CASE NO.:
Appeal (civil) 3183 of 2003

PETITIONER:
Clariant International Ltd. & Anr.

RESPONDENT:
Securities & Exchange Board of India

DATE OF JUDGMENT: 25/08/2004

BENCH:
N. Santosh Hegde,S.B. Sinha & A.K. Mathur

JUDGMENT:
J U D G M E N T
With
CIVIL APPEAL NOs. 3701, 3872 of 2003
and D3952 of 2004

S.B. SINHA, J:

These appeals under Section 15Z of the Securities and Exchange Board of India Act, 1992 (for short, 'the said Act) arise out of a judgment and order dated 21.02.2003 passed by the Securities Appellate Tribunal, Mumbai (for short, 'the Tribunal') in Appeal No.114 of 2002.

BACKGROUND FACTS :

Colour Chem Ltd. is a target company. Its shares are listed on the Bombay Stock Exchange and National Stock Exchange. Appellant No.1 (Clariant) in Civil Appeal No.3183 of 2003 is a Swiss company being subsidiary of another Swiss company, Clariant AG. Hoechst is a German company whereas Ebito Chemiebeteiligungen AG (Ebito) is a Swiss company. In Ebito Clariant held 49% and Hoechest 51% shares. An agreement was entered into by and between Hoechst and Clariant pursuant whereto and in furtherance whereof German Specialty Chemicals business was transferred to the latter by transferring 583708 equity shares of Rs.100/- each of the target company. On or about 21.11.1997, with a view to give effect to the said agreement, Clariant sought for an exemption from compliance of the requirements of making open offer to the shareholders of the target company in terms of the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short, the Regulations). Such exemption, however, was not granted. Hoechst in the aforementioned situation decided to sell off the shares held by it in the target company to Ebito, a company which was floated on 19.5.2000 as a special purpose vehicle. Actual transfer took place on 13.10.2000. Ebito by reason of the aforementioned transfer became a 100% subsidiary of Clariant.

A complaint was received by the Securities and Exchange Board of India (for short, 'the Board') to the effect that as by reason of the aforementioned arrangement as 50.1% shares/voting rights and control in the target company had been made without any public announcement, the provisions of the Regulations had been violated. Upon an inquiry made in this behalf, the Board came to the conclusion that the acquirer had actually acquired the control over the target company on 21.11.1997. By reason of an order dated 16.10.2002, the Board directed :

"13.1 In view of the findings made above, in exercise of the powers conferred upon me under sub-section (3) of Section 4 read with Section 11B SEBI Act 1992 read

with regulations 44 and 45 of the said Regulations, I hereby direct the Acquirer to make public announcement as required under Chapter III of the said Regulations in terms of regulations 10 & 12 taking 21.11.97 as the reference date for calculation of offer price. The public announcement shall be made within 45 days of passing of this order.

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

An appeal was preferred thereagainst by the acquirer wherein the primal question raised was the rate of interest for the delay involved in making payment to the shareholders who tendered the shares in the public offer required to be made in terms of the Regulations.

It is not in dispute that the value of the share as on 24.2.1998 was Rs.220/-; on 22.10.2002 Rs.213/- and on the date of public announcement i.e. on 7.4.2003 the value of the share was Rs.209/- , Rs.233/- Rs.203/- and Rs.220/-, whereas the offer price was Rs.318/-.

The submissions of the acquirer before the Tribunal were that (i) the rate of interest is on the higher side; (ii) the dividends having been paid in the meantime, the same should be set off from the amount of payable interest; and (iii) the interest is payable only to those shareholders who held shares on the triggering date, namely, 24.2.1998.

IMPUGNED JUDGMENT :

The Tribunal by its impugned judgment while rejecting the first two contentions raised on behalf of the acquirer accepted the third, holding : "(i) Those persons who were holding shares of the target company on 24.2.1998 and continue to be shareholders on the closure day of public offer to be made in terms of the directions given by the Respondent vide the impugned order alone shall be eligible to receive interest in case the shares which they were holding on 24.2.1998 are tendered in response to public offer made in terms of the impugned order, and accepted by the Appellants.

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

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

The acquirer has preferred Civil Appeal No.3183 of 2003, whereas the Board has filed Civil Appeal No.3701 of 2003 against the said judgment. Civil Appeal Nos. D3952 of 2004 and 3872 of 2003 have been filed by the Administrator of the Specified Undertaking of the Unit Trust of India and by one Umeshkuamr G. Mehta respectively.

Submissions :
Mr. R.F. Nariman, and Mr. D.A. Dave, learned Senior Counsel appearing on behalf of the appellants, would submit that the intent and purport of Regulation 44 of the Regulations, being to compensate the shareholders for the loss suffered by them, the rate of interest payable to the shareholders would vary from case to case. The guidelines in this regard having been provided for in the statute, Mr. Nariman would submit, grant of 9% interest should be held to be just and proper in view the fact that the investment was to be made for a long period, i.e., for about five years. In support of the said contention, the learned counsel placed reliance on Kaushnuma Begum (Smt.) and Others vs. New India Assurance Co. Ltd. and Others [(2001) 2 SCC 9], H.S. Ahammed Hussain and Another vs. Irfan Ahammed and Another [(2002) 6 SCC 52], United India Insurance Co. Ltd. and Others vs. Patricia Jean Mahajan and Others [(2002) 6 SCC 281] and DDA and Others vs. Joginder S. Monga and Others [(2004) 2 SCC 297].

It was further submitted that those shareholders who had purchased the shares later than the date fixed by the SEBI were not entitled to receive any compensation by way of interest as they were not the shareholders on the said date having regard to the fact that their names did not appear in the register of the company. As regard the findings of the Board that the amount of dividend paid to the shareholders would not be set off against the amount of interest, it was argued that having regard to the fact that actual date of transfer had been fixed on 22.3.1998, by reason of a fiction created, a person must be deemed to be a shareholder as on that date and having regard to the fact that interest was being paid to the shareholders at the offer price from the said date till the actual payment is made, the amount received by the shareholders by way of dividend is liable to be adjusted from the amount to be paid by way of interest. Our attention has further been drawn to the fact that pursuant to the order of this Court dated 28.4.2003 a sum of Rs.111.50 crores had been deposited and invested in a nationalized bank.

Mr. Kirit Rawal, learned Senior Counsel appearing on behalf of the Board, would, on the other hand, contend that while fixing the rate of interest, the Board, being an expert body, exercises a discretionary jurisdiction and, thus, the Tribunal and this Court should not interfere therewith. The learned counsel would argue that the rate of interest fixed at 15% p.a. cannot be said to be arbitrary and in support thereof reliance has been placed on Delhi Development Authority vs. M/s Surgical Cooperative Industrial Estate Ltd. and Others [(1993) Supp. 4 SCC 20]. Mr. Rawal would contend that from a bare perusal of Regulation 44(i) of the Regulations, it would appear that all those shareholders who had opted to sell their shares pursuant to the public offer are entitled to the payment of interest and, thus, the finding of the Tribunal in this regard is bad in law.

It was submitted that Regulation 44 must be read with Section 11B of the Act so as to put a proper and effective meaning thereto in terms whereof the Board is entitled to issue any direction including those which are specified therein..

As regard the direction issued by the Tribunal to the effect that only those shareholders who were on the roll of the company and continued to be so on the date of public offer alone are entitled to interest, Mr. Rawal would contend that by reason of such construction of Regulation 44, the free transferability of the shares which is the basic feature of the security market would be interfered with.

Mr K.K. Rai, learned counsel appearing on behalf of the Appellant in

Civil Appeal No. 3872 of 2003, would, inter alia, contend that transaction being commercial in nature, interest at the rate of 15% cannot be said to be on a high side. Reliance in support of the said contention has been placed on State Bank of Patiala and Another vs. Harbans Singh [(1994) 3 SCC 495] and Regional Provident Fund Commissioner vs. Shiv Kumar Joshi [(2000) 1 SCC 98].

It was contended that as shares were traded on speculation, it may not be possible to identify the shareholders who as per direction of the Tribunal would be entitled to interest as the shares by such time might have changed many hands. Furthermore, the process being a complex one, Regulation 44 should be read in such a manner which may be effectually worked out.

Mr. Shrish Kr. Misra, learned counsel appearing on behalf of the Administrator of the Specified Undertaking of the Unit Trust of India in Civil Appeal No.D3952 of 2004 would submit that the appellants therein should be held to be entitled to grant of interest despite the fact that it was not a shareholder as on 11.3.1998 as would appear from the following :

A. That the Unit Trust of India was a statutory corporation under the Unit Trust of India Act, 1963 and was/ is the shareholders of the Target company and as on 24-2-1998 holding 1123800 shares.

B. That Unit Trust of India Act, 1963 has been repealed by the Act of the Parliament i.e. Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002.

C. That the said Act provides for transfer and vesting of Undertaking (excluding Specified Undertaking) of Unit Trust of India to a Specified Company (being UTI Trustee Company Pvt. Ltd.) to be formed and registered under the Companies Act 1956 as well as for transfer and vesting of Specified Undertaking of Unit Trust of India in the Administrator appointed by the Central Government in the terms of section 7 of Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002.

D. That as per section 4(1) (b) of the said Act the Specified undertaking of the erstwhile Unit Trust of India being all business, assets, liabilities and properties set out in Schedule-I of the said Act stood transferred to the vested in the "Administrator of the Specified Undertaking of the Unit Trust of India" on and with effect from the appointed day viz. 1-2-2003. That by virtue of section 4(1)(a) of the said Act, the Undertaking (excluding the Specified Undertaking) of the erstwhile Unit Trust of India being all business, assets, liabilities and properties set out in schedule \026 II of the said Act stood transferred to and vested in the "UTI Trustee Company Pvt. Ltd" on and with effect from the appointed day viz. 1-2-2003.

E. That the 1123800 shares (considering face value of Rs. 10/- each) purchased by the erstwhile Unit Trust of India were/are from the amount which relates to Schedule I & II to the said Act. Therefore, the shares purchased by the erstwhile Unit Trust of India of M/s. Colour Chem Ltd. stands transferred to and vested in the 'Administrator of the Specified Undertakings of the Unit Trust of India' and the 'Specified Company' i.e. UTI Trustee Company Pvt. Ltd. by virtue of the said Act.

F. That out of 1123800 shares the amount invested for 501100 (considering face value of Rs.10/- each as on 24-

2-1998) shares is from the schemes which come under schedule \026I of the said Act, as such the "Administrator of the Specified Undertaking of the Unit Trust of India" is the successor in holder of 501100 shares.

G. That the amount invested by the erstwhile Unit Trust of India for the balance 622700 (considering face value of Rs.10/- each as on 24-2-1998) shares was from the schemes which come under the Schedule \026 II of the said Act, as such the "UTI Trustee Company Pvt. Ltd." is the successor in holder of those 622700 shares.

H. That as per Section 5(1) of the said Act all the assets and liabilities including lands, buildings, vehicles, cash balances, deposits, foreign currencies, disclosed and undisclosed reserves, reserves fund, special reserve fund, benevolent reserve fund, any other fund stock, investments, shares, bonds, debentures, security, powers authorities privileges benefits of the erstwhile Unit Trust of India vest in "Administrator of the Specified undertaking of the Unit Trust of India" and "UTI Trustee Company Pvt. Ltd."

I. That as per section 5(2) of the said Act "All contracts, deeds bonds guarantees, power of attorney other instruments (including all units issued and unit schemes formulated by the Trust and working arrangements) subsisting immediately before the appointed day and affecting the Trust shall cease to have effect or to be enforceable against the Trust and shall be in full force and effect against or in favour of the specified company (UTI Trustee Company Pvt. Ltd.) or the Administrator (Administrator of the Specified Undertaking of the Unit Trust of India) as the case may be, in which the undertaking or specified undertaking has vested by virtue of the said Act and enforceable as fully and effectually as if instead of the Unit Trust of India, the specified company (UTI Trustee Company Pvt. Ltd) or the Administrator (Administrator of the Specified undertaking of the Unit Trust of India) had been named therein or had been a party thereto.

The Relevant Statutory Provisions:

The Securities and Exchange Board of India Act, 1992 was enacted to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matter connected therewith or incidental thereto. Section 11 of the Act provides that inter alia the duty of the Board is to protect the interest of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit, which would include in regulation of substantial acquisition of shares and take-over of companies. Section 11B empowers the Board to issue directions, inter alia, in the interest of investors, or orderly development of securities market. Regulation 44 of the 1997 Regulations reads thus :

"44. Directions by the Board. 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".

In terms of the said regulation, there was no express power to issue any direction as regard grant of interest.

Regulation 44 of 1997 Regulations was substituted in the year 2002 with effect from 9.9.2002, the relevant portion of which reads thus :
"44. Directions by the Board. Without prejudice to its right to initiate action under Chapter VIA and section 24 of the Act, the Board may, in the interest of securities market or for protection of interest of investors, issue such directions as it deems fit including: -
(i) directing the person concerned, who has failed to make a public offer or delayed the making of a public offer in terms of these Regulations, to pay to the shareholders, whose shares have been accepted in the public offer made after the delay, the consideration amount along with interest at the rate not less than the applicable rate of interest payable by banks on fixed deposits."

As the impugned order of the Tribunal had been passed on 21.2.2003, it is not disputed that Regulation 44 as amended in 2002 shall be attracted in the instant case.

'Shareholder' has neither been defined in the Act nor in the Regulations; whereas 'shares' has been defined to mean shares in the share capital of a company carrying voting rights and includes any security which would entitle the holder to receive shares with voting rights but shall not include preference shares..

In terms of sub-section (2) of Section 2 of the said Act, the words and expressions used and not defined in the Act but defined in the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Depositors Act, 1996 (22 of 1996) shall have the meanings respectively assigned to them in that Act.

Clause (2) of Regulation 2 provides that all other expressions unless defined therein shall have the same meaning as have been assigned to them under the Act or the Securities Contracts (Regulation) Act, 1956 , or the Companies Act, 1956, or any statutory modification or re-enactment thereto, as the case may be. As 'shareholder' has not been defined, with a view to bring a 'shareholder' within the provisions of the said Regulations, we have no option but to refer to the relevant provisions of the Companies Act, 1956. Section 41 of the Companies Act defines 'member', sub-sections (1) and (2) whereof are as under :-

"41. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.

(2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company."

Rate of interest :

Section 11 of the Act provides that it shall be the duty of the Board to protect the interest of investors in securities. Regulation 44 of 1997, however, empowered the Board to issue directions only in the interest of the securities market. The expression "in the interest of the investors" did not occur therein. Regulation 44 of 2002 Regulations, thus, confers a wider power upon the Board. The said power is without prejudice to its right to initiate action under Chapter VIA and Section 24 of the Act which deals with offences . Regulation 44 of 2002 Regulations, furthermore, empowers the Board to issue directions both in the interest of the securities market as well as for protection of interest of investors. Such directions may be issued in its discretion. It, however, in its discretion may or may not issue such directions. Regulation 44 (i) of Regulations, therefore, confers a power upon the Board to issue directions also in the interest of the investors which would include a direction to pay interest.

A direction in terms of Regulation 44 which was in the interest of securities market indisputably would have caused civil or evil consequences on the defaulters. Clause (i) of Regulation 44, however, does not provide for any penal consequence. It provides for only a civil consequence. By reason of the said provision, the power of the Board to issue directions is sought to be restricted to pay the amount consideration together with interest at the rate not less than the interest payable by banks on fixed deposits. Both the Board and the Tribunal have proceeded on the basis that the interest is to be paid with a view to recompense the shareholders and not by way of penalty or damages. Such a direction, therefore, was for the purpose of protecting the interest of investors and not "in the interest of the securities market". The transactions in the market are not thereby affected one way or the other. The Board, as noticed hereinbefore, has a discretion in the matter and, thus, it may or may not issue such a direction. The shareholders do not have any say in the matter. As a necessary concomitant, they have no legal right.

The Board further having a discretionary jurisdiction must exercise the same strictly in accordance with law and judiciously. Such discretion must be a sound exercise in law. The discretionary jurisdiction, it is well-known, although may be of wide amplitude as the expression "as it deems fit" has been used but in view of the fact that civil consequence would ensue by reason thereof, the same must be exercised fairly and bona fide. The discretion so exercised is subject to appeal as also judicial review, and, thus, must also answer the test of reasonableness.

In Kruger and Others vs. Commonwealth of Australia, reported in 1997 (146) Australian Law Reports, page 126, it is stated :

"Moreover, when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised. Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention\005."

The discretionary jurisdiction has to be exercised keeping in view the purpose for which it is conferred, the object sought to be achieved and the reasons for granting such wide discretion. [(See Narendra Singh Vs. Chhotey Singh and Another, (1983) 4 SCC 131]

A discretionary jurisdiction, furthermore, must be exercised within the four-corners of the statute. [See Dr. Akshaibar Lal and Others Vs. The Vice-Chancellor, Banaras Hindu University and Others, (1961) 3 SCR 386 and also para 9-022 of De Smith, Woolf and Jowell's Judicial Review of Administrative Action, 5th Edition, page 445]

Interest can be awarded in terms of an agreement or statutory provisions. It can also be awarded by reason of usage or trade having the force of law or on equitable considerations. Interest cannot be awarded by way of damages except in cases where money due is wrongfully withheld and there are equitable grounds therefor, for which a written demand is mandatory.

In absence of any agreement or statutory provision or a merchantile usage, interest payable can be only at the market rate. Such interest is payable upon establishment of totality of circumstances justifying exercise of such equitable jurisdiction. [See Municipal Corporation of Delhi vs. Sushila Devi (Smt.) and Others \026 (1999) 4 SCC 317 \026 Para 16].

In Executive Engineer, Dhenkanal, Minor Irrigation Division, Orissa and Others vs. N.C. Budharaj (Deceased) by Lrs. And Others [(2001) 2 SCC 721], Raju, J. speaking for the majority held that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called, namely, interest, compensation or damages.

In Black's Law Dictionary, the word 'compensation' has been defined as under :

"money given to compensate loss or injury".

In a given case where the liability arises during pendency of a litigation, doctrine of restitution can be invoked. In South Eastern Coalfields Ltd. vs. State of M.P. and Others [(2003) 8 SCC 648], it was observed :

"\005In law, the term "restitution" is used in three senses (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another (See Black's Law Dictionary, 7th Edn., p. 1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that "restitution" is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done:

"Often, the result under either meaning of the term would be the same\005.Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."

When a bench-mark is fixed by a statute, the question as to whether a discretion has been judicially or properly exercised or not will have to be determined in the context of the facts of the particular case. [See Irrigation Department vs. G.C. Roy, (1992) 1 SCC 508]. When a bench-mark is fixed or the court grants interest at the agreed rate, it may not be necessary to give reasons but where interest is granted at a higher or lessor rate, some reasons are required to be assigned.

By reason of Regulation 44, as substituted in 2002, the discretionary jurisdiction of the Board is curtailed. It in terms of Regulations 1997 could award interest by way of damages but by reason of Regulation 2002, its power is limited to grant interest to compensate the shareholders for the loss suffered by them arising out of the delay in making the public offer. The courts of law can take judicial notice of both inflation as also fall in bank rate of interest. The bank rate of interest both for commercial purpose and other purposes had been the subject-matter of statutory provisions as also the judge-made laws. Even in cases of victims of motor vehicles accidents, the courts have upon taking note of the fall in the rate of interest held that 9% interest to be reasonable. [See Kaushnuma Begum (supra), and H.S. Ahammed Hussain (supra) and Patricia Jean Mahajan (supra)]

The statutory changes brought about must be noticed by the court keeping in view the fact that the nature of jurisdiction by the Board has been changed. The mischief rule also in this case should be applied. Furthermore while construing such provisions, the courts must take into consideration the provisions of the law as had been interpreted by courts prior thereto.

By way of an example we may notice that the proviso appended to sub-sections (1) and (2) of Section 34 of Code of Civil Procedure provides for the grant of rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions.

In DDA vs. M/s Surgical Cooperative Industrial Estate Ltd. and Others [(1993) Supp.4 SCC 20] whereupon Mr. Rawal has placed reliance, 15% interest was directed to be paid only in favour of those members who had already been allotted plots and made some payments, on a suggestion made by the court, as would appear from the following :

"\005At the rate of 15% interest the amount would be considerably less yet we suggested to the learned counsel for these members to ascertain from their clients if they would be willing to purchase the plots at 50% of the price realised in the last auction. They conveyed their willingness to pay that price i.e. 50% of Rs. 10,756 per square metre. Mr. Arun Jaitley, the learned counsel for the Delhi Development Authority submitted that although he had no instructions from his clients in the matter his clients would abide by any just, reasonable and fair order that this Court would make in the facts and circumstances of the case\005."

The said decision, therefore, has no application to the fact of the present matter.

We also do not agree with the contention that the payment of interest for delay in making the public offer is a commercial transaction.

While determining the cases of commercial transaction also, fall in rate of interest has been taken note of by this Court in Citibank N.A. etc. vs. Standard Chartered Bank and Others etc. [(2004) 1 SCC 12, Para 62] and Citibank N.A. vs. Standard Chartered Bank etc [(2004) 6 SCC 1, para 54].

It is at this stage relevant to note that the rate of interest at the rate of 15% as directed by the Board has been affirmed by the Tribunal stating :

"\005Even on applying the said test, it does not appear to me that the 15% interest directed to be paid to the shareholders as compensation for the delay involved in making the payment in the Appellants' case is unjust. In this context it is to be noted that the payment was to be made, in case the offer had been made according to the provisions of the Takeover Regulations, by 22.3.1998

and the amount to be so paid remains unpaid till date. Therefore, in my view the interest rate applicable should be that rate which was prevailing on 22.3.1998 and not the one prevailing on the date of the impugned order. According to the information furnished by the Appellants the rate of interest payable on deposits for a period of 3 years and above by nationalized banks was around 12% at that point of time. In this context one should not fail to note that the interest is directed to be paid to the shareholders to compensate the loss. Had the shareholder received the money on due date, in the normal course what return he would have received by effectively investing that money has to be taken into consideration. The amount was due on 22.3.1998. The then existing rate of 12%, if calculated on quarterly rest basis, at the end of 2002 works out to more than 15% and therefore, even if the interest is worked out in relation to the rate of interest payable on deposit by nationalized banks, the rate of interest payable by the Appellants fixed at 15% p.a. by the Respondent in the instant case cannot be considered unjust, and the same is also not contrary to the view held by the Hon'ble Supreme Court in Kaushnuma Begum's case or against the provisions of regulation 44(i)\005."

The observation of the Tribunal was on a wrong premise as the rate of interest in a case of fixed deposit in a nationalized bank was not to be calculated on quarterly rest basis. Furthermore, the bank rate of interest which was prevailing in 1998 had also fallen down.

The rate of interest at the relevant time as was payable by Syndicate Bank, a nationalized bank, is as under :

"FIXED DEPOSIT INTEREST RATES
FOR THREE YEARS AND ABOVE
FROM SYNDICATE BANK

Sl.No.
From
To
Percentage
1.
02.07.1996
30.04.1997
13%
2.
01.05.1997
31.08.1997
12%
3.
01.09.1997
31.10.1997
11%
4.
01.11.1997
21.12.1997
10%
5.
22.12.1997
14.01.1998
11%
6.
15.01.1998
21.01.1998

11.5%
7.
09.02.1998
11.10.1998
12%
8.
12.10.1998
14.03.1999
11.5%
9.
15.03.1999
04.04.1999
11.25%
10.
05.04.1999
30.04.1999
11%
11.
01.05.1999
22.08.1999
10.5%
12.
23.08.1999
11.11.1999
10.25%
13.
12.11.1999
09.04.2000
9.75%
14.
10.04.2000
31.08.2000
9%
15.
01.09.2000
15.10.2000
9.5%
16.
16.10.2000
31.12.2000
10%
17.
01.01.2001
11.02.2001
9.75%
18.
12.02.2001
14.03.2001
10%
19.
15.03.2001
09.07.2001
9.5%
20.
10.07.2001
14.09.2001
9.25%
21.
15.09.2001
15.12.2001
8.75%
22.
16.12.2001
20.01.2002
8.50%

JUDIS

23.
21.01.2002
07.04.2002
8.25%
24.
08.04.2002
06.08.2002
7.75%
25.
07.08.2002
27.10.2002
7.50%
"

While awarding interest, it is required to bear in mind that interest would be payable on the maximum price of the share which was Rs.318/- and not on Rs.220/- which was not the prevailing price in 1998, as a result whereof not only a shareholder would be getting a higher price but would also be getting interest thereupon.

So far as the contention regarding the applicability of dynamics of the market or its being a volatile one is concerned, the same, in our opinion, has nothing to do with rate of interest inasmuch both the Board and the Tribunal proceeded on the basis that the shareholders are to be compensated by way of interest for delayed payment. In that view of the matter, the relevance of rate of interest payable for the period it is payable and the persons who are entitled to be compensated were required to be determined. Rate of interest should be a reasonable one as the same became payable for the delay in making the payment, subject of course to the statutory provision contained in the Regulations. As noticed hereinbefore, the discretion of the Board vis-'-vis the Tribunal had been curtailed. There is a change even in relation to the nature of discretion of the Board. The Board and the Tribunal , thus, failed to apply the correct principles of law in determining the rate of interest payable in this case.

To whom interest is payable:

It is not in dispute that the acquirer contravened Regulation 12 while acquiring the control of the target company. Regulation 14(3) provides that a public announcement referred to in Regulation 12 is required to be made by the merchant banker 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. Clause 4 of Regulation 15 provides that the offer under these Regulations shall be deemed to have been made on the date on which the public announcement appeared in any of the newspapers referred to in clause (1). The announcement of offer in terms of Regulation 16(xi) is to contain that date by which individual letters of offer would be posted to each of the shareholders. Regulation 20 provides for the minimum offer price. In terms of clause (1) of Regulation 21, the public offer is required to be made by the acquirer to the shareholders of the target company to acquire from them an aggregate minimum 20% of the voting capital of the company.

The Board arrived at an inference that the acquirer had acquired the control of the target company as the special vehicle company on 19.5.2000. The liability of the acquirer to pay interest should be judged in the aforementioned context.

Shareholder :

To become a shareholder, a person has to fulfill two conditions, namely, he must agree in writing to become a member of a company and whose name should be entered in its register of members. The members holding equity share capital of company and whose names are entered as beneficial owner in the records of the depository shall be deemed to be the members of the concerned company.

In Palmer's Company Law, 23rd Edn. at page 154, para 12-07, it is stated :

"12-07 Subscribers as members \026 The subscribers of the memorandum are deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members (1948 Act, s. 26(1))."

It is further stated :

"49.04. Other members \026 In the case of members other than the subscribers to the memorandum two essential conditions have to be satisfied to constitute a person a member:

(1) an agreement to become a member; and

(2) entry on the register.

These two conditions are cumulative: unless they are both satisfied, the person in question has not acquired the status of member.

Thus, an agreement to become a member alone does not create the status of membership; it is a condition precedent to the acquisition of such status that the shareholder's name should be entered on the register. Conversely, the company is not entitled to place a person's name on the register without his having agreed to become a member; a person improperly registered without his assent is not bound thereby and may have his name removed from the register."

In M/s Howrah Trading Co., Ltd. vs. The Commissioner of Income Tax, Calcutta [(1959) Supp.(2) SCR 448], the law is stated thus :
"The question that falls for consideration is whether the meaning given to the expression "shareholder" used in section 18(5) of the Act by these cases is correct. No valid reason exists why "shareholder" as used in section 18(5) should mean a person other than the one denoted by the same expression in the Indian Companies Act, 1913. In In re Wala Wynaad Indian Gold Mining Company Chitty, J., observed :
"I use now myself the term which is common in the courts, 'a shareholder', that means the holder of the shares. It is the common term used, and only means the person who holds the shares by having his name on the register.""
[See also Balkrishan Gupta and Others vs. Swadeshi Polytex Ltd. and Another [(1985) 2 SCC 167]]

The rights of a shareholder are purely contractual and would be such which are granted to him by Company's Memorandum or Articles of Association together with the statutory rights conferred on him by the Companies Act.

A shareholder having regard to the direction issued by the Tribunal must be one who was a shareholder on the triggering date. Purpose and object of creating a legal fiction is well-known. Once a fiction is created upon imagining a certain state of affairs, the imagination cannot be permitted to be boggled when it comes to the inevitable corollaries thereof.

[See Dipak Chandra Ruhidas vs. Chandan Kumar Sarkar [(2003) 7 SCC 66]], ITW Signode India Ltd. Vs. CCE, [(2004) 3 SCC 48], and Ashok Leyland Ltd. Vs. State of Tamil Nadu, (2004) 3 SCC 1].

Directions by the Board are required to be issued for the purpose of protecting the interest of the investors which would imply that such protection be extended to the persons who are entitled thereto and not any other shareholder who would get the same by windfall. The shareholders contemplated under clause (i) of Regulation 44 must be those shareholders whose shares have been accepted upon public announcement of offer and who have suffered loss owing to blockage of amount by not being able to sell the shares held by them. The object of the said provision is to protect the interest of such shareholders who had suffered a loss for delay in making the public announcement and, thus, may have to be compensated. The very fact that the bench-mark as regard the rate of interest has been fixed is also a pointer to the fact that the interest is to be paid to such investors who had suffered some loss.

While compensating a person, the court should see that he is not unjustly enriched. Interest is directed to be paid on the default of the acquirer occasioning loss suffered by an investor of his money. The question of paying interest by way of compensation to persons who had not suffered any loss, thus, would not arise.

Interest was, therefore, payable only to such persons who were shareholders of target company as on the triggering date.

Deposits made by the Appellants in this Court \026 Effect :

It is not in dispute that the appellants pursuant to an order of this Court dated 28th April, 2003 have deposited a sum of Rs.111.50 crores which has been calculated on the following basis :

"

1.
Total paid-up capital of Colour-Chem Ltd.
(By number of shares)
11,650,000
2.
No. of shares to be acquired through open offer
2,330,000
3.
Estimated number of shares available for offer having eligibility for interest as per SAT Order (as of 25.4.2003)
3,724,224
4.
Ratio of acceptance as per Regulation 21(6)
40%
5.
No. of shares likely to be acquired as per Regulation 21(6) from the lot eligible for Interest
1,489,690
6.
Balance to be acquired from the lot of shares not eligible for interest
840,310
7.
Total price consideration @ Rs.318/- per share
740,940,000
8.
Total interest payable in respect of shares at Sl. No.5 above \026 As per the Open Offer - @ 15% p.a. for the period 22.3.1998 to 21.6.2003

(1918 days) Rs.250.65/share)
Rs.373,390,799

TOTAL AMOUNT TO BE DEPOSITED AS
PER SUPREME COURT ORDER OF 28TH
APRIL, 2003

Rs.1,114,330,799

ROUNDED OFF TO :

Rs.111.50 crores

"

The estimated number of shares available as per order of the Tribunal as on 25.4.2003 would be about 60% of the total shareholders, who would be benefitted.

We have hereinbefore noticed that the offer price of Rs. 318/- per equity share would be payable as on 24.2.1998 although the market price thereof at the relevant time was only Rs.220/-.

We may notice the difference on monetary terms on the amount payable to the investors on public announcement of offer, as would appear from the following chart :

TOTAL PAID-UP CAPITAL
OF COLOUR-CHEM LTD. : 1,16,50,000 EQUITY SHARES

FACE VALUE : RUPEES 10/- EACH

OPEN OFFER PRICE : RUPEES 318/- PER SHARE

NO.OF SHARES TO BE
ACQUIRED IN THE OPEN
OFFER : 20% OF THE PAID-UP
CAPITAL \026 23.30 LAKHS SHARES

TOTAL CONSIDERATION : RUPEES 7409.40 LAKHS

Interest Rate per
Annum
Period 24.2.1998
to 20.6.2003
Interest per Share (Rs.)
A
B
C
15%
5916.35
253.92
14%
5521.93
237.00
13%
5127.51
220.07
12%
4733.08
203.14
11%
4338.66

186.21
10%
3944.24
169.28
9%
3549.81
152.35
8%
3155.39
135.42

The difference of amount calculated on the basis of interest at the rate of 10% and 15% would be about Rs.85 per equity share. If shareholders are to be compensated owing to the act of delay on the part of the acquirer in making the public announcement, in a case of this nature, an attempt should be made to strike a delicate balance. The bank rate of interest payable by the nationalized banks on a fixed deposit for the period from 1998 to 2003 was around 9%. This fact has been accepted by the Tribunal. It has also been accepted by the Tribunal that the decisions of this Court relating to rate of interest payable by nationalized banks on fixed deposits and on the compensation amount fixed under the Motor Vehicles Act would be 9% p.a. The Tribunal has applied the said test but, as discussed hereinbefore, committed two apparent errors, namely, it did not think fit to calculate the mean of the rate of interest payable by the banks and; it thought that quarterly rests is payable on the deposits made by an investor in a bank. Quarterly rests are only payable in commercial transactions when a bank grants loans.

When any criteria is fixed by a statute or by a policy, an attempt should be made by the authority making the delegated legislation to follow the policy formulation broadly and substantially and in conformity thereof. [See Secretary, Ministry of Chemicals & Fertilizers, Government of India vs. Cipla Ltd. and Others \026 (2003) 7 SCC 1 - Para 4.1]

The rate of interest fixed by the Board and the Tribunal, thus, in our opinion, was not correct.

Effect of Board being an expert body:

The modern sociological condition as also the needs of the time have necessitated growth of administrative law and administrative tribunal. Executive functions of the State calls for exercise of discretion. The executive also, thus, performs quasi judicial and quasi legislative functions and, in this view of the matter, the administrative adjudication has become an indispensable part of the modern state activity.

Administrative Tribunals may be called a specialized court of law, although it does not fulfil the criteria of a law court as is ordinarily understood inasmuch as it cannot like an ordinary court of law entertain suits on various matters, including the matter relating to the vires of legislation. However, such a Tribunal like ordinary law courts are bound by the rules of evidence and procedure as laid down under the law and are required to determine the lis brought before it strictly in accordance with the law.

O. Hood Phillips in his ’Constitutional and Administrative Law’, Eight Edition, at page 686 under the Chapter "Tribunals" has stated as follows :-

"These are independent statutory tribunals whose function is judicial. The tribunals are so varied in composition, method of appointment, functions and procedure, and in their relation to Ministers on the one hand and the ordinary courts on the other, that a satisfactory formal classification is impossible."

Reasons for creating special tribunals, according to the learned author, are:
(i) Expert knowledge
(ii) Cheapness
(iii) Speed
(iv) Flexibility
(v) Informality

At para 30-021 at page 692 of the said treatise, it is stated :

"Appeals from tribunals

A party to proceedings before most statutory tribunals, who is dissatisfied with the tribunal's decision on a point of law, may either appeal to the High Court or require the tribunal to state a case for the opinion of the High Court. Appeal lies by leave of the High Court or of the Court of Appeal to the Court of Appeal, and thence to the House of Lords (section 11)."

In 'Environmental Enforcement: The Need for a Specialist Court' by Robert Carnwath published in (1992) Journal of Planning and Environment Law at page 799, the requirements of having an environment court in place of the ordinary courts were highlighted. The author had submitted a report known as "Enforcing Planning Control" and on referring thereto, it was noticed:

"Most of the report's substantive recommendations for reform of the planning enforcement system were adopted by the Government and incorporated in the Planning and Compensation Act 1991. There was no formal response to the suggestions for a unified court system. This was hardly surprising, since reform of the court system is not within the remit of the Department of the Environment.

Last year, however, the idea was given a new impetus from an unexpected quarter. Sir Harry Woolf gave his Garner lecture to U.K.E.L.A. on the theme "Are the Judiciary Environmentally Myopic?" He commented on the problems of increasing specialization in environmental law; and on the difficulty of the Courts, in their present form, moving beyond their traditional role of detached "Wednesbury" review. He went on to discuss the benefits of:

"\005having a Tribunal with a general responsibility for overseeing and enforcing the safeguards provided for the protection of the environment\005The tribunal could be granted a wider discretion to determine its procedure so that it was able to bring to bear its specialist experience of environmental issues in the most effective way."

A key feature of this Tribunal would be flexibility. Possible innovations would be the involvement of expertise from other professions (architects, surveyors, etc.); "multidisciplined adjudicating

panels"; broad discretion over rights of appearance; power to instruct independent counsel on behalf of the Tribunal or members of the public; resources for direct investigation by the Tribunal itself; and incorporation into the Tribunal of the existing inspectorate to deal with "cases of a lesser dimension."

The Board is indisputably an expert body. But when it exercises its quasi judicial functions; its decisions are subject to appeal. The Appellate Tribunal is also an expert Tribunal. Only such persons who have the requisite qualifications are to be appointed as members thereof as would appear from Sub-section 2 of Section 15M of the said Act which reads thus:-

"15.M Qualification for appointment as Presiding Officer or Member of the Securities Appellate Tribunal. \026

(2) A person shall not be qualified for appointment as Member of a Securities Appellate Tribunal unless he is a person of ability, integrity and standing who has shown capacity in dealing with problems relating to securities market and has qualification and experience of corporate law, securities laws, finance, economics or accountancy:

Provided that a member of the Board or any person holding a post at senior management level equivalent to Executive Director in the Board shall not be appointed as Presiding Officer or Member of a Securities Appellate Tribunal during his service or tenure as such with the Board or within two years from the date on which he ceases to hold office as such in the Board."

The conflict of jurisdiction between an expert tribunal vis-'-vis the courts in the context of the doctrine of separation of powers poses a problem even in other countries. [For a detailed discussion see the Article 'Powers of the Takeovers Panel and their Effect upon ASIC and the Court' by Barbara Mescher \026 [2002 (76) Australian Law Journal, p.119].

In Australia, the takeover Panel has also a function of identifying and notifying the third parties who are affected by a decision. Takeover panel created under the Corporate Law Economic Reform Programme Act, 1999, as amended by the Corporation Act, 2001, is also an expert panel.

Throughout the world, specialized adjudicators are performing numerous roles. There are diverse specialized tribunals in America as also in the Commonwealth countries. In certain States, statutes have been enacted authorizing appeals to the Administrative Division which jurisdiction used to be exercised by the High Court alone. The appeals range from questions of law to selected questions of fact, to full rehearing of all issues. [See Stephen Legomsky's 'Specialized Justice].

Had the intention of the Parliament been to limit the jurisdiction of the Tribunal, it could say so explicitly as it has been done in terms of Section 15Z of the Act whereby the jurisdiction of this Court to hear the appeal is limited to the question of law.

The jurisdiction of the appellate authority under the Act is not in any way fettered by the statute and, thus, it exercises all the jurisdiction as that of the Board. It can exercise its discretionary jurisdiction in the same manner as the Board.

The SEBI Act confers a wide jurisdiction upon the Board. Its duties and functions thereunder, run counter to the doctrine of separation of powers. Integration of power by vesting legislative, executive and judicial

powers in the same body, in future, may raise a several public law concerns as the principle of control of one body over the other was the central theme underlying the doctrine of separation of powers.

Our Constitution although does not incorporate the doctrine of separation of powers in its full rigour but it does make horizontal division of powers between the Legislature, Executive and Judiciary. [See Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, AIR 1955 SC 549].

The Board exercises its legislative power by making regulations, executive power by administering the regulations framed by it and taking action against any entity violating these regulations and judicial power by adjudicating disputes in the implementation thereof. The only check upon exercise of such wide ranging power is that it must comply with the Constitution and the Act. In that view of the matter, where an expert Tribunal has been constituted, the scrutiny at its end must be held to be of wide import. The Tribunal, another expert body, must, thus, be allowed to exercise its own jurisdiction conferred on it by the statute without any limitation.

In Cellular Operators Association of India and Others vs. Union of India and Others [(2003) 3 SCC 186], this Court observed :

"TDSAT was required to exercise its jurisdiction in terms of Section 14A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub-section (7) of Section 14A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of jurisdiction of a court or a Tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by the Parliament in the Amending Act of 2000. TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law".

The court noticed the celebrated book on "Judicial Review of Administrative Law" by H.W.R. Wade and C.F. Forsyth and held :

"The rule as regard deference to expert bodies applies only in respect of a reviewing court and not to an expert tribunal. It may not be the function of a court exercising power of judicial review to act as a super-model as has been stated in Administrative Law by Bernard Schwartz, 3rd edition in para 10.1 at page 625; but the same would not be a case where an expert tribunal has been constituted only with a view to determine the correctness of an order passed by another expert body. The remedy under Section 14 of the Act is not a supervisory one. TDSAT's jurisdiction is not akin to a court issuing a writ of certiorari. The tribunal although is not a court, it has all the trappings of a Court. Its functions are judicial.

In 'Jurisdiction and Illegality' by Amnon Rubinstein a judicial power in contrast to the reviewing power is stated thus:

"A judicial power, on the other hand, denotes a process in which ascertainable legal rules are applied and which, therefore, is subject to an objectively correct solution. But that, as will be seen, does not mean that the repository of such a power is under an enforceable duty to arrive at that solution. The legal rules applied are capable of various interpretations and the repository of power, using his own reasoning faculties, may deviate from that solution which the law regards as the objectively correct one."

The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees".

In West Bengal Electricity Regulatory Commission vs. CESC Ltd. [(2002) 8 SCC 715], a Bench of this Court, (in which one of us Santosh Hegde, J. was a member), observed :

"\005From s.4 of the 1998 Act, we notice that the Central Electricity Regulatory Commission which has a judicial member as also a number of other members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect to the judges of the High Court, we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with this type of factual and technical matters. Therefore, we recommend that the appellate power against an order of the state commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. We notice that under the Telecom Regulatory Authority of India Act 1997 in chapter IV, a similar provision is made for an appeal to a special appellate tribunal and thereafter a further appeal to the Supreme Court on questions of law only. We think a similar appellate provisions may be considered to make the relief of appeal more effective."

The provisions of the 1992 Act and the Regulations framed thereunder squarely apply to the observations made by this Court in West Bengal Electricity Regulation Commission (supra).

We may furthermore notice that in Part XI of the Electricity Act, 2003, an expert appellate tribunal for electricity in the light of the observations made by this Court has been constituted.

Dividend: Effect of

In view of our findings aforementioned, we are of the opinion that while calculating the amount of interest, the amount of dividend paid to the shareholders should be excluded. The shareholders who by reason of default on the part of acquirer have been deprived of interest payable on the difference of the offer price and market price would be entitled to interest as direction to pay interest being not penal in nature, they cannot make double gains. The Tribunal, in our opinion, has committed an error in holding that the dividend being a participatory benefit available to a shareholder and being distinct from interest, the same should not be taken into consideration. The regulation fixes a benchmark as regard rate of interest. If any amount

has been received by the shareholders by keeping the shares till a public offer was made, the amounts so received by him by way of dividend should be set off. We would reiterate that the shareholders did not have any right to get interest and in effect and substance they were only to be compensated for the loss of interest and nothing more. On the same analogy, if they had received some gains by holding the shares fairly for a long period of five years, the amount of dividend cannot be permitted to be retained by them. The amount of dividend should, thus, be adjusted towards the interest payable to them.

Conclusion:

We, therefore, direct, having regard to the peculiar facts and circumstances of the case, that the interest of justice would be sub-served, if the rate of interest is directed to be paid at 10% per annum from March 1998 till 2003.

The interest at the rate of 10% per annum is directed in stead and place of normal 9% having regard to the fact that the Appellants themselves in their Memorandum of Appeal filed before the Tribunal had contended that the Board should have granted interest at the rate of 10% per annum instead of 15%.

If any dividend was paid during the said period, the same shall be adjusted with the amount of interest.

The appellants had deposited a total amount of 111.50 crores which sums have been invested. The interest accruing thereupon shall enure to the benefit of those shareholders who were entitled to the payment of interest for the period during which the said amount remained invested in terms of the order of this Court..

We uphold that part of the decision of the Tribunal whereby it was held that those persons who were the shareholders till 24.2.1998 and continued to be shareholders on the closure day of public offer alone would be entitled to interest.

The case of the Administrator of the Specified Undertaking of the Unit Trust of India, however, stands on a different footing. The facts of the matter, as noticed hereinbefore, clearly go to show that in effect and substance, the Appellants are the successors of the U.T.I. They being the statutory beneficiary, are entitled to interest irrespective of the fact that it came into being after 1998.

For the reasons aforementioned, Civil Appeal Nos.3183 of 2003, filed by the Acquirer and D3952 of 2004 filed by the Administrator of the Specified Undertaking of the Unit Trust of India, are allowed; whereas Civil Appeal No.3701 of 2003 filed by SEBI and Civil Appeal No. 3872 of 2003 filed by Umeshkumar G. Mehta are dismissed. No costs.