(2019) 12 SEBI CK 0010

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No.220 Of 2019

Arun Goenka APPELLANT

Vs

Securities And Exchange Board Of India And Others RESPONDENT

Date of Decision : 11-12-2019

Acts Referred:

Securities And Exchange Board Of. India (Substantial Acquisition Of Shares And Takeovers) Regulations, 1997 — Regulation 10, 11, 12, 14(1), 20(4), 20(5), 24(7)
Takeover Regulations, 2011 — Regulation 35(2)(c)

Citation : (2019) 12 SEBI CK 0010

Hon'ble Judges : Dr. C. K. G. Nair, Member;M. T. Joshi, J

Bench : Division Bench

Advocate : Arun Goenka, Kumar Desai, Vivek Shah, Manish Chhangani

Final Decision : Dismissed

Judgement

Dr. C.K.G. Nair, Member

1. Aggrieved by the observation letter dated March 27, 2018 issued by Securities and Exchange Board of India (â??SEBIâ?? for short) to the

Merchant Banker on the Draft Letter of Offer (DLOF) submitted by the acquirers, this appeal has been filed. Appellant disputes the price offered by

the acquirers and seeks to re-examine the open offer and to revise the price to Rs. 800/- as well as to direct the acquirers to make payment of interest

to all shareholders whose shares have been accepted in the open offer from February 2, 2010 for the delay in implementing the open offer from 2010

to 2018.

2. Appellant is an investor and holds 5000 shares (jointly with his wife) in the Target Company, namely, Golden Tobacco Limited (â??GTLâ?? for

short; Respondent No. 5). Consequent to certain acquisition made by one Shri

Pramod Jain and others, the acquirers (Respondent Nos. 2 â?" 4) came

out with a public announcement proposing a voluntary open offer pursuant to Regulation 10 and 12 of the SEBI (Substantial Acquisition of Shares and

Takeovers) Regulations, 1997 (â??Takeover Regulations 1997â?? for short) to the shareholders of GTL. On November 12, 2009 public

announcement was made with an offer price of Rs. 101/- per share for acquiring 25% of the equity shares of GTL. However, instead of implementing

the public announcement, in August 2011 the acquirers made an application to SEBI, inter alia, requesting SEBI to permit them to withdraw the offer

on the ground of inordinate delay by SEBI in issuing its observations. On April 13, 2012 SEBI rejected the said request. An appeal was filed against

the said order of SEBI before this Tribunal and vide order dated August 6, 2014 the appeal was dismissed. On November 7, 2016, the Honâ??ble

Supreme Court also dismissed a consequential appeal preferred by the acquirers. Thereafter, a Review Petition was also filed by the acquirers which

was also dismissed by the Honâ??ble Supreme Court on February 1, 2017.

3. Thereafter, on December 30, 2017 the acquirers came out with a detailed public statement and on January 28, 2018 a Draft Letter of Offer was

published. On March 27, 2018 SEBI communicated its comments to the Draft Letter of Offer. On April 18, 2018 the Letter of Offer was published.

On April 27, 2018 the offer opened and on May 16, 2018 the offer closed. May 31, 2018 was the last date of dispatch of consideration to respondents

/ those who tendered the shares in the open offer.

4. The appellant appearing in person strenuously contended that the offer price made by the acquirers was grossly inadequate as the Target Company

GTL had a plot of land worth about Rs. 2000 crore which was not reflected in the said valuation. To press home his contention appellant also relied on

submission made by the acquirers in their appeal before this Tribunal seeking to withdraw the open offer made that the appellants therein had acquired

shares of the Target Company GTL because of GTL having property worth about Rs. 2000 crore.

5. The appellant further submitted that acquirer made a valuation of its shares on March 20, 2018 @ Rs. 58. 90 which was a sham valuation report got

prepared by the acquirers through an unqualified Chartered Accountant. Because the said Chartered Accountant did not have the mandatory ten years experience at the relevant time to undertake such valuation tasks. Moreover, it was contended that all the public shareholders who surrendered

the shares are entitled for interest from 2010 to 2018, since GTL had sought to withdraw the public offer which was implemented only in 2018

consequent to the dismissal of even the Review Petition by the Honâ??ble Supreme Court. In short, the appellant contends that the shareholders are

entitled for a higher price @ Rs. 800/- per share and they are also entitled for interest on the same. It is also the contention of the appellant that since

a fresh public announcement was made in 2018 and at that time the shares of the GTL was infrequently traded a fresh valuation exercise needs to be

done taking into account the assets of GTL correctly in such a valuation exercise.

6. The learned counsel Shri Kumar Desai appearing for respondent no. 1 SEBI submitted that since the entire process of offer and payment of

consideration thereon have been completed the appeal has become infructuous. He also fairly submits that though in their reply the issue of locus etc.

has been raised SEBI is not pressing the same.

7. The learned counsel for respondent no. 1 SEBI further contended that the trigger date for the public announcement / open offer was November 12,

2009. At the relevant time the shares of GTL was frequently traded and therefore the open offer price had to be fixed in terms of Sub-Regulation

20(4) of Takeover Regulations 1997. Sub-Regulation 20(5) is not relevant, as submitted by the appellant since that provision is for infrequently traded

scrips. Citing the relevant portion of the public announcement made by the acquirers dated November 12, 2009 it was emphasized by the learned

counsel that the maximum offer price applicable at that time was Rs. 100.15 and the acquirers had offered Rs. 101/- by rounding of the same.

Thereafter though the acquirer sought to withdraw the open offer which was finally dismissed by the Honâ??ble Supreme Court, the trigger date for

the public announcement / open offer remains the same i.e. November 12, 2009. Therefore as on the trigger date share of GTL was a liquid scrip,

frequently traded on both NSE and BSE and therefore the price arrived at in terms of Sub-Regulation 20(4) @ Rs. 101/- per share was appropriate.

Moreover, relying on the order of the Honâ??ble Supreme Court in the matter of Clariant International Limited & Anr. vs SEBI reported in (2004) 8

SCC 524 the learned counsel for respondent no. 1 submits that shareholders holding securities on the reference date only would be entitled to interest.

This also has been provided in the open offer by giving interest @ of Rs. 60.25 to the original shareholders and Rs. 0.45 to other than original

shareholders. Therefore, the learned counsel submits that the valuation report prepared by the Chartered Accountant which arrived at a value of Rs.

58.30 per share or other valuations done are totally irrelevant to the matter. It was also contended that the document dated December 30, 2017 was

not an offer letter; instead it was a detailed public statement which SEBI had asked the merchant banker to issue because of the eight year gap

between the original public announcement and the open offer to enable the shareholders to be informed about the full background of the matter. The

learned counsel emphasized the table relating to tentative schedule of activities in the Detailed Public Statement issued on December 30, 2017 wherein

the original schedule as per 2009 announcement and the revised schedule as per the Detailed Public Statement are juxtaposed. The learned counsel

for the respondent no. 1 also relied on the order of this Tribunal in the matter of Arun Goenka vs SEBI (Appeal No. 244 of 2014 decided on

14.10.2014) and contended that only shareholders of the Target Company who holds the shares on the trigger date are eligible to get compensated in

terms of interest which was also held in the matter of Clariant International Ltd. (supra).

8. Learned counsel Shri Manish Chhangani, appearing for the acquirer (Respondent No. 4), in addition to supporting the submissions made by the

learned counsel for respondent no. 1 SEBI, submits that Regulation 35(2)(c) of the Takeover Regulations 2011 explicitly states that all public

announcements made under the Takeover Regulations 1997 have to be completed under the 1997 Regulations itself and submits that the regulatory

provisions are very clear and without any ambiguity that Sub-Regulation 20(4) of the Takeover Regulations 1997 and not Sub-Regulation 20(5) is what

is to be complied with in the instant matter and that is what has been implemented. Relying on the Post Offer Report dated June 25, 2018 submitted to

SEBI by the Merchant Banker, the learned counsel submits that the said Post Offer Report also was filed under Sub-Regulation 24(7) of the 1997

Takeover Regulations.

9. Having heard all the parties and after perusing the documents on record we

find no merit in the appeal. The appellant, instead of emphasizing the

relevant facts over-emphasized three valuation reports and the infrequently traded nature of GTL shares in 2018 which has no relevance and sought

interest to all shareholders etc. which is untenable. The crux of the matter is simple; whether the price offered by the acquirers and the interest paid

thereon to certain shareholders are in consonance with the applicable regulatory provisions and Court orders thereon.

10. For convenience we quote Sub Regulation 20(4) of the Takeover Regulation 1997 and Sub Regulation 35(2)(c) of the Takeover Regulations 2011:-

Takeover Regulations 1997

â??Offer price.

20(1) The offer to acquire shares under regulation 10, 11 or 12 shall be made at a price not lower than the price determined as per sub-regulations (4)

and (5).

20(2) â?¦â?¦â?¦.

20(3) â?¦â?¦â?¦.

20(4) For the purposes of sub-regulation (1), the offer price shall be the highest ofâ?

(a) the negotiated price under the agreement referred to in sub-regulation (1) of regulation 14;

(b) price paid by the acquirer or persons acting in concert with him for acquisition, if any, including by way of allotment in a public or rights or

preferential issue during the twenty-six week period prior to the date of public announcement, whichever is higher;

(c) the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the

shares of the company are most frequently traded during the twenty-six weeks or the average of the daily high and low of the prices of the shares as

quoted on the stock exchange where the shares of the company are most frequently traded during the two weeks preceding the date of public

announcement, whichever is higher:

Provided that the requirement of average of the daily high and low of the closing prices of the shares as quoted on the stock exchange where the

shares of the company are most frequently traded during the two weeks preceding the date of public announcement, shall not be applicable in case of

disinvestment of a Public Sector Undertaking.

Explanation.â?"In case of disinvestment of a Public Sector Undertaking, the relevant date for the calculation of the average of the weekly prices of

the shares of the Public Sector Undertaking, as quoted on the stock exchange where its shares are most frequently traded, shall be the date preceding

the date when the Central Government or the State Government opens the financial bid.â??

Takeover Regulations 2011

â??35(2) Notwithstanding such repeal, â?

(a) â?¦â?¦â?¦â?¦

(b) â?¦â?¦â?¦â?¦.

(c) any open offer for which a public announcement has been made under the repealed regulations shall be required to be continued and completed

under the repealed regulations.â??

11. Clearly for frequently traded shares Sub Regulation 20(4) is applicable and if an open offer has been made under Takeover Regulations 1997 that

process has to be completed under the same Regulations as is explicitly stated in Sub Regulation 35(2)(c) of the new Takeover Regulations 2011.

Here, it is an undisputed fact that the trigger for public announcement / open offer came on November 12, 2009 and consequently public

announcement was made. Though the open offer was delayed on account of the subsequent stand (for recalling the public announcement) taken by

the acquirers the original date of trigger does not change. The valuation done as per the applicable methodology under Regulation 20(4) is not

questioned; what is questioned is the valuation in 2018 which is not applicable in the matter. When the offer price of Rs. 101/- per share was made

based on the price given by the acquirers in 2009 what is implemented here is the same price. Moreover, since the market price captures the intrinsic

value of the GTL shares including GTLâ??s properties, assets etc. in 2009 and since it was a frequently traded share rightly no valuation was

necessary as per the applicable Regulations.

12. It is also an undisputed fact that interest to original shareholders who tendered their shares have been given by the acquirers @ Rs. 60.25 per

share and for other shareholders @ Rs. 0.45. Here, we quote the relevant paragraphs from the order in Clariant International Ltd. & Another

(supra) where the Honâ??ble Supreme Court held:-

â??56. 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.

88. 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.â??

13. In the light of the aforesaid reasons, we find no merit in the submissions made by the appellant regarding either the offer price or the entitlement of

all shareholders for receiving interest.

14. For all the above reasons we find no merit in the appeal and the same is dismissed with no order on costs.