(2020) 07 SEBI CK 0029

In the Securities Appellate Tribunal Mumbai

Case No : Miscellaneous Application No. 172 Of 2020, Appeal No. 149 Of 2020

Aurora UK Bidco Limited APPELLANT

Vs

Securities & Exchange Board Of India RESPONDENT

Date of Decision : 17-07-2020

Acts Referred:

Securities And Exchange Board Of India (Substantial Acquisition Of Shares And Takeover) Regulations, 2011 — Regulation 3(1), 4, 8(4), 5(1), 8(16), 14(1), 16
Securities And Exchange Board Of India (Substantial Acquisition Of Shares And Takeovers) Regulations, 1997 — Regulation 10, 20(5)

Citation : (2020) 07 SEBI CK 0029

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

Bench : Full Bench

Advocate : Janak Dwarkadas, Indranil Deshmukh, Ruetveij Pandya, Dipti Baja, Samhita Mehra, Pradeep Sancheti, Vivek Shah, Abhiraj Arora

Final Decision : Dismissed

Judgement

M.T. Joshi, J

1. Aggrieved by the decision of Securities and Exchange Board of India (hereinafter referred to as â??SEBIâ?) dated 1t4h February, 2020 appointing

an independent Chartered Accountant in terms of Regulation 8(16) of the Securities and Exchange Board of India (Substantial Acquisition of Shares

and Takeover) Regulations, 2011 (hereinafter referred to as â??SAST Regulationsâ?) for computation of offer price in accordance with Regulation

8(4) of the SAST Regulations the present appeal is filed.

2. Facts leading to the present appeal are as under:-

a. The Appellant is a private limited company subject to the jurisdiction of laws of Jersey, Channel Islands. On November 12, 2019 it entered into a

Share Purchase Agreement (hereinafter referred to as â??SPAâ?) with various entities as detailed in the appeal. This transaction involved multiple

jurisdictions across the world which includes subsidiaries of Accelya Topco Ltd. (hereinafter referred to as â??TOPCOâ?). This resulted into

acquiring 74.66% of voting share capital of Accelya Solutions India Limited in India (â??Target Companyâ?). It triggered an open offer under

Regulations 3(1) and 4 read with Regulation 5(1) of the SAST Regulations. The Appellant was therefore required to make the mandatory open offer

to acquire at least 26% of the outstanding equity share capital of the target company from its public shareholders at a price as determined according to

the provisions of the SEBI SAST Regulations. The equity shares of the Target Company are not â??frequently traded sharesâ? on the Stock

Exchanges, therefore, the Appellant was required to make an open offer at a price which would be the fair price of the equity shares of the Target

Company, as determined under Regulation 8(4) of the SAST Regulations.

b. Regulation 8(4) of the SAST Regulations read as under:

â??.....the offer price shall be the fair price of shares of the target company to be determined by the acquirer and the manager to the open offer

taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation

of shares of such companies.â??

c. Regulation 8(16) of the SAST Regulations reads as under:-

16. ""For purposes of clause (e) of sub-regulation (2) and sub-regulation (4), the Board may, at the expense of the acquirer, require valuation of the

shares by an independent merchant banker other than the manager to the open offer or an independent chartered accountant in practice having a

minimum experience of ten years.â??

d. As per the Regulations, the Manager of the Appellant appointed two independent Chartered Accountants, MSKA & Associates and Bansi S.

Mehta & Co. to determine the fair price of the equity shares of the Target Company in accordance with Regulation 8(4) of the SEBI SAST

Regulations. While MSKA & Associates determined the fair price at Rs.944.19, Bansi S. Mehta & Co. determined the same at Rs.939.07. In these

circumstances, the Appellant accepted the higher price of the two valuation and as per the Regulations arrived at Rs.944.19/- as offer price for the open offer. Thereafter public announcement as required by the SAST Regulations was made. Some complaints were received upon publication of the

public statement. Those complaints were forwarded to the Manager. Some shareholders complained that the price should be in the range of Rs.1250/-

to Rs.3,400/-. They applied their own methodologies. The Manager dealt with those complaints. Ultimately a draft letter of offer as per Regulation 16

of the SAST Regulations was filed with Respondent SEBI on t7h January, 2020. Thereafter Respondent SEBI sought some clarifications and

information from the Manager. After getting detailed response from the Manager, Respondent SEBI conveyed its impugned decision dated 14th

February, 2020 to the Manager. It conveyed the decision of appointing M/s. Varma & Varma for computing the fair price of the equity shares of the

Target Company in accordance with the parameters specified under SAST Regulations.

Appellant was directed to pay a fees of Rs 300,000/- to the valuer. Aggrieved by the said communication the present appeal is preferred.

e. The grounds in the appeal memo, submissions made by Shri Janak Dwarkadas, learned Senior Counsel for the Appellant and the written

submissions together raise the following issues.

i. That merely because SEBI has power to appoint the valuer does not mean that the valuer can be appointed without assigning any reasons. The

discretion has to be exercised judiciously. The direction to appoint the valuer at the cost of the Appellant results in incurring civil liability. In this

circumstance the laconic order without assigning any reason is liable to be set aside.

ii. On the other hand, Mr. Pradeep Sancheti, learned Senior Counsel for the Respondent submitted that merely appointing a third valuer in order to find

out fair price of the infrequently traded equity shares does not involve any fact finding jurisdiction of SEBI. It is, therefore, an administrative order

against which no appeal lies. He alternatively submitted that the material available with the Respondent SEBI supports that there was a contest

regarding fair price of this infrequently traded equity shares. Therefore relying on the decision of this Tribunal in the case of Tenneco Inc., Appeal

no.108 of 2019 decided on 16th May, 2019 he submits that elaborate procedure of hearing while appointing the independent valuer by Respondent

SEBI is not required and he therefore wanted that the appeal be dismissed.

3. Considering the submissions of Mr. Pradeep Sancheti, learned Senior Counsel, copy of the office note resulting into the impugned decision was

called for and the same has been provided to us.

4. We have heard Mr. Janak Dwarkadas, Senior Advocate with Mr. Indranil Deshmukh, Mr. Ruetveij Pandya, Ms. Dipti Bajaj and Ms. Samhita

Mehra, Advocates for the Appellant and Mr Pradeep Sancheti, Senior Advocate with Mr. Vivek Shah and Mr. Abhiraj Arora, Advocates for the

Respondent. Upon hearing both the sides, in our view, the appeal is liable to be dismissed for the following reasons.

Reasons

5. As regards the issue of maintainability of the appeal number of judgements were relied upon by the Appellant in the written submissions. It is now

well established that a communication/decision conveyed to a person is in the nature of a quasi judicial order if it affects the right of the party. The

authority who issues such communication must have a legal authority which determines the question affecting the rights of the party. [(1) National

Securities Depository Limited v. Securities and Exchange Board of India (2017) 5 SCC 51;7 (2) Rajesh Toshniwal v. Securities and Appellate Board

of India 2012 SCC OnLine SAT 84.]

6. The impugned decision conveys to the Manager of the Appellant the decision of the Respondent to appoint an independent valuer at the cost of the

Appellant. This decision is based on the power drawn by Respondent SEBI from Regulations 8(16) of the SAST Regulation which provides that the

Respondent SEBI â??mayâ? exercise the said discretion. The impugned order directs the Appellant to bear the expenses of the valuation.

Considering all these facts, in our view, the impugned decision cannot be called as merely an administrative decision but a quasi-judicial decision,

amenable to the appellate jurisdiction of this Tribunal.

7. This takes us to find out the validity of the decision taken by Respondent SEBI. In this regard, Mr. Janak Dwarkadas, learned Senior Counsel

heavily relied on the decision of the Honâ?ble Supreme Court in the case of G.L. Sultania v. Securities and Exchange Board of India (2007) 5 SCC

133.

As this decision is based on the provisions of Regulation 20(5) of the then SAST Regulations 1997, which is substantially similar to the present

provisions of Regulation 8(16) it is necessary to advert to the said Regulation which runs as under :-

â??(5) Where the shares of the target company are infrequently traded, the offer price shall be determined by the acquirer and the merchant banker

taking into account the following factors:

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

(b) the highest price paid by the acquirer or persons acting in concert with him for acquisitions, 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;

(c) other parameters including return on networth, book value of the shares of the target company, earning per share, price earning multiple vis-a-vis

the industry average:

Provided that where considered necessary, the Board may require valuation of such infrequently traded shares by an independent merchant banker

(other than the manager to the offer) or an independent chartered accountant of minimum ten years standing or a public financial institution.â??

8. The facts of the case in G. Sultania cited supra, would show that some members of one Somany family pursuant to a family settlement transferred

around 40% of the equity share capital of the Target Company therein to other brothers. This triggered the provisions of the SAST Regulations, 1997

which obliged one of the brother i.e. Respondent no.3 therein to make a public announcement to acquire the shares in accordance with the SAST

Regulations 1997. The shares of the Company were infrequently traded. In these circumstances, one Chartered Accountant was appointed to value

the shares. The said Chartered Accountant determined the price of each shares of the Target Company at Rs.43.02/-. The Appellant being

shareholder of the Company raised objection with SEBI about this valuation. Accordingly, Respondent SEBI appointed M/s. Patni and Company to

value the shares under the provisions of then prevailing Regulation 10 and Regulation 20(5) of the SAST Regulations, 1997. This valuer valued the

shares at the rate of Rs.63.50 per share by one method and Rs.64.17 by another method. However, Somany brothers were not satisfied with the

higher valuation. Therefore again another valuer namely M/s. T.R. Chadda and Company was appointed by SEBI to value the shares of the Target

Company. It valued each share of the Target Company at Rs.60.04. Appellant G.L.Sultania still dissatisfied with this valuation complained to SEBI

and enclosed copies of two valuation report of two other approved valuers which valued the shares of the Target Company at Rs.408 and Rs.590 per

share respectively. SEBI however accepted the valuation report of M/s. Patni and Company as detailed supra. Appellant G.L. Sultania challenged the

order of SEBI before this Tribunal. The same was dismissed by the Tribunal. The Honâ?ble Supreme Court dismissed the appeal challenging the said

order.

9. Mr. Janak Dwarkadas, learned Senior Counsel heavily placed reliance on the observation of the Honâ?ble Supreme Court made in paragraph

no.41. In this paragraph the Honâ??ble Supreme has taken the survey of the Regulation 20(5) of 1997, which reads as under:

â??41. The question there arises as to who shall determine whether the valuation of shares is reasonable and acceptable. Undoubtedly Regulation

20(5) mandates that the offer price shall be determined by the acquirer and the merchant banker taking into account the factors mentioned therein.

The Board as the regulator is not bound to accept the offer price which is required to be incorporated in the public offer, if it suspects that the offer

price does not truly represent the fair value of the shares determined in accordance with Regulation 20(5). It has therefore been provided that if

considered necessary the Board may require valuation of such shares by an independent merchant banker. The purpose is only to ensure that the

valuation arrived at is a fair valuation after taking into consideration all the enumerated factors in Regulation 20(5). In doing so the Board has to act

prudently and within the limits of its jurisdiction. It cannot object to the price offered by the acquirer unless it has reasons to suspect that the price

offered has not been determined fairly taking into account the enumerated factors. In case of doubt, it may require valuation of the shares by an

independent merchant banker or chartered accountant. If the valuation determined by the acquirer or his merchant banker agrees with the valuation of

the Board's valuer, more or less, then the Board has no option but to accept the offer price of the acquirer. It may suggest changes in the draft letter

of offer, but it is doubtful if it can compel the acquirer to improve his offer even if the offer price is found to be fairly arrived at after due consideration

of the matters enumerated in the Regulation. We do not wish to express any considered opinion in this regard, because that question does not arise in

the facts of this case. The acquirer in the instant case did not challenge, rather accepted the suggestion of the Board to incorporate in his offer

document the offer price based on the valuation report of M/s. Patni and Company which was the highest.â??

10. Relying on the above observation Mr. Dwarkadas submits that the Respondent SEBI can direct for appointment of independent valuer only when

it suspects that the offer price does not truly represent the fair value of the shares. The Respondent SEBI has to act prudently and within the limits of

its jurisdiction. Mr. Janak Dwarkadas, learned Senior Counsel further submitted that merely because some shareholders had complained to SEBI

cannot give rise to a suspicion that offer price arrived by the two independent valuers does not represent the fair price of the shares. He further

submits that the impugned decision does not even show application of mind. It is merely a communication that a third valuer is appointed by SEBI and

the Appellant should pay its fee. He submits that this laconic order cannot be called as a decision of a quasi-judicial Authority and therefore is liable to

be set aside.

11. However, the facts of the case of G. Sultania as detailed supra would show that the grievance raised by the shareholders had caused Respondent

SEBI to appoint an independent valuer as per the then Regulation 20(5) of the Takeover Regulations 1997. No further material regarding the suspicion

was there on record. Even the issue of parameters of jurisdiction of SEBI in appointing an independent valuer did not arise in the case as explicitly

expressed by the Honâ?ble Supreme Court as above. On the other hand as regards the issue in the said case, in para no.45 the Honâ?ble Supreme

Court held as under:-

â??45. We are of the considered view that the submission urged by the appellants is not tenable. There is nothing in the Regulations which requires

the Board to pass a reasoned order for all it does as a regulator. Being a regulator the Board has to take various steps, issue directions from time to time and pass appropriate orders. While considering the offer price to be incorporated in the letter of offer it must no doubt apply its mind to the offer

price proposed to be incorporated in the letter of offer and the basis thereof. If it finds that the offer price is reasonable and the valuation report is

satisfactory it may approve the offer price to be incorporated in the letter of offer.â?? (emphasis supplied)

12. Further, in para 47 the Honâ??ble Supreme Court taking into consideration the provisions of SAST Regulation, 1997 held as under:-

â??47. It cannot be lost sight of that the scheme of the Regulations is to permit an intending acquirer to make his offer to the shareholders whose

shares are sought to be acquired. Despite the regulatory powers of the Board, the offer still remains that of the acquirer and not of the Board. The

Board has only to be satisfied that the offer made is reasonable and fair and in the interest of the shareholders. In case of doubt it may seek the

opinion of another expert valuer which impliedly supports the contention that it is not expected to act as an expert valuer.â??

13. Thus, the facts in G.L. Sultania as detailed supra are akin to the facts involved in the present case. We have gone through the copy of the office

note supplied to us. It could be found that the grievances of the shareholders has made SEBI to take the impugned decision to appoint another

independent valuer. The appellant was already made aware of those grievances. The impugned decision/communication cannot be faulted with merely

on the grounds that the reasons are not explicitly recorded in the decision. In the case of G.L. Sultania as noted supra the Honâ?ble Supreme Court

also noted that a reasoned order is not required.

We also find that the Respondent SEBI has un-necessarily adopted a rigid stand of raising objection to share office note with the appellant, on the

ground of confidentiality. As already noted by us, the office note does not contain any confidential information, but merely the grievances of certain

stakeholders about valuation of the equity shares, already known to the appellant. Respondent SEBI as a responsible public body functioning as quasi

judicial and regulating authority is expected to be as much transparent in itâ?s actions as far as possible albeit subject to certain exceptions like

confidentiality of investigation, privacy of third party etc. Be that as it may, the impugned order however cannot be faulted for these reasons.

14. In the case of Tenneco Inc. cited supra, the Appellant had challenged the appointment of an independent valuer (Haribhakti) in the similar

circumstances and also acceptance of the report of the said valuer by SEBI. In the said case also G.L. Sultania was relied on by the Appellant. This

Tribunal vide para no.10 held as under:-

â??10. In our view, though elaborate procedure of hearing the acquirer before appointing independent Chartered Accountant by respondent SEBI is

not required, the respondent SEBI ought to have given an opportunity to the appellant before revising the offer price by providing material on the basis

of which Haribhakti had arrived at different valuation. Then respondent SEBI should have taken decision by recording brief reasons upon

consideration of the objections, if any, received from the appellant to the valuation arrived at by Haribhakti.â??

15. In the result we find that the appeal is devoid of merit. Hence the following order :-

The appeal as well as the Misc. Application is hereby dismissed with no order as to costs.

16. Before parting, we find that a number of appeals are being filed before the Tribunal praying for the quashing of the communication to appoint a

Chartered Accountant under Regulation 8(16) of the SAST Regulations on the ground of non application of mind or that no reasoned order was

passed. Whereas the Supreme Court in Sultaniaâ?s case (supra) has held that a regulator is not required to give a reasoned order, we observe that a

regulator while communicating its decision to appoint a Chartered Accountant under Regulion 8(16) of the SAST Regulations may indicate the

application of mind while considering the issue at hand.

17. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor

a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Presiding Officer on

behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally

signed copy sent by fax and/or email.

