

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No. 25 of 2008

Date of decision : 10.4.2008

Shri Sukumar Chand Jain

..... Appellant

Versus

1. Securities and Exchange Board of India
2. SBI Capital Markets Limited
3. INEOS ABS (Jersey) Limited
4. Lanxess ABS Limited

..... Respondents

Mr. E.P. Bharucha Senior Advocate with Mr. Vyapak Desai Advocate and Mr. Advait Sethna Advocate for the Appellant.

Dr. Poornima Advani Advocate with Haihangrang E.H. Newme Advocate for Respondent No.1.

Mr. Janak D. Dwarkadas Senior Counsel with Mr. Gaurav Joshi and Mr Ankit Lohia Advocates for Respondents No. 2 and 3.

Mr. P. N. Modi Advocate for Respondent No.4.

Coram : Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer (Oral)

Challenge in this appeal is to the order dated 7.2.2008 passed by the whole time member of the Securities and Exchange Board of India (for short the Board) rejecting the claim of the appellant to include the non-compete consideration of Rs.50.03 per share to the price offered by the acquirer for the shares offered in pursuance to the public offer.

Facts giving rise to this appeal lie in a narrow compass and these may first be noticed.

LANXESS ABS Limited is the target company. LANXESS India Private Limited is one of its major shareholders holding 50.97% of the shares. Rakesh Agrawal and his group held another 18.82% shares in the target company. In pursuance to a share purchase agreement executed between INEOS ABS (Jersey) Limited (hereinafter called the acquirer) and LANXESS India Private Limited, Rakesh Agrawal and his group of shareholders and others, the acquirer agreed to acquire 69.8% of the shares of the target company which triggered the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the takeover code). Since the acquisition was far in excess of the threshold limit prescribed by the takeover code, the acquirer came out with a public announcement which appeared in the newspapers on June 30, 2007. The public at large and the public shareholders of the target company were informed that the acquirer had entered into the aforesaid share purchase agreement at a price of Rs.196.36 per equity share from LANXESS India Private Limited and at a price of Rs.201 per equity share from Rakesh Agrawal and his group of shareholders. In addition to this price, the acquirer had also agreed to pay Rakesh Agrawal and his group of shareholders a non-compete consideration of Rs.16,56,32,495/- for entering into the non-compete undertaking referred to in the share purchase agreement. It is common case of the parties that after this public announcement appeared in the newspapers, the appellant purchased for the first time 100 shares of the target company on July 10, 2007 and thereafter he made further purchases and kept trading in the shares of the target company and as on September 29, 2007 he held 6190 shares. Having purchased the shares after the public announcement, the appellant filed a complaint with the Board on July 24, 2007 complaining therein that the non-compete fee mentioned in the share purchase agreement appeared to be structured in a way so as to pass on a part of the sale consideration to Rakesh Agrawal and his group of shareholders. According to the complainant (appellant) this would deprive the minority shareholders from receiving a higher price for their shares in the open offer. On receipt of this complaint, the Board forwarded the same to the merchant banker of the acquirer and thereafter

correspondence was exchanged between the parties whereafter the Board offered its comments on the draft letter of offer submitted to it by the acquirer through its merchant banker. It is relevant to mention that in its comments, the Board appears to have accepted the plea of the complainant (appellant) and the acquirer was advised to revise the offer price after including the payment of non-compete fee (per share) in the offer price. On receipt of the comments of the Board, the merchant banker of the acquirer addressed two communications to the Board seeking personal hearing with a view to satisfy it that the offer price was not required to be revised and that the non-compete fee agreed to in the share price agreement was justified. The Board after hearing the merchant banker on behalf of the acquirer and on a consideration of the oral and written submissions made before it, revised its earlier stand and by order dated 7.2.2008 held that the non-compete consideration of Rs.50.03 per share was justified in terms of the takeover code as it was within the 25% limit prescribed in Regulation 20(4) and 20(8) of the takeover code. The application filed by the merchant banker on behalf of the acquirer was accordingly disposed of. Hence this appeal.

We have heard the learned senior counsel for the parties. The learned senior counsel appearing for respondents no. 2 and 3 at the outset raised a preliminary objection stating that the appellant had not approached the Tribunal with clean hands and that the appeal by virtue of his own conduct had become infructuous. He also urged that the reliefs prayed for in the memorandum of appeal should not be granted in the facts and circumstances of the case. We are inclined to agree with him and the reason for this is that we are not satisfied with the bona fides of the appellant in filing the present appeal. The grievance of the appellant is that the acquirer having paid an additional sum to Rakesh Agrawal and his group of shareholders which, according to him, is structured in a way to pass on a part of the sale consideration in the form of non-compete fee, should be paid to all the shareholders to whom the offer has been made. We fail to understand as to why the appellant purchased the shares of the target company after the public announcement on June 30, 2007 when his grievance was that the acquirer was not offering adequate price for the shares to the shareholders other than

Rakesh Agrawal and his group. No satisfactory explanation is forthcoming from the side of the appellant. Not only did he purchase the shares and become a shareholder of the target company for the first time after the public announcement, he also traded in those shares subsequently and his portfolio had swollen to 6190 shares as on September 29, 2007. Obviously, the appellant had purchased the shares only to litigate with the target company. We are satisfied that he has not approached the Tribunal with clean hands and must fail on this short ground.

There is yet another reason why the appellant must fail. It is common case of the parties that during the pendency of the appeal, the appellant unconditionally offered his entire shareholding to the target company which offer has been accepted and he has ceased to be a shareholder. Having offered the shares which have been accepted, he cannot be allowed to make a grievance that the price offered by the acquirer was not adequate or that the same price which was offered to Rakesh Agrawal and his group of shareholders should have been offered to him and other public shareholders. In view of this conduct of the appellant, he is estopped from challenging the purchase made by the acquirer nor can he claim a higher price. As already observed, he was not satisfied from the beginning as to the price offered by the acquirer then why did he offer his shares unconditionally. Having done so, he has to be non-suited on this ground. This apart, the main relief sought in the appeal cannot be granted. The primary prayer made in the memorandum of appeal is to issue a direction to the acquirer to pay the additional price to all the shareholders as was paid to Rakesh Agrawal and his group in the form of non-compete fee. It is not in dispute that the acquirer had come out with a public announcement and thereafter a letter of offer was issued to all the public shareholders and there would have been large number of shareholders who did not offer their shares presumably for the same reason for which the appellant was making a grievance, namely, that the price offered by the acquirer was not adequate. Since there would be large number of shareholders who did not offer their shareholding and today if the acquirer were to be directed to pay additional amount to the shareholders who had actually offered their shares, we would be doing injustice to those shareholders who did

not offer their shares. For this reason as well the claim of the appellant, has to be rejected.

For the reasons recorded above and without going into the merits of the claim made by the appellant, we dismiss the appeal leaving the parties to bear their own costs. The application filed by India Deep Value Fund for intervention also stands dismissed.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

10.4.2008
ddg/-