SUPREME COURT OF INDIA

I.P. Holding Asia Singapore P. Ltd. & Anr.

Vs.

Securities & Exchange Board of India

C.A.No.7390 of 2012

(Madan B.Lokur and Kurian Joseph, JJ.,)

20.08.2014

JUDGEMENT

Madan B. Lokur,J.,

1. The question for consideration is whether the appellants in this appeal are liable to pay a non-compete fee to the public shareholders of the target company as is being to be paid to the outgoing promoters of the target company which is being taken over by the appellants. In our opinion, the answer to this question must be in the negative.

The Facts

2. Appellant no. 1 is a company incorporated under the laws of Singapore. Appellant no. 2 is the holding company of appellant no. 1 Signature Not Verified through a subsidiary.

3. The outgoing promoters of the target company (the Andhra Pradesh Paper Mills Ltd.) are referred to hereinafter as the Bangur group. The Bangur group consists of 20 entities, both individuals and others.

4. On 29th March, 2011 the appellants entered into two agreements with the Bangur group. In terms of the first agreement, a share purchase agreement, the appellants and the Bangur group agreed that the appellants would acquire the shares of the target company held by the Bangur group by purchasing 2,12,60,008 fully paid up equity shares of Rs.10/- each forming 53.46 % of the share capital of the target company. The agreed price per share was Rs. 523/- and the aggregate amount payable to the Bangur group was about Rs. 1111.9 crores.

5. In addition to the price of Rs. 523/- per share, the appellants agreed to pay an exclusivity fee of Rs. 21.20 per share to the Bangur group, pursuant to an exclusivity agreement of 11 th November, 2010 whereby the parties concluded that it would be in their mutual interest to maintain exclusive negotiations with one another during the period the appellants considered the proposed acquisition of shares of the target company. Consequently, the price agreed to

be paid by the appellants to the Bangur group was Rs. 544.20 per fully paid up equity share having a face value of Rs. 10/-.

6. The second agreement entered into between the appellants and the Bangur group was a non-compete and business waiver agreement. In terms of this agreement the appellants agreed to pay to the Bangur group an amount of about Rs. 277.95 crores, inter alia, for refraining from competing with the business of the target company either on their own or through their affiliates for a period of three years, the business of the target company being manufacturing, sale and trading of pulp and paper.

7. In terms of Regulation 10 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the Takeover Code) the appellants gave an open offer through publication in newspapers on 1st April, 2011 for the acquisition of up to 85,67,521 fully paid up equity shares of the target company from the existing shareholders representing 21.54% of the voting capital. As per the public announcement, the appellants fixed the price of each fully paid up equity share at Rs. 544.20 (Rs.523/- + Rs.21.20). We were told that the public announcement received an overwhelming response.

8. On completing these formalities, the merchant banker of the appellants filed a draft letter of offer dated 15 th April, 2011 with the Securities and Exchange Board of India (for short SEBI) in accordance with the Takeover Code.

9. Thereafter, some correspondence ensued between the merchant banker of the appellants and SEBI. The sum and substance of this correspondence related (as far as we are concerned) to three issues connected with the non-compete fee: (1) The merchant banker was requested to provide the current business and object clause of the non-individual promoters of the target company; (2) The merchant banker was requested to provide details of the experience of Yogesh Bangur and Ms. Surbhi Bangur to whom a non-compete fee was being paid; (3) The merchant banker was requested to provide the shareholding pattern of the non-individual promoters of the target company.

10. The merchant banker of the appellants provided the information as requested for by SEBI.

View of SEBI

11. On a consideration of the information provided, SEBI issued a letter on 3rd August, 2011 to the merchant banker of the appellants in which it gave its comments on the draft letter of offer. What bothered the appellants were the comments made by SEBI with regard to the non-compete fee paid to the Bangur group. The merchant banker of the appellants was advised to incorporate certain points in the letter of offer. These are mentioned below.

12. SEBI informed the appellants through their merchant banker to revise the offer price to the public shareholders from Rs. 544.20 to Rs. 674.93. This figure was arrived at by adding to the original offer price of Rs. 554.20 a sum of Rs. 130.73 per share. The figure of Rs.

130.73 per share was arrived at on the basis that the non-compete fee paid to the Bangur group being about Rs. 277.95 crores would work out to Rs.130.73 per share held by the Bangur group. The veiled insinuation was that the non-compete fee of Rs.130.73 per share was in fact a part of the negotiated price per share payable by the appellants to the Bangur group. That being so, SEBI required that amount be added to the offer price of Rs. 544.20 per share to all public shareholders.

13. The reasons given by SEBI for adding the non-compete fee calculated on a per share basis to the offer price were as follows:-

> "(1) Of the 20 promoter entities comprising the Bangur group, only 5 of them were eligible to get the non-compete fee.
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> (2) Of the remaining 15 promoter entities, 2 individuals Yogesh Bangur and Ms. Surbhi Bangur were not eligible to the non-compete fee since they did not have any experience or expertise in the area of operation of the target company and hence they were not capable of offering any competition. They were being given a non-compete fee only because they were shareholders of the target company. As regards the 13 companies who were promoter entities of the Bangur group, SEBI was of the opinion that none was eligible for getting a non-compete fee since they were not in the business of the target company. Furthermore, according to SEBI these 13 promoter entities did not even have, in their object clause, the business of pulp and paper manufacturing.
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> (3) The merchant banker was not able to give sufficient justification for the payment of non-compete fee to the 15 promoter entities mentioned above.
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> (4) Since the exclusivity fee was being paid to the Bangur group and also to the public shareholders, there was no reason why the public shareholders were not given the non-compete fee also."

14. The reasons given by SEBI read as follows:-

> 'Non-Compete fees
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> Revise the offer price from Rs. 554.20/- to Rs. 674.93 (i.e. Rs. 544.2 + Rs. 130.73/- lis non-compete fees to the sellers in excess of the price which is to be paid to all public shareholders. Also ensure compliance with the relevant regulations including escrow account and other requirements. The reasons for the same are as follows:-
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> i. Out of the twenty promoter entities only five entities (i.e. Mr. L.N. Bangur, Ms. Alka Bangur. Mr. Shreeyas Bangur and two HUFs whose Kartas are Mr. LN Bangur and Mr. Shreeyash Bangur) are eligible to get the non-compete fees.

ii. From the details furnished by MB, we have noted that apart from the aforesaid entitles, the other promoter sellers i.e. 13 companies and two individuals (Mr. Yogesh Bangur) and Ms. Surbhi Bangur) are not eligible to get the non-compete fee for not competing with the acquirer/Target company as they do not have any experiences/expertise in the area of operation of the Target Company and are therefore not capable of offering any competition. They are mere shareholders of the target company. As regards the 13 companies none of them are in the business of pulp and paper manufacturing which is the product line of the Target Company.

Furthermore, they do not even have such business objectives in their main object clause. Further, the two individuals (i.e. Mr. Yogesh Bangur and Ms. Surbhi Bangur) are getting the non-compete fee merely for being the relatives of the Mr. L.N. Bangur who is a director of the target company, which does not seem to be logical.

iii. Further, the MB has failed to furnish sufficient justification as to why the aforesaid 15 members of the promoter group are getting the non-compete fees.

iv. It has been submitted by the acquirer/Merchant Banker that the acquirer on the ground of prudence and good corporate practice has decided to pay the exclusivity fees (i.e. the fees paid to the promoter group sellers for not to solicit acquisition proposals from, or enter into any negotiations with, any party other than the acquirer in relation to the sale of shares held by them in target company) to all the public shareholders. The acquirer/Merchant Banker has failed to justify why the same logic has not been used while paying a different price per share (without the non-compete fee) to all the public shareholders.' "

15. Feeling aggrieved by the communication sent by SEBI to the merchant banker on 3rd August, 2011, the appellants preferred an appeal under Section 15-T of the Securities and Exchange Board of India Act, 1995. The appeal was filed with the Securities Appellate Tribunal at Mumbai and was registered as Appeal No. 130 of 2011. The appeal was heard by the Tribunal and came to be dismissed by an order dated 12th September, 2012 (impugned).
View of the Tribunal

16. While dismissing the appeal filed by the appellants, the Tribunal extensively referred to and relied upon orders passed by it in three earlier appeals [*Tata Tea Ltd. v. SEBI*[1] *Cementrum IB v. SEBI*[2]*; E-Land Fashion China Holdings Ltd. v. SEBI*[3] After considering the view expressed in those appeals, the Tribunal held that it had the jurisdiction to decide whether an excessive amount of non-compete fee was paid to the promoter entities and that some of them were not capable of providing any competition to the business of the target company after its takeover by the appellants.

17. The Tribunal then found that in so far as the two individuals that is Yogesh Bangur and Ms. Surbhi Bangur are concerned, they had no experience in the business of the target company and they were paid non-compete fee only because they happened to be

shareholders in the target company. It was held that these two individuals were not involved in the day to day business of the target company and were not capable of providing any threat to the business of the target company. The Tribunal held that in contrast, Ms. Sheetal Bangur was a director in the target company and involved in its day to day business but she was not given any non-compete fee only because she was not a shareholder. It was concluded, on this basis, that the non-compete fee was directly linked to the shareholding of the promoter entities and had nothing to do with the possibility of their being in competition with the target company.

18. As regards the 13 non-individuals who also formed a part of the Bangur group, the Tribunal held that none of them had anything to do with the business of the target company and therefore they were not in a position to offer any competition to it. In this context, the Tribunal referred to one of the promoter entities namely Mugneeram Ramcoowar Bangur Charitable and Religious Trust which had nothing to do with the business activities of the target company. Reference was also made to another promoter entity called Samay Books Ltd. (Samay) which was in the business of printing and publishing. A third promoter entity referred to by the Tribunal was the Maharaja Shree Umaid Mills Ltd. (MSUML) which was carrying on business as a composite textile mill and did not have the necessary knowledge or experience relating to the pulp and paper business and therefore was not capable of offering any competition to the target company.

19. On these findings, the Tribunal concluded that the non-compete agreement was a sham which resulted in depriving other shareholders of the target company of their rightful claim to get a just price for their shares. Consequently, the Tribunal dismissed the appeal preferred by the appellants.

20. The appellants, being aggrieved by the order passed by the Tribunal preferred an appeal in this Court under the provisions of Section 15-Z of the SEBI Act

Discussion

21. In our view, the Tribunal has made two fundamental errors. In the first place, the Tribunal committed a jurisdictional error by misunderstanding the scope of Regulation 20(8) of the Takeover Code.[4*] This Regulation provides that any payment made to persons other than the target company in respect of a non-compete agreement in excess of 25% of the offer price arrived at under sub-Regulation (4) or (5) or (6) shall be added to the offer price. A bare reading of Regulation 20(8) of the Takeover Code makes it quite clear that the jurisdiction of the Tribunal gets triggered only when the non-compete fee is in excess of 25% of the offer price. If the non-compete fee is less than 25% of the offer price (as in the present case), the jurisdiction of SEBI would be exercisable only in an extremely rare case and only if SEBI was in a position to ex facie conclude that the transaction involving the takeover of the target company was not bona fide.

22. We say this because it is imperative to give sufficient elbow room to commercial entities for entering into a business transaction. There are a host of considerations that go into business relations and transactions between different entities. This applies, perhaps more

equally, to the takeover of a target company by another corporate body. It was observed in G. *L. Sultania v. Securities and Exchange Board*[4] that 'For the acquirer the decision to acquire shares is a commercial decision' and in our opinion, that decision must be respected unless there are good reasons not to do so.

23. It is for this reason that the Takeover Code as originally framed in 1997 did not contain any provision relating to the payment of non-compete fee. The issue was reconsidered by the Reconvened Committee of Substantial Acquisitions of Shares and Takeovers with Justice Bhagwati as the Chair. On the recommendation of the Reconvened Bhagwati Committee, the Takeover Code was amended in September, 2002 providing, inter alia, for a regulatory framework for payment of non-compete fee. That regulatory framework is to be found in clause (8) of Regulation 20 which was introduced in the Takeover Code with effect from 9th September, 2002.

24. While looking into this issue, the Reconvened Bhagwati Committee felt that it is possible that in some cases the offer price per share does not truly reflect the actual consideration paid and this could be used as a ploy for reducing the cost of acquisition through a public offer.

25. The Reconvened Bhagwati Committee, while being fully aware of the possibility of a misuse of the non-compete fee, nevertheless recommended an elbow room of up to 25% of the consideration which would not be included or factored in for the purpose of reckoning the offer price. This is what the Reconvened Bhagwati Committee had to say:-

> 'Parameters for determining offer price On non-compete payment the Committee noted that there is a need to address the situation specially where the acquirer passes on a significantly large portion of the consideration to the outgoing promoter in the form of non-compete fee and only a token amount is shown as negotiated price for acquisition of shares under the agreement. The Committee felt that in such cases the offer price does not truly reflect the actual consideration paid and this could be used as a ploy for reducing the cost of acquisition through public offer.
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> The Committee recommends that Any payment in respect of non-compete agreement in excess of 25 per cent of consideration paid to persons other than the target company shall be deemed to form part of the consideration paid for acquisition of shares and should be factored in for the purpose of reckoning offer price.'

26. From this it is quite clear that ordinarily when there is a gap of 25% between the consideration paid to the outgoing promoters and the non-compete fee, SEBI ought not to conduct any inquiry. However, this cannot be treated an absolute proposition and we are quite willing to say that if it appears ex facie, without any searching questions being asked or any intricate reasoning, that it appears to SEBI that the difference between the offer price and the non-compete fee is less than 25% but that is nevertheless a disguise or a camouflage for reducing the cost of acquisition through a public offer, then SEBI can certainly delve further into the matter.

27. In so far as the present case is concerned, on an ex facie reading of the share purchase agreement and the non-compete agreement between the appellants and the promoter entities, no such conclusion is apparent, nor was it canvassed or pointed out. In our opinion therefore, there was no occasion for SEBI to carry out a searching enquiry into the payment of non-compete fee to the Bangur group.

28. Assuming for the sake of argument that an inquiry into the payment of non-compete fee is permissible, where does it lead us in this appeal?

29. According to SEBI, Yogesh Bangur and Ms. Surbhi Bangur had no 'experience/expertise in the area of operation of the target company and are therefore not capable of offering any competition'. During the course of submissions, it was suggested that what was actually paid to them (and perhaps others) was not a non-compete fee but control premium. We cannot agree.

30. Yogesh Bangur, apart from being the son of L.N. Bangur (the founder of the target company and one of the persons `eligible' for payment of the non-compete fee), has a specialized post-graduate degree in programme and project management and had been involved in the business of the target company for more than 4 years. Given this unique position and also his position of a whole time director of MSUML which had over 21% of the shareholding of the target company, it is odd that SEBI and the Tribunal concluded that he did not have sufficient information, access or ability to be in a position to compete with the business of the target company.

31. Similarly, Ms. Surbhi Bangur, daughter-in-law of L. N. Bangur and wife of Shreeyash Bangur (both of whom were also found `eligible' to receive the non-compete fee) had completed her bachelors and masters degree in business administration. More importantly, she was also a director on the Board of Samay (along with L. N. Bangur), which is one of the members of the Bangur group. Therefore, it cannot be said with certainty, as has been canvassed on behalf of SEBI, that she lacked experience or expertise in the business of providing any competition to the target company.

32. But what is more important is the perception of the appellants. On these facts, the appellants perceived a threat from these individuals to their business activities. It is not the case of SEBI that the threat perception was irrational – it may arguably be unfounded or minimal but is certainly not beyond the imagination of a reasonable person. The threat perception cannot be decided on the basis of the hindsight of SEBI (unless the perception is found to be perverse) but must be left to the commercial wisdom of the players on the field.

33. In support of its contention that the threat perception from Yogesh Bangur and Ms. Surbhi Bangur was entirely imaginary, it was (negatively) submitted that Ms. Sheetal Bangur was a director in the target company and was actually involved in its day to day activities, and yet a non-compete fee was not paid to her. Was it because she was not a shareholder in

the target holder (as suggested) or was it because she really posed no competitive threat? Or, was there some other valid reason?

34. At this stage, it is necessary to appreciate the shareholding pattern of the Bangur group in the target company.

35. Of the 53.46% fully paid up shares held by the Bangur group in the target company, Digvijay Investments Ltd. (DIL) held 24.70% while the Maharaja Shree Umaid Mills Limited (MSUML) held 21.65%. The remaining about 7% shares were held by the other members of the Bangur group. This included Samay Books Ltd. (Samay – 0.10%), the General Investment Company Ltd. (GICL – 0.01%) and Apurva Export Pvt. Ltd. (Apurva – 0.57%).

36. Ms. Sheetal Bangur held 78.96% of the shares in Apurva, 2.60% of the shares in GICL and 92.19% of the shares in Samay. Through these entities, she held shares in DIL and MSUML. Therefore, although she did not directly hold any shares in the target company, she did so indirectly. The cross-holding of shares between the various members of the Bangur group and through them in the target company is being mentioned only to point out that the shareholding pattern was not as simple as made out during the course of oral submissions by learned counsels. Looking to the intricacies and complexities involved, it is possible that the shareholding pattern was considered by the appellants and the Bangur group while indirectly giving a non-compete fee to Ms. Sheetal Bangur. It could have been in the mind of the appellants that Ms. Sheetal Bangur was indirectly getting an adequate amount of non-compete fee, and therefore it was not advisable to also directly give her any non-compete fee.
37. This possibility cannot be straightaway ruled out since even SEBI did not raise any issue in this regard in its comments given on 3rd August, 2011. The regulatory authority not having raised this issue, it is quite clear that it was raised for the first time only as a legal argument when the matter was taken up by the Tribunal. The justification for this, it is submitted before us, is based on the provisions of Order XLI Rule 33 of the Code of Civil Procedure as well as two judgments referred to by learned counsel for SEBI. G.L. Sultania and *Swedish Match AB v. Securities and Exchange Board of India*[5]

38. In Swedish Match AB v. Securities and Exchange Board of India (supra) this Court observed that 'The Tribunal was entitled to take a different view of the matter from that of the [Securities and Exchange] Board with a view to sustain the ultimate result in the appeal in exercise of its appellate power. Such a power in the appellate court/tribunal is akin to or analogous to the principles contained in Order XLI Rule 33 of the Code of Civil Procedure.' But for the purposes of the present case, it is not necessary for us to go into the question whether SEBI could have supported its view by adding reasons at the appellate stage. This is because it is quite clear from the protracted correspondence between SEBI and the merchant banker of the appellants, that the relevant facts were taken into consideration by SEBI when it issued the letter dated 3 rd August, 2011. If the facts justify denial of direct payment of non-compete fee to Ms. Sheetal Bangur, no amount of arguments in law can replace the facts at an appellate stage or before us.

39. The facts suggest that there could be a plausible reason for the appellants not paying any non-compete fee to Ms. Sheetal Bangur. This may be relatable to her not being a shareholder in the target company. Even if we could, we do not think it appropriate to substitute our view for that of the regulator or permit a new dimension to be added to the case in an appeal only on the basis of oral arguments, without any analysis of facts. Under these circumstances, we are of the view that nothing much turns on the non-payment of non-compete fee directly to Ms. Sheetal Bangur. All that need be said on this subject is that in this regard, SEBI acted prudently (as it is expected to) while the Tribunal hypothesized.

40. G.L. Sultania also does not advance the case of SEBI. The purpose of the Takeover Code was explained therein in the following words:

> 'It cannot be denied that the [Securities and Exchange] 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.'

41. It is nobody's case that the valuation of the shares by the appellants was detrimental to the interests of the shareholders, except to the extent that the shareholders in the public offer were denied the benefit of the non-compete fee paid to the Bangur group. There is no allegation that the valuation of the shares was not in conformity with Regulation 20(5) of the Takeover Code.

42. The second fundamental error by SEBI was in splitting the non-compete agreement between the appellants and 5 members of the Bangur group on the one hand and 15 members of the Bangur group on the other. If the non-compete agreement was a sham as held by the Tribunal, then the entire agreement would have to be held as a sham and the entire transaction would require to be held as a sham transaction. It cannot be, on a reading of the non-compete agreement as a whole, that a part of it is a sham in respect of some of the contracting parties and it is a genuine agreement in respect of the other contracting parties. There is absolutely no indication given in the non-compete agreement that it is severable or that there was any intention to split it into two or more distinct parts.

43. The absurdity resulting in splitting-up the non-compete agreement can be better appreciated from a hypothetical example. What if the Tribunal had partially agreed with the appellants and held that the non-compete agreement was valid in respect of say ten or twelve of the promoter entities instead of five? This could happen if the genuineness of the non-compete agreement is examined in relation to each promoter entity, as has been done by SEBI. Does it not, therefore, mean that the non-compete agreement has to be split in twenty ways to decide whether it is genuine or sham in respect of five or ten or twelve of the promoter entities? Can this be said to be a reasonable construction of the non-compete agreement? We are afraid that this surely cannot be the correct way of reading the non-compete agreement and that is why we are of the view that the Tribunal committed a fundamental flaw in holding only a part of the non-compete agreement as a sham. The Tribunal should have either held the entire non-compete agreement as a sham or it ought to have held the entire non-compete agreement as a genuine agreement. The question of a half-way house simply does not arise.

44. One other minor issue was raised by SEBI, namely, that the non-individual entities did not have the business objectives of manufacturing, sale and trading of pulp and paper in their main object clause. This is only stated to be rejected since the memorandum of association of a corporate entity can always be altered in accordance with the procedure under the Companies Act, 1956.

45. For completeness, we may mention two events that have occurred since the non-compete agreement was entered into on 29th March, 2011. Firstly, the non-compete period of three years has expired, in a sense rendering this exercise academic. Secondly, the Takeover Code has been repealed with effect from 23 rd October, 2011 and substituted by the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. The new Takeover Code does away with the concept of a separate non-compete fee, the amount being included in the offer price in terms of Regulation 8 thereof

Conclusion

46. On a consideration of the entire facts of the case, we are of the view that the appeal deserves to be allowed and accordingly it is allowed. The directions and orders passed by SEBI and the Securities Appellate Tribunal are set aside. However, there will be no order as to costs.

Judgment Referred

[1]*C.A.No.136 of 2008*
[2]*C.A.No.28 of 2008*
[3]*C.A.No.27 of 2011*
[4]*JT 2007 (7) SC 0573: 2007 (5) SCC 133*
[5]*JT 2004 (7) SC 0094: 2004 (11) SCC 641*