

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on:26.9.2019
Date of Decision: 7.11.2019

Misc. Application No.418 of 2019
And
Appeal No.352 of 2019

Tenneco Inc.
500 North Field Drive, Lake Forest,
Illinois 60045,
United States of America. Appellant

Versus

Securities & Exchange Board of India
SEBI Bhavan, C-4A, Bandra Kurla
Complex, Bandra (E), Mumbai 400051. Respondent

Mr. Janak Dwarkadas, Senior Advocate with Mr. Somasekhar Sundaresan, Ms. Struti Rajan, Mr. R. Pandya, Mr. Rushin Kapadia, Ms. Dipti Bajaj, Ms. Mitali Mehta, Ms. Jeeta Nayak and Mr. Pratham Masurekar, Advocates i/b. Cyril Amarchand Mangaldas, Advocate for the Appellants.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Vivek Shah, Mr. Abhiraj Arora, Advocates i/b. ELP for the Respondent.

Mr. Kumar Desai, Advocate with Mr. Vivek Shah and Mr. Abhiraj Arora, Advocates for the Respondent in Intervention Application No.418 of 2010.

Mr. Mohan Krishna Swamy, appeared in Person for MA. No.418 of 2019.

With
Appeal No.359 of 2019

Chandra Prakash Tripathi
 Plot No.25, Nisargamita Co-op
 Housing Society, Govadi Gut No.45,
 CIDCO Mahanagar IV near Sai Shruti
 Park, Off Paithan Road,
 Aurangabad – 431002.

..... Appellant

Versus

Securities & Exchange Board of India
 SEBI Bhavan, C-4A, Bandra Kurla
 Complex, Bandra (E), Mumbai 400051. Respondent

Mr. Ravishekhhar Pandey, Advocate i/b. Vis Legis Law
 Practice for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Vivek Shah and Mr.
 Abhiraj Arora, Advocates i/b. ELP for the Respondent.

With
Appeal Lodging No.458 of 2019

Bhavook Tripathi
 2nd Floor, Govardhannath Society,
 S No.372, Lane No. B,
 Koregaon Park,
 Pune 411001.

..... Appellant

Versus

1. Securities & Exchange Board of India
 SEBI Bhavan, C-4A,
 Bandra Kurla Complex, Bandra (E),
 Mumbai 400051.

2. Tenneco Inc.
 500 North Field Drive, Lake Forest,
 IL 60045, United States of America.

..... Respondent

Mr. Kumar Desai, Advocate with Mr. Vivek Shah and Mr. Abhiraj Arora, Advocates i/b. ELP for the Respondent no.1.

Mr. Janak Dwarkadas, Senior Advocate with Mr. Somasekhar Sundaresan, Ms. Shruti Rajan, Mr. R. Pandya, Mr. Rushin Kapadia, Ms. Dipti Bajaj, Ms. Mitali Mehta, Ms. Jeeta Nayak and Mr. Pratham Masurekar, Advocates i/b. Cyril Amarchand Mangaldas for Respondent no.2.

**With
Appeal Lodging No.459 of 2019**

Bhavook Tripathi
2nd Floor, Govardhannath Society,
S No.372, Lane No. B,
Koregaon Park,
Pune 411001.

..... Appellant

Versus

1. Securities & Exchange Board of India
SEBI Bhavan, C-4A,
Bandra Kurla Complex, Bandra (E),
Mumbai 400051.

2. Tenneco Inc.
500 North Field Drive, Lake Forest,
IL 60045, United States of America.

..... Respondent

Mr. Kumar Desai, Advocate with Mr. Vivek Shah and Mr. Abhiraj Arora, Advocates i/b. ELP for the Respondent no.1.

Mr. Janak Dwarkadas, Senior Advocate with Mr. Somasekhar Sundaresan, Ms. Shruti Rajan, Mr. R. Pandya, Mr. Rushin Kapadia, Ms. Dipti Bajaj, Ms. Mitali Mehta, Ms. Jeeta Nayak and Mr. Pratham Masurekar, Advocates i/b. Cyril Amarchand Mangaldas for Respondent no.2.

CORAM: Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Justice M.T. Joshi

1. All the present appeals have arisen from the same order passed by respondent Securities and Exchange Board of India (hereinafter referred to as 'SEBI') dated 4th July, 2019 pursuant to the remand by this Tribunal vide order dated 16th May, 2019 in Appeal no.108 of 2019 and other connected appeals.

2. The issue relates to the valuation of the shares of Federal-Mogul Goetz (India) Ltd (referred to hereinafter as 'Target Company/FMGL') by appellant Tenneco Inc (hereinafter referred to as 'Tenneco') arising out of open offer for acquisition of 25.02%.

3. The Target Company is the subsidiary of erstwhile Federal Mogul Holding Ltd. (referred to hereinafter as 'FMHL') and Federal Mogul Vermögensverwaltungs GMBH (referred to hereinafter as 'FMVG'). FMGL has merged into appellant Tenneco which is a public limited corporation based in USA on 1st October, 2018. In the circumstances, the holding in FMHL being 60.05 percent and FMVG being

14.93 percent in the Target Company it stood transferred to the appellant Tenneco. The Target Company's 25.2% of the shares from various shareholders in India was therefore required to be valued for making an open offer under the provisions of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (hereinafter referred to as 'SAST Regulations').

The shares of the Target Company are infrequently traded in the stock exchanges and, therefore, the valuation of the shares are required to be made as per sub-Regulation 8(2) (e) of the SAST Regulations which reads as under:-

2. Sub-regulation 8(2)(e) provides as under:-

(e) where the shares are not frequently traded, the price determined by the acquirer and the manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies; and”

4. Accordingly, appellant Tenneco had appointed two valuers namely MSKA & Associates (MSKA) and J.D. Jhaveri & Associates (Jhaveri). These valuers determined the fair value per share at Rs.372.10/- and Rs.397.66/-

respectively. The appellant rounded up the value to Rs.400 per share as a fair price and public announcement was made. Draft letter of offer as per the SAST Regulations was filed with SEBI on 16th October, 2018.

5. Respondent SEBI invoking its powers from Regulation 8 and more particularly sub Regulation (16) of Regulation 8 of the SAST Regulations appointed another Chartered Accountant M/s. Haribhakti and Company LLP (referred to hereinafter as 'Haribhakti'). After considering the material, Haribhakti assessed the price at Rs.600 per share. Therefore, respondent SEBI directed appellant Tenneco to revise the fair price at Rs.608.46 as per the Regulation.

Aggrieved by the said decision appellant Tenneco filed Appeal no.108 of 2019 before this Tribunal. Appellant Chandra Prakash Tripathi had also filed Appeal no.182 of 2019. Appellant Tenneco had raised a contention before us that without giving any opportunity to the appellant the third valuer was appointed by SEBI. No opportunity was given to the appellant before accepting the values fixed by the said valuer. Opportunity should have been given by SEBI before

making the observation and, therefore, appellant wanted that the said order be set aside and instead the offer price of Rs.400 be upheld.

6. Appellant Chandra Prakash Triphati on the other hand then put a grievance before us that infact the valuation of eventhird valuer is too low. According to him, the valuation should have been at par with comparable valuation of other entities like WABCO India Ltd which was recently acquired by another international corporation at the rate of Rs.6318 per equity share.

7. After hearing all the parties this Tribunal passed the following order dated 16th May, 2019.

“10. In our view, though elaborate procedure of hearing the acquirer before appointing independent Chartered Accountant by respondent SEBI is not required, the respondent SEBI ought to have given an opportunity to the appellant before revising the offer price by providing material on the basis of which Haribhakti had arrived at different valuation. Then respondent SEBI should have taken decision by recording brief reasons upon consideration of the objections, if any, received from the appellant to the valuation arrived at by Haribhakti.

11. In the circumstance, in view of the above fact there is no need to consider the plea of Mr. Mohan Krishnaswamy, the appellant in Appeal No.182 of 2019 and counter submissions of the appellant. In the circumstances, we pass the following order.

1. The appeal no.108 of 2019 is hereby allowed with no order as to costs.

2. The impugned observation/direction is hereby set aside.

3. The case is remitted back to the respondent SEBI. Since the appellant has now received the valuation report of Haribhakti and other documents during the pendency of the appeal it would be at liberty to raise objections to the report before the respondent SEBI, within a period of three weeks from the date of this order.

4. The appellant Mr. Chandrakant Tripathi and the intervener Mr. Mohan Krishnaswamy would be at liberty to make written representation to the respondent SEBI within the same period.

5. The respondent SEBI thereafter shall take an appropriate decision after considering the objections, if any, of the appellants or intervener within a period of four weeks.”

8. After remittal of the matter, the appellant made submission/representation before the respondent SEBI dated 6th June, 2019. Respondent SEBI also held a meeting with the representative of appellant Tenneco on 20th June, 2019 in order to give an opportunity to explain the objection on the valuation report of Haribhakti. Additionally, more written submission were made by the appellant hereinabove vide letter dated 25th June, 2019. The impugned order states that

respondent SEBI also examined the representations of the interveners.

9. It appears from the record that respondent SEBI forwarded all the material to Haribhakti and after obtaining the response from Haribhakti dated 1st July, 2019 passed the impugned order, principally putting the reasons given by Haribhakti in it's response.

10. Hence the present appeal by appellant Tenneco.

11. Appellant Chandra Prakash Tripathi being aggrieved by the said order also filed the present appeal, while Mr. Bhavook Tripathi also challenged said order vide Appeal Lodging No.458 of 2019. He also filed another Appeal Lodging No.459 of 2019 raising the issue of non deposit of offer price in escrow account by appellant Tenneco as per the Regulations. Misc. Application No.418 of 2019 for intervention is filed by Mr. Mohan Krishna Swamy who appeared in person.

12. Heard Mr. Janak Dwarkadas, Senior Advocate assisted by Mr. Somasekhar Sundaresan, Ms. Struti Rajan, Mr. R. Pandya, Mr. Rushin Kapadia, Ms. Dipti Bajaj, Ms. Mitali Mehta, Ms. Jeeta Nayak, Mr. Pratham Masurekar, Mr.

Ravishekhar Pandey, Advocates for the Appellants and Mr. Pradeep Sancheti, Senior Advocate assisted by Mr. Vivek Shah, Mr. Abhiraj Arora, Mr. Kumar Desai, Advocates for the Respondents.

Heard Mr. Mohan Krishan Swamy in person.

Shri Janak Dwarkadas, learned senior counsel for the appellant submitted as under:-

That respondent SEBI without paying any heed to the material made available to it by the appellant, had simply forwarded it's objections to Haribhakti; sought Haribhakti's response and merely cut and pasted remarks of Haribhakti. The response of Haribhakti however was received by respondent SEBI after the meeting/hearing took place and, thus, no opportunity to file objections to the response of Haribhakti was given. Thus, respondent SEBI has abdicated its jurisdiction by outsourcing the objection raised by the appellant. There is non application of mind as regards the directions of this Tribunal. Alternatively, the learned counsel took us through the valuation report of MKSA and Jhaveri as also the valuation report of Haribhakti to show that Haribhakti's report is flawed being against the Regulations as

well as the decisions of Supreme Court and High Courts etc. He therefore submitted that the appeal be allowed, the impugned decisions be quashed and it should be held that the valuation of shares of Rs.400 is a fair valuation.

13. Appellant Chandra Prakash Tripathi and Bhavook Tripathi on the other hand for reasons forwarded by them contended that the fair price is required to be arrived at Rs.820 per share and at Rs.1877 respectively.

14. Upon hearing both the sides, in our view all the appeals are liable to be dismissed for the reasons to follow:-

Reasons

1. Though appellant Tenneco and respondent SEBI are at loggerheads on the issue of valuation of shares there is atleast an agreement and rightly so, that the valuation of shares of a Company is not a precise science. The conclusion arrived by expert valuer would be subjective and depend upon individual exercise. In the circumstances, there cannot be any indisputable single value. (Para 17 of the copy of the submissions of appellant Tenneco to respondent SEBI dated 6th June, 2019 Exhibit 16). The Target

Company is a going concern but its shares are infrequently traded. In the circumstances, sub Regulation 8(2)(e) of the SAST Regulation as quoted above provides a guideline for valuation of the shares which is already referred above. The valuation has to be carried out by taking into account valuation parameters including (1) book value (2) comparable trading multiples and (3) such other parameters as are customary for valuation of shares of such companies.

2. Submission of all the parties would revolve around the weightage to be given to these parameters. So far as Book value/NAV method is concerned Haribhakti considered the same. However, for the reasons that the Target Company is a going concern with its share infrequently traded, its NAV would be insignificant and, therefore kept the said valuation out of calculation. On the other hand, two valuers appointed by the appellant had given weightage to these parameters. Weightage of one was given to book value, while two each was given to

Comparable Companies Multiple (CCM) and market price (para 5.4 of the valuation report at Exhibit 2).

Jhaveri had also adopted the same formula.

3. According to the appellant, this valuation is on the basis of the ratio of G.L. Sultania and Another vs SEBI (2007) 5 SCC 133 (Sultania judgement).

Another dispute relates to the CCM. There is vast diversion between the claims of the appellant Tenneco, respondent SEBI or the other appellants as to which Companies should be selected for comparison.

4. Haribhakti's report would show that it relied on the data of the peer set which included Bosch and WOBCO India. Appellant Tenneco's contention is that these are not comparable companies for the reasons that their revenue is generated from different range of products. Cadbury India Ltd. (2015) 125 CLA 77 High Court of Bombay is relied on to buttress the argument.

5. On the other hand, counsel for the Respondent SEBI and other appellants submitted that data of Bosch

and WABCO is also required to be considered as the target company had also patented technology like that of Bosch and WABCO India Ltd.

6. Having heard all the parties and upon appreciating the ratio of Sultania and Cadbury cited above, according to us, after remand of the matter to the respondent SEBI had rightly obtained the response of the appellant. It has also examined the submission of the intervener i.e. present appellant Chandra Prakash Tripathi. It also sought response from Haribhakti and thereafter made the observation vide the impugned direction.
7. The objection of the appellant that respondent SEBI has merely cut and paste the observation of Haribhakti after the hearing was concluded, though appears to be attractive, the same will have to be repelled for the reasons that Haribhakti has not given any fresh response, but had merely relied on its earlier report.
8. In the case of Sultania as well and in Cadbury it had been observed that the valuation being not a precise

science and though all the parameters are required to be considered, the weightage to be given to each of the parameters may depend upon the facts and circumstances of each of the case, we do not find any defect in the approach of SEBI.

9. For the similar reason the objection of Mr. Chandra Prakash Tripathi and Bhavook Tripathi will have to be rejected.

10. Mr. Bhavook Tripathi had submitted before us the alleged systematic oppression of the minority shareholders and mis-management of the Target Company in order to create false negative picture of the Target Company. However, the issue is beyond the scope and jurisdiction of this Tribunal.

11. In Appeal Lodging No.458 of 2019 Mr. Bhavook Tripathi claims that as per Regulation 22 of the SAST Regulations, the control of Indian Company cannot be transferred without completion of the open offer process or without deposit of 100% funds required for the open offer in an escrow account. This issue is also beyond the scope of the present

appeal. Appellant Bhavook Tripathi would be at liberty to raise the same issue before the respondent SEBI. If such an application is filed before SEBI, the same will be disposed off expeditiously in accordance with law.

12. In the result, Appeal nos. 352, 359 of 2019, Appeal Lodging Nos.458 and 459 of 2019 are hereby dismissed. The application of the intervener No. 418 of 2019 is also disposed of.

13. The acquirer had deposited 25% of the consideration under the open offer in terms of Regulation 17 of the SAST Regulations, 2011. Since the offer price has now increased to Rs.608.46, the acquirer is required to make good the deficiency. However considering the fact that on account of dispute being raised by the acquirer and others, the consideration towards the offer price is still being enjoyed by the acquirer. Thus in the peculiar circumstances we direct the acquirer to deposit the total consideration towards the offer price in the escrow account under Regulation 17 read with 21 of

the SAST Regulation within four weeks from today after adjusting the amount already deposited so as to complete the payment of consideration to shareholders who have tendered their shares in acceptance of the open offer.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C. K. G. Nair
Member

Sd/-
Justice M.T. Joshi
Judicial Member

7.11.2019

Prepared and compared by
RHN