

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

APPEAL NO.37/2001

In the matter of:

B.P. Plc (formerly B.P.Amoco)& Castrol Limited Appellants

Vs.

Securities & Exchange Board of India Respondent

APPEARANCE;

**Mr. Atul M Setalvad
Sr. 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
Maneksha & Sethna**

**Mr. Ananta Barua
Jt.Legal Adviser, SEBI**

**Mr. Vinay Chauhan
Legal Officer, SEBI for Respondent**

(Appeal arising out of the Securities and Exchange Board of India's decision dated 23.7.2001)

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 also a public limited company, is 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 challenged the said order by filing an appeal in the Tribunal (appeal No.11 of 2001). The appeal was disposed of by the tribunal on 27.4.2001, holding that the relevant date for the purpose of deciding the offer price to the shareholders of Castrol (India) Ltd. should be 14.3.2000 and not 7.7.2000. On 16.5.2001 the Appellants filed an appeal against the said order in the Hon'ble Bombay High Court (appeal No.582/2001). During the pendency of the said appeal, the Respondent by its letter dated 23.7.2001 directed the merchant banker of the Appellants to proceed with the offer formalities within 15 days from the date of receipt of the letter and to pay interest @ 15% per annum on the open offer price for the period from 14.3.2000 till the actual date of payment of consideration to the share holders under the public offer. Since the Appellants felt aggrieved by the said direction, they amended their pending appeal in the Hon'ble High Court to impugn the said direction. It has been stated that at the stage of oral arguments, the Hon'ble Court suggested that the Appellants should adopt the statutory remedies against the Respondent's said order and ought not directly approach the Hon'ble High Court and accordingly the challenge to the levy of interest was not argued before the Hon'ble High Court. They decided to file an appeal in the Tribunal under section 15T of the SEBI Act. The present appeal is in the said context. It is understood that the Hon'ble High Court has already dismissed appeal No. 582/2001. Shri A.M.Setalvad, the learned Senior Counsel, appearing for the Appellants submitted that levy of interest vide order dated 23.7.2001 was done as an after thought in as much as whilst passing the original order on 16.2.2001 or at any time thereafter, till 23.7.2001, no claim for payment of interest was made by the Respondent. Shri Setalvad submitted that the original order dated 16.2.2001 did not contain any direction for payment of interest, that once the order dated 16.2.2001 was made by the Respondent, and the matter was carried in appeal by the Appellants, the Respondent ceased to have any authority to modify/review the order. Learned Senior Counsel stated that the appeal against the said order filed in the Tribunal was dismissed on 27.4.2001 and till 23.7.2001 there was no demand or any direction from the Respondent to pay interest, that for the first time payment of interest was brought up by the Respondent in its affidavit dated 26.6.2001 filed in reply to the Appellant's Writ Petition in the Hon'ble Bombay High Court. He pointed out that the impugned direction is to pay interest from 14th July 2000, more than a year before the direction was given. According to the learned Senior Counsel such a direction with retrospective effect is unfair, in inequitable and not permitted in law.

Shri Setalvad submitted that the Respondent exceeded its jurisdiction and powers by directing the Appellants to pay interest on the offer price at the rate of 15% per annum, from 14th July, 2000 till the date of payment of consideration as interest cannot be levied by the Respondent in the absence of any statutory provision permitting to levy interest, that there are no provisions in the SEBI Act or in the Regulations empowering the Respondent to issue such a direction. According to the learned Senior Counsel regulation 22 (12) is the only provision relating to payment of interest in the Regulations which has limited application, that the Respondent's contention that it is empowered to levy interest under section 11 (1) of the SEBI Act is untenable, as the said section contains a general provision which cannot justify levy of interest particularly in the nature of penalty. He further stated that in exercise of the powers conferred under section 11 of the Act, read with section 11 (2) (h) the Respondent has framed the Regulations and as per the said Regulations interest can be levied only for the purpose stated in regulation 22 (12), that there is no other provision relating to payment of interest in a case like the instant one. According to the learned Senior Counsel resorting to the general provision in section 11 (1) is not only not permissible, but is excluded by the express provision relating to payment of interest in regulation 22(12). In this context he referred to the maxim *expressio unius est exclusio alterius* - a canon of construction holding that to express or include one thing implies the exclusion of the other or of the alternative. He further submitted that direction to pay substantial sum of penalty by way of interest is contrary to section 15H, where under the maximum penalty leviable is Rs. 5 lacs for a failure by an acquirer to make a public offer.

Shri Setalvad submitted that even if it is assumed, that the Respondent has power to direct payment of interest, there is no warrant or basis for payment of interest from 14.7.2000. Referring to the appeal No.11/2001 filed by the Appellants in the Tribunal, Shri Setalvad stated that in the said appeal proceedings the Respondent inter alia had contented that the Appellants ought to have made a public announcement to acquire the shares conditional upon acquiring shares of Burmah Castrol and if they failed to do so the Appellants need not have proceeded with the offer process, that the corollary to the said contention must mean that the Appellants could proceed with the offer process only after acquiring the shares i.e. on 7.7.2000 and consequently the offer would have been completed by 7.11.2000 and not by 14.7.2000. Shri Setalvad referring to the provisions of regulation 16 stated that certain information required to be furnished in the Public Announcement was not available on 14.3.2000 and as such the public announcement would have been deficient on those factors, if published with reference to the said date. He also submitted that since statutory approvals were yet to be received, issuing an offer at that time would have in effect resulted in causing uncertainty and consequential problems to the shareholders of Castrol India.

Shri Setalvad, referring to the rate of interest of 15% levied, stated that it is unjustified as the alleged rationale for directing payment of interest is that the Appellants have used the amount payable under the open offer and deprived the shareholders the use thereof. He submitted that the interest rates prevalent in the United Kingdom are in the region of 5-6% per annum; that even in India interest rates over a one year period range between 9-10%.

Shri Goolam Vahanvati, learned Advocate General, appearing for the Respondent stated that the appeal filed by the Appellants against the Tribunal's order has already been dismissed by the Hon'ble High Court, holding that the relevant date referable for deciding the offer price in the instant acquisition is 14.3.2000. He submitted that in the Respondent's affidavit dated 26.6.2001 referred to by the Appellants, it had referred to two different scenarios to show the gain to the Appellants by not adhering to the requirements of regulation pertaining to payment of consideration to the shareholders and the substantive prayer therein was to direct the Appellants to pay interest to the shareholders of Castrol (India) Ltd., @15% per annum from 14.7.2000. Learned Advocate General stated that the relevant public announcement date required to be taken into consideration being 14.3.2000, the Appellants were required to pay consideration for the shares purchased by them in the public offer on or before 14.7.2000 and having not paid the consideration, interest was payable from the said date. He said that in any case accepting 7.7.2000 as the commencement date of acquisition and consequently treating 7.11.2000 as the due date for payment of consideration/interest would be contrary to the time frame provided in the Regulations. Citing various provisions from the Regulations providing the time frame to complete the process of takeover, the learned Advocate General stated that the Appellant should have completed the entire process within 4 months from 14.3.2000. He stated that since it has been held by the Tribunal and upheld by the Hon'ble Bombay High Court that the referral date for fixing offer price was 14.3.2000, being the date of public announcement, the shareholders of Castrol (India) are entitled to receive consideration @ Rs.351 per share by 14.7.2000, that having been deprived of the same to them, obligation on the part of the Appellants to pay interest arose from 14.7.2000.

Shri Vahanvati, without prejudice to his submission that the referral date for deciding interest should be 14th July, 2000, submitted that for any reason if it is held that the said date is not the appropriate date, the alternative should be 18th September, 2000, being the outer limit of 60 days meant for keeping the offer open and finalising the matter by taking 18.5.2000, as the date on which statutory approvals were received, as the referral date, that in any case it cannot be 7th November, 2000. According to him, the Appellants could have completed other formalities, pending approval of the authorities and on becoming the offer unconditional the offer could have kept open and completed the process including payment to the shareholders within 60 days from the said date and that 60 days time limit was over on 18th September, 2000, i.e. the date on which the obligation to pay crystallised.

Countering the Appellants' argument that substantial sum of penalty is being recovered from the Appellants in the guise of interest, Shri Vahanvati submitted that direction to pay interest on a sum which is due to the shareholders is not a penalty and as such any attempt to link the quantum of interest payable with penalty provided in section 15H is untenable, that what is being asked to pay is the legitimate claim of the shareholders for the delay involved in making payment to them. Learned Advocate General submitted that the shareholders are entitled to receive interest for the period starting from the day the consideration for shares tendered by them became due and payable and till the payment was made. Therefore it cannot be said that directing the Appellants to pay interest from the said date is not tenable. He also contested the Appellants contention that the impugned order has been issued by way of modification/review of the earlier order.

Regarding the Respondent's power to levy interest, the learned Advocate General referred to the provisions of regulation 44 and section 11 of the Act. He pointed out that regulation 44 is very wide as it gives the Respondent wide powers "to give such directions as it deems fit to protect the interest of the investors", and directing the Appellants to pay interest for the delayed payment of consideration to the shareholders against the shares sold by them is only an investor protection measure. He further pointed out that even otherwise section 11 (1) mandates the Respondent to protect the interests of the investors by taking such measures, as it thinks fit. Countering the argument that section 11 (1) being a general provision, the same cannot be resorted to in view of the specific provisions provided in the regulation occupying the field, Shri Vahanvati stated that the Respondent has not acted in a manner contradictory to what is stated in regulation 44, and further that the said regulation is an "inclusive" one as could be seen the way it is worded. In this context he cited the Hon'ble Bombay High Court's decision in Anand Rath's case (Anand Rath v. SEBI (2001) 32 SCL 227) to show that the Respondent is empowered to direct the Appellants to pay interest to the shareholders of Castrol India, as it is a measure to protect the interest of the shareholders.

Referring to the Appellants' contention that the Respondent is not empowered to levy interest for any purpose other than what is stated in regulation 22 (12), the learned Advocate General submitted that said regulation is to meet a situation which is beyond the control of the acquirer and it cannot be said that because of the remedial measure provided therein to meet the specific situation, the Respondent is debarred from levying interest on delayed payment of money due to the shareholders in other circumstances.

Learned Advocate General, submitted that the rate of interest @ 15% per annum has been arrived at by the Respondent taking into consideration the Indian scenario. He said that the interest rates prevalent in U.K are of no relevance in the context as the matter relates to the interests of the minority shareholders in India and the 15% interest rate is not high or unreasonable.

Learned Advocate General submitted that even if an offer is made conditional, and subsequently the

conditions are met with or waived and on the offer becoming final, it has to be viewed that the order has become unconditional not prospectively but retrospectively i.e. with effect from the date on which the conditional offer was made. Therefore, in the context of making the offer unconditional on 7.7.2000, it has to be viewed that offer which the Appellant had made with reference to the public announcement dated 14.3.2000 itself became unconditional.

I find that the Appellants in their earlier appeal (11 of 2001) filed in the Tribunal had prayed that the order dated 16.2.2001 passed by the Respondent be quashed and set aside and the relevant date for the purpose of deciding the offer price be declared as 7th July, 2000. The said appeal was disposed of by the Tribunal on 27th April, 2001 upholding the Respondent's order. On a perusal of the said order of 16.2.2001 it is seen that it was confined to the contents of the offer documents submitted to the Respondent. Payment of interest to the concerned shareholders was not an issue before the Respondent in the inquiry preceding the said order. The order dated 23.7.2001, impugned in the present appeal is directed to the Appellants for paying interest to the shareholders in the light of the delay involved in paying consideration for the shares tendered by them in response to the offer made by the Appellants. Thus the present direction is independent of the one issued earlier. There is no indication that the impugned direction is by way of modification to the earlier order or that it is the result of a review of the order. Therefore the impugned order cannot be considered as a modification / review of the Respondent's earlier order and as such the question as to whether the Respondent is entitled to modify/review its order does not arise.

The Appellants' contention that the direction to pay substantial sum of penalty by way of interest is contrary to section 15H of the Act is unfounded. Section 15H, no doubt provides for imposition of monetary penalty, if any person, who is required under the Act or any rules or regulations made thereunder, fails to make a public announcement to acquire shares at a minimum price. Section 15H is thus a penal provision applicable to the persons failing to comply with the statutory requirements. Monetary penalty realised thereunder is not meant for compensating the loss incurred by the investors. The provision is deterrent in nature. But levy of interest is not a penal action. It is independent of the penal action provided in section 15H. Interest in the instant case is levied with a view to compensate the shareholders to whom payment of their legitimate dues were delayed. Therefore the argument-linking levy of interest and penal consequences provided in section 15H is untenable. The argument that since the Appellants were bonafide pursuing the remedies available to them under the law, the direction to pay interest for the period is unjust and unfair is also untenable. As the Hon'ble Supreme Court in *Dinesh Chandra Jamnadas Gandhi v. State of Gujarat* (AIR 1989 SC 1011) held "it is no defense that the accused acted on a mistaken interpretation of the statute which he honestly believed to be correct". Investors cannot be made to suffer for the reason that the Appellants had a different perception on the need to comply with the statutory requirements. The Appellants objection to the direction to pay interest with retrospective effect i.e., from 14.7.2000 is also not tenable. The interest is required to be paid for the delay involved in paying the consideration for the shares tendered by the shareholders in response to the public offer to purchase shares made by the Appellants. In fact it is nothing but a sale consideration payable by the Appellants to the shareholders. For the delay involved in receiving the payment of the consideration amount for the period from the date on which it was due till the date on which actual payment is made, the shareholder is entitled to receive interest. Since the due date precedes the date of direction, it is illogical to view that the loss suffered by the shareholders for the period till the date of issuance of the order need be ignored. There is no force in the argument that the interest is payable only prospectively.

Shri Setalvad's submission that since the interest rates in UK are in the region of 5-6% and that even in India the interest rates over a one year range being between 9-10%, direction to pay @ 15% is unjustified, is also of no force. The rate of 15% is not arrived at by the Respondent in an arbitrary manner. It has some basis. In this context it is to be noted that section 73 of the Companies Act also deals with a situation where the application money received in response to a public issue is required to be refunded. The said section requires the issuer company to pay interest to the subscribers on the subscription money refund if delayed with interest at such rate, not less than four percent and not more than fifteen percent, as may be prescribed by the Government. The rate has been prescribed by the Government, obviously taking into consideration all the relevant aspects, as fifteen percent per annum vide rule 4D of the Companies (Central Government's) General Rules and Forms, 1956 notified under the Companies Act. I do not find any reason as to why a person to whom money is due from the acquirer as consideration for the acquisition of his shares should be treated differently from a person to whom money is due by way of refund in a public issue from an issuer company. In my view 15% interest payable under section 73 (2A) of the Companies Act should be in equal force applicable to the instant case. Therefore direction to pay interest @15% in the instant case cannot be considered as unjustified.

The next question is as to whether the Respondent is empowered to levy interest in the absence of any such specific provision for the purpose in the SEBI Act /regulations. In this context it is to be noted that the object of the SEBI Act is to provide for the establishment of a Board to protect the interests of investors in securities etc. Powers and functions of the Board has been provided in Chapter IV of the Act. Section 11(1) therein is on the powers of the Board. According to section 11(1):

(1) it shall be the duty of the Board to protect the interests of investors in securities and promote the development of, and to regulate the securities market by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for

(a)

(b) regulating substantial acquisition of shares and takeovers of companies.

- (ba)
- (c)

Thus one of the functions of the Board in terms of sub section 2 (h) of section 11 is regulating substantial acquisition of shares and takeovers of companies. The Respondent, for the said purpose has already notified the Regulations. Regulation 44 of the said Regulations empowers the Respondent to issue certain directions. The said regulation reads as under:

"The Board may, in the interests of the securities market, without prejudice to its right to initiate action including criminal prosecution under section 24 of the Act give such directions as it deems fit including:

- (a) directing the person concerned not to further deal in securities;
- (b) prohibiting the person concerned from disposing of any of the securities acquired in violation of these Regulations;
- (c) directing the person concerned to sell the shares acquired in violation of the provisions of these Regulations;
- (d) taking action against the person concerned"

The Appellant's argument that since the Respondent has notified the Regulations specifically for the purpose of regulating acquisitions and takeovers provisions of sub section (1) of section 11, which are general in nature, is no longer available, is difficult to accept.

It is true that the Regulations provide measures for regulating substantial acquisition of shares and takeovers. But that does not mean that the Respondent cannot take any investor protection measure with reference to a matter relatable to substantial acquisition of shares and takeovers, especially in the absence of any specific provision in the regulation. Scope of regulation 11(1) is sufficiently wide to meet situations, for which measures are not specifically provided in the regulation. Even though Anand Rathi's case referred to by the learned Advocate General is of no direct help in this context, there is no shortage of authorities explaining the scope of section 11. The legal position has been explained in SEBI Vs. Alka Synthetics (1999) 19 SCL 460 decided by the Division Bench of the Hon'ble Gujarat High Court. In the judgement the Hon'ble Court had observed that "so far as the authority of law in the SEBI to issue such directions is concerned, such measures as it thinks fit is clearly discernable on the basis of the provisions contained in section 11 read with section 11B of the SEBI Act. Merely because in section 11(2) it is provided that "the measures referred to therein may provide for" cannot be taken to mean that such measures have to be laid down in advance. It is a matter of common knowledge that the SEBI has to regulate a speculative market and in case of speculative market varied situations may arise and all such exigencies and situations cannot be contemplated in advance and, therefore, looking to the exigencies and the requirement, it has been entrusted with the duty and function to take such measures as it thinks fit. Thus the measures cannot be laid down as a onetime exercise to be followed in defined cases. The SEBI has to rise to the occasion for taking appropriate measures to combat even such situations in the speculative market, which may or may not be conceived in advance. We have to therefore consider and interpret the power of SEBI under the provisions so as to see that the objects sought to be achieved by Act is fully served, rather than being defeated on the basis of any technicality. Instead of general principles of law, in such cases we have to consider the matter on first principle. The first principle is that the provisions of an Act have to be given a meaning so as to advance the object sought to be achieved by that Act. The duty and function had been entrusted to take such measures as it thinks fit and in order to discharge this duty the power is vested under section 11B. In such a situation, it cannot be said that there was no authority of law with the SEBI to take appropriate measure. Now the question arises as to whether such measures should essentially be provided and published in advance. No one can be expected to do any task which is impossible and whereas we have already observed that the measures have to be taken to meet a particular eventuality, which may or may not be conceived earlier, there is no question laying down such measures in advance and publishing the same. Thus, there is an authority under law to take the measures and merely because the measures have not been laid down in advance and published. It cannot be said that SEBI had no other authority under law to issue the directions, as contained in the impugned orders. The authority has been given under the law to take appropriate measures as it thinks fit and that by itself is sufficient to cloth the SEBI with the authority of law".

In this context it is also be noted that regulation 44 is not an exclusive provision debarring the Respondent taking any measures other than those mentioned in the regulation. It is therefore clear that SEBI is legally entitled to issue directions to the concerned persons to pay interest to the shareholders to whom payment of consideration against the shares acquired was delayed.

The argument that since regulation 22 (12) provides for levy of interest only in a particular situation, interest cannot be levied in any other situation is not correct. Substantive provision of regulation 22(12) is not on levy of interest. Said regulation directs the acquirer within a period 30 days from the date of the closure of the offer, complete all procedures relating to the offer including payment of consideration to the shareholders who have accepted the offer. In the event the acquirer is unable to make the payment to the shareholders who had accepted the offer before the said period of 30 days due to non-receipt of the requisite statutory approvals, the Board if satisfied that non-receipt of the requisite statutory approval was not due to any willful default or neglect of the acquirer or failure of the acquirer to diligently pursue the applications for such approvals, is empowered to grant extension of time for the purpose, subject to the acquirer agreeing to pay interest to the shareholders for delay beyond 30 days, as may be specified by the Board from time to time. It could be seen that the regulation thus provides for levy of interest in a no default situation. It cannot be said that as a result of the said regulation, interest is not leviable in any other context where the acquirer had defaulted. It defies the logic to believe that the regulator is empowered to levy interest in a situation which was beyond the control of the acquirer but not

empowered to levy interest in a default situation which the acquirer created on his own.

The legal maxim *expressio unius est exclusio alterius* is of no blind application. Black's Law Dictionary, (Seventh edition – 1999), the authority which the learned Senior Counsel had cited, itself explains the limitations of the said maxim in the following words:

"Several Latin maxims masquerade as rules of interpretation while doing nothing more than describing results reached by other means. The best example is probably *expressio unius est exclusio alterius*, which is a rather elaborate, mysterious sounding, and anachronistic way of describing the negative implication. Far from being a rule, it is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore, there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact of what the court has discovered from context". Reed Dickerson, *The Interpretation and Application of Statutes* 234-35 (1975).

Therefore, I am of the view that SEBI is empowered to issue the impugned direction. Regulation 22 (12) in my view does not put any embargo on the Respondent in exercising its power under section 11(1).

Having come to the conclusion that the Respondent is empowered to direct the Appellants to pay interest in the instant case and that interest required to be paid at 15% per annum is justified, the next question to be considered is as to the date from which the interest is payable.

The Regulations provide a strict time frame for completion of formalities to be followed in the matter of substantial acquisition of shares and takeovers. It provides for making public announcement to acquire shares by an acquirer in the event of acquisition of shares / voting rights or control over a company beyond certain cut off limits prescribed in regulations 10, 11 and 12. Since the instant case is covered under regulation 12, the public announcement is required to be made in terms of regulation 14(3) 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. According to regulation 15(4):

"the offer under these regulations shall be deemed to have been made on the date on which the public announcement has appeared in the news paper".

The rest of the time frame has been prescribed in regulation 22 as under:

(2) Within 14 days of the public announcement of the offer, the acquirer shall send a copy of the draft letter of offer to the target company at its registered office address, for being placed before the board of directors and to all the stock exchanges where the shares of the company are listed.

(3) The acquirer shall ensure that the letter of offer is sent to all the shareholders (including non-resident Indians) of the target company, whose names appear on the register of members of the company as on the specified date mentioned in the public announcement, so as to reach them within 45 days from the date of public announcement.

Provided that where the public announcement is made pursuant to an agreement to acquire shares or control over the target company, the letter of offer shall be sent to shareholders other than the parties to the agreement.

Explanation: (i) A copy of the letter of offer shall also be sent to the Custodians of Global Depository Receipts or American Depository Receipts to enable such persons to participate in the open offer, if they are entitled to do so.

(ii) A copy of the letter of offer shall also be sent to warrant holders or convertible debenture holders, where the period of exercise of option or conversion falls within the offer period.

(4) The date of opening of the offer shall be not later than the sixtieth day from the date of public announcement.

(5) The offer to acquire shares from the shareholders shall remain open for a period of 30 days.

(6) The acquirer shall, within a period of 30 days from the date of the closure of the offer, complete all procedures relating to the offer including payment of consideration to the shareholders who have accepted the offer and for the purpose open a special account as provided under Regulation 29.

Provided that where the acquirer is unable to make the payment to the shareholders who have accepted the offer before the said period of 30 days due to non-receipt of requisite statutory approvals, the Board may, if satisfied that non-receipt of requisite statutory approvals was not due to any willful default or neglect of the acquirer or failure of the acquirer to diligently pursue the applications for such approvals, grant extension of time for the purpose, subject to the acquirer agreeing to pay interest to the shareholders for delay beyond 30 days, as may be specified by the Board from time to time.

Where the acquirer fails to obtain the requisite statutory approvals in time on account of willful default or neglect or inaction or non action on his part, the amount lying in the escrow account shall be liable to be forfeited and dealt with in the manner provided in clause (e) of sub regulation 12 of Regulation 28, apart from the acquirer being liable for penalty as provided in the

From the sequence of action stipulated in the regulation it is clear that the offer is required to be opened within the 60th day from the date of public announcement, and kept open for a period of 30 days and the procedure for acquisition including payment of consideration is required to be completed within 30 days from the closure of the offer. Thus, the entire process is expected to be completed within 120 days from the date of publication of the public announcement to acquire shares. In fact the whole time schedule is relatable to the public announcement date. Once the public announcement date is known, the rest of the action is required to be taken in arithmetic precision as provided in regulation 22. In the instant case, it has already been held by this Tribunal (in appeal No.11/2001 decided on 27.4.2001) that the date of public announcement is 14.3.2000. Therefore the entire exercise should have been completed by 12.7.2000. The fact that the Appellants had not adhered to the said time schedule, should not in the normal course be a ground to absolve them from their obligation to pay interest. But at the same time genuine practical difficulties if any came in their way in discharging their obligation, should be taken into account. It has to be seen as to whether non-compliance of the requirements within the time frame was really due to factors beyond their control.

The Appellants' version that since the 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 only in a completed acquisitions announcement was required to be made, according to me does not lend much support to the Appellants' cause. Since the instant acquisition is covered under regulation 12, the governing provision of public announcement is in regulation 14 (3). The said regulation clearly states that the public announcement 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 acquisition of control. This position has already been examined by the Tribunal in appeal No.11/2001 and held as follows:

"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 any case, 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 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. It is also seen from regulation 16(viii) and 22(8) etc., that public announcement of offer to acquire shares of the Target Company with conditions has been recognised by the Regulations.

In the instant case, it has to be noted that on receipt of the regulatory approval from EC and FTC by 18.5.2000 Appellant No.1 posted the first formal letter of offer to the shareholders of Burmah Castrol on 8.6.2000. The offer was made 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 shareholders 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% of the shareholders of Burmah Castrol Plc, those conditions were waived and it became a subsidiary of the Appellant and consequently Appellant No.1 gained control of all the subsidiaries of Burmah Castrol Pls. Including Castrol (India) Ltd. In case any of these conditions failing, the acquisition of Burmah Castrol would not have come through and consequently indirect acquisition of its subsidiaries including Castrol India, also would not have come into effect. In the said circumstances the suggestion that the Appellants should have completed payment formalities by 14.7.2000 is impracticable as it would mean that the payment etc, should have been completed within a short period of 7 days of the completion of the acquisition, against one month time given to the acquirer in regulation 22 (12) to complete procedures including payment of consideration. As already stated, the Appellants could have completed all the other formalities, pending fulfillment of the conditions and within one month from the actual date of effecting the acquisition, they should have paid consideration to the shareholders. In my view, 7.7.2000 i.e., the date on which offer became unconditional be the deemed date of closing the offer as only after the said date the Appellant could decide with certainty as to how much consideration it has to pay to each of the shareholders participated in the offer. Till such date there was no clear idea as to what percentage of public shareholding was available to them, 90% or something less. Even if they had made an offer within 90 days from the date of public announcement (i.e., by 14.7.2000) the acquirer was precluded in making payment before the acquisition of the holding companies was completed by waiving the acceptance condition, the material adverse change condition etc., on 7.7.2000. In anyway, the due date for payment of consideration to the shareholders of Castrol India cannot be a date earlier than 7.7.2000 i.e., the date on which Burmah Castrol, the holding company became a subsidiary of Appellant No.1, for the reason that the acquisition of Castrol India was incidental to the acquisition of its holding company, Burmah Castrol. Hypothetically, think of a situation wherein the conditions were waived sometime later say in August or September, 2000. In that event can it be said that still the payment should have been made by

14.7.2000, i.e., before the holding company's shares were actually acquired? It is to be noted that interest in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. The liability rises from the day the amount was due and payable and continues till the day the amount was actually paid. This basic characteristic has to be considered while identifying the due date for payment of the consideration.

Learned Advocate General's reference to 18th September 2000 seems to be based on the fact that the Appellants received regulatory approval from EC, FTC etc., on 18.5.2000. If 120 days for completion of the process are to be worked out from the said date, it could be 18.9.2000. I do not find any logic in accepting 18.5.2000 as the referral date. If that date is acceptable instead of 14.3.2000, why not 7.7.2000, the date on which the offer was made wholly unconditional? As Bhagwati Committee pointed out in the report, the regulation should be given a purposive interpretation taking into consideration, the practical aspect involved in each case. I am of the view that the Appellants should not be denied of the one-month time, which the regulations provide to them to complete the formalities after the closure of the offer. In the peculiar facts and circumstances of the case, it will be but fair to reckon the said one month to 7.7.2000 taking that date as the deemed closure date as it was the date on which the offer became wholly unconditional. In this context it is to be noted that as per the Appellants' own version first formal letter of offer to the shareholder of Castrol India was posted on 8.6.2000. If they had done the same thing with reference to Castrol India's shareholders on the same day, the payment of consideration had to be completed by 8.8.2000. In any case an acquirer cannot be expected to accept shares and pay consideration for the same in an acquisition which was not complete in all respects.

In the light of the facts and circumstances discussed above I am of the view that the liability to pay money to the shareholders actually arose with effect from 8.8.2000, i.e., the outer time limit by which payment should have been made on completion of all the relevant formalities and failure to make the payment by that date should attract the liability to pay interest on the sum payable. Having failed to make payments by the said date the Appellants are liable to pay interest at the rate of 15% on the open offer price for the period from 8th August, 2000 till the actual date of payment of consideration to the shareholders referred to in the impugned order. The impugned order stands modified to the said extent.

The order as modified to be sustained. The appeal is disposed of accordingly.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: September 5, 2001