BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

APPEAL NO. 11/2001

In the matter of:

1. B.P.Amoco Plc
2. Castrol Limited **Appellants**
Vs.
Securities & Exchange Board of India **Respondent**

APPEARANCE;

Mr. Atul M Setalvad
Sr. Advocate

Mr. Gaurav Joshi
Advocate
I/b. Bhaishankar Kanga & Girdharlal

Mr. Shobhan Thakore
Advocate

Mr.Ramesh Chandra
Advocate

Bhaishankar Kanga & Girdharlal **for Appellants**

Mr. Goolam Vahanvati
Advocate General of Maharashtra

Ms Rameeza Hakeem Advocate

Ms Uma M Dalal
Advocate
Maneksha & Sethna

Mr. Ananta Barua
Division Chief, SEBI **for Respondent**

(Appeal arising out of the Securities and Exchange Board of India's decision dated 16.2.2001)

ORDER

Both the Appellants are public limited companies incorporated in the United Kingdom. Burmah Castrol Plc is also a public limited company incorporated in the United Kingdom. Pursuant to an offer made by Appellant No.1, Burmah Castrol Plc became its wholly owned subsidiary. Burmah Castrol Plc has a subsidiary namely Burmah Castrol Holdings Ltd, which in turn has a subsidiary namely Castrol Limited (Appellant No.2). Castrol Ltd has a subsidiary company namely Castrol India Ltd with 51% share holding. Castrol (India) Ltd is a public limited company incorporated in India. Equity shares of Castrol (India) Ltd are listed on the Stock Exchange, Mumbai and also permitted for trading on the National Stock Exchange.

On 14.3.2000 Appellant No.1 issued a press announcement stating that subject to certain pre-conditions being met, it was prepared to make an offer in the United Kingdom for the acquisition of the entire share

capital of Burmah Castrol Plc. It was also stated in the announcement that the offer would only be made if the following pre-conditions were satisfied that (i) all applicable waiting periods under the Hart-Scott Rodino Antitrust Improvement Act, 1976 and the regulations thereunder expiring, lapsing or otherwise terminating; and (ii) the European Commission issuing a decision declaring the merger to be compatible with the common market, and that if EEC or the FTC refused to grant the regulatory approvals, the offer would lapse. On receipt of the requisite approvals from the concerned authorities, Appellant No. 1, posted the first formal letter of offer to the shareholders of Burmah Castrol Plc on 8.6.2000. The offer so made was subject to certain conditions which included (i) the condition that the Appellant would be bound by the offer only if valid acceptance was received from not less than 90% of share holders of Burmah Castrol Plc, unless such requirement is waived by the Appellant (the Acceptance Condition) and (ii) no material adverse change having occurred in the business, assets, financial or trading position or profits of any member of the Burmah Castrol Group taking as a whole (the Material Adverse Change Condition). On 7.7.2000, upon receipt of acceptance from more than 50 percent of the share holders of Burmah Castrol Plc, Appellant No.1 waived the Acceptance Condition, the Material Adverse Change Condition and all other conditions and declared the offer wholly unconditional. As a result of the said acquisition of the shares of Burmah Castrol Plc, it became a subsidiary of the Appellant and consequently Appellant No.1 gained control of all the subsidiaries of Burmah Castrol Plc, including Castrol (India) Ltd. In that context, on 10.7.2000, Appellant No.1 approached the Respondent, seeking exemption from the requirement of making a public offer for acquisition of upto 20% of the shares of Castrol India Ltd as required under the Securities and Exchange of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the Regulations). The said exemption application was disposed of by the Respondent vide order dated 7.8.2000, by granting exemption subject to certain conditions which was not acceptable to the Appellant. The Appellant withdrew on 6.12.2000 its request for exemption and proceeded to take steps to make public offer to the share holders of Castrol (India) Ltd, as required under the Regulations, and for that purpose, a draft text of the public announcement was filed with the Respondent on 6.12.2000, wherein the offer price was shown as Rs. 311.91 calculated by taking 7.7.2000 as the relevant date. The Appellant did not receive immediately any comments on the draft text of the announcement, from the Respondent. On 11.12.2000 the Appellants made a public announcement for acquiring 20% of the equity share capital of Castrol (India) Ltd, at a price of Rs. 311.91 per share. On 10.1.2001 the Appellants received a letter from the Respondent asking them not to proceed with the dispatch of the letter of offer and also to await its comments. Thereafter the matter was discussed between the parties. In the absence of any consensus, the Respondent by its communication dated 16.2.2001 inter alia directed the Appellants to revise the minimum offer price taking 14.3.2000 as the relevant date and also to correspondingly increase the deposit in the escrow account. The Appellants are not agreeable to take 14.3.2000 as the relevant date for the purpose. They have therefore challenged the said decision of the Respondent in the present appeal.

Shri A.M.Setalvad, learned Senior Counsel, appearing for the Appellants explained the background of the appeal and stated that acquisition of control over Castrol India Ltd., was not intended but only incidental to the acquisition of the shares of Burmah Castrol. According to him the crucial point required to be considered in the present appeal is as to what is the relevant date to be taken for the purpose of deciding the minimum offer price. According to the learned Senior Counsel the Respondent's order directing to take 14.3.2000 as the relevant date for the purpose was not tenable. Quoting the provisions of regulation 14(3) Shri Setalvad stated that the announcement of the offer made by the Appellant on 14.3.2000 was preconditional on obtaining approvals of the EEC and the FTC that if such approvals had not been obtained the offer would have lapsed. In support of this submission he cited several paragraphs from the copy of the text of the public announcement filed along with the appeal. He stated that on receipt of the requisite approvals from the authorities formal offer letters were posted on 8.6.2000 to the share holders of Burmah Castrol, that even the said offer was also a conditional one and non fulfillment of those conditions in the absence of waiver of the same by the authorities/the Appellant would have resulted in the offer inoperative. According to the learned Senior Counsel acceptance of the offer by the share holders of Burmah Castrol was, in the strict sense not an acceptance at all, as the same was still conditional, that it became a final acceptance and a contract only when all the conditions were fulfilled or waived on 7.7.2000 i.e., the date on which Appellant No.1 declared the offer wholly unconditional. He submitted that the public announcement made by Appellant No.1 on 14.3.2000 was not an offer at all either in fact or in law that it was only an announcement conveying an expression of intent and as such there was no acquisition of control over Castrol (India) Ltd at that point of time. According to Shri Setalvad since the acquisition became final only on 7.7.2000, relevant date for calculating the offer price should be 7.7.2000.

Shri Setalvad stated that the Appellant's decision on 14.3.2000 was to initiate steps to acquire shares of Burmah Castrol and it had no intention to acquire the shares of Castrol India or to take control over the said company, that in the order dated 7.8.2000, the Chairman of the Respondent had also endorsed the

same view. Shri Setalvad further submitted that an offer is synonymous with a 'proposal' as defined in section 2 (a) of the Indian Contract Act, 1872 and that to constitute a 'proposal' there must be a signification of a willingness to do something with a view to obtain the assent of the other; there can be no such signification if the offer or proposal is conditional. Consequently, in law there was no proposal by the Appellant at all on 14.3.2000 and no question can possibly arise of there being any decision on that date. He also submitted that the impugned order is contrary to the view taken by the Chairman of the Respondent in his order dated 7.8.2000 and this is clearly a case of one authority defying the other.

Referring to sub regulation (3) of regulation 14 relied on by the Respondent, the learned Senior Counsel submitted that the said regulation requires an offer to be made within four days of deciding change or changes that would result in the acquisition of control over the target company i.e., Castrol (India) Ltd in the instant case. According to the learned Senior Counsel, the sub regulation therefore covers cases where a decision is taken on the target company, that the expression 'decided' referred to in the regulation refers to some definitive action which has the effect of such a change. According to him a mere decision to make announcement of a pre-conditional offer to the shareholders of Burmah Castrol, cannot be viewed as decision as such to acquire the shares of or control over Castrol (India) Ltd. Learned Senior Counsel submitted that the decision to make change in the control of Castrol (India) Ltd., as a result of acquiring the shares of Burmah Castrol must be a clear, definite and binding decision. It is not merely the intention to change the control of Castrol (India) Ltd that is determinitive. According to him it cannot be said that a clear and definite decision was taken by Appellant No.1 to make a change in the control of Castrol (India) Ltd on 14.3.2000. It was only when the preconditions were fulfilled or waived that the announcement became decision. Referring to the provisions of regulation 16 relating to minimum offer price, and the manner in which the same is to be arrived at as provided in regulation 20, Shri Setalvad submitted that on a strict interpretation of these provisions, the price is required to be worked out taking 11.12.2000, as the relevant date, i.e. the date on which public announcement was made in India with reference to acquisition of Castrol (India) Ltd and that if the price is worked out on that basis it would be significantly lower being around Rs. 253.85. The learned Senior Counsel submitted that as the control over Castrol India was acquired on 7.7.2000, the Appellants felt it fair and proper to calculate the offer price taking 7.7.2000, as the relevant date, which was around Rs.311.91.

Shri Setalvad submitted that if it is viewed that a conditional announcement to acquire the shares of a holding company is taken as a decision to acquire the control of its subsidiary and consequently trigger a public offer to the share holders of the subsidiary company, an anamalous result would ensue, as the acquirer might be saddled with the subsidiary even though the conditions are not fulfilled and as a result of which the acquirer might not be able to secure the holding company for the acquisition of which the entire process was initiated.

Learned Senior Counsel submitted that on satisfying the pre-conditions stipulated in the announcement made on 14.3.2000 formal offer to acquire shares was issued to the shareholders of Burmah Castrol Plc on 8.6.2000, subject to certain conditions and thereafter the Board of Directors of Burmah Castrol Plc made a recommendation to their shareholders to accept the offer. Learned Senior Counsel further submitted that under UK Company Law, it is not the power of the Board of Directors of a target company to bind its shareholders in these circumstances, and the persons empowered to make any decision regarding the future ownership of Burmah Castrol were its shareholders by accepting or refusing to accept the offer.

According to the learned Senior Counsel if 14.3.2000 is considered as the relevant date, that would have lead to obligation on Appellant No.1 to release a public announcement under regulation 14 (3) by 20.3.2000 and in terms of regulation 22(4) the offer would need to have opened on 19.5.2000 and would have to close on 17.6.2000 as per regulation 22 (5). In such a situation the offer for 20% of Castrol India would have closed about three weeks before the outcome of the main offer was known (i.e., 7.7.2000) and this would possibly have led to the result that the Appellant would have owned 20% of Castrol India Ltd, without holding any share of Burmah Castrol, should the main offer have failed. Learned Senior Counsel submitted that this is not the intention of the said regulations and would not have been in the interest of the Appellants, Burmah Castrol, and Castrol India or the public shareholders of Castrol (India) Ltd. He further stated that there was also the risk that a competing third party offer might have been made for Burmah Castrol and in that event both offering parties would have been obliged by the Respondent's interpretation of regulation 14 (3) to make an offer for 20% of Castrol India. This might have resulted in Appellant No.1 holding 20% of Castrol (India) Ltd and another foreign company owning a further 20%, and in such a scenario the successful offeror in the offer of Burmah Castrol would have been left with a potentially hostile minority shareholder in Castrol India.

Shri Setalvad stated that the Appellants had submitted the text of draft public announcement to the Respondent stating therein the relevant date and offer price. No objection to the same was taken by the Respondent and the Appellants thus proceeded with the issuance of the public announcement. The Respondent having failed to object to the draft announcement which clearly stated that the price was based on taking 7.7.2000 as the relevant date, is estopped from, now contending that the relevant date should be 14.3.2000.

The learned Senior Counsel submitted that the Respondent acted in a discriminatory manner in the matter as in the case of Unilever Plc, which had also made a conditional offer on 6.6.2000 to take over Best Foods, another foreign company, the 26 week period was not calculated from 6.6.2000 when Unilever Plc first made the announcement in the United Kingdom, but the period was reckoned with reference to the completion of acquisition on 6.10.2000.According to the learned Senior Counsel, the facts relating to acquisition of Best Foods by Unilever Plc and the instant case are comparable.

Referring to the Respondent's statement that conditional announcements/offers are permissible under the Regulations, Shri Setalvad submitted that each of the cases referred to by the Respondent is specific to facts and no general proposition should be drawn therefrom.

Shri Goolam Vahanvati, learned Advocate General, appearing for the Respondent narrated the sequence of events leading to acquisition of control of Castrol (India) Ltd., by the Appellants. According to him also the basic question for consideration in the appeal was as to when the obligation to make a public announcement to acquire shares arose in the process of acquisition of control over Castrol (India) Ltd by the Appellants, in terms of the Regulations. According to him the Regulations clearly catalogues the requirements and the manner in which the same to be complied with. Learned Senior Counsel stated that timing of public announcement offer is clearly stated in regulation 14, that as per sub regulation 3 thereof, the public announcement referred to in regulation 12 is required to be made not later than four working days after any such change or changes are decided to be made as would result in the acquisition of control over the Target Company by the acquirer.

Learned Senior Counsel submitted that the take over Regulations have a particular scheme. Regulation 10 provides that no acquirer shall acquire shares or voting rights which entitle such acquirer to exercise 15% 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. Regulation 12 follows the same pattern, thereunder irrespective of whether or not there has been acquisition of shares or voting rights, the prohibition is on acquiring control. Learned Senior Counsel submitted that in regulation 12 the operative words are 'acquirer' and 'acquire'.

According to him the definition of the expression 'acquirer' in regulation 2 (1)(b) covers not only completed acquisition but also agreement to acquire, and it also covers direct and indirect acquisitions. The moment the acquirer sets into motion the process of acquiring shares or control, acquisition within the meaning of the regulation takes place and this triggers off the obligation to make a public announcement. Learned Senior Counsel submitted that the public announcement is required to be made before actually acquiring shares, that post acquisition announcement will serve no purpose and that is not what is contemplated in the regulation. Referring to the provisions of regulation 12 and also to the explanation to regulation 11, the learned Senior Counsel submitted that it is a fallacy to suggest that the obligation to make a public announcement arises only when the acquisition is complete. The regulation imposes a condition precedent viz., the obligation to make a public announcement. According to the learned Sr. Counsel the scheme of the Regulations makes it clear that the public announcement itself can be conditional.

Shri Vahanvati submitted that from the text of the public announcement made by the Appellant on 14.3.2000 it is clear that the Appellant had agreed to acquire the shares of Burmah Castrol Plc, that making announcement or making public issue subject to fulfillment of certain conditions is perfectly in tune with the regulations as could be seen from regulation 16.It was open for Appellant No.1 to make public announcement conditional upon its acquiring Burmah Castrol. Learned Senior Counsel cited regulation 21 (2) also to show that conditional offer had the recognition of the law. He also submitted that in several cases, the Respondent had approved conditional offers made by the acquirers as it was in tune

with the regulations. In support he referred to the instances stated in the written submission made by the Respondent. Learned Senior Counsel submitted that regulation 14 (3) applies when any change or changes are decided. Such change or changes are the decision to set into motion the process to acquire the Target Company, it has nothing to do with the actual acquisition of its shares. He submitted that this position is further made clear from the use of the word "would" in regulation 14 (3) that what regulation 14 (3) is concerned with is the likely acquisition of the target company and not the effective or completed acquisition of control.

Shri Vahanvati submitted that regulation 10 provides that no acquirer shall acquire shares or voting rights in excess of 15% unless the acquirer makes a public announcement to acquire the shares of such a company, in accordance with the Regulations. Thus regulation 10 is categorical in its language. But, regulation 12 provides that 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. The word 'unless' used in the regulation indicates that a public announcement is a necessary pre-condition for the acquisition of shares/voting rights in or control over the Target Company. He further submitted that under regulation 27 (1) (b), a public announcement may be withdrawn if the necessary statutory approvals have been refused and similarly regulation 27 (1) (d) provides for withdrawal in such circumstances as in the opinion of SEBI merits. He submitted that if for any reason the acquisition did not materialise, Appellant No.1 was entitled to take recourse to withdraw the public announcement under regulation 27.

Learned Senior Counsel, referring to the Appellant's contention that the Respondent had taken a view inconsistent with the view taken by it on 7.8.2000 in the matter, pointed out that the Chairman's order dated 7.8.2000 was not in the context of the requirements of public announcement. The Appellant had approached the Respondent seeking exemption from the provisions of the regulations and the order passed by the Chairman needs to be read in that context. The impugned order is with reference to the requirements of the price determination in the context of the Appellant having chosen to make public offer. In the order dated 7.8.2000, at para 9, the Chairman had observed that though it was not a case of direct acquisition of the shares of the Target Companies or transactions entered into for the purpose of acquiring controlling in the target companies, it was inevitable that the same would lead to the change in control of the target companies as much as the control from the Burmah Castrol will now pass on to the acquirer i.e., Appellant No.1. Learned Senior Counsel pointed out that in any case the Appellant vide its letter dated 6.12.2000 had withdrawn the request for exemption. Shri Vahanvati submitted that the Appellant may not have the intention to acquire Castrol India, but the fact remains that the Appellant acquired control over the said company.

Referring to the relevant date as 7.7.2000, reached at by the Appellant for the purpose of deciding the minimum offer price, the learned Senior Counsel referred to the provisions of regulation 20 (2) (d) and submitted that the said date i.e., 7.7.2000 had no relevance at all for arriving at the offer price. He pointed out that a public announcement on the proposed open offer to acquire 20% of the paid up equity capital of Castrol India Ltd by Castrol Ltd., was published on 11.12.2000, inter alia fixing the minimum offer price. He submitted that the date has to be fixed as per law i.e. the date on which the obligation arose, and the relevance of 14.3.2000 need be seen in that context. Referring to the allegation that the Appellant's case was treated discriminately vis-à-vis the similarly placed case of acquisition of Best Foods by Unilever, learned Senior Counsel referred to the details of the said acquisition furnished by the Respondent in its written submission and submitted that the facts of the case are distinguishable and as such not comparable.

According to the learned Senior Counsel the moment Appellant No.1 announced its intention to acquire Burmah Castrol, intention to acquire Castrol (India) Ltd., also took place, albeit indirectly and therefore the Appellant ought to have made a public announcement to acquire a minimum of 20% of the shares of the said Castrol (India) Ltd., in accordance with the regulations arriving at the offer price by taking 14.3.2000 as the relevant date. He submitted the contention that the offer would have been wholly in operative, had the Appellant received the shares carrying less than 51% of the voting rights in Burmah Castrol is of no force. In terms of regulation 12, an acquirer is prohibited from acquiring control over the Target Company unless he makes a public announcement to acquire the shares of the Target Company. It was always open for Appellant No.1 to make a public announcement to acquire the shares of the target company, simultaneous to the acquisition of the shares of Burmah Castrol and making it dependent upon completion of conditions, in respect of acquiring the shares of Burmah Castrol. It cannot be said that the obligation to make public announcement only arose when the acquisition of Burmah Castrol became complete. Learned Senior Counsel further submitted that the Regulations do not lay down

determination of offer price dependent on whether the offer is subject to some conditions or not. Learned Senior Counsel further submitted that the Appellant is seeking to re-write the regulations by bringing new element such as determination of price with reference to the date of fulfillment of the conditions subject to which the offer was made.

According to the learned Senior Counsel the contention of the Appellant that it had no intention to acquire the shares of Castrol (India) Ltd or take control over the said company is not correct. When an acquirer agrees to acquire the entire equity stake of a holding company, the intention to acquire all the subsidiary companies which arise as a consequence of the acquisition of the holding company is factored into the acquisition process from the very outset. According to the learned Senior Counsel the obligation to make an open offer for the acquisition of shares of Castrol (India) Ltd., therefore arose immediately upon the expression of intention to acquire Burmah Castrol and not just when the acquisition process of Burmah Castrol became complete.

Shri Vahanvati submitted that the Regulations do not contemplate different treatments to offers in respect of determination of offer price which are subject to certain conditions or not. Even assuming that the making of the public announcement and the subsequent procedural requirements could not be done as per the time schedule as provided in the Regulations, in view of the fact that the offer made by Appellant No.1 to acquire the shares of the Burmah Castrol was itself subject to obtaining statutory approvals or acceptance of minimum offer by shareholders of Burmah Castrol, the minimum offer price to be offered to the shareholders of the Indian target company ought to have been fixed with reference to 14.3.2000 as per the Regulations, since the obligation to make the offer for the shares of Castrol (India)Ltd arose on 14.3.2000 itself. In any case, it was always open for Appellant No.1 to make an offer to acquire shares of Castrol (India) Ltd in terms of the Regulations subject to obtaining of necessary approvals while acquiring the shares of the target company and making the said offer dependent upon acquiring the shares of Burmah Castrol. Had the Appellant thereafter failed to obtain the statutory approvals or the necessary levels of acceptance, then the Appellant need not have proceeded with the offer process as regulation 27 can be resorted to take care of such an eventuality. According to the learned Senior Counsel it cannot be said that the obligation to make public announcement only arose when the acquisition of Burmah Castrol became complete.

I have very carefully considered the submissions putforth by the parties in their written as well as oral submissions. At least on one issue there is consensus, that is the main issue required to be considered in the appeal is determination of the relevant date for the purpose of calculating the minimum offer price required to be offered to the share holders of Castrol (India) Ltd. In this case, relevant date factor is very important from the point of view of the Appellants as well as the public shareholders of Castrol India for the reason that it has a strong bearing on the financial burden on the Appellants and financial benefit to the share holders of Castrol (India) Ltd. In case it is decided that the relevant date is 14.3.2000, the minimum offer price would be around Rs. 350.08 per share, thereby requiring the acquirer to shell out more. If 7.7.2000 is considered as the relevant date, the minimum offer price would be Rs. 311.91, resulting in the share holders getting a lesser price for the shares than what they would have got in case 14.3.2000 is accepted as the relevant date. Thus the financial implications of the offer is relatable to the exact date to be taken into consideration for the purpose of calculating the offer price.

I think in this context it will be useful to quickly go through the governing regulatory regime applicable to substantial acquisition of shares and takeovers having a bearing on the matter before the Tribunal. In terms of section 11(1)(h) of the Securities and Exchange Board of India Act 1992 (the Act) one of the functions of the Respondent is regulating substantial acquisition of shares and take over of companies. For the purpose, the Respondent has notified the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 These Regulations provide certain ground rules to be followed by the concerned parties in the matters relating to substantial acquisition of shares and takeovers. The objective of the Regulations is to provide an orderly framework within which the process of substantial acquisition of shares/control could be conducted. Justice Bhagwati Committee report, based on which the 1997 Regulations have been drafted, had clearly stated that the Regulations for substantial acquisition of shares and take overs should operate principally to ensure fair and equal treatment of all share holders in relation to substantial acquisition of shares and takeovers; the Regulations should ensure that such process do not take place in a clandestine manner without protecting the interest of the share holders. Justice Bhagwati Committee in para 1.2 of its report stated that it would be:

> "The Committee also recognised that the process of takeovers is complex and is

interrelated 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:

1. Equality of treatment and opportunity to all shareholders.
2. Protection of interests of shareholders
3. Fair and truthful disclosure of all material information by the acquirer in all public announcements and offer documents.
4. No information to be furnished by the acquirer and other parties to an offer exclusively to any one group of shareholders.
5. Availability of sufficient time to shareholders for making informed decisions.
6. An offer to be announced only after most careful and responsible consideration.
7. The acquirer and all other intermediaries professionally involved in the offer, to exercise highest standards of care and accuracy in preparing offer documents.
8. Recognition by all persons connected with the process of substantial acquisition of shares that there are bound to be limitations on their freedom of action and on the manner in which the pursuit of their interests can be carried out during the offer period.
9. All parties to an offer to refrain from creating a false market in securities of the target company.
10. No action to be taken by the target company to frustrate an offer without the approval of the shareholders.

In the event of any ambiguity or doubt as to the interpretation of the regulations, 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".

In para 3.34 of the report under the heading "Indirect acquisition" it as been stated:

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

Regulations 10, 11 and 12 are core regulations. Regulations 10 and 11 require the acquirer acquiring shares beyond the prescribed limit to make a public announcement to acquire shares of the target company from the shareholders in accordance with the regulations. While regulations 10 and 11 deal with the substantial acquisition of shares, regulation 12 is on the acquisition of control over a company.

As per the said 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 acquires such shares in accordance with the Regulations.

Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a resolution passed by the shareholders in a general meeting".

For the meaning of the expression "acquirer" appearing in the regulation, regulation 2 (1) (b) has to be referred to, therein "acquirer" has been defined as any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer.

The Regulations also provide a time frame to be followed in the process. Regulation 14 (3) refers to the public announcement of offer required to be made in the context of acquisition covered under regulation 12. As per regulation14 (3) requisite public announcement is required to be made by the merchant banker (appointed by the acquirer) not later than four working days after any such change or changes are decided to be made as would result in the acquisition of control over the target company by the acquirer.

Regulation 16 lists the contents of the public announcement of offers referred to in regulations 10, 11, and 12. As per the said regulation one of the particulars to be stated in the announcement is "the minimum offer price for each fully paid up or partly paid up share". The manner in which the minimum offer price is required to be arrived at has been explained in detail in regulation 20. In the case of the shares of a listed company (Castrol India is a listed company), in terms of clause (d) of sub regulation (2) of regulation 20, the minimum offer price shall be the highest of the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the 26 weeks preceding the date of public announcement. In terms of regulation 28, the acquirer is required, by way of security for performance of his obligations under the Regulations, deposit in an escrow account, a sum of money worked out as a percentage of the total quantum of the offer amount.

In terms of regulations 18 (1) and 18 (2), within fourteen days from the date of public announcement made under regulations 10,11 and 12 as the case may be, the acquirer is required, through its merchant banker, file with the Respondent a copy of the draft of the letter of offer, containing disclosures as specified.

The letter of offer is required to be dispatched to the shareholders not earlier than 21 days from its submission to the Respondent under sub-regulation (2) of regulation 18. Provided that if, within 21 days from the date of submission of the letter of offer, the Respondent specifies changes, if any, in the letter of offer, the merchant banker and the acquirer have to carry out such changes before the letter of offer is dispatched to the shareholders.

As could be seen from the facts of the case, the acquisition of control over Castrol (India) Ltd by the Appellants was consequential to the acquisition of the shares of its ultimate holding company viz. Burmah Castrol Plc. It is therefore a case of indirect acquisition of control attracting the provisions of regulation 12 and allied regulations.

The Appellant had opted to make a public offer in terms of regulation 12. By the Appellant’s own admission it had withdrawn the application filed with the Respondent, seeking exemption from making open public offer for 20% of the shares of Castrol (India) Ltd. The present dispute is basically limited to the question as to what should be the relevant date for the purpose of fixing the minimum price payable to the shares proposed to be acquired from the public. According to the Appellants, the relevant date should be 7.7.2000, i.e., the date on which the Appellant, after getting necessary approval etc., declared the offer to the share holders of Burmah Castrol unconditional. But the Respondent does not subscribe to this view it holds that the relevant date should be 14.3.2000, i.e., the date on which Appellant No.1 issued the public announcement stating therein the decision of Appellant No.1 to acquire Burmah Castrol for 3 ($ 4.7) billion, as agreed to between the said parties.

I have already stated the requirements of regulation 12, in the brief survey of the applicable statutory provisions to the case, in the preceding paras. It could be seen therefrom that there is a prohibition on the acquirer that "no acquirer shall acquire control over the Target Company, unless such person makes a public announcement to acquire shares in accordance with the regulation and acquires such shares in accordance with the regulations". Thus the regulation not only mandates issuance of public announcement by the acquirer but also requires the acquirer to acquire such shares in accordance with the Regulations. It is clear that issuance of public announcement is not a post acquisition requirement, but definitely a pre-acquisition requirement. In the light of such a clear requirement of the regulation, it is difficult to subscribe to the Appellant’s view that its obligation to issue public announcement arose only on completing the acquisition on 7.7.2000.On a perusal of the said regulation, it could be seen that the duty to make public announcement to acquire shares is fastened on the acquirer. As stated above the expression "acquirer" has been defined in the regulation to mean any person who, directly or indirectly acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to

acquire control over the target company, either by himself or with any person acting in concert with the acquirer. Thus in terms of the said definition, not only a person directly or indirectly acquiring the shares or voting rights in the target company or acquiring control over the target company is an acquirer, but one agreeing to acquire shares/voting rights or control is also an acquirer. It is not necessary that one should actually acquire shares/voting rights or control to consider him as an acquirer. It would suffice if a person agrees to acquire shares or voting rights or control over, the Target Company.

Having come to the conclusion that the instant acquisition attracts the requirements of regulation 12, the next question to be considered is as to when the obligation to make the public announcement referred to in regulation 12 arose. In this context, the provisions of regulation 14 (3) need be looked into for guidance. As per sub regulation (3) of regulation 14 the public announcement referred to in regulation 12 shall be made not later than four working days after any such change or changes are decided to be made as would result in the acquisition of control over the target company by the acquirer. Now let us see the relevance of the public offer announcement made by the Appellant on 14.3.2000 to the present case. In this context it is felt necessary to revisit the submission made by Shri Setalvad that the public announcement made on 14.3.2000 was preconditional on obtaining approval of the concerned authorities and in the event those approvals were denied, the offer itself would have become inoperative. The offer became wholly unconditional on the fulfillment of all the conditions on 7.7.2000 and only at that point of time Burmah Castrol, became a subsidiary of the Appellant and consequently Castrol (India) Ltd too became the Appellant's indirect subsidiary. It is seen from the copy of public announcement made by the Appellant on 14.3.2000 that acquisition of shares of Burmah Castrol was subject to fulfillment of certain pre-conditions. The letter of offer issued to the shareholders of Burmah Castrol also had put certain pre-conditions. But whether such conditional announcement or offer make any difference as far as the obligation to take 14.3.2000 as the relevant date for deciding the offer price? To my mind the answer is in the negative.

As already stated in the light of the provisions of regulation 12 read with regulation 2 (1) (b), if a person agrees to acquire shares in or control over the Target Company he becomes an acquirer and is obliged to issue a public announcement in the circumstances stated in regulations 10, 11 or 12 as the case may be. The Appellants contention that the public announcement issued on 14.3.2000 was merely an "expression of intent" and there was no agreement as such between the parties to acquire shares at that point of time is contrary to the facts available before me. In the press release of the announcement issued by Appellant No.1 on 14.3.2000, a copy of which has been filed as Exhibit "A" to the appeal, it has been stated in bold letters that:

> "BP AMOCO AGREES RECOMMENDED CASH OFFER TO BUY BURMAH CASTROL FOR 3 ($ 4.7) BILLION"
>
> It has been further stated therein that "in a move that will powerfully boost the brand impact and growth potential of its global lubricants business, BP Amoco today announced that it has agreed to buy Burmah Castrol for 3 ($ 4.7) billion. The recommended cash offer of 16.75 per share for Burmah Castrol has been agreed by the boards of both companies (emphasis supplied). It is also to be noted that in the announcement the statement made by Mr. Jonathan Fry, Chairman of Burmah Castrol has been quoted that, "the board of Burmah Castrol unanimously recommends that Burmah Castrol shareholders accept B.P. Amoco's offer. The combination with BP Amoco will provide significant new opportunities for Castrol's business and employees". In part III of the announcement in para (1) it has been again clearly stated that " The Boards of BP Amoco and Burmah Castrol announce that they have reached agreement on the terms of a recommended cash offer to be made by Morgan Stanley Dean Willer on behalf of B.P.Amoco for all the issued and to be issued share capital of Burmah Castrol. The offer will be 16.75 in cash for each Burmah Castrol share valuing Burmah Castrol's issued share capital at approximately 3 billion. The Board of Burmah Castrol, which has been so advised by Schroders and Wasserstein Perella , its financial advisers, consider the terms of the offer to be fair and reasonable. In providing advice to the Board of Burmah Castrol, Schroders and Wasserstein Perella have taken account of the directors commercial assessments. The Board of Burmah Castrol will unanimously recommend Burmah Castrol shareholders to accept the offer as the directors have undertaken to do in respect of their beneficial holdings". (emphasis supplied) It is true that the press release also stated that BP Amoco's offer, which will be preconditional in certain regulatory clearances, will be 16.75 in cash for each Burmah Castrol share, valuing Burmah Castrol at approximately 3($4.7) billion. It has also been stated therein that " The formal offer document will be sent to Burmah Castrol shareholders when the pre-conditions of the offer, which involve regulatory clearances, have been satisfied or waived". It is clear from the text of the public announcement that the Appellant had considered all the relevant aspects and decided to acquire Burmah Castrol and agreed to acquire

the shares. Even the valuation of the said company had been completed, as could be seen from the unambiguous statement in the announcement with reference to the valuation of the shares in the following words – "This represents (i.e., value of the shares) a premium of 61% over the average closing price of Burmah Castrol shares for the three months to March 10, 2000 (the last day preceding the announcement that BP Amoco and Castrol were in discussions about a possible offer) The premium is 74 percent over the closing price for Burmah Castrol shares on March 10, 2000. Burmah Castrol shareholders will retain the right to receive the final dividend 31.9 percent shares declared on February 28, 2000".

On a query from the Tribunal as to the meaning of the expression "agree" and "agreement" appearing in the announcement, the learned Senior Counsel had stated that it was only a loose expression used in a mere press release. I find extremely difficult to view it in that manner, as one cannot expect loose expressions repeatedly used in such an important document. The said press announcement cannot be considered as a routine press release of no significance. It is evident that this press release was issued in compliance of the procedural requirements governing takeovers in the United Kingdom. The fact that it is an "announcement" is evident from the "Note to the Editors" appearing in the release wherein it has been stated that " Back ground information on BP Amoco and Burmah Castrol is given in Part II of this announcement and additional information on the offer is set out in Part III and its appendices. The foregoing summary should be read in conjunction with the rest ofthis announcement". I do not think anything more is required to show that the press release was not a mere press release but a public announcement in the matter of acquisition of shares of Burmah Castrol by Appellant No.1. Appellant No.1 cannot be unaware of the consequences of making loose expressions or false statements in such an important announcement.

In the light of the above statements extracted from the text of the public announcement issued by the Appellant on 14.3.2000 it is clear that the Appellant had agreed to acquire the shares of Burmah Castrol. It is also clear therefrom that the Board of Directors of Burmah Castrol was also a party to the decision. The meticulous details of the financial and business effects of the post acquisition period have also been stated in the announcement, thereby showing that the decision to acquire Burmah Castrol was genuine and serious and had agreed upon by the parties. Otherwise there would not have been any reason to undertake valuation of the assets of the said Burmah Castrol. The Appellants argument that under the UK Company Law it is not the power of the Board of Directors of the target company to bind its shareholders its decision regarding the future ownership of the target company is of no relevance for the purpose of identifying the relevant date for fixing the offer price. The question is whether the acquirer had agreed to acquire the shares. It is amply clear that the acquirer had agreed.

As already discussed above, since Appellant No.1, according to its own statement, had agreed to acquire the share of Burmah Castrol, the Appellant should be considered as the acquirer. Since the offer was to acquire the entire shareholding in the said Burmah Castrol, obviously the control of its subsidiaries would also pass on to the ultimate holding company automatically. So it cannot be said that the ultimate control over the subsidiaries including Castrol (India) Ltd remained unchanged. The Appellant cannot be unaware of the same. In this context it is also pertinent to refer to the Material Adverse Change Condition referred to para 5 (f) that " no material adverse change having occurred in the business, assets, financial or trading position or profits of any member of the Burmah Castrol Group which is material in the context of the Burmah Castrol Group taken as a whole". It is an admitted fact that the Castrol (India) Ltd is a member of the Burmah Castrol Group and that acquisition of the group companies covered the said Castrol (India) Ltd also is clear from the scheme of acquisition of the shares of Burmah Castrol. Therefore though the public announcement dated 14.3.2000 was directed towards the acquisition of shares of Burmah Castrol, it also covered acquisition of control of subsidiaries of said Burmah Castrol, including control over Castrol India. The Appellant has stated in para 5 (g) of the appeal (at pg.5 of the paper book) that "on 7th July, 2000, upon receipt of acceptance from more than 50 percent of the share holders of Burmah Castrol Plc, the Appellant No.1 waived the Acceptance Condition, the Material Adverse Change Condition and all other conditions and thereby declared the offer wholly unconditional. At this point Burmah Castrol became a subsidiary of Appellant No.1". According to the Appellant as a result of the aforesaid transaction, through Burmah Castrol and its subsidiaries, it acquired control over Castrol India without directly acquiring any shares or voting rights therein; thus it was on 7.7.2000, the appellant actually acquired the shares of Burmah Castrol and resultantly control over Castrol India. The Appellant's contention that acquisition of control over Castrol India was incidental and an unintended consequence of acquisition of the Burmah Castrol, is of not much relevance. From the scheme of the Regulations it is clear that the nature of acquisition, whether direct or indirect is of no relevance, from the compliance angle of the requirements of regulation 12. Similarly the public announcement and the letter of offer issued to the shareholders of Burmah Castrol were conditional and there was no final decision as

such on 14.3.2000 is also of no support to the Appellant in terms of the provisions of regulations 12 and 14 discussed above. On a perusal of regulation 14 it is clear that a public announcement is required to be made not later than four working days after any change or changes decided to be made, as would result in any acquisition of control over the target company. On a plain reading of regulation 14 (3) it is difficult to agree with the view that regulation 14 (3) applies only when a change or changes in the Board of Directors or control is decided upon. I fully agree with the Respondent's view that the term "change or changes decided to be made" must be read in the light of regulation 12 and be construed so as to mean decision taken for such changes, as would result in the acquisition of control of the target company. The word "would" used in regulation 14 (3) conveys that what the said regulation is concerned with is the likely acquisition of control and not the actually effected acquisition of control. The word 'would' in the context need be understood in its literary sense as "expressing probability". Thus when Appellant No.1 announced its intention to acquire the shares of Burmah Castrol on 14.3.2000, the announcement constituted an intention to acquire, albeit, indirectly the control over all its subsidiary companies including the Indian subsidiary viz. Castrol (India) Ltd on the same day itself i.e. 14.3.2000.

In this context it is also to be noted that in the public announcement dated 14.3.2000, with reference to the Appellant's offer of 16.75 in cash for each Burmah Castrol share, it has been stated that " this represents a premium of 61% over the average closing price for Burmah Castrol shares for the three months to March 10, 2000 (the last day preceding the announcement that BP Amoco and Burmah Castrol were in discussion about a possible offer)". (emphasis supplied). Thus the offer price to shareholders of Burmah Castrol has been worked out on the basis of the regime in vogue in the United Kingdom. That being the case, it is untenable to say, especially when the provisions of the Regulations are clear, that offer price to the public share holders of Castrol (India) Ltd will be referable to the date on which the acquisition of Burmah Castrol, the ultimate holding company of Castrol (India) Ltd is completed. In this context one has to remember the Bhagwati Committee's recommendation (supra) that one of the principles to be followed in acquisitions is "equality of treatment and opportunity to all share holders". For this purpose the applicable principle should be to the extent possible the same to the shareholders of the holding company as well as the shareholders of its subsidiaries which are also acquired in the same chain of action. There cannot be two entirely different standards.

The Appellant's version that since public announcement and the subsequent issuance of letter of offer were subject to fulfillment of certain conditions and as such in the event of failure to satisfy those conditions the acquisition of Burmah Castrol would have lapsed and consequently the acquisition of Castrol (India) Ltd also would have lapsed and in completed acquisition only announcement was required to be made, according to me does not weigh much in support of the Appellant's cause. In any case, as rightly submitted by the Respondent, it was open for Appellant No.1 to make an offer to acquire shares of Castrol (India) Ltd in terms of the Regulations subject to the condition of obtaining of necessary approvals, etc. by its holding company and making the said offer dependent upon acquiring the shares of Burmah Castrol. In case the Appellant had thereafter failed to obtain the statutory approvals, then the Appellant need not have proceeded with the offer process. Regulation 27 takes care of such an eventuality. Further, it is also seen that issuing public announcements/offer letters stating that the acquisition is subject to fulfillment of conditions is not uncommon as could be seen from the material submitted by the Respondent along with its written submissions.

In the light of the position explained above, it is difficult to agree with the Appellant's view that the public announcement dated 14.3.2000 being conditional, is of no consequence for deciding the offer price to the other shareholders of Castrol (India) Ltd. Submission of the learned Senior Counsel that an offer in the scheme of the Regulations is synonymous with a "proposal" as defined in section 2 (a) of the Indian Contract Act, 1872 and that to constitute a "proposal" there must be a signification of a willingness to do some thing with a view to obtain the assent of the others that there can be no such signification if the offer or proposal is pre-conditional or conditional and consequently in law there was no proposal by the Appellant at all on 14.3.2000 and no question can possibly arise of there being any decision on that date, is not a proposition gaining support from the Regulations. I have already explained the requirements of the regulation 12 and 14 (3) and these regulations do not in any way even suggest that a public announcement or offer should be unconditional and should be relatable to a concluded acquisition. It could be seen from regulation 16 (xviii) and 22 (8) etc., that public announcement of offer to acquire the shares of the target company with conditions has been recognised by the Regulations. In this context it is pertinent to mention that at present we are not on a dispute arising out of the breach of a contract, but on the question of compliance of the statutory requirements as laid down in the Regulations. Appellant's view that for the purpose of deciding the minimum offer price to the shareholders of Castrol (India) Ltd, the relevant date should be taken as 7.7.2000 is not supported by the Regulations. I do not find any regulation to which the said date can be linked.

The Appellant's contention that in the draft letter of offer submitted to the Respondent on 20.12.2000 it had clearly set out the relevant date and offer price and that since no objection to the same was taken by the Respondent, the Respondent is now estopped from holding that the relevant date should be 14.3.2000 and not 7.7.2000 is also of no force as is evident from the Appellant's own version in para 5 (r) in the appeal. It is seen therefrom that vide letter dated 10.1.2001 the Respondent had directed the Appellants not to proceed with the dispatch of the said letter of offer and to await its comments. Thereafter the matter was discussed by the representatives of the Appellants with the representatives of the Respondent and that the Appellants were informed that the relevant date for the purpose of calculating the offer price ought to be 14.3.2000 and not 7.7.2000. From the sequence of events stated in the said para (r) it is not possible to agree with the Appellant's view that the Respondent is estopped from asking the Appellants not to take 7.7.2000 as the relevant date.

Shri Setalvad had stated that the Respondent had treated the Appellant's case discriminately vis-a-vis the acquisition of Bestfoods by Unilever Plc. The Respondent has explained in its written reply in detail how the facts relating to acquisition of Bestfoods is distinguishable from the facts of acquisition of Burmah Castrol by the Appellants. In the light of the information available before me, as provided by the parties, I am inclined to hold that the acquisition of Bestfoods is not exactly identical with the acquisition of Castrol (India) Ltd, to be treated identically.

In the light of the above discussion I am of the view that the impugned order is to be sustained and the relevant date for the purpose of deciding the offer price to the share holders of Castrol (India) Ltd should be 14.3.2000 and not 7.7.2000.

For the reasons stated above, the impugned order is upheld and the appeal is dismissed.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: April 27, 2001