in appeal, would go against the provisions of section 15T and regulation 46. It is not an interim order. It is also not an order which does not affect the rights of the target company's shareholders. It is apparent from SEBI's letter dated 15.11.2002 that SEBI had taken a final decision in the matter taking into consideration the complaints received by it in the matter and also the counter views as provided by the merchant banker. In any case as far as Bayer is concerned SEBI's decision is a final decision on the offer price for the purpose of the public offer. The argument that such a decision can not be challenged in an appeal would in effect, be denial of the means for reddressal of grievances to the shareholders whose right to exit from the target company availing the benefit of a fair price for their shares, as provided in regulation 46. SEBI by its said decision, has allowed the acquirers to go ahead with their scheme of acquisition. There is no other alternative remedy available to the Appellants, but to move the appropriate authorities outside SEBI to get the said order set aside/modified. The appropriate forum provided for the purpose in the Act is the Securities Appellant Tribunal. In my view since the Appellants are aggrieved by the decision of SEBI, appeal remedy as provided under section 15T/regulation 46 should be available to them and it does not stand to reason to say that the appropriate remedy available to the shareholders in the said situation is to seek relief by filing a writ petition under Art.226 of the Constitution of India. As the Appellants' Counsel rightly pointed out when an alternate remedy is available, the writ petition is not normally maintainable. The said alternative remedy is the appeal remedy provided in Section 15T of the Act/regulation 46 of the 1997 Regulations.

I do not find any support to the Respondent's case from the decision of the Hon'ble High Court in Hari Narayan Bajaj (supra) and Hon'ble Supreme Court in Konkan Railway Corporation (supra) In Harinarayan Bajaj, the Hon'ble High Court was considering appeals

filed against the decision of this Tribunal upholding an interim order passed by SEBI on the supply/non supply of documents/materials etc. to Bajajs in an ongoing investigation against them. While considering the appeal Hon'ble High Court had observed:

> "In our opinion, in the context of the scheme of SEBI Act, it is difficult to accept the submission of the appellants that each and every order by the Appellate Tribunal is intended to be subjected to appeal under section 15Z. Mere procedural orders are not the orders which can be taken up and challenged under section 15Z of the Act. Unless the orders formally adjudicates and affect rights of the parties, it is difficult to conceive that remedy of an appeal under section 15Z would be available. In terms section 15Z provides for an appeal from the decision of the Appellate Tribunal "on any question of fact or law" arising out of the order. This clearly implies that the order in appeal should have decided the fact or law or decided the mixed question of fact and law. The section, in our opinion does not contemplate an appeal against any decision or order does not decide the fact or law affecting any right of the parties."
>
> Xxxxxx
>
> "Therefore, we have no hesitation to hold that purely procedural orders which do not affect the substantive right of the parties are not appealable under section 15Z of the Act. This interpretation would also apply with equal force to Section 15T which provides an appeal to the Securities Appellate Tribunal against the order passed by the SEBI Board or adjudicating officer. Therefore, the interlocutory orders not affecting the rights of the parties woud not be appealable under section 15T."

In the light of the nature of the SEBI's decision communicated vide letter dated 18.10.2002 and its effect on the right of the shareholders, it can not be said that the said decision is an inter locutory one or that it has not decided fact or law affecting anybody's right, so

as to apply the ratio in the Harinarayan Bajaj case relied on by the Respondents. In this context the requirement on the acquirer "to make a public announcement to acquire shares in accordance with regulations" provided in regulation 10, 11 and 12 can not be overlooked. This public offer requirement provided in the regulations is in recognition of the other shareholders' right to exit from the target company availing of the benefit of the public offer in the context of substantial acquisition of shares or voting rights or acquisition of control over the target company, by an acquirer. Regulation provides for a fair price to the shares of the shareholders opting to exit. Regulation 20 provides several pricing formulae to benefit the other shareholders of the target company. Therefore, any final decision, on pricing which according to a shareholder, has not been properly arrived at as per the Regulations is against his right to get the right price provided in the regulations, and as such appelable. The Appellants have filed the present appeals as they are aggrieved by the price offered by Bayer.

In Konkan Raiwalys' case relied on by the Respondent's Counsel, the Hon'ble Supreme Court was determining the question as to whether the order of the Chief Justice or his designate in exercise of the power under section 11 of the Arbitration and Conciliation Act, 1996 was amenable to the jurisdiction of the Hon'ble Supreme Court under Article 136 of the Constitution of India. The Hon'ble Court after detailed consideration of the relevant issues held "In conclusion we hold that the order of the Chief Justice or his designate under section 11 nominating an arbitrator is not an adjudicatory order and the Chief Justice or his designate is not a Tribunal. Such an order can not properly be made the subject of a petition for special leave to appeal under Article 136." Article 136 empowers the Hon'ble Supreme Court to grant special leave to appeal from any judgement, decree sentence or order in any cause or matter passed or made by any court or Tribunal in the territory of India. It is in this context it was held that the order of the Chief Justice or his designate under section 11 nominating an arbitrator is not appealable under Article 136. In view of the clear wording of Section 15T/regulation 46, I

am not inclined to agree with the Respondent's version that following ratio in Konkan Railway, the present appeal is not maintainable.

Shri Seervai's submission that for not impleading the merchant banker as a party in appeal no.101/2002, the appeal is not maintainable, is not very sound. It is to be noted that the public offer is required to be made by the acquirer. The merchant banker is only a functionary in the process of making public offer, acting at the behest of the acquirer. The Appellant has impleaded Bayer, the acquirer as a party. In the appeal no relief has been sought against the merchant banker. Relief has been sought against the SEBI's order which even though is technically addressed to the merchant banker is effectively directed to the acquirer. In these circumstances I do not consider that the merchant banker is a proper and necessary party to the appeal proceeding. In this context the observation made by the Hon'ble Supreme Court in Ramesh Hirachand Kundanmal V Municipal Corporation of Grater Bombay and other (1992) 2 SCC 524 provides the guidance:

> "The person to be joined (in a suit) must be one whose presence is necessary as a party. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which can not be effectively and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested' in the answer, i.e. he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights".

In my view in the appeal proceedings before the Tribunal only a necessary or proper

party may be added. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an affective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings. In the said view of the matter I do not consider that the merchant banker to the public offer, is a proper and necessary party to the appeal. The argument that appeal no.101/2002 for want of arraying the merchant banker as a Respondent is not maintainable, is devoid of any merit.

In the light of the above discussion, I am of the view that the appeals are maintainable The appeals are taken on record.

Counsel for parties had advanced detailed argument even at this stage of the proceedings on the question of the price offered to the shareholders of the target company, in the public offer. In fact Shri Dwarkadas had requested that at this stage this Tribunal give atleast a prima facie finding on this aspect. What should be the offer price is the bone of contention in the appeals. The issue is very complex and requires detailed consideration. At this stage of the proceedings we are considering the Appellants' prayer for an interim order staying the public offer process started by Bayer and for the said purpose, a finding on the price factor is not considered very relevant.

During the course of the hearing of the Appellants' prayer for the interim order, on 22.11.2002 the Acquirers through their Counsel had made a statement that even though the closure date of the offer is 30.11.2002 the acquirers will not proceed further pursuant to the closure of the offer till such time the Tribunal decides the question of maintainability of the

appeals and the prayer for interim order. This was acceptable to all the concerned parties present.

Shri Bharucha during the course of the arguments had submitted that he is restricting his prayer for interim order. The Appellant (in appeal no.101/2002) has in writing sought "in the interest of larger body of shareholders" "limited orders i.e. that completion of the Offer should be subject to the condition that the offer price shall be subject to such revision as the Hon'ble Tribunal may direct and the Acquirers shall pay to the shareholders who have tendered shares pursuant to the offer, the differential amount, if any, between the offer price and the amount as directed by the Hon'ble Tribunal etc."

On a perusal of the modified prayer for the interim relief as extracted above, it appears to be very fair and reasonable as this would enable the Acquirers to proceed further in the matter and also enable the shareholders who have tendered their shares in response to public offer (offer has already been closed on 30.11.2002) to avail also of the benefit, if any, in case the Tribunal decides that the offer price should be revised to a higher price. This modified prayer was accepted to by the other Appellants also.

Taking into consideration all the relevant aspects, the Acquirers are allowed to proceed further in the public offer closed on 30.11.2002 as per the Regulations subject to the condition that the offer price shall be subject to such revision, in case this Tribunal directs to revise the same, in its order disposing of the appeals, and the Acquirers shall pay such difference in price, if any, to the shareholders for those shares accepted by the Acquirers in the public offer referred to above.

Sd/-

(C.ACHUTHAN)

PRESIDING OFFICER

Place: Mumbai

Date: February 10 ,2003.