

SUPREME COURT OF INDIA

(1) G.L. Sultania and Another; (2) H.L. Somany and Others; (3) R.K. Somany and Others

Vs

Securities and Exchange Board of India and Others

(B. P. Singh and Altamas Kabir, JJ)

16.05.2007

JUDGMENT

B. P. SINGH, J.

1. This batch of appeals has been preferred by the appellants under Section 15Z of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the 'Act') impugning the common judgment and order of the Securities Appellate Tribunal, Mumbai dated December 8, 2005 disposing of eleven appeals before it. While Civil Appeal No.1672/2006 arises out of Appeal Nos. 134 and 138 of 2005; Civil Appeal No.1704/2006 has been filed against Appeal Nos. 137, 159, 160, 161 and 164 of 2005 and Civil Appeal No.1740 of 2006 has been filed against Appeal Nos. 158, 162, 163 and 139 of 2005. The Appellate Tribunal by its impugned judgment and order dismissed all the appeals.

2. The grievance of the appellants before the Securities Appellate Tribunal was that the Securities and Exchange Board (hereinafter referred to as the 'Board') as well as the Merchant Banker had not properly valued the shares of the target company in accordance with the parameters laid down in Regulation 20(5) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the 'Takeover Code'). Respondent No.3, who is the real contesting respondent, on the other hand contended before the Appellate Tribunal that the valuation of shares was done having regard to the parameters laid down under Regulation 20(5) of the Takeover Code and the Board had taken all necessary precautions to safeguard the interest of the shareholders so as to ensure payment of best price for the shares to be sold by them. It was further contended that the shares were valued by three reputed firms of valuers and the Board ultimately approved the highest price per share determined by the firm of valuers

appointed by the Board namely, M/s. Patni and Company.

3. Learned counsel for the appellants argued at length in his effort to satisfy us that the price approved by the Board for incorporation in public offer under the provisions of the Takeover Code was not a fair price and that in reaching that valuation the valuer had committed mistakes in as much as it had not properly appreciated the requirements of Regulation 20 (5) of the Takeover Code. On the other hand counsel for the respondents with equal vehemence supported the conclusion reached by the Appellate Tribunal and submitted that the valuers had taken into account the parameters laid down under Regulation 20(5) of the Takeover Code and a valuation so arrived at could not be successfully challenged. It was also submitted that valuation of shares is a technical matter and this job must be entrusted to the specialists in the field. Interference by the Court must be limited to those cases where it is shown that while working out the valuation the valuer completely lost sight of the requirements of Regulation 20 (5) of the Takeover Code or committed some such grave error of law or principle which necessitated Court's interference and resultantly necessitated a fresh valuation in accordance with the provisions of the Takeover Code. Learned senior counsel submitted that in the facts of this case there was no justification for not accepting the valuation suggested by M/s. Patni and Company who had been appointed for the purpose by the Board.

4. Though the issue involved in the appeals lies within a narrow compass, in view of the submissions vehemently urged on either side it becomes necessary to recapitulate the essential facts which provide the background in which the dispute has arisen. These facts are more or less admitted by the parties.

5. The acquirers are Respondent Nos. 2 and 3 herein namely, ACE Glass Containers Ltd., and Shri C.K. Somany respectively. Respondent No.4 is the target company Hindustan National Glass and Industries Ltd.

6. It is not in dispute that the Somany family comprising of four brothers managed several companies including the target company. All the brothers held equal shares in the target company and the public share-holding in the target company was negligible, that is less than 0.30%. The shares of the target company are infrequently traded. In the year 1994 about 40% of the equity capital of the target company was transferred to Shri C.K. Somany pursuant to a family settlement arrived at between the brothers. According to the appellants on August 5, 1994 there was an agreement between Shri C.K. Somany, Respondent No.3 and his brothers for the sale of the entire balance shareholding in the target company held by his brothers to Respondent No.3, Shri C.K. Somany at the price of Rs.267/- per share. This, however, is disputed by Respondent No.3, Shri C.K. Somany. In this background disputes arose between the parties and the brothers of Respondent No.3, Shri C.K. Somany filed Civil Suit No.35 of 1997 before the Calcutta High Court against Respondent Nos.2 and 3 and others for specific performance of the agreement dated August 5, 1994. In that suit an ex-parte order of injunction was passed restraining Respondent No.3 Shri C.K. Somany from selling the shares obtained from the other brothers in the target company. In his written statement Respondent No.3 Shri C.K. Somany made a counter claim and prayed for a mandatory injunction directing Shri R.K. Somany to sell 3, 40, 000 shares of the target company to him @ Rs.15 per share, and the remaining two brothers to sell their shareholding in the target company @ Rs.40 per share which was the prevailing price on the date of the filing of the suit.

7. During the pendency of the Suit Shri S.K. Somany one of the brothers of Respondent No.3 offered to sell 7.30% share held by him in the target company on the basis of price mutually acceptable to the parties. In view of the agreement arrived at between the two brothers, Respondent No.3 Shri C.K. Somany moved the Calcutta High Court for modification of the interim order thereby permitting him to acquire 7.30% shares of Shri S.K. Somany in the target company. This triggered the provisions of the Takeover Code which obliged Respondent No.3, Shri C.K. Somany to make a public announcement to acquire shares in accordance with the Takeover Code. In accordance with Regulation 16 of the Takeover Code he was obliged inter-alia to include in the public announcement the minimum offer price for each fully paid up or partly paid up share. The application made by Respondent No.3, Shri C.K.Somany for exemption for making an open offer was rejected by the Board and he was directed to comply with the requirements of the Takeover Code particularly those contained in Chapter 3 thereof. A Memorandum of Understanding had been recorded on October 7, 2002 between Respondent No.3, Shri C.K. Somany and his brother Shri S.K. Somany to acquire 7.30% of the shares of the latter in the target company @ Rs.40 per share. However, in view of the directions of the Board, Respondent No.3 was required to make an open offer to all the share-holders of the target company including his brothers.

8. The public announcement was made by respondent Nos.2 and 3 herein to acquire the balance 19.19% share of the target company held by the minority shareholders on November 30, 2003. The offer price proposed to be mentioned in the public announcement was Rs.40 per share as determined by the Merchant Banker namely, M/s. UTI Bank on the basis of the MOU dated October 7, 2002 between Respondent No.3 Shri C.K. Somany and his brother Shri S.K. Somany for sale of the shares of the target company @ Rs.40 per share.

9. The appellants complained to the Board that the price offered for the shares in the public announcement was very low and had not been determined in accordance with the parameters laid down in Regulation 20(5) of the Takeover Code. Since the price offered by the acquirers respondents 2 and 3 as determined by the Merchant Banker was not acceptable to the appellants, respondents 2 and 3 in consultation with the Merchant Banker namely, M/s. UTI Bank appointed M/s. Deloitte Haskin and Sells, a firm of Chartered Accountants, to value the shares of the target company. The aforesaid firm of valuers determined the price of each share of the target company as Rs.43.02 Ps. The appellants still persisted in their objection that the value of each share determined by the aforesaid firm of valuers was not correct.

10. Before approving the draft letter of offer, and having regard to the objections raised by the appellants, the Board appointed M/s. Patni & Company to value the shares. The aforesaid valuers namely, M/s. Patni & Company valued the shares of the target company at the rate of Rs.63.50 per share by one method and Rs.64.17 by another method which had the approval of this Court in Hindustan Lever Employees' Union vs. Hindustan Lever Ltd. and Others : ♦ 1.

11. Respondent Nos. 2 and 3 were not satisfied with the higher valuation of M/s. Patni and Company and, therefore, the Merchant Banker wrote to the Board objecting to the same on March 9, 2005. The Board permitted the Merchant Banker to get the shares valued by any other Chartered Accountant. In these circumstances, the Merchant Bankers in consultation with the Board appointed

M/s. T.R. Chadha and Company to value the shares of the target company. According to the report of M/s. T.R. Chadha & Company submitted on April 13, 2005 the fair market value of each share of the target company was Rs.60.04.

12. From the facts stated above it will appear that the shares of the target company have been valued by three firms of Chartered Accountants, namely, M/s. Deloitte Haskin and Sells who valued the shares of the target company at Rs.43.02 per share, M/s. Patni and Company who valued each share of the target company at Rs.64.17 and M/s. Chadha and Company who valued each share of the target company at Rs.60.04.

13. It may be noticed at this stage that by letters dated March 11, 2004 and June 11, 2004 appellant G.L. Sultania had complained to the Board against the valuation of shares by the Merchant Banker and while doing so he had enclosed copies of two valuation reports of M/s. Anand K. Associates and M/s. Sanjay Bajoria and Associates valuing the shares of the target company at much higher rates namely, Rs.408/- and Rs.590/- per share.

14. In the circumstances set forth above the Board accepted the valuation report of M/s. Patni and Company and by its order of August 19, 2005 approved the draft letter of offer incorporating the revised offer including interest. Certain other matters were also incorporated in the original public announcement as directed and a corrigendum was issued accordingly. The offer was opened on August 31, 2005 and closed on September 19, 2005. The appellants tendered the shares without prejudice to their rights and contentions but challenged the order of the Board before the Appellate Tribunal.

15. The Appellate Tribunal by its order of December 8, 2005 dismissed the appeals preferred before it. Having noticed the background facts in which the controversy arose, the appellate Tribunal observed that the valuation of shares could be impeached on the ground of fraud, mistake or miscarriage of justice. It could also be interfered with if there was an apparent or arithmetical error or the valuers took into account something, which ought not to have been taken into account or interpreted the regulations wrongly, or proceeded on some erroneous principles. The interest of the shareholders had to be protected. The appellate Tribunal could also be asked to interfere if it was found that the offer price arrived at was so extravagantly high or so inadequately low that one could infer that the valuer must have committed an error in working out the offer price for the public offer. The appellate Tribunal, however, noticed that there was no allegation of mala fide either against the Board in approving the public offer or against the three valuers whose reports were considered by the Board. Since the shares were not traded frequently the valuers had to keep in mind the principles incorporated in Regulation 20 (5) of the Takeover Code. It noticed that if only clauses (a) and (b) of Regulation 20(5) were to be considered, the only negotiated price under (a) being Rs.40/- per share the minimum offer price to be incorporated in the public offer could be Rs.40/- per share. However, the merchant bankers as well as the valuers also considered the matters which were relevant under Regulation 20(5)(c) of the Takeover Code. After taking into account all relevant considerations M/s. Deloitte had valued each share at Rs.43/- while M/s. Patni and Company valued at Rs.64.17 ps. per share and M/s. Chadha and Co. at Rs.60.04 per share. There is no dispute that the offer price incorporated in the public offer is more than what it could be under Regulation 20(5)(a) and (b) of the Takeover Code. The only question, therefore, which fell for

consideration was whether the shares had been valued by the valuers keeping in view the other parameters enumerated in clause (c) of Regulation 20(5).

16. It was argued before the appellate Tribunal that neither the Board nor the Merchant Banker applied their mind in determining the fair market value of the shares which resulted in gross under-valuation of the shares. It was also argued that the principles laid down in Hindustan Lever Employees' Union vs. Hindustan Lever Limited and others : ♦ 1 did not apply to the facts of this case as that was a case of amalgamation whereas in the instant case Regulation 20(5) had to be strictly complied with. An argument was also advanced that since M/s. Ace Glass Containers Ltd. was a subsidiary of the target company its assets should also have been taken into account while valuing the shares of the target company. It was the case of the appellants that the total assets of the subsidiary company should be added to the total assets of the target company, which was the holding company, and the value of the shares of the target company be worked out on that basis. The appellants also contended that the valuation report of Patni & Co. did not take into account the return of net worth, the book value of the shares, or the earning per share. If these factors were considered the value of each share would have been more than Rs.200/- each.

17. The appellate Tribunal noticed the fact that the Board had exercised its discretion under the proviso to sub-regulation (5) of Regulation 20 by requiring the shares to be valued by an independent merchant banker or an independent Chartered Accountant of minimum 10 years' standing or a public financial institution. Since the appellants objected to the valuation report of M/s. Deloitte the Board exercised its discretion and appointed M/s. Patni & Co. to go into the matter and submit a valuation report.

18. The appellate Tribunal held that M/s. Ace Glass Containers Ltd. was a sick company under the BIFR. The valuers had taken into account the net value of its shares. The submission that the entire assets of its subsidiary should have been taken into account in working out the value of the shares of the target company was untenable. It further held that the said M/s. Ace Glass Containers Ltd. was not a subsidiary of the Target Company within the meaning of that term in Section 4(1) of the Companies Act, 1956 since the target company did not own more than = in nominal value of the equity share capital of M/s. Ace Glass Containers Ltd. It also held that the Target Company did not control the composition of the Board of Directors of M/s. Ace Glass Containers Ltd.. Moreover even M/s. Bajoria, whose valuation report had been relied upon by the appellants, proceeded on the basis that M/s. Ace Glass Containers Ltd. was not a subsidiary company of the target company. This position was also accepted by Shri Sultania, one of the appellants before it. The appellate Tribunal held that there was nothing on record on the basis of which it could be reasonably concluded that the valuation reports of the three valuers suffered from the vice of perversity or gross error.

19. Considering the submission that M/s. Patni & Co. had not taken into account the net worth of the target company, it held that return on net worth was only indicative of the profitability of the company and was not in itself a method of share valuation. It was, however, one of the factors to be considered in evaluation. M/s. Patni & Co. applying the ratio in Hindustan Lever Ltd. (supra) had calculated the yield value and in paragraph 3.2.1 worked out the return on net worth for the year 2001-2002 to be 5.38 % taking into account the book value as the basis for valuation.

20. So far as the net asset value was concerned it held that the accounting law mandated exclusion of revaluation from computation of net worth. Therefore, the contention that revaluation of resources ought to have been added to the net worth was rejected as untenable. It was held that in the instant case the calculation was done in accordance with the provisions of the Companies Act, 1956; Sick Industrial Companies (Special Provision) Act, 1956 and the SEBI (Disclosure and Investor Protection Guidelines), 1999. It also rejected the contention that the earning per share had not been worked out by the valuer and in this connection reference was made to paragraph 3.3.2 wherein the earning per share had been calculated. Regarding adopting 15 % as the capitalization ratio the appellate Tribunal held that the CCI Guidelines which were adopted by the Government of India and the Controller of Capital Issues had been taken into account and even though the SEBI had abolished the CCI guidelines, the principles and the norms enunciated therein could be taken into account.

21. The appellate Tribunal did not accept the valuation reports of M/s. Agarwal and M/s. Bajoria produced by the appellants which valued the shares at abnormally high rates of Rs. 408/- and Rs.590/- per share. Apart from other reasons, the very fact that there was such a wide disparity in valuation in the aforesaid two reports, was itself a sufficient ground to reject them.

22. In view of these findings the appellate Tribunal held that the Board had acted strictly in terms of the Takeover Code and approved the public offer. There was no ground, therefore, to assail the approval to the public offer. The valuation of shares by M/s. Patni & Co. was arrived at after following the norms laid down in Regulation 20(5) of the Takeover Code and, therefore, it could not be characterized as either erroneous, arbitrary or unreasonable.

23. Aggrieved by the order of the appellate Tribunal the appellants have filed the instant appeals under Section 15(Z) of the Securities and Exchange Board of India Act, 1992. The appeal to this Court against the decision or the order of the Securities Appellate Tribunal may be entertained on any question of law arising out of such order.

24. Counsel for the appellants submitted that questions of law do arise for consideration of this Court. He referred to several decisions of this Court and submitted that the Board failed to appreciate that the valuation report of Patni & Co. failed to take into account all the relevant factors enumerated in Section 20(5) of the Take Over Code, in particular he referred to the factors mentioned in clause) of sub-regulation (5) of Regulation 20 and submitted that for failure to properly appreciate those factors the Board ought to have rejected the report of the aforesaid valuer.

25. It cannot be denied that the Board under the Act is a regulatory authority charged with the duty 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. The Takeover regulations have been framed with a view to provide transparency in transfers arising out of substantial acquisition of shares and takeovers. The object is to bring about fairness in such transactions as also to protect the interests of the investors in securities. In the Takeover Code there are provisions which are intended to protect the interests of small shareholders so that in any substantial acquisition of shares they get a fair price

for the shares transferred by them. The entire scheme designed for this purpose, including the making of a public offer as also a counter offer, is to protect the interests of the investors, particularly the smaller ones who run the risk of getting an unfair deal in such transactions. Ultimately the entire exercise is undertaken under the regulatory eye of the Board with a view to ensure fairness to the shareholders of the company. Therefore, when a public offer made under the Takeover Code is challenged on the ground that the shares had not been properly valued and the price offered in the public offer document does not represent the fair price of the share in question, the Court must examine whether the provisions of the Takeover Code have been scrupulously observed, and whether the Board as the regulatory authority has exercised its authority and discretion in a proper manner so as to ensure fairness to the shareholders. At the same time one cannot lose sight of the fact that a public offer made by a person intending to acquire substantial shares in a company is a commercial venture of acquisition of shares, but the law steps in obliging him to offer a fair price for the shares which the shareholders may part with in response to the statutory public offer.

26. We may notice some of the decisions cited at the Bar by counsel for the parties on the question of scope of interference by this Court in such appeals.

27. In *M/s. S.C. Cambatta and Co. Private Limited, Bombay vs Commissioner of Excess Profits Tax, Bombay* : $\diamond = \diamond$, a question arose in connection with the valuation of the goodwill. This Court observed that the goodwill of the business depends on a variety of circumstances or a combination of them. The location, the service, the standing of the business, the honesty of those who run it, and the lack of competition and many other factors go individually or together to make up the goodwill, though locality always plays a considerable part. At the same time, locality is not everything. In the case of a theatre or restaurant, what is catered, how the service is run and what the competition is, contribute also to the goodwill. In that case a question arose whether the goodwill of the company in question was calculated in accordance with law. This, the Court observed was a question of law. It was found that the Tribunal had taken into account only the value of the lease hold of the site to the subsidiary company, and rejected the other considerations which go to make up the goodwill of the business. This Court concluded that it was manifest that the matter of goodwill needed to be considered in a much broader way than what the Tribunal did. A question of law did arise in the case. It will thus appear that this Court held that a question of law did arise for consideration if in valuing the goodwill only one factor was considered and other ignored i.e. all relevant factors were not considered. The question was whether the goodwill was calculated in accordance with law.

28. In the case of *Commissioner of Gift Tax, Gujarat vs. Executors and Trustees of the Estate of Late Shri Ambalal Sarabhai, Ahmedabad* : \diamond shares in a private limited company not quoted on the stock exchange were gifted.. In valuing the shares the High Court adopted the break up value method for determination of the value of shares. It was contended that the profit earning method was more appropriate in the facts of the case. In this context the Court observed :-

"The correct principle of valuation applicable to a given case is a question of law. The parties can agree upon a principle permissible under and recognized by law. If two or more alternative principles are equally valid and available, it might be permissible for the parties to agree upon one

of the alternative modes of valuation in preference to another. In this case, the revenue cannot be said to be precluded from urging the correct legal position. In the ultimate analysis, it requires to be held that the view of the High Court as to the principle of valuation in determining the value of the kind of shares concerned in this case cannot be held to be correct."

This decision is clearly an authority for the proposition that the correct principles of valuation applicable to a given case is a question of law.

29. *Bharat Hari Singhania and Ors. Vs. Commissioner of Wealth Tax (Central) and Ors.* : ¶ 5 was a case which arose under the Wealth Tax Rules. The aforesaid rules provided only one method for assessing market value of unquoted equity shares namely, the break up method. In this context it was observed that where a method of valuation is prescribed by the rules, then notwithstanding the fact that there may be several methods of valuing an asset, and even assuming that there was another method which was more appropriate, still the method chosen by the rules, which was also one of the recognized methods, must be adopted. This was a case of determination of market value of unquoted equity shares.

30. Reliance is placed on the decision of this Court in *Dr. Renuka Datla (Mrs.) Vs. Solvay Pharmaceuticals B.V. and others* ¶ for the proposition that even where finality attaches to the decision of the valuer, the Court could still intervene if the valuation was made on a fundamentally erroneous basis, or a patent mistake had been committed by the valuer, or that the valuation was vitiated by a demonstrably wrong approach or a fundamental error going to the root of the valuation. The same decision also lays down that if the valuer applied the standard methods of valuation, considered the matter from all appropriate angles without taking into account any irrelevant material or eschewing from consideration any relevant material, his valuation could not be challenged on the ground of its being vitiated by fundamental error.

31. In *Duncans Industries Ltd. Vs. State Of U.P. and Others* ¶ 3 This Court Held That The Question Of Valuation Is Basically A Question Of Fact and This Court Is Normally Reluctant To Interfere With The Finding On Such A Question Of Fact If It Is Based On Relevant Material On Record. Similarly In *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.* : ¶ 7 This Court Sounded A Note Of Caution Observing That Valuation Of Shares Is A Technical and Complex Problem Which Can Be Appropriately Left To The Consideration Of Experts In The Field Of Accountancy. So Many Imponderables Enter The Exercise Of Valuation Of Shares.

32. These decisions clearly lay down the principle that valuation of shares is not only a question of fact, but also raised technical and complex issues which may be appropriately left to the wisdom of the experts, having regard to the many imponderables which enter the process of valuation of shares. If the valuer adopts the method of valuation prescribed, or in the absence of any prescribed method, adopts any recognized method of valuation, his valuation cannot be assailed unless it is shown that the valuation was made on a fundamentally erroneous basis, or that a patent mistake had been committed, or the valuer adopted a demonstrably wrong approach or a fundamental error

going to the root of the matter. Where a method of valuation is prescribed the valuation must be made by adopting scrupulously the method prescribed, taking into account all relevant factors which may be enumerated as relevant for arriving at the valuation.

33. Learned counsel for the appellant rightly submitted that the valuation report of M/s. Patni and Company must be tested on the touchstone of Regulation 20(5) of the takeover code which provides as follows:-

"Offer price (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-regulation (4) and (5).

(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-'-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.

Explanation ; (i) For the purpose of sub- regulation (5), shares shall be deemed to be infrequently traded if on the stock exchange, the annualized trading turnover in that share during the preceding six calendar months prior to the month in which the public announcement is made is less than five per cent (by number of shares) of the listed shares. For this purpose, the weighted average number of shares listed during the said six months period may be taken.

(ii) In case of disinvestments of a Public Sector Undertaking, the shares of such an undertaking shall be deemed to be infrequently traded, if on the stock exchange, the annualized trading turnover in the shares during the preceding six calendar months prior to the month, in which the Central

Government of the State Government as the case may be opens the financial bid, is less than five per cent (by the number of shares) of the listed shares. For this purpose, the weighted average number of shares listed during the six months period may be taken.

(iii) In case of shares which have listed within six months preceding the public announcement, the trading turnover may be annualized with reference to the actual number of days for which the shares have been listed".

34. So far as clauses (a) and (b) are concerned, there can be no dispute that the highest price offered by the acquirers for the shares of the target company under the Memorandum of Undertaking dated 7th October, 2002 was Rs.40/- per share and the price to be paid by C.K. Somany group for purchase of shares permitted by the High Court of Calcutta was also Rs.40/- per share. Thus the offer price based on factors under clauses (a) and (b) of Regulation 20(5) works out to not less than Rs.40/- per share. This cannot be disputed.

35. The thrust of the challenge to the valuation is founded on non-compliance with clause (c) of Regulation 20(5). It is argued before us that either the parameters enumerated therein have not been considered at all, or if considered there is complete disregard of well settled principles of valuation of shares depicting clearly a fundamentally erroneous approach.

36. At this stage we may make a few observations about Regulation 20(5). This Regulation applies to infrequently traded shares of a company. It lays down the parameters that must be taken note of and considered in arriving at the valuation. But it must be understood that the parameters laid down are by no means exhaustive. There are many other considerations which may be factored into any valuation process. What the aforesaid Regulation, however, mandates is that the parameters expressly laid down therein must in all cases be considered by the valuer since they are basic and essential to the valuation of infrequently traded shares of a company. If the valuation report discloses non consideration of any of the enumerated parameters, the report shall stand vitiated for that reason. This however does not prevent the valuer from considering other relevant factors according to accepted principles of valuation of shares.

37. It may also be observed that not any one of the parameters is in itself decisive. All the factors have to be considered and the valuation arrived at. The Regulation itself does not prescribe the weightage to be assigned to different enumerated parameters. As noticed earlier, many imponderables enter the exercise of share valuation. It must therefore follow that the weightage to be given to the different factors that go into the process of valuation, must be left to the wisdom, experience and knowledge of the experts in the field of share valuation. Such being the method of share valuation which involves subjective and objective considerations, there is considerable scope for difference of opinion even amongst experts. Even if the correct principles are applied, different valuers may arrive at different valuations. Each one of them may be right, yet the valuations may differ. Mathematical precision and exactitude are not the attributes of share valuation, for at best the valuation arrived at by an expert is only his opinion as to what the value of the share should be. No doubt the variation may not be very wide between two valuations prepared honestly by two valuers applying the correct approach and the correct principles, but some variation is unavoidable.

38. There is one other factor which cannot be ignored. The Regulation seeks to protect the interest of an investor by ensuring that he gets a fair price for his shares in the target company.

39. For the acquirer the decision to acquire shares is a commercial decision. The same block of shares may have different value for different acquirers. An acquirer who intends to control the management of the target company by acquisition of the shares in question, without acquiring majority shares, may value the shares differently from an acquirer who is already in management of the Company but wishes to acquire the majority of shares to strengthen his voting rights. A majority shareholder may also wish to acquire shares so as to hold 75% of the equity capital which will ensure passage of special resolutions. Such an acquirer may value the shares differently from his point of view. Similarly a shareholder already holding 75% shares may acquire more shares only to consolidate his holding in the target company. It may not suit his objectives to pay a higher price than the other three categories noticed above.

40. For the purpose of Regulation 20(5) we are not concerned with the price that a particular acquirer may be willing to offer on subjective consideration or for his special reasons. The Regulation is meant to provide guidance to arrive at a fair value of shares objectively which the acquirer is expected to offer to the shareholders of the target company.

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.

42. Learned counsel for the appellants submitted that the Board in approving the letter of offer of the acquirers failed in performance of its duty as required under the Act and Regulations and consequently failed to pass appropriate directions including, to revise the offer price in terms of the

mandate under the Takeover Code. According to him, the Board ought to have passed a reasoned order after giving to the appellants and other complainants an opportunity of hearing before determining the offer price for the public announcement. He contended that apart from the report of M/s. Patni and Company, the Board had before it several communications of the appellant pointing out the statutory scheme and evidence to support the contention that the offer price approved by the Board was substantially lower and ought to be much higher. In particular he referred to the valuation reports obtained by the appellant from M/s. Anand K. Associates and M/s. Sanjay Bajoria and Associates which supported a much higher valuation of the shares in question.

43. On the other hand, counsel for the respondent/acquirers submitted that under Regulation 20(5) the Board does not exercise appellate jurisdiction over the valuation but only exercises its powers akin to judicial review as a regulator to oversee that there is no palpable illegality. The Board being a regulator is bound to oversee that substantial acquisition of shares and takeovers occurs in accordance with the relevant Regulations. It must be satisfied that the valuation of shares is not arbitrary, perverse, or capricious and that the expert valuer has taken into account all the factors mentioned in the relevant Regulation applicable to the acquisition in question. It does not play the role of a valuer itself, but whenever considered necessary it may get the shares valued by an expert nominated by it. This is necessarily so because the valuation of shares lies within the domain of experts and the Board cannot arrogate to itself the role of an expert valuer though it cannot be denied that the members of the Board are conversant with the working of the securities market and in that sense they may have considerable experience. Reliance was placed on the judgment of this Court in *Miheer H. Mafatlal (supra)* and submitted that the Court must not sit in appeal over opinion rendered by experts.

44. Learned counsel appearing on behalf of the Board submitted that the Board had done all that was necessary before approving the letter of offer. It had considered the letter of offer and also the complaints received by it from the appellants and others. Since there was a serious dispute as to the correct valuation of shares, it appointed M/s. Patni and Company to value the shares independently. After receiving the valuation report of M/s. Patni and Company, it also considered the grievance of the acquirers against the said report and permitted them to get a valuation report from another expert valuer. That is how the acquirers got a report from M/s. T.R. Chadha and Company. Having considered the letter of offer, the three valuation reports before it in the light of the provisions of the Regulations, the Board was satisfied that the valuation of shares done by M/s. Patni and Company represented the fair value of the shares. It was also the highest and therefore favourable to the interest of shareholders. There is nothing in the scheme of Regulation 20 which requires the Board to pass a reasoned order while approving the offer price declared in such public offer document.

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. The power of the Board under Regulation 44(f) must be understood in the context of the scheme of the Regulations. Any price which it might "determine" under the aforesaid Regulations must also be determined

having regard to the factors enumerated in Regulation 20(5). If it finds that the valuer's report takes into consideration all the relevant factors and the offer price has been determined applying the principles applicable to such valuation, it may have no reason to differ. It may not approve the offer document, if it finds the price offered to be low and unreasonable, applying the parameters laid down in Regulation 20(5). It must, therefore, follow that the Board must approve the price offered unless it is shown that the valuation arrived at must be faulted for non compliance with the Regulations which lay down the norms and parameters which must be observed. 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 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. If there is material on record to show that the Board applied its mind to the offer made and considered it in the light of the relevant provisions of the Regulations and all factors enumerated therein, its decision to approve the offer price to be incorporated in the letter of offer cannot be faulted on the ground that it has not passed a reasoned order. The facts of this case disclose that the Board not only considered the offer document submitted by the acquirers along with the report of the valuer, it took the precaution to seek the opinion of another expert valuer in view of complaints made by some shareholders. The appellants cannot therefore make a grievance that their objections were not given due weight. Thereafter, it also gave an opportunity to the acquirers to get the opinion of another expert valuer. Ultimately the Board reached the conclusion that the share price fixed by the expert valuer appointed by it represented the true and fair value of the shares in question and being the highest was also in the interest of the shareholders. The suggestion of the Board to the acquirers to incorporate in the public offer, the offer price on the basis of the valuation report of M/s. Patni and Company was accepted by the acquirers and the offer price earlier suggested by them was enhanced. We are, therefore, satisfied that the Board acted in a reasonable manner and in consonance with the Regulations. Only after considering all relevant matters it approved the offer price to be incorporated in the public offer document.

46. We shall deal with the valuation reports of M/s. Anand K. Associates and M/s. Sanjay Bajoria and Associates later.

47. It was next contended that the appellate authority also failed to exercise its powers inasmuch as it failed to appreciate that the Board had clearly failed in discharge of its duty and had further failed in not exercising powers conferred upon it which were to be exercised in favour of the investors. We find from the impugned order of the appellate authority that it has considered all aspects of the matter and has reached a firm conclusion that the Board had acted in a judicious manner having regard to all relevant considerations. There were good reasons to reject the valuation reports of M/s. Sanjay Bajoria and Associates and M/s. Anand K. Associates submitted by the appellants.

48. We shall now consider the specific points raised by the appellants to support the contention that the relevant factors were not considered by M/s. Patni and Company and both the Board as well as the appellate authority failed to notice non-compliance of the provisions of Regulation 20(5) which vitiated the report of M/s. Patni and Company and also the approval of the offer price by the Board.

49. Before we advert to the rival submissions urged on behalf of the parties pertaining to specific points in the report of M/s. Patni and Company, it is necessary first to notice the salient features of the report.

50. M/s. Patni and Company has proceeded on the basis of financial data made available to it by the target company, which included inter- alia its audited financial statements for the financial years ending 31st March, 2002 and 2003, and the unaudited results of quarter ended June, 2003. It takes note of the three commonly adopted methods of valuation of shares, namely, the Net Asset Method, The Profit Earning Capacity Method, and the Market Price Method. It observes that each method proceeds on different fundamental assumptions, which have greater or lesser relevance, and at times there is no relevance of a particular methodology to a given situation. While the Net Value Method represents the value of the shares with reference to the value of the assets owned and the liability as on the valuation date, the Profit Earning Capacity Method (for short the "PECV") involves determination of the future maintainable earnings of the Company from its normal operations. The common method employed to derive the value of the business is to multiply estimated maintainable earnings with the price earning ratio of comparable companies in the industry. The report also refers to the approval of this Court in Hindustan Lever Employees Union (supra) of the method adopting a combination of all three methods of valuation after giving appropriate weightage to them.

51. Applying the Profit Earning Capacity Method, it has calculated the "yield value" by taking the average of 9 years, from 1993-1994 to 2001-2002. The year 2002-2003 was excluded for the reasons recorded in the report which show that on account of abnormal situations the profits of the Company had decreased. In Hindustan Lever, the principle that for working out the average profit, profit of only those years which were normal and not affected by abnormal situations should be considered, was approved. Taking the capitalization rate as 15% as suggested for manufacturing Companies in erstwhile Controller of Capital Issues guidelines, the value of shares has been worked out to Rs.55.06 per share.

52. By adopting the Net Asset Value Method the value of Rs.77 per share has been worked out by dividing the Share Capital of the Company plus Reserves and Surplus (excluding Revaluation Reserve and Contingent Liabilities) by the number of equity shares of the Company.

53. Applying the Market Value Method, having regard to the infrequently traded shares of the Company, the average of market price of six months prior to October 7th , 2002, the reference date as stated in the letter of offer has been taken resulting in a value of Rs.66.87 paise per share.

54. Combining all the three values and giving them appropriate weightage, value of each share has been worked out to Rs.64.18 paise. In applying the weightage, the precedent in Hindustan Lever (supra) has been followed.

55. The valuer M/s. Patni and Company has expressly noticed the provisions of Regulation 20(5). It has concluded that applying clause (a) and (b) of Regulation 20(5) the offer price of the shares cannot be less than Rs.40/- per share being the rate at which the shares were negotiated under the

agreement referred to in sub- regulation (1) of Regulation 14, also being the price at which the acquirers were permitted to buy the shares of the target company by the Calcutta High Court.

56. Adverting to the parameters enumerated in clause (c) of Regulation 20(5), the Book Value has been worked out to Rs.83.02 paise per share.

57. Profit Earning Capacity Value has been worked out to Rs.34.39 paise per share.

58. The earning per share has been worked out by multiplying average earning per share by Industry Profit Earning which is taken as 9.60 for the sector Glass and Glass Products (as per capital market dated March 1-14, 2004). So calculated the price per share comes to Rs.67.97 paise.

59. After taking the values worked out by the three methods PECV, NAV and EPS and giving them weightage, the value per share comes to Rs.57.55 per share.

60. To arrive at the fair market value, M/s. Patni and Company after analyzing the financial results of the target company for the financial years 1993-1994 to 2002-2003, as also the unaudited results of three quarters of the current year, decided to exclude the financial year 2002-2003 on account of abnormally low profits in that year as a result of abnormal circumstances. It also decided to exclude the current financial year because of abnormally high profits as a result of general boom in economic scenario and upward trend of Rupee in comparison to Dollar. Thereafter applying the same weightage as in Hindustan Lever, (except for the market price) the fair value per share has been found to be Rs.63.50 paise. The weightage for market value was reduced from 2 to 1 because in the case of infrequently traded shares, the market price has less relevance.

61. We have carefully examined the report submitted by Patni and Company. It is quite apparent to us that the report cannot be assailed on the ground that it does not take notice of various factors mentioned in Regulation 20(5) of the Takeover Code. The valuer has in fact referred to the said Regulations and enumerated the factors to be taken into account. It has thereafter proceeded to make the necessary calculations after giving due weightage to various factors. In doing so the valuer has relied upon the principles approved by this Court in Hindustan Lever Employees Union (supra). Learned counsel for the appellants submitted that the principles approved in Hindustan Lever Employees Union (supra) were not relevant and should not have been applied by the valuer. This was because that was a case of amalgamation of two companies and it was in that context that the valuation of the shares had to be determined. It is true that Hindustan Lever Employees Union (supra) related to a case of amalgamation but for determining the value of the shares of the companies for the purpose of equivalence and to determine the ratio in which the shares were to be allotted, the valuer had to determine the value of the shares of the amalgamating companies applying the same accounting principles of valuation which are usually applied by the valuer in valuation of shares for other purposes as well. We, therefore, find no substance in the submission of learned counsel for the appellants that the valuer had committed a mistake in applying the principles approved by this Court in Hindustan Lever Employees Union (supra).

62. The question then arises as to whether having noticed the relevant factors the valuer adopted the accepted principles and practice of valuation.

63. We heard the parties at length on this question only to find out whether there was any such error committed by the valuer which vitiated its report. We have found none. In fact the argument before the Court was that in following a particular practice or giving a particular weightage or selecting a date for assuming a particular value, the valuer committed mistakes.

64. On the other hand the respondents have supported the reasons given by the valuer in its report. The valuer has really estimated the value of the shares adopting all the three well-known methods of valuation, namely the net assets value method, the market value method and the profit earning capacity method. Thereafter after giving appropriate weightage it has worked out the value of the shares of the target company.

65. We shall briefly notice some of the objections raised before us by the appellants and the reply of the respondents to those objections only to demonstrate that they are really matters within the realm of the experts to determine and the Court may not be justified in delving into those matters, which must be left to the wisdom, expertise and experience of a qualified valuer.

66. According to the appellants while applying the Earning Per Share method for arriving at an alternate value the valuer took P/E ratio at 9.6 instead of 20.9. According to the appellants the figure pertaining to March 1 to 14, 2004 which had been taken into account by the valuer was not relevant and it should have taken the figures relevant to the public announcement date 13th November, 2003 and the letter of offer dated 25th August, 2005 which was represented in the issues of Capital Market relevant to the period, November 1-2003, and not March 1-14, 2004. According to him in both the periods there were only three profit making companies and therefore there was no reason why the valuer should have taken the industry P/E ratio as represented during the period March 1-14, 2004.

67. On the other hand the respondents contended that the Capital Market which is a fortnightly magazine gives the necessary data in regard to each industry. The data pertaining to every industry category reflect the "full year", the "latest quarter" and the "trailing twelve months" figures. The Capital Market source itself says that the companies with an earning per share (EPS) of less than (1) are not considered. According to him the "trailing twelve months" reflects the most current computation of the price earnings multiple and that period includes more companies with an EPS of more than (1) and was, therefore, more representative of the market.

68. The valuer in its report has observed that the Industry P/E of 20.9 is not the correct indicator of the industry. As the industry (glass and glass products) covers 12 companies out of which 6 companies are loss making hence having a negative P/E ratio and the other 3 companies having

minimal profit, the Industry Composite P/E ratio of 20.9 is calculated based on P/E ratio of 3 profit making companies only, thereby ignoring the performance of other 9 companies. Moreover P/E ratio of glass and glass product industry is very fluctuating because of infrequent trading of shares of most of the companies in this sector. It is for these reasons that P/E ratio of 9.6 (Source - Capital Market dated 1-14, 2004 sector glass and glass product) was considered as the industry P/E ratio.

69. The appellants then submitted that the Net Asset Value comes to Rs.133.27 if reserves and surplus as per consolidated accounts of the target company and subsidiaries at book value was taken. This was not done by the valuer. According to the appellants the Net Asset Value would have come to Rs.233.04 if 50 % of the net worth of the controlled associate company, ACE Glass Containers Ltd. was considered which also the valuer failed to do. The value of the shareholding of the target company in the subsidiaries and ACE Glass as reflected in the Balance Sheet of the target company merely reflected the historical cost of such investments and not the true value thereof.

70. Learned counsel for the respondents submitted in reply that ACE Glass was a potentially sick company registered with the BIFR having carry forward losses of Rs.266 crores as on March 31, 2003 and there is no reasonable prospect of earning any dividend from ACE Glass in the immediate foreseeable future. There was no question of consolidating the net worth of ACE glass into the net worth of the target company or the profit earning capacity of ACE Glass with the profit earning capacity of the target company. The valuer was aware of the existence of the accounts of the subsidiaries and has proceeded to value the shares of the target company in accordance with the norms for valuation of shares. He further submitted that cumulative revenue of the two wholly owned subsidiaries is around 4 % of the revenue of the target company. Similarly the cumulative assets of the two subsidiaries (on a net block basis) is also around 2 % of the total net block of the target company. He submitted that it is well recognized that a shareholder in a company does not ipso facto have a right in the assets of the company and that his right is only to receive dividends from the company. The value of the assets of the target company cannot be included to the value of the assets of the holding company, more so in the case of an associate company.

71. The valuer has also recorded reasons to the effect that it is not mandatory to derive the valuation of shares on the basis of consolidated Financial Statement. As per normal accounting practices, for determining the value of shares as a going concern only individual financial statements are considered because parent company is entitled to dividend only and has no right whatsoever in the assets of subsidiary and associate companies.

72. The appellants made a grievance that the capitalization ratio of 15 % was taken by Patni & Company whereas the capitalization ratio should have been 8 %. It was submitted that the guidelines issued by the CCI had been repealed and, therefore, reliance could not be placed on the aforesaid guidelines.

73. To this the respondents have replied by saying that the CCI guidelines have always been and continued to be a material and significant indicator for purpose of valuation in India. The mere fact that the CCI as a statutory authority has since been abolished does not make the CCI guidelines redundant.

74. The report of Patni & Company shows that the CCI guidelines had been followed which laid down the principles which are applicable in working out the profit earning capacity which involve two important factors, namely average profit before tax and capitalization ratio.

75. Another objection of the appellants is that if revaluation reserve was considered the Net Asset Value would have come to Rs.124.82 but this was not done by the valuer.

76. In reply to the said submission, learned counsel for the respondents submitted that the revaluation reserves are never considered as part of the net-worth computation. Referring to Section 2(29A) of the Companies Act, 1956, which defines "net worth", he submitted that the definition expressly excludes revaluation reserves. Moreover the CCI guidelines clearly provided that the revaluation reserves arising out of revaluation of fixed assets should ordinarily be ignored. Only after an efflux of 15 years would it be reasonable to consider non-exclusion of revaluation reserves. Even SEBI guidelines for initial public offerings of shares expressly exclude capitalization arising out of revaluation reserves for purposes of determining "promoter's contribution" to be eligible to make an initial public offering.

77. In its report the valuer has submitted that while calculating Return on Networth (5.38 %) of the company for the year 2001 - 2002 revaluation reserve has been included. As per paragraph 6.2 of CCI guidelines only genuine reserve should be included while calculating "True Networth" of the company. Therefore, Return on Net Worth should have been calculated after deducting the revaluation reserve. The valuer has, however, commented that in the present case valuation of shares would not be affected by this inclusion of the valuation of shares while calculating return on Net Worth.

78. Another objection raised by the appellants is that Profit Earning Capacity Value should not be calculated on the basis of past earnings alone as done by the valuer, but on future maintainable profit basis. The fallacy of the valuation lies in the fact that while valuing the shares in accordance with PECV method, the valuer has arrived at a figure of 55.06 per share while undertaking the said exercise in accordance with HLL guidelines and the said value is reduced to Rs.34.39 while adopting the very same method but while valuing the shares in terms of Regulation 20(5)).

79. To this the reply of the respondents is that the valuer has correctly applied the HLL/TOMCO principles for computation of the "Yield Value". Adopting those principles audited financial statements of 9 years between 1993-1994 and 2001-2002 were considered. The financial statement for the year 2002-2003 was excluded since the profits for that year had fallen by nearly 50 %. Adopting these principles and taking into account the discounting rate of 15 % applicable in terms of the CCI guidelines a value of Rs.55.06 per share was computed by the valuer. The valuer also independently applying the yield value and without applying HLL principles computed the value of the shares as Rs.34.39. After having arrived at two distinct values as aforesaid, the valuer adopted the higher of the two values.

80. We have only referred to some of the objections raised by the appellants and we must observe

that several other similar objections were raised by them. We have also noticed the reply of the respondents and in most cases the observations of the valuer. It appears to us that the appellant expects this Court to act as an expert itself. This, we are forbidden from doing. Unless it is shown that some well accepted principle of valuation has been departed from without any reason, or that the approach adopted is patently erroneous or that relevant factors have not been considered by the valuer or that the valuation was made on a fundamentally erroneous basis or that the valuer adopted a demonstrably wrong approach or a fundamental error going to the root of the matter, this court would not interfere with the valuation of an expert. As noticed in *Miheer H. Mafatlal (supra)*, valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy. So many imponderables enter the exercise of valuation of shares.

81. Having considered all aspects of the matter, we are satisfied that the valuer, Patni & Company have not committed any such error which may justify our interference. They have considered all the factors relevant under Regulation 20(5) of the Takeover Code and have adopted a reasonable approach which does not call for interference by us. It may be that views may differ and it is no gain saying that even experts may differ in their conclusions or even reasoning. The court must take notice of this fact and must not interfere unless there are compelling reasons to upset the finding of the expert valuer on grounds such as those enumerated in the earlier part of the judgment or other similar grounds.

82. We are then left with the valuation reports of two other Chartered Accountants submitted by the appellants before the Board, namely reports of M/s. Sanjay Bajoria & Associates and M/s. Anand K. Associates. Sanjay Bajoria & Associates valued the shares of the target company at Rs.590/- per share while the other Chartered Accountant valued the shares at Rs.408/- per share. The Board, in our opinion, has given good reasons for rejecting those reports. It is noticed that the shares were valued at abnormally high rates and as between the two reports there was a vast different (Rs.182/- per share). This great disparity itself furnishes a good ground for rejecting these reports particularly, when the valuation reports of three other valuers had valued the shares at much lower rates. It is not as if the regulator, namely, the Board did not take notice of these reports. On the contrary, having noticed the objections of the appellants it decided to appoint its own valuer to value the shares of the target company. Ultimately the report of the valuer appointed by the Board was accepted by the acquirer and that value was permitted to be incorporated in the offer document by the Board.

83. We are, therefore, satisfied that the Board committed no error in accepting the report of Patni & Co. The Board has acted in a reasonable manner and made its best efforts to secure a reasonable price for the shares of the shareholders. It has exercised its discretion wisely and we find no reason to interfere.

84. We, therefore, find no merit in these appeals and they are accordingly dismissed but without any order as to costs.