BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

APPEAL NO.13/2001

In the matter of

Punjab State Industrial Development Corpn. Ltd. Appellant

Vs.

1. Securities and Exchange Board of India Respondent No.1
2. M/s DSM Andeno b.v. Respondent No.2
3. Alpha Employees Holdings Private Limited Respondent No.3
4. Alpha Drugs India Limited Respondent No.4
5. Mr. V.K. Garg Respondent No.5

APPEARANCE:

Mr.Randeep Rai
Advocate

Mr.Gautam Dutt
Advocate

Mr. Anil K. Aggarwal
Company Secretary for Appellant

Mr.Ananta Barua
Division Chief for Respondent No.1

Mr. Aspi Chinoy
Sr. Counsel
I/b J.Sagar Associates

Mr. Aditya Bhagat
Advocate

Mr. Juan Jubani
Authorised representative for Respondent No.2

Mr.Iqbal M. Chagla
Sr. Counsel

I/b. D.H.Law Associates
Mr. Nussrat Hassan
Advocate

Mr. Sidhartha Srivastava
Advocate

Mr. Anil Kohli
Director
Alpha Employees Holdings Pvt.Ltd for Respondent No.3.

None for Respondent No. 4

None for Respondent No. 5

(Appeal arising out of the order dated 7.3.2001 made by the Chairman, Securities & Exchange Board of India)

ORDER

Respondent No.1 (SEBI) granted exemption to Respondent No.3 (AEPL) from the compliance of the requirements of the provisions of Chapter III of the Securities & Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the 1997 Regulations) subject to certain conditions, in the matter of transfer of 50.72% shares of Respondent No.4 by Respondent No.2 (DSM) to AEPL. The Appellant claiming to be aggrieved by the said order has filed the present appeal.

ADIL was incorporated in 1987 as a public limited company with the main object of manufacturing certain drug intermediaries. The promoters of the company are the Appellant and Respondent No.5 and his associates. In the year 1992 DSM, a company incorporated in Netherlands acquired about 14.12% shares in ADIL. With the acquisition of further shares in 1997, its holding reached 50.72% of the paid up capital of ADIL. Share holding pattern of ADIL as per the information available before the Tribunal is as under:

Appellant 8.69%

Private Promoters 11.70%

Public 28.89%

DSM 50.72%

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ADIL, it is reported, has continuously incurred losses since commencement of commercial production in 1992 (except in the year 1994 - 95). It has not paid dividend to its shareholders since incorporation. ADIL's net worth has eroded to the extent of Rs. 34 crores of the total net worth of Rs. 44 crores. It has been stated that, as it is, ADIL is incurring a loss of about Rs. 40 lakhs per month. A reference has already been made to the Board for Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985. ADIL, thus, is in a precarious financial condition.

DSM, the majority shareholder, took a decision to divest its share holding in ADIL. It has been stated that DSM could not find any buyer interested in acquiring its share holding in ADIL and as such could not commercially off load its investment. In the meantime a revival plan was drawn out to salvage ADIL. In that context DSM decided to transfer its entire holding to AEPL, a company stated to be incorporated by the employees of ADIL, with the understanding that the said AEPL will in turn give not less than 2500 shares of ADIL free of cost to each one of the employees of ADIL numbering 189. DSM also agreed to provide financial assistance to the tune of Rs.14.425 crores (as a non repayable grant) for settling ADIL's bank liabilities and a further sum of Rs.4.2 crores, as long term interest free loan, for ADIL's revival.

Since 50.72% of the shares of ADIL were proposed to be transferred to AEPL, resulting change in control in the ownership ADIL and that AEPL was not in a position to make any public offer to purchase the shares of other share holders, AEPL approached SEBI vide application dated 26.9.2000, seeking exemption from compliance of the requirement of making public offer under regulation 12 of the 1997 Regulations. SEBI forwarded the proposal to its advisory Panel on 10.10.2000. Panel was not inclined to grant exemption as sought for. AEPL made further representation before SEBI and the matter was re-referred to the Panel. The panel reexamined the matter and inter alia recommended granting exemption subject to compliance of the following terms and conditions:

"(1) That proper legal document incorporating the representations and assurances contained in the

original application as modified by additional information contained in Chairman's said letter dated 8th December, 2000 and as further modified in Alpha Employees Holdings Pvt.Ltd's said letter dated 18th December, 2000 is made and executed by and between all necessary and requisite parties making it legally obligation on the concerned party to comply with the same.

(2) That the shareholders of Alpha Drug India Limited pass a special resolution at the meeting of its shareholders permitting voting through postal ballot thereat thereby ratifying the change in control;

(3) That the notice of such a meeting to the shareholders of Alpha Drug India Limited is to accompany an envelope for postal ballot with pre-paid postal stamps affixed;

(4) That DSM, the majority shareholder in Alpha Drug India Limited being interested in the resolution to be passed at the meeting of the shareholders of Alpha Drug India Limited is to abstain from voting in respect thereof

(5) That the shares of Alpha Employees Holdings Pvt. Ltd., to remain locked for a period of 3 years and no transfer thereof to take place excepting in case of an employee of Alpha Drug India Limited holding shares leaving the company. In such an event, transfer of shareholdings of such an employee be permitted on to another employee of the company; and

(6) That Alpha Employees Holdings Pvt. Ltd shall not grant any loan to any of its Directors."
Again AEPL represented and made further submissions before SEBI, and SEBI remitted the case back to the Panel for its advice on the following grounds:

> "(i) The target company is a potentially sick company and has suffered accumulated losses of about 32 crores till date. The net worth has been eroded to the extent about 72% and there is no financial institution or bank which has lent any money as term loan to the target company. Therefore, the rehabilitation scheme or revival plan has been initiated by all the employees with the help of outgoing majority shareholder who was committed to invest Rs.18.62 crores including a non repayable grant of Rs.14.42 crorees and an interest free loan of Rs.4.20 crores.
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> (ii) The majority foreign shareholders are holding 50.72% and are interested in the revival of the company and as such cannot be termed as interested shareholders in as much as they are not acquiring any control over the Target Company. On the contrary the amount is to be invested for the revival of the potentially sick company which they are not obligated to do.
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> (iii) Further, the shares are to be gifted to the employees by the outgoing shareholders without any consideration i.e. without taking any money. It is important to note that the outgoing majority shareholder has demonstrated substantial concern for the other shareholders and offered substantial support, which is not obliged to and is making generous offer to rehabilitate the Target Company. In fact it would be difficult to get the outgoing shareholder to stay in the company and continue. In fact as the business of majority of shareholder and the target company are not in synergy anymore it would be difficult to retain and ensure their interest any longer. In fact the sustained efforts of the majority shareholders would provide a fair change of revival for the Target Company.
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> (iv) The objective of the outgoing shareholder is to support as far as possible a revival of the Target Company. It is not the case of acquisition of shares as such and is mainly for the rehabilitation of the company and therefore it is requested that the condition which is imposed viz. that the interested member should (abstain from voting) not be made applicable in the case under reference. It is apprehended that if the outgoing shareholder is not allowed to vote, the whole scheme would be in jeopardy and be detrimental in the interest of the shareholders and the employees. In view of the above, it is requested that an ordinary resolution be allowed to be passed by a simple majority and the outgoing majority shareholder be allowed to vote. Further, it is requested that the above simple resolution be passed in a EGM and the postal ballot should be an additional facility."

The Panel after considering the representation, vide its order dated 25th January, 2001 recommended as under:

> "On consideration of the application of Alpha Employees Holdings Pvt. Ltd (for short,

AEPHL), on the facts stated during the course of hearing granted by the Chairman, Securities and Exchange Board of India as narrated in the above captioned letter dated 16th/18th January, 2001, the Panel is of the view that it would be sufficient if the shareholders of Alpha Drug India Limited (for short ADIL) pass an Ordinary resolution, in place and stead of special resolution at the meeting of its shareholders permitting voting through postal ballot thereat ratifying the change in control. Accordingly, the earlier recommendations of the Panel stand modified only to the extent of permitting the shareholders of ADIL to pass Ordinary Resolution in place and stead of Special resolution at the meeting of its shareholders. Rest of the terms and conditions recommending grant of exemption as contained in earlier recommendations of the Panel remain unaltered. However, in addition, in Panel's view, while permitting voting through postal ballot, the Board of Directors of ADIL shall appoint a designated person to conduct, supervise and control the exercise of postal ballot in fair and transparent manner and see that the notice of the meeting containing a draft of the resolution is sent to all members entitled to vote requesting them to sent their assent or dissent within a period of thirty days from the date of posting of the letter and that such notice is sent under certificate of posting to all the shareholders of ADIL with a pre-paid postage envelope for facilitating the communication of the assent or dissent of the shareholders to the resolution within the said period. The designated person shall ascertain the will of such shareholders voting through postal ballot based on the response received and submit the report to the Chairman of the meeting for taking into consideration while declaring the results of the poll.

With intent to safeguard the interest of the shareholders of ADIL other than DSM, the majority shareholder in ADIL who is interested in the resolution to be passed in the meeting of the shareholders of ADIL, the condition of DSM to abstain from voting as contained in the earlier recommendation of the Panel is sustained and continued."

AEPL was thereafter again heard by the Chairman, SEBI. He observed as under:

"I find that DSM is not acquiring any control over the Target Company. On the contrary, DSM is divesting its 50.72% majority stake in the Target Company. In addition, DSM has also committed to invest about Rs.18.62 crores including non-repayable grant of Rs.14.42 crores and interest free loan of Rs.4.20 crores. It has been stated that the business of ADIL is not in synergy any more with DSM. DSM in divesting its entire holding in favour of AEHPL which is a company pre-dominantly owned by the employees of ADIL. The collective shareholding of the employee of ADIL in AEPHL would be 80%. It has been stated that DSM had agreed to take a minority stake of 20% in AEPHL at the request of the employee(s) since it was perceived that the transfer of the technology and the provision of marketing support would be facilitated by DSM's involvement in addition to giving them comfort to monitor the utilisation and recovery of their loan without direct involvement in ADIL. I find that there was no legal obligation on the part of DSM to gift its majority holding to the employees or to provide non-refundable grant or interest free loan to the target company and could have exited from the company without making such commitment. It has been stated that the structure for effecting the employee takeover has been finalised in consultation with DSM and their advisers, Price Waterhouse Coopers Securities. I find that DSM has demonstrated substantial concern and offered substantial support, which it is not obligated to do so for the purpose of revival of the Target Company, which is a potentially sick company. Thus, DSM is not acquiring any control of the Target Company and are interested in revival of the company and as such cannot be termed as an acquirer or shareholder interested in acquiring the control of the Target Company. I am of the view that if DSM is not allowed to vote in the ratification resolution the whole revival plan for the Target Company may be jeopardized, which will not be in the interest of the shareholders and the employees. Therefore, under the facts and circumstances of the case, I relax the condition in respect of non-participation of DSM in voting."

Chairman, SEBI, vide order dated 7.3.2001 granted exemption to AEPL from the requirement of complying with the provisions of Chapter III of the 1997 Regulations, subject to the following conditions:

That the shareholders of ADIL shall pass a resolution at the meeting of the shareholders permitting voting inter-alia through postal ballot thereto thereby ratifying the change in control.

The Board of Directors of ADIL shall appoint a designated person to conduct, supervise and control the exercise of postal ballot in a fair and transparent manner and see that the

notice of the meeting containing a draft of the resolution is sent to all members entitled to vote requesting them to sent their assent or dissent within a period of 30 days from the date of the posting of the letter and such notice is sent under certificate of posting to all the shareholders of ADIL with a prepaid postage envelope for facilitating the communication of assent or dissent of the shareholders to the resolution within the said period.

The designated person shall ascertain the poll of the shareholders passed and received and submit a report to the Chairman of the meeting for taking into consideration while declaring the result of the poll.

That the shares of AEHPL to remain locked in for a period of 3 years and no transfer thereof to take place excepting in case of an employee of ADIL holding the shares leaving the company. In such an event, transfer of shareholding of such an employee be passed on to another employee of the company.

That the AEPHL shall not grant any loan to any of its directors"

[Note: The above quotes are extracted from the impugned order as they appear therein.]

Shri Randeep Rai, learned Counsel appearing for the Appellant referred to the reply filed by SEBI and submitted that since the impugned order was passed in the absence of full facts, the order be remanded for reconsideration. According to the learned Counsel the material facts relating to the litigation such as Writ Petition before the Punjab and Haryana High Court, on going arbitration, police cases etc., were not brought to the notice of SEBI by AEPL while exemption application was under consideration. He stated that since the order is not based on all the relevant facts, remanding the matter to SEBI will be fully justified. He further submitted that SEBI did not of its own ever made any attempt to verify the veracity of ADIL's statement that the revival plan is made at the behest of all the employees, that SEBI's exemption order is based on the assumption that all the employees of ADIL have approved the scheme.

Referring to the challenge to the locustandi of the Appellant to file the appeal Shri Rai submitted that since the Appellant being a promoter and a major shareholder in ADIL any change in its ownership and control in the company is a matter of concern to it, that the Appellant has every right to move the Appellate Tribunal to protect its interest as SEBI's order if allowed would adversely affect its interest. He also submitted that SEBI did not follow the requirements of the principles of natural justice, while making the impugned order, as the Appellant was not given any reasonable opportunity to putforth its views before SEBI, though the Appellant is a concerned party in terms of regulation 4 (6), He also submitted that since the transfer of shares amounted transfer of joint control to sole control, specific requirements of regulation 12 should have been insisted upon to be complied with. Shri Rai submitted that the proposed revival programme is only a cover up to avoid the compliance of the take over code and action by BIFR, that it is meant to benefit DSM and the present management. According to Shri Rai DSM now is a debtor being a guarantor to the creditor Banks and on accepting the revival scheme it will become a creditor to the company, as the proposed Rs.4.2 crores long term loan will be secured by mortgaging ADIL's properties. He also pointed out that since AEPL is stated to be a private limited company, it can not have 189 members, as a private limited company is statutorily barred to have more than 50 members. He also submitted that as a result of the proposed transfer of shares no one except DSM and its associates will be benefited. The employees and public shareholders numbering around 5, 00, 00 will be the losers. According to Shri Rai since the Appellant being a public sector undertaking it is morally bound to protect not only its interest but also the interests of other shareholders, creditors and the employees of ADIL. Learned Counsel further submitted that SEBI has predetermined the issue and decided to grant the exemption, as is evident from the manner in which it was making reference after reference to the Panel till it succeeded in getting a partially favourable recommendation, and even that recommendation was diluted by allowing DSM to vote in the matter, knowing very well that by permitting DSM to vote the resolution would be carried out as DSM had an enblock 50. 72% vote with it. Learned Counsel further submitted that the whole revival plan was hatched without the knowledge of the Board of Directors of ADIL, that the Director Board was never informed of the plan, before approaching SEBI. He also submitted that section 192 A of the Companies Act providing for postal ballot, requires the notice to be sent by Regd. Post, but in the instant case, SEBI diluted even that statutory requirement by providing issuance of notice under certificate of posting. According to the learned Counsel grant of exemption by SEBI has virtually taken away the shareholders' rights to protect their interests. He submitted that the resolution as carried out does not truly represent the wish of the majority shareholders, as could be seen from the statistics provided by DSM itself vide Annexure R.3 to its reply, as only very

few share holders, out of a mass of 5, 000 did participate in the voting. According to the learned Counsel, the proposal as it stands is only meant to help the management to avoid scrutiny by BIFR and any proper and reasonable revival of ADIL at BIFR's behest. Referring to the charge of forum shopping at Courts and Tribunals, Shri Rai submitted that the Appellant had filed Writ Petition No.6683 of 2001 before the Hon'ble High Court of Punjab & Haryana as a contingency measure and he undertook to withdraw the said writ petition forthwith and requested the Tribunal to proceed in the appeal.

Shri Iqbal M Chagla, learned Senior Counsel appearing for AEPL explained the background in which the Respondent approached SEBI seeking exemption from compliance of the provisions of regulation 12. He submitted that ADIL is a sick company and its financial position has been drifting from bad to worse, depleting its net worth at a fast rate, that if ADIL is left unnourished, all concerned i.e. all the shareholders, creditors and employees would be brought to grief, as there was no doubt about the ultimate fate of ADIL in that event. Shri Chagla stated that it was in this scenario DSM entered the scene with generous financial assistance, by offering management buyout of its 50. 72% stake in the equity capital of the company, providing about Rs.14.42 crores to settle the loan liabilities by way of non repayable grant, and Rs. 4.20 crore rupees by way of interest free long term loan to meet the immediate fund requirement to revive ADIL. He submitted that DSM being a global entity was not comfortable to take a company in which it had majority shareholding into liquidation and that as its efforts to get a buyer for its shares, who could run the company did not succeed, the only alternative was to revive the company, as per the package, discussed in detail in the impugned order. Apart from the financial assistance DSM had agreed to give technical support etc., required to revive ADIL at no extra cost to AEPL. He made it clear that its entire shareholding is proposed to be gifted to the employees of ADIL and is not being sold. AEPL has not acquired the shares as such to attract the Regulations. AEPL/employees of ADIL had not been in any way forced to accept the share offer made by DSM. DSM had only offered the shares to the employees by way of gift. It was upto them to accept and participate in the management and revive the company or opt out. Shri Chagla made it clear that, at the relevant point of time when AEPL approached SEBI for exemption, the proposal was to offer shares to employees with option to accept or not. He submitted that the fact that a private company cannot have more than 50 members is not disputed, that nothing prevents a private company from converting to public in the event of its membership crossing the 50 member bench mark. This being only a technical formality should not come in the way of the proposed employee participation in the ownership of ADIL.

Shri Chagla referring to the allegation that the employees of ADIL are opposing the revival plan, stated that it is incorrect, that the Appellant has been colluding with Respondent No. 5 as well as a retrenched employee of ADIL, Shri Ram Narain Singh Mahar, that the said parties orchestrated various attempts at forum shopping at courts and tribunals by misleading the courts in an effort to snatch one or the other judicial order that would some how scuttle the revival plan or browbeat DSM into acceding to their unreasonable demands. He cited the instances (i) CW No.1877 of 2001 filed by Shri Ram Narain Singh Mahar before the Hon'ble Punjab and Haryana Hbigh Court, which was dismissed as withdrawn on 7.2.2001 (ii) CWP No. 5337 M of 2001 filed by Shri Ram Narain Singh Mahar, before the Hon'ble Punjab and Haryana High Court was disposed of by the Hon'ble Court with the direction that the alleged complaint be referred to the police for investigation on February 15, 2001, which has been completed and no offence has been found to be made out (iii) CWP No.4580 of 2001 filed by Shri V.K Garg (the Respondent No.5) seeking prohibitory relief against DSM from divesting its shares in ADIL, was dismissed as withdrawn with permission to file at the appropriate forum on March 27, 2001 (iv) Civil Suit filed by Shri Ram Narain Singh Mahar before the Civil Judge, Rajpura for permanent injunction from restraining DSM from transferring or selling ADIL's shares to AEPL in any manner, that the order of the Civil Judge dated May 9,. 2001 in the aforesaid suit was stayed by the Hon'ble Punjab and Haryana High Court vide order dated 16.5.2001 in civil revision petition No.7660 of 2001. Shri Chagla submitted that the aforesaid facts would show that there is no opposition of the employees as falsely alleged by the Appellant, that filing of various petitions and suits by one disgruntled ex-employee Shri Ram Narain Singh Mahar cannot be construed to be representative of all the employees of ADIL. He further submitted that various police complaints have been registered against the said Ram Narain Singh Mahar and referred to copies of two First Information Reports registered by police against him at annexure 4 to the AEPL's reply. He stated that Shri Ram Narain Singh Mahar has been responsible for attempts at inciting and fermenting trouble among a section of the employees of ADIL to demand sharing of the grants to be received from DSM.

Shri Chagla submitted that the Appellant has falsely and baselessly alleged that there is suppression and concealment of material facts regarding the ongoing arbitration proceedings between Respondent No. 5 and DSM on the one hand and the Appellant and Respondent No. 5 on the other, as these interse disputes between the aforesaid parties relate to alleged obligations of the parties under the agreements

dated 3.11.1997 and 19.8.1986 respectively and on a subject matter of arbitration proceedings, the factum of the inter se disputes and the claims between the aforesaid parties and the pending arbitration proceedings between them has no relevance or bearing to the exemption sought from SEBI by AEPL.

Shri Chagla submitted that the Appellant or any other shareholder or creditor of ADIL is not going to suffer any prejudice from the exemption granted by the impugned order and on the other hand AEPL, ADIL and its employees and shareholders are likely to suffer grave and irreparable prejudice and loss in case DSM simply exits from ADIL, that the speed for revival of ADIL is of great significance as losses of ADIL are mounting at the rate of about Rs.40 lakhs a month and are causing ADIL's net worth erosion of 1% a month, that any serious and committed promoter as the Appellant claiming itself to be, would not want the closure of one of the few operating companies it holds shares in, that the actions of the Appellant in blocking the revival plan for ADIL betray any logical explanation.

Shri Chagla referred to the statistics pertaining to the voting pattern on the resolution furnished by the DSM in its reply at (Annexure 3), and stated that even if DSM's holding is excluded, still there was overwhelming support from other shareholders (other than the Appellant) in support of the Resolution, which clearly demonstrates that the other share holders favour the proposed revival scheme.

Shri Chagla pointed out that the Appellant, the self-professed champion of other shareholders, is objecting the proposal with the sole motive of getting back its investment. It is not at all concerned about the interests of other shareholders or creditors or employees of ADIL. In this context Shri Chagla cited the Appellant's letter dated 2.2.2001 and 26.3.2001 to DSM, where the Appellant had specified its priority by stating "to reconsider your proposal for transfer of shareholding in the company (ADIL) and request you not to dispose your shareholding in the company till our shareholding is bought back….. We would like to place on record that DSM can consider making similar offer to PSIDC offering one time settlement with financial support in case it intends to make exit from the business …..", that the demand to buy back its shares exposes the Appellant's motive. Shri Chagla stated that in case the revival plan fails to come through, the loser will be the ordinary shareholders and the employees. He pointed out that the Appellant has not come forward with any proposal to save the situation. He pointed out that in case a public offer is made, as per the SEBI pricing formula, the offer price would be around Rs. 8/- per share which AEPL cannot afford at present; and if the transfer of shares is not exempted from making public offer, it is a certainty that ADIL will sink; that there is at least a ray of hope of resurrecting ADIL if the proposed revival scheme is allowed to operate, and that precisely for the said reason and taking into consideration the interests of the shareholders SEBI granted exemption. On the question of the alleged non compliance of regulation 4 (6) by SEBI, Shri Chagla stated that the expression "concerned party" used in the regulation refers to the persons directly concerned i.e., the applicant acquiring the shares and not the shareholder population of the target company as a whole. Any interpretation giving "concerned party" a meaning to include all the shareholders of the target company, would defeat the very purpose of the regulation, as it would not be possible in that event to hear few thousand (at least) shareholders in a month's time and decide the application by SEBI.

Shri Chagla submitted that SEBI's conduct in arriving at the conclusion stated in detail in the impugned order can not be impeached as has been attempted by the Appellant. SEBI is mandated to protect the interests of the investors and it is expected to look at the issue from a broader angle. He submitted that the argument that DSM is an interested party and as such it should be restrained from voting the resolution is unsustainable for the reason that every shareholder including the Appellant in that sense is an interested person in the matter and as such disallowing DSM and allowing others to exercise voting rights is not proper or legally tenable. In this context Shri Chagla referred para 9 of the impugned order and stated that SEBI has very clearly explained the reason to allow DSM to participate in the voting.

Shri Chagla stated that the Appellant has filed writ petition No.6683 of 2001 before the Hon'ble Punjab and Haryana High Court wherein similar reliefs have been prayed for as sought in para 6 and 7 of the appeal and as such the Appellant's appeal is liable to be dismissed on this count.

Shri Aspi Chinoy, learned Senior Counsel appearing for DSM submitted that the proposed transfer of shares is not a commercial acquisition to gain control of ADIL. The Respondent is gifting away the shares held by it to ADIL's employees. He submitted that every effort by DSM to commercially dispose of its holding failed, as it could not get a buyer. ADIL is drifting towards total financial ruin, and there is not any option left with at the moment, either allow ADIL to perish or take best possible measures to

revive it. The second course being beneficial to all concerned., it was decided to pursue the same. Shri Chinoy submitted that DSM was not under any legal obligation to revive ADIL and meet the revival expenses. Nothing would have prevented it from keeping the investment as it is, and allow ADIL to perish. In that event, closure of ADIL was iminent throwing the employees out of job and depleting the company's share value further to the disadvantage of the shareholders. He narrated the initiative taken by DSM to revive ADIL and the financial burden undertaken by it for the purpose. He submitted that it is not in the tradition of DSM group companies to run away from ventures in which they are partners. He submitted that the present revival plan, is a bail out operation intended to benefit all concerned i.e., shareholders, employees and creditors. He stated that if ADIL is allowed to be wound up, the Appellant also would not get any benefit. According to him, the Appellant is using the Court/Appellate forum to put pressure on DSM to buy back its holdings in ADIL, come what may. This single-minded objective has been demonstrated by it in its correspondence with the DSM Dehril referred to by Shri Chagla. He stated that as a public sector undertaking, it is not expected to kill a company to the disadvantage of its shareholders and employees but nourish to health.

Shri Chinoy submitted that the Appellant is neither an aggrieved person nor a concerned party, to be eligible to file the appeal or to claim hearing before SEBI. He stated that DSM is virtually a donor and SEBI has rightly understood the efforts taken by DSM, the very objective of the revival scheme, and the larger public interest involved while granting exemption. He submitted that the transfer of shares involved is not against the interest of any shareholder, that on the contrary it is to the benefit of all the shareholders and in tune with objective of the 1997 Regulations.

Regarding the allegation that the SEBI's direction to issue notice under certificate of posting in the context of the postal ballot ordered, learned Senior Counsel stated that SEBI is empowered to put conditions while making orders under the SEBI Act and since the matter involved is covered under SEBI Act, it is perfectly justified in directing issue notice under PUC.

Shri Ananta Barua representing SEBI explained the procedure for granting exemption under regulation 4 (6). He stated that every application seeking exemption is forwarded to the takeover Panel and on receipt of the Panel's recommendation and after hearing the party seeking exemption, the request is considered, that in case any additional particulars/information relevant to the matter are brought before SEBI, and if it is felt that the matter need further examination, it is referred to the Panel for its considered opinion. He submitted that even though reference to Panel is mandatory SEBI is not bound to accept the Panel's recommendations, that the Panel's role is only advisory. He stated that in the instant case on receipt of additional particulars, more than once the case was referred to the Panel. According to him such references to Panel are not uncommon. He further submitted that SEBI's direction to issue notices under certificate of posting for the purpose of postal ballot is well within its powers that such directions had been issued in the past and parties had accepted such direction and complied with the same. He refuted the Appellant's contention that SEBI has asked in its reply for remand of the matter as full disclosures were not made before it while seeking exemption under regulation 4 (6). He said that all that the reply states is that if the Tribunal feels that the matter need be re-examined, the matter can be remanded. Shri Barua submitted that impugned order is intended to benefit all concerned and is not in any way prejudicial to the interests of any shareholder. In this context he referred to para 9 of the order and stated that SEBI has clearly stated therein the reasons for granting exemption.

This Tribunal vide its order dated 8.5.2001 had temporarily restrained ADIL from giving effect to the proposal of DSM for transfer of shares for a period of eight weeks from the date of the order. Subsequently, vide order dated 3.7.2001 operation of the said interim order was extended by 10 days.

While DSM and AEPL filed detailed reply to the Memorandum of Appeal, ADIL and Respondent No. 5 neither filed any reply nor made any oral representation before the Tribunal. SEBI filed a cryptic reply in the context of the interim relief sought by the Appellant. No detailed reply to the Memorandum of Appeal was thereafter filed by the said Respondent. Its representative made brief oral submission defending the impugned order.

I have carefully considered the representation made by the parties in their pleadings and also the oral submissions made on their behalf.

Learned Counsel for DSM and AEPL had brought to my notice the fact of civil writ petition No.6683 of 2001 filed by the Appellant before the Hon'ble High Court of Punjab and Haryana, seeking more or less the same relief sought in the appeal pending before the Tribunal. They had sought dismissal of the appeal on that ground. However, in view of the submission made by the Appellant's Counsel that the Appellant would be withdrawing the said CWP forthwith (this has been subsequently confirmed by the Appellant in writing vide its letter dated 19.6.2001) I am not inclined to dismiss the appeal on the said ground as prayed for by the Respondents' Counsel.

The preliminary objection that the Appellant has no locus standi to file the present appeal has already been considered and decided by the Tribunal in its interim order dated 8.5.2001. The Appellant as a shareholder with reasonably high stake in ADIL is apprehensive of the post acquisition scenario as it feels that AEPL has no potential to efficiently run ADIL and as such the change if effected as a result of the transfer of shares would adversely affect its interest as a shareholder. It cannot be said that a change in control over ADIL in which the Appellant has substantial investment should be of no concern to it. In terms of section 15T of the SEBI Act any person aggrieved by an order of SEBI is entitled to prefer an appeal to the Tribunal. In the light of the fact that the Appellant is one of the promoters and a dominant shareholder in ADIL, that it is apprehensive of the consequences of change in the ownership of ADIL, and consequently claiming to be aggrieved by the impugned order which facilitates such change, it is not possible to hold that the Appellant is not aggrieved and as such not entitled to file the appeal.

The Appellant's version that the impugned order has been made without affording it an opportunity to present its case and as such the order is bad, is untenable. Regulation 3 (1) enumerates certain specific acquisitions out of the scope of regulations 10, 11 and 12 of the 1997 Regulations. However, since such list cannot be exhaustive, the regulation has provided an omnibus clause enabling SEBI to exempt such other cases from the applicability of the said regulations 10, 11 and 12 in the manner provided under regulation 4. Sub regulation (1) of Regulation 4 requires SEBI to constitute an expert Panel for the purpose. According to sub regulation (2) for seeking exemption, the acquirer is required to file an application along with prescribed fee with SEBI, giving details of the proposed acquisition and grounds on which the exemption has been sought. In terms of sub regulation (4) SEBI is required, within 5 days from the receipt of the application, forward the same to the Panel and the Panel as per sub regulation (5) is required within 15 days from the date of receipt of the application, to make its recommendations to SEBI. According to sub regulation (6) "the Board shall after affording reasonable opportunity to the concerned parties and after considering all the relevant facts including the recommendations, if any, pass a reasoned order on the application under sub regulation (2) within 30 days thereof". The Appellant's contention that it is "a concerned party" and as such in terms of sub regulation (6) SEBI should have given it an opportunity of being heard is not acceptable, as the expression "concerned party" in the said regulation cannot be construed to mean all the shareholders of the target company and as a corollary thereto seek their views for the purpose of deciding the application. Scope of the expression is restricted. No doubt the person seeking exemption is a "concerned party" and he is entitled to putforth his views. Depending on the facts and circumstances of the case it is for SEBI to decide as to in addition to the person seeking exemption anybody else need be given the right of representation. It cannot be held that each and every shareholder has a vested right to be heard in the matter. It may not be forgotten that the exemption order is required to be made on the subjective satisfaction by SEBI, and it is upto SEBI to decide what is the relevant material to be relied on or who is the concerned party to be heard, to reach at the decision. It is also to be noted that the whole exercise of decision making under the regulation has to be completed within 30 days. In this case, apparently SEBI had felt it not necessary to hear the Appellant and the Appellant cannot force it on SEBI. Therefore not affording an opportunity to the Appellant in the matter at the stage of deciding the exemption application cannot be considered as a deficiency to discard the order.

Yet another objection from the Appellant is about noncompliance of the requirements involved in transferring joint control to sole control in terms of regulation 12. This objection is not well founded. The question whether the transfer of share in question is a transfer from joint control to sole control, is not relevant here in view of the exemption granted to AEPL from the applicability of regulation12. When such an exemption is granted, there is no question of complying with the requirement of the said regulation. Since the impugned order has granted exemption from complying with the requirements of regulation 12, the charge of non-compliance of the requirement of the said regulation cannot hold good.

Appellant's contention that the impugned order directing AEPL to issue notices "under certificate of posting" for the purpose of postal ballots under section 192A of the Companies Act as incorrect is also not tenable for the reason that the direction is not with reference to matters which are to be decided by

postal ballot under the Companies Act. SEBI has opted the mode of postal ballot for seeking shareholders willingness and in that context it is at liberty to prescribe the manner in which the said postal ballot mode can be effected. In fact, even if section 192A had not been there, SEBI would be right in asking the shareholders to express their views through postal ballot after fully explaining the method and procedure for the purpose. In this context it is also to be noted that SEBI's expert Panel had also recommended issuance of notice under certificate of posting.

As already stated SEBI did not consider it necessary to file a detailed reply to the appeal for the reasons best known to it. Of course it had filed a very cryptic reply in the context of the Appellant's request for interim order. Since the Appellant had harped on this reply heavily demanding remand of the matter, it is felt appropriate to extract the full text of SEBI's short reply, for ready reference, hereunder:

> "This affidavit is being filed for the purpose of putting on record the submissions made on behalf of the answering respondent before the Hon'ble Tribunal on May 2, 2001 which are also on record of this respondent, that may be taken into account while considering the prayer of the Appellant, who is inter alia seeking an interim injunction against the holding of the shareholders' meeting scheduled to be held on May 9, 2001 by the target company, i.e., respondent No.4, the conducting of the postal ballot and giving effect to the proposal of DSM, i.e., the respondent No. 2 for the transfer of shares and change in control of the target company in favour of the acquirer company i.e., respondent No. 3 and such other interim orders as may be passed by the Hon'ble Tribunal in the matter.
>
> It is submitted that the respondent No. 3 had filed an application before the answering respondent under Regulation 4 of the SEBI (Substantial Acquisition of Shares and Takeovers), Regulations, 1997 for seeking exemption from the making of a public offer in the matter of the proposed acquisition of 50.82 percent shares of respondent No.4, the target company from respondent No.2 who is the majority holder of the target company. It is submitted that the exemption was sought for essentially on the following grounds:
>
> > 1) the revival plan initiated by the third respondent (including inter alia the transfer of 50.82 percent shares of the target company to the acquirer company) included all employees of the target company and each employee would be offered 2,500 shares of the acquirer company.
> >
> > 2) The shareholding of the Acquirer Company was spread broadly amongst all employees of the Target Company collectively holding 80% i.e., Mr. Anil Kohli who had earlier proposed to hold 45. 60% of the Acquirer Company would now hold only 34. 40% and the other 188 employees would collectively hold 45. 60% of the acquirer company with a number of shares ranging between 2, 500 and 1,25,000. Thus Mr. Kohli's effective holding in ADIL would be around 17%.
> >
> > 3) The change in control over the Target Company would shift to the Acquirer Company, which would be jointly owned by all 189 employees and not just a few employees.
> > Based on the grounds as submitted above, as well as the recommendations of the Takeover Panel, SEBI had issued its order on March 7, 2001, granting exemption as sought for.
> >
> > However, the appellant has presently stated certain facts essentially relating to the fact that the employees of the target company for whose benefit the proposed acquisition was purported to take place, has filed a writ petition in the Punjab and Haryana High Court against the proposed transfer of shares by respondent nos.2, to the respondent no.3, whereupon the High Court had referred the matter to the concerned authorities for investigation.
> >
> > It has been further stated that as the second respondent and the third respondent have concealed from SEBI the fact that arbitration proceedings have been initiated between the second respondent and the private co-promoter on one hand and between the appellant corporation and the private co-promoter on the other, the order of SEBI deserves to be set aside.
> >
> > It is submitted that if, as stated by the appellant corporation certain information/facts, were not brought to the notice of SEBI by the third respondent while seeking exemption, as a consequence of which the Takeover Panel or SEBI was not able to consider the same before taking the view while passing the order dated March 7, 2001, the authenticity of the said facts/ existence of the arrangement, etc., as alleged in the appeal and whether the

same would have been found to be material in arriving at a decision by the Panel or SEBI would need to be ascertained.

In view of the above, the case may be accordingly disposed of.

Sd/-

G.BABITA RAYUDU
ASSISTANT LEGAL ADVISOR
SECURITIES AND EXCHANGE BOARD OF INDIA

The last para of the reply is very vague and also casual. What is expected from the market regulator is not a reply couched in "ifs" and "buts" In the light of the information available with SEBI as flowing from the pleadings, it should have come out with a definite view as to there was any need to remand or not. It would have been but proper to make a clear and unambiguous prayer to remand the matter if the Respondent felt so. In a sense SEBI's role is not confined to that of a mere adversary party in the appeal proceedings before the Tribunal. As a regulator it has the duty to assist the Tribunal by presenting correct legal and factual position. I do not find its present reply is in tune with that spirit. Anyhow I had elicited information from the Respondents' Counsel on the litigations and about the ongoing arbitration referred to by the Appellant. Shri Chagla stated that the arbitration matter reportedly not disclosed in the application does not have any bearing on the proposed transfer of the DSM's shareholding to AEPL. Neither AEPL nor ADIL is a party directly concerned with the inter se dispute between DSM and Respondent 5 or the Appellant and Respondent No.5. Similarly the litigation in the High Court has been disposed of. In his presentation he had explained the fate of those cases (supra) which the Appellant has also not rebutted. From his submission, as I could see, there is nothing to show that a sizable number of employees of ADIL are opposing the scheme. In any case on a perusal of the order it is seen that the scheme provides to offer shares to the employees of ADIL by way of gift, as a welfare measure and it is for the employees to accept or discard the offer. It cannot be said that SEBI was unaware of the "dissent" of the employees Union as could be seen from the Union's letter dated 2.1.2001 addressed to SEBI as well. A copy of this letter is a part of the appeal. SEBI has not denied receipt of the said letter. Therefore the presumption is that SEBI had considered the said representation while deciding AEPL's application seeking exemption and found no merit in it. The Appellant has not given any tangible reason as to why an employee should decline DSM's offer especially when it is of no extra cost to him. I do not find anywhere in the impugned order any indication to the effect that the scheme will be operative only if all the 189 employees accept the offer of shares as proposed. In the light of the facts and circumstances, I do not consider it necessary to remand the matter and delay a decision in the matter. It is felt that any avoidable delay in such a matter should be avoided as time factor is very important in achieving the proposed objective of the scheme i.e., revival of ADIL, in view of the fast deteriorating financial position of ADIL.

The Appellant has not questioned the factual position putforth by DSM that the financial position of ADIL is in a precarious condition and that by now a substantial portion of its net worth amounting Rs. 34 crores out of a total net worth of Rs.44 crores has eroded and it is being further eroded at the rate of Rs. 40 lakhs approximately every month. One need not be a financial expert to envisage the financial crisis, which ADIL is currently facing and what would be the effect in case the deterioration is not arrested forthwith. In this context the revival plan as proposed by DSM and AEPL provides some ray of hope. In the absence of any such revival plan, it is imminent that the ADIL will become insolvent and in that event even the Appellant will not be getting adequate compensation towards its investment in the capital of ADIL. The demand that AEPL should make a public offer to purchase at least 20% of the shares from the existing shareholders as provided in regulation 12 is not practicable in view of paucity of funds with the company. The priority is to revive ADIL and thereby expect value addition to the existing shares in the hands of the public. It is too much to expect for any reasonable person to ask DSM to meet the share purchase expenses of a public offer as well, in addition to 18 crores rupees already promised to fund in to revive ADIL. I do not see anything objectionable in a measure meant to revive the Company as the revival would be beneficial to the shareholders as a whole.

The plan to revive ADIL is meant for the benefit of all the shareholders and also the employees of ADIL. In case the plan is implemented, a hopeless scenario may convert to a hopeful one, as a turn around in the financial health of ADIL could be reasonably expected. In that event it would definitely benefit 50, 000 public shareholders and also the employees who are on the verge of losing their employment now. If the revival plan is not facilitated then closure of ADIL, as it is, is imminent being a potentially sick company with 74% of its net worth having already eroded. In case ADIL is closed it would not only lead to complete loss of gainful employment of the workers in a backward village of Punjab but also result in loss of the entire investment of all the shareholders of ADIL including the

Appellant.

The Appellant's main objection to the impugned order appears to be that SEBI has allowed DSM to exercise its voting rights as against its exclusion recommended by the advisory Panel, while deciding the resolution. I do not find any thing objectionable in SEBI seeking the views of the Panel in the light of the fresh set of facts or new submissions coming up before it. The Panel's recommendation to exclude DSM is on the ground that it is an interested party. This reasoning is not very strong, as in that case all the shareholders could be considered as interested in the matter. It is to be remembered that DSM is not the acquirer. DSM is a donor as its shares are proposed to be offered to the employees of ADIL by way of gift. It is clear from the impugned order that the regulatory authority has properly understood the whole issue and it has viewed the matter quite rightly from a very broad perspective, realising that allowing ADIL to have a natural death would not be in the interest of the share holders. The fact that DSM's shares are offered to the workers of ADIL, by any standard, should not be a matter of worry to the Appellant as in any case, it was certain that in the absence of effecting any revival plan ADIL will sink leaving nothing to benefit the Appellant. To redeem the situation the revival scheme has been mooted, and no one would benefit by aborting the scheme. One should not forget that in the event of ADIL becoming insolvent, its shareholders would get nothing. Revival gives them at least some hope. It is meant to protect the interests of the shareholders as well.

The Appellant has failed to establish that the exemption order made by SEBI is not in the larger interest of the existing shareholders. No prejudice whatsoever is caused by the impugned order to any shareholder of ADIL including the Appellant. The takeover code is not meant to ensure proper management of the business of companies or to provide remedies in the event of mismanagement. It has a limited role. It's main objective is to ensure equality of treatment and opportunity to all shareholders and afford protection to them, in the event of substantial acquisition of shares and takeovers. The test is as to whether the other shareholders have been treated unfairly in the context of takeover. There is nothing to suggest that there is any such unfair treatment to the shareholders in the instant case. On the contrary the transfer of shares forming part of the revival scheme appears to be in the larger interest of the existing shareholders. In this context it is seen from the voting pattern on the resolution provided by DSM that only very few "other share holders" had disagreed to the resolution. I do not see anything contrary to the objective of the takeover code, in the impugned order. There are other legislations in the field to be resorted to in the event of oppression, mismanagement etc.

After closing the arguments the Tribunal received two representations by post, one supporting and the other opposing the revival scheme, claiming to be from the employees of ADIL. These representations are neither properly verified nor supported by any affidavit.. Since the authenticity of these claims are not established and that these "employees" are not party to the proceedings before me, I have not considered the rival claims.

For the reasons sated above, I do not see any merit in the appeal. The appeal is dismissed.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: July 12, 2001