Series-2

Judicial Pronouncements in Valuation

Valuation Standards Board
and
ICAI Registered Valuers Organisation
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Message

In the recent past, the shift to the fair-value based financial reporting, fragmented regulatory regime surrounding valuations, advent of the insolvency and bankruptcy code and enhanced stakeholder expectations, have contributed to the thought-process of creating a discrete class of professionals who would be entrusted with the responsibility of performing valuation. The Companies Act, 2013 (*'Act'*), more specifically section 247 therein, incarnated this distinct class of professionals as 'Registered Valuers'.

With the enactment of the Insolvency and Bankruptcy Code, the importance of a regulated and monitored valuation professional has become noticeable and it has put an obligation on the Registered Valuer to ensure the conduct of the valuation exercise is in accordance with the highest standards of professionalism.

Contemplating the need to create recognition and awareness about the practical dimension and procedures of law in the area of Valuation, ICAI RVO together with the Institute of Chartered Accountants of India has decided to bring out the publication Judicial Pronouncements in Valuation for assisting the Registered Valuers, members and other stakeholders.

I am extremely happy for all the joint initiative taken by the Institute of Chartered Accountant of India with ICAI RVO. I would like to acknowledge the diligent efforts of all the members of the Valuation Standards Board of ICAI under the Chairmanship of CA. Mangesh Kinare, Vice Chairman CA. Cotha S Srinivas and my colleagues on the Board of ICAI Registered Valuers Organisation (ICAI RVO) Shri Pawan Singh Tomar, Prof. Anil Saini, CA. (Dr.) Debashis Mitra for their collective efforts and support.

I also appreciate the efforts of Shri. Rakesh Sehgal, Managing Director ICAI RVO assisted by CA. Sarika Singhal, Officiating CEO ICAI RVO and Secretary, Valuation Standards Board for their significant contribution in finalisation of this Publication.

I am confident that this publication would be of immense help to the Registered Valuers, professionals and other stakeholders in developing their expertise and proficiency.

Date: 3rd February, 2023 **Rajeev Kher**

Place: New Delhi Chairperson and Independent Director, ICAI RVO

Foreword

The Valuation Standards Board (VSB) was formed by the Institute of Chartered Accountants of India (ICAI) to formulate Valuation Standards with a view to providing consistent, uniform and transparent valuation policies to the members undertaking the Valuation Assignments and to set up concepts, principles and procedures which are generally accepted internationally having regard to legal framework and practices prevalent in India. The Board also Interacts/ Represents on issues relating to Valuation with Government/IBBI and promotes adoption of ICAI Valuation Standards.

Continuing with the joint endeavour for the benefit of the Valuation Professionals in India, the Valuation Standards Board of ICAI and ICAI Registered Valuers Organisation are bringing out this publication *"Judicial Pronouncements in Valuation- series-2*". The Publication aims to provide learnings to the Valuation Profession based on the Valuation reports so that they can be guided to follow best practices.

I extend my sincere appreciation to CA. Mangesh Pandurang Kinare, Chairman, CA. Cotha S. Srinivas, Vice-Chairman, and all Members of Valuation Standards Board for bringing out this publication which will help the professionals in understanding from the judicial learnings.

I am sure that this publication would provide necessary value addition to the members, especially to the Registered Valuers and other Stakeholders.

CA. (Dr.) Debashis Mitra
President, ICAI
Director, ICAI RVO

Date: 07.02.2023
Place: New Delhi

Preface

Valuation is an essential part of business decision making and an effective valuation of business/assets is required to facilitate transactions in the market. In the last five years, the Indian economy has witnessed the proliferation of the Valuation Profession which has shown a rapid growth. Various processes such as Corporate Insolvency Resolution Process (CIRP), Merger & Acquisition, Investment Analysis, Fund Raising, Capital Budgeting etc. is dependent upon the Valuation Report of a Valuer and as such the Valuer plays a key role in the development of the economy. As an important stakeholder of the ecosystem, Registered Valuers are required to maintain a fine balance between a high degree of proficiency and ethical standards which accentuate the need of best practices to be followed.

The valuation profession under the Companies Act, 2013 and the IBC, in its present form is a regulated profession. The RVs are bound by the Valuation Rules and Code of Conduct contained therein. They are answerable for their actions and misconduct, if any. This is a good start for creating a credible base of valuers in the country.

As we can witness that the various judgements have been issued by the Tribunals and Courts wherein important clarifications have been provided to the Valuers along with guidance and issues in Valuation while issuing Valuation Reports. With these judgements professionals are evolving and guided.

Looking at the importance, the Valuation Standards Board of ICAI and ICAI Registered Valuers Organisation (ICAI RVO) have taken this joint initiative in bringing Judicial Pronouncements in Valuation in the form of a Series– **Judicial Pronouncements in Valuation - Series 2** to help professionals for clear understanding of the various provisions. This publication covers important Case Analysis based on the decisions by Supreme Court, High Courts, ITAT, NCLAT and NCLT on issues under the field of Valuation inclusive of key learnings from the verdicts of the various cases for guiding Valuation Professionals.

We take this opportunity in thanking the President ICAI, CA (Dr.) Debashis Mitra, and the Vice President ICAI, CA. Aniket Sunil Talati for their thought leadership and continued encouragement in bringing out the publication.

We would also like to express our gratitude towards the Board of ICAI RVO comprising of Shri Rajeev Kher, Chairman of the Board and other Directors, Shri Pawan Singh Tomar, Prof. Anil Saini and Dr. Rakesh Sehgal for joining in the constant efforts of the Board.

We would also like to thank all members, co-opted members, special invitees of the Board for their support and guidance in bringing out this publication.

We would like to put on record the efforts put in by CA. Sarika Singhal, Secretary VSB, ICAI and Officiating CEO, ICAI RVO and Ms. Seema Jangid, Assistant Secretary, CA Nikita Aggarwal and other team members for providing the technical and administrative support.

We sincerely believe that this publication will be extremely helpful to the profession's members, valuers, industries, and other stakeholders.

CA. Mangesh Pandurang Kinare
Chairman
Valuation Standards Board, ICAI

CA. Cotha S Srinivas
Vice Chairman
Valuation Standards Board, ICAI

Date: 3rd February, 2023

Place: New Delhi

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Orders passed by the Hon'ble Supreme Court of India

Case No.1

Bharat Sanchar Nigam Limited Vs M/s. Nemichand Damodardas & Anr. (2022)

IN THE SUPREME COURT OF INDIA

Appellant: Bharat Sanchar Nigam Limited

Vs.

Respondent: M/s. Nemichand Damodardas & Anr.

Civil Appeal No. 3478 of 2022

Decided on: 11.07.2022

1. Brief Facts of the Case

- A land situated in Maharashtra, owned by the original landowners/claimants was acquired by the State Government under the provisions of the Land Acquisition Act for Bharat Sanchar Nigam Limited (BSNL).
- The award determining the total compensation was declared by the Land Acquisition Officer at Rs. 14,33,703/- (@ Rs. 13.32 per sq. ft.).
- At the instance of the landowners, reference was made to the Reference Court which enhanced the compensation amount to Rs.21/- per sq. ft.
- Aggrieved by the above judgement and order, a further appeal to the Hon'ble High Court was made. Consequently, the High Court passed the order in First Appeal No.1302 of 2009 and partly allowed the said appeal preferred by the original owners and increased the amount of compensation for the land to Rs.174/- per sq. ft. (more than 800% of the Reference Court compensation and about 1300% of the compensation awarded by the Land Acquisition Officer), mainly relying upon the current Ready Reckoner rates of the land.
- Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court enhancing the amount of compensation to Rs.174/- per sq. ft., BSNL preferred the present appeal.

2. Issues raised by Appellant (BSNL)

The appellant objected to the enhancement in compensation on the following grounds: -

- The High Court has made a serious mistake by increasing the amount of compensation solely based on the prevailing Ready Reckoner rates by more than 800% increase, which as such is not permissible as held by the apex Supreme Court in the case of Jawajee Nagnatham Vs. Revenue Divisional Officer, Adilabad, A.P. and Ors., (1994) and Krishi Utpadan Mandi Samiti, Sahaswan Vs. Bipin Kumar, (2004).
- The Ready Reckoner could not be relied upon because PW3 – a government officer – specifically acknowledged that the actual market rates for sales transactions differ from the Ready Reckoner's rates and that the Ready Reckoner does not reflect the correct market price because it was created solely to collect stamp duty.
- The High Court has relied upon and/or considered the Full Bench decision of the Bombay High Court in the case of Shalini Vaman Godbole Vs. Special Land Acquisition Officer, Special Unit, Solapur and Ors., (2009) 5Mah LJ 884 rather than not following the decisions of this Hon'ble Supreme Court in the case of Jawajee Nagnatham (supra) and Krishi Utpadan Mandi Samiti, Sahaswan (supra), which are binding on all Courts of the country under Article 141 of the Constitution of India.

3. Submissions made by Original Claimants/ Respondent: -

The Original claimants presented the following arguments against the grounds submitted by the Appellant:-

- While increasing the amount of compensation to Rs. 174/- per sq. ft., the Ready Reckoner and the Government Resolution dated 31.10.1994 were relied on by the High Court. It was submitted that the Value of land as per Ready Reckoner is a statutory cost, and even the government has passed a resolution stating that the Ready Reckoner's price and value must be taken into account when determining compensation.
- The aforesaid Government Resolution has made it mandatory, that wherever necessary, the capitalization method and/or the Ready Reckoner valuation, whichever is higher, must be used during market selection on the date of notification under Section 4 of the Land Acquisition Act.

- Further, the Ready Reckoner is made after taking into account the major roads, railways, and other geographical features of each area, as well as by examining the transactional data from sales and purchases and is used for registering documents.
- The sale transactions cannot be for a lesser amount than the market price. However, the value of the land in the documents may be higher than the value proposed by the Ready Reckoner. A government policy decision that the Ready Reckoner's value and price can be used to determine compensation for lands acquired under the Land Acquisition Act is not subject to judicial review, especially when the decision is not challenged.
- The prices mentioned in the Ready Reckoner are after following the procedure as required under the Maharashtra Stamp (Determination of True Market Value of property) Rules, 1995. Relying upon the decision of the Hon'ble Supreme Court in the case of Lal Chand Vs. Union of India and Anr., (2009) (para 41), in which the Court held that the procedure adopted by the Expert Committee constituted under the Stamp Act, law is a scientific and methodical assessment of market value, and, therefore, there is no reason why such rates should not be a relevant piece of evidence for determination of the market value.
- The High Court has heavily relied upon the Government Resolution as well as the Ready Reckoner prices and its decision in the case of Shalini Vaman Godbole (supra). However, the High Court has not followed its aforementioned decisions in the cases of Jawajee Nagnatham (supra) and Krishi Utpadan Mandi Samiti, Sahaswan (supra), which were binding on it under Article 141 of the Indian Constitution, for determining whether the Ready Reckoner prices can be considered or not while deciding the compensation for the lands acquired under the Land Acquisition Act.

4. Court's Observations and Decision

- The High Court has heavily relied upon the Government Resolution as well as the Ready Reckoner prices and its decision in the case of Shalini Vaman Godbole (supra). However, the High Court should have followed the Supreme Court's decisions in the cases of Jawajee Nagnatham (supra) and Krishi Utpadan Mandi Samiti, Sahaswan (supra), which were binding on it under Article 141 of the Indian Constitution, for

determining whether the Ready Reckoner prices can be considered or not while deciding the compensation for the lands acquired under the Land Acquisition Act.

- Accordingly, under the Land Acquisition Act, compensation cannot be determined based on the prices mentioned in Ready Reckoner which are fixed for the entire area and are used to calculate stamp duty.
- The Court observed that PW-3, a government official, specifically acknowledged that the Ready Reckoner was prepared for the proper stamp duty and registration fees to be recovered and that the actual rates of sales transactions differ from those in the Ready Reckoner, and that the Ready Reckoner cannot reflect correct market prices. Even PW-4 explicitly stated in his deposition that the Ready Reckoner is only for stamp duty collection.
- This court has observed that the Basic Valuation Registers that are kept for the purpose of collecting proper stamp duty cannot be used to determine the land's market value under Section 23 of the Land Acquisition Act.

5. Decision of the Court

- In view of the above arguments and observations, the order passed by the High Court was quashed and set aside and the order passed by the Reference Court determining the compensation @ Rs.21/- per sq. ft. was restored.

6. Key Learnings for the Valuers from the above case

- Under the Land Acquisition Act, compensation cannot be determined based on the Ready Reckoner's prices which are fixed for the entire area and are used to calculate stamp duty.
- The land's market value depends on the location of the land, the amount of land, whether or not the land is located in a developed area, whether the land being acquired is a small plot or a large area, as well as a number of other advantages and disadvantages, must be taken into account.
- The Basic Valuation Register, which is prepared and kept up to collect stamp duty cannot serve as a basis for determining the market value stated in the instrument submitted for registration.

- The compensation for the lands acquired under the Land Acquisition Act cannot be determined using a uniform market value for the land.
- The amount of compensation for the land under the Land Acquisition Act is determined by adopting either one of the three methods appropriate to the facts of a particular case must be taken into consideration, namely:
    i. Expert opinion.
    ii. The price paid within a reasonable time in bona fide transactions of purchase of the lands acquired or the lands adjacent to the lands acquired and possessing similar advantages; and
    iii. The number of years purchase of the actual or immediately prospective profits of the lands acquired.

Case No. 2

Duncans Industries Ltd Vs State of U.P. & Ors (1999)

IN THE SUPREME COURT OF INDIA

Appellant: Duncans Industries Ltd

Vs.

Respondent: State Of U.P. & Ors.

Decided on: 03.02.1999

1. Brief Facts of the Case

- ICI India Ltd executed a Deed of Conveyance dated June 9,1994 in favor of Chand Chhap Fertilizer and Chemicals Ltd. (CCFCL) (Appellant), in which the company agreed to transfer its fertilizer business- manufacturing, marketing, selling, and distributing urea fertilizer, for a slump price, or total sale consideration, of Rs.70 crores. The Company, Chand Chhap Fertilizer and Chemicals Ltd., has since been renamed as M/s. Duncans Industries Limited, Fertilizers Division, Kanpur Nagar.
- The “fertilizer business” included demised land, freehold land and residential building and Plant and Machinery related to fertilizer business.
- At the time of submission of deed for registration, the concerned Registrar referred the document to the Collector in accordance with Section 47-A(II) of the Stamp Act, informing the Collector of the document's noncompliance with Section 27 and requesting a proper valuation in order to collect the stamp duty and penalty due on the document.
- Following an investigation, the Collector assessed a penalty of Rs. 30,53,167.50 and a stamp duty of Rs. 37,01,26,832.50.
- The aggrieved party challenged the aforementioned order in a revision under Section 56 of the Stamp Act before the Chief Controlling Revenue Authority. According to his order dated 04.04.1995, the aforementioned

Revisional Authority partially allowed the challenge, set aside the penalty and slightly modified the Collector's stamp duty. As a result, the appellant became liable for Rs. 36,68,08.887.50 as stamp duty on the Deed of Conveyance.

- Thereafter, the appellant challenged the order before the High Court in Civil Misc. Writ Petition No.9170/95 in which the appellant had challenged the Sub-Registrar's Authority to make a reference to the Collector on the ground that there was no material to entertain any reason to believe that the market value of the property which was the subject matter of the conveyance deed had not been accurately stated in the instrument.
- Being still aggrieved with the order of the High Court, the appellant had filed an appeal before the Hon'ble Supreme Court of India.

2. Key Grounds of Appeal

- The High Court made a mistake in concluding that the plant and machinery transferred to the appellant were immovable properties subject to the Stamp Act. To the contrary, according to the conveyance deed, the vendor had not given the appellant any title to the plant and machinery.
- The High Court erred in concluding that the machinery and plant were the subjects of the conveyance deed based on paragraphs 10 and 11. The paragraphs merely referred to an earlier instrument, and referring to an earlier transaction in a document does not mean that the terms and conditions of that transaction are incorporated into that document.
- The High Court did not look into the intentions of the parties, even though they had delivered possession of the plant and machinery as movables and treated them as such.
- The referred plant and machinery are neither immovable nor transferred property under the terms of the deed of conveyance. As a result, it was impossible to determine the correct and true value of the property conveyed under the deed of conveyance without considering the value of the aforementioned machinery and plant.
- The authorities and the High Court's accepted valuation of the machinery and plant is incorrect and contrary to the law.

3. Submissions made on behalf of the State

- The Deed of Conveyance by ICI in favour of the CCFCL for the sale and transfer of fertilizer business contemplated an agreement to transfer the business of manufacturing, marketing, distribution and sale of urea fertilizer that is fertilizer business itself with a condition that the first stream, second stream and the third stream urea manufacturing plants as well as the Ammonia manufacturing plants would also be transferred as a part of the transfer of fertilizer business of the ICI as a going concern.
- A para that defined the fertilizer business demonstrated that the vendor intended to transfer all properties associated with the fertilizer business.
- The High Court noted that the appellant had not seriously challenged the authorities' valuation, so the appellant's challenge to the valuation should not be accepted, according to its observations.

4. Key Issues and Observations by the Hon'ble Supreme Court

Issue No 1: Whether the plant and machinery in this case can be construed as immovable property or not?

Observation: The Facts and circumstances of each case determine whether the machinery embedded in the earth is movable property or immovable property. Consideration should be paid to the intention of the parties whether such embedment was intended to be temporary or permanent. A careful reading of the agreement of sale and the conveyance deed as well as the relevant circumstances and the nature of the machineries involved demonstrated that the machineries that were embedded in the earth to serve as a fertiliser plant embedded permanently with the intention to use the same as a fertiliser plant and the same were not embedded to dismantle and remove for sale at any time.

As a result, the argument that these machines should be considered as movables cannot be accepted.

Issue No 2: Whether the vendor did transfer the title of the plant and machinery by the Conveyance Deed?

Observation: The fact that appellant attempted to emphasize the fact that only the land is being sold under the conveyance deed in some of the relevant paragraphs of the conveyance deed and that a reference is made to the

handing over of possession of the machinery on an earlier date does not ipso facto establish that the vendor did not convey the title of the plant and machinery under the conveyance deed.

Issue No. 3: Whether the High Court was justified in accepting the valuation made by the Authorities regarding the plant and machinery?

Observation: During the argument, the appellant did not seriously challenge the finding regarding the valuation of the plant and machinery. However, the appellant questioned the accuracy of the valuation provided by the Authorities. The issue of valuation is essentially a factual one, and this Court typically hesitates to alter a finding on a factual issue if it is supported by relevant material on record.

The assertion made by the appellant that the Enquiry Committee's replacement is not authorised by law is rejected in view of the matter that the Collector had established an Enquiry Committee to determine the actual market value of the property conveyed by deed and in this process, the Collector has the full legal authority to seek assistance from any source, even if it means forming or re-forming multiple Committees.

5. Decision of the Hon'ble Supreme Court

- The appellant was not able to demonstrate that the reconstitution of the Expert/Enquiry Committee was prejudicial to it in any way.
- The Valuers are skilled professionals who had taken into account all aspects of valuation, including the machinery's lifespan, when assessing its value. The majority of the valuations made by the Enquiry Committee and the Valuers are based on the documents presented by the Appellant itself.
- As a result, the argument that the revisional authority's valuation, which was accepted by the Collector, is either arbitrary or based on any material, is not accepted.
- Once the Court gets convinced that the method adopted by the Authorities for the purpose of valuation is based on relevant materials then it will not interfere with such a finding of fact.
- Further, even the appellant had not challenged the valuation seriously, hence, the Court was unable to submit the appellant's final claim.
- Accordingly, the Hon'ble Supreme Court had dismissed the said appeal in view of the above facts and circumstances.

6. Key Learnings for Valuers from the above case

- While valuing any asset, the Valuer has to determine and ascertain the category/classification of the asset type.
- To determine whether an asset that is grounded/ embedded in the earth is a movable property or immovable property is to be determined based on the facts and circumstances of each case. Further, the intention of the parties is also to be considered that whether such embedment was intended to be temporary or permanent.
- The Court will not intervene in the findings of a Valuer, who is a skilled professional if he has taken into account all aspects of valuation, including the lifespan etc., while assessing the value.
- If the Court is convinced that the method adopted by the Authorities for the purpose of valuation is based on relevant material, then the Court does not intervene in the findings of the Valuer.

Orders Passed by the Hon'ble High Courts of India

Case No. 3
German Remedies Ltd. (2003)

IN THE BOMBAY HIGH COURT

Decided On: 27th June, 2003

1. Brief Facts of the Case

- The German Remedies Ltd (Petitioner) was a corporation formed and registered under the Indian Companies Act 1913 and was deemed to be an existing company within the meaning of the Companies Act 1956.
- In addition to the petitioner company, three additional businesses, Recon Health Care Limited, Zydus Pathline Limited, and Zoom Properties, (transferor companies) were intended to be amalgamated and merged with Cadila Health Care Limited (transferee company) under a single plan of amalgamation.
- In the present case, two renowned firms of valuers had performed valuation and suggested the swap ratio of 7 equity shares of Rs. 5 each in the transferee company for 4 equity shares of Rs. 10 each of the petitioner company. The objectors submitted the fair swap ratio should have been 2 to 1 (8 to 4) or more instead of 7 to 4 as suggested by the valuers.
- According to the objectors, the ratio was unfavorable to the equity shareholder of the petitioner company and the scheme was not true and genuine; it was a ruse used by the transferee firm and its promoters/directors to seize the transferor company's assets.

2. Series of Events

- The scheme had been accepted and sanctioned by the Gujarat High Court in response to a petition brought by Zydus Pathline Limited, one of the transferor companies having its registered office in the state of Gujarat.
- Similarly, the High Court of Gujarat accepted and sanctioned the plan in a Company Petition submitted by Cadila Health Care Ltd., the transferee company having its registered office in the state of Gujarat.

- Because the petitioner company's registered office was located in Mumbai, which is within the jurisdiction of Bombay High Court, it had requested approval of the scheme for its merger with the transferee business.
- In response to the petitioner's summons for directions, the court directed that a meeting of the petitioner company's equity shareholders be empaneled to consider and, if deemed appropriate, approving, with or without modifications, the petitioner company's scheme of arrangement of amalgamation with the transferee company, along with the three other companies mentioned above. The court dispensed with convening meetings of the transferor company's secured or unsecured creditors by the same decree dated.
- In accordance with the directions, a meeting of the petitioner company's equity shareholders was conducted. The meeting was attended by equity shareholders, their authorised representatives and proxies; 15 equity shareholders did not vote. Out of 251 shareholders who voted, 219 voted in favour while 17 voted against and 15 shareholders' votes were declared invalid.
- Out of the total 63,84,008 votes cast at the meeting, 63,82,306 were cast in favour of the motion, 1,068 were cast against it, and 634 votes were ruled invalid. As a result, the scheme was approved by an overwhelming majority of more than 90 percent in number and 99 percent in value of the equity shareholders present and voting.
- After having obtained the necessary approval of the members, the petitioner company filed this petition for sanction of the scheme. By an order, the petition was admitted and the petitioner was directed to serve the notice of the date of hearing of the petition on the Official Liquidator as well as on the Regional Director, Department of Company Affairs, Western Region, Mumbai.
- The Official Liquidator had filed a report dated stating that the affairs of M/s. Zoom Properties Limited and the petitioner had not been conducted in a manner prejudicial to the interest of their members or public interest.

3. Objections Raised

The objections raised by the Objectors are summarized below**:**

- According to Rule 78 of the Company (Court) Rules, 1959, the Chairman

of the Meeting must give his report of the meeting's outcome in Form No. 39, covering all facts, including the names and addresses of the members who attended the meeting. The objectors contended that the Chairman's report provides the number of shareholders, their authorized representatives, and proxies who attended the meeting but did not provide the individual names and addresses of the members, therefore violating Rule 78 and Form No. 39.

Accordingly, the report of the Chairman appointed to the meeting of the equity shareholders, which was attached to the petition as Exhibit G, was incomplete and does not comply with Rule 78 of the Company (Court) Rules.

- The scheme is not genuine and bonafide and is a cloak under which the transferee firm and its promoters/directors want to grab the transferor company's properties.
- The Valuers' Valuation Report was neither legal, appropriate, nor correct. The Valuers have failed to account for the transferor company's shutdown of its Andheri plant and the resulting valuation of the real estate.
- The swap ratio of 7 equity shares of Rs. 5 of the Transferee Company in exchange for 4 equity shares of Rs. 10 of the Petitioner Company is unjust and inappropriate. The swap ratio should have been more generous in favor of transferor firm members.
- The objectors claimed that the transferor company's Andheri facility had been shuttered and that the workers there had been offered a voluntary retirement option. As a result, the transferor company's assets in relation to its Andheri factory were to be sold. As a result, those assets had to be assessed based on the value of the real estate rather than as a going concern. According to the objectors, the Valuers ignored this information and failed to value the transferor company's real estate.

4. Insight into the Valuation report

An insight into the Valuation Report is given below, to understand the consideration taken up by the Valuer while preparing the Valuation Report:

- The Valuer had mentioned in the Valuation Report that German Remedies' Andheri factory was being closed. There would be profit from the sale of assets as a result of the closure. Cost savings, VRS, and

case closures would be incurred, for which the information supplied by GRM management had been relied upon.

- The valuation was performed considering the following three methods: Net Asset Value, Profit Earning Value, and Market Value of the company's shares as quoted on the Stock Exchange.
- The valuers had arrived at the valuation on the basis of the relative valuation of shares of both the companies based on the aforesaid methodologies and various qualitative factors relating to each company, business dynamics and growth potential of the business.

5. Scope & limits of the Court's jurisdiction

For a better understanding of the Court's ruling, the reader should examine the following extent and limitations of the Court's authority:

- Before sanctioning a scheme, even if it has been approved by the statutory majority of the concerned creditors or members, the court must be satisfied that the statutory procedure has been followed and that the scheme is just, fair, and reasonable to the persons who are likely to be affected by it because it would bind not only the majority of the shareholders or creditors, but also the dissenting minority of the shareholders or creditors.
- As a result, the strategy must be reasonable and equitable to them. It must also not be unfair to the shareholders, creditors, or any class of them.
- The court does not serve as a rubber stamp and does not act only on the ipse dixit of the majority of shareholders, but it has the authority to reject the scheme if it believes it to be unfair, unjust, or irrational to the shareholders, creditors, or any class of them.
- The court cannot sit in judgement on the informed view of the interested parties to the scheme of arrangement since it would be in the province of corporate and commercial knowledge of the concerned parties.
- The court has neither the expertise nor the jurisdiction to develop deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority.
- The Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The court acts like an umpire in a game

of cricket who has to see that both teams play their game according to the rules and do not overstep the limits. But, subject to that how best the game is to be played is left to the players and not to the umpire.

6. Court's observations and Decisions

- Court observed that along with the affidavit, the petitioner provided the names and addresses of the members, authorized representatives, and proxies who attended the meeting, as well as the way in which they voted. Initial deficiency, if any, in not giving the names and addresses of the members in the Chairman's Report submitted to the court was cured. Thus, the scheme could not be rejected on account of this technicality.
- The Court noticed that the argument that the Valuers had not taken into account the fact that the Andheri facility was closed was not factually true. The accusation that the corporation failed to disclose to the valuers that the transferor company's assets related to its Andheri plant were to be sold was likewise false.
- The Valuers had considered all the essential criteria and the Valuer appropriately considered the weightage average of various methods to arrive at the fair market value.
- The Court believed it was not for it to sit in appeal over the valued judgement of the equity shareholders, who were meant to be businessmen. With wide eyes, commercial men who recognize their shared advantage and interests behind the proposed plan have approved the swap ratio of 7 to 4 as stated by an overwhelming majority of 90% in numbers and 99% in value of the members present and voting. The Court's limited power was merely to determine whether the ratio is so incorrect or the mistake is so egregious that the scheme is unfair, unjust, or oppressive to a minority of members or any class of members. According to the Court, it was not demonstrated that the swap ratio was unfair and unjust to the members of the petitioner company.
- Further, unless otherwise specified in the plan, the assets and properties of the transferor become the property of the transferee company as a natural result of any scheme of merger of any two firms. In any case, the transferor-assets company would not become the personal property of the transferee-promoters company or directors.

- The properties would not become the directors' personal property, but rather the property of the transferee-company, of which the objectors would immediately become members if the proposal was approved.
- Accordingly, the claim that the promoters/directors seek to take over the petitioner-properties company and valuable real estate was false.
- In view of the above arguments the Court considered that the objections were not legal and valid and also stated that the Gujarat High Court had already sanctioned the composite scheme in respect of one of the four transferor-companies and the transferee-company, so the Court did not see any reason to take a different view.
- Hence. the transferor company's merger scheme was approved.

7. Key Learnings for Valuer from the above Case

- A merger occurs when two firms combine to establish a new company. Acquisition occurs when one corporation buys out another and proclaims itself as the new owner. Different Methodologies of valuation are being used to arrive at the fair market value which is dependent upon various factors and circumstances.
- Valuation is not an exact science. Different methods are applied for valuation. Valuations made by different methods may widely differ and it is generally considered appropriate to adopt weighted average of the valuation determined by different methodologies to arrive at the fair market value. Further. what weightage should be given to which factor would depend upon the facts and circumstances of the case.
- The exchange ratio is in the realm of commercial wisdom of well-informed equity shareholders. It is not for the court to sit in appeal over the valued judgment of the equity shareholders who are supposed to be commercial men. The limited jurisdiction of the Court is only to see whether the ratio is so wrong, or the error is so gross as would make the scheme unfair or unjust or oppressive to the minority of the members or any class of them.

Case No. 4
R. Sivakumar Vs SRP Tools Limited (2009)

IN THE HIGH COURT OF MADRAS

Appellant: R. Sivakumar

Vs.

Respondent: SRP Tools Limited and Subramanian Engineering Limited

C.M.P.No.11680 of 2005

Decided On: 17.11.2009

1. Brief Facts of the Case

- The Appellant is a minority shareholder who had opposed the Scheme of Arrangement proposed by the Respondents: SRP Tools Limited (Transferor Company) and Subramanian Engineering Limited (Transferee Company).
- Transferor Company began with two ventures, one in Ranipet and the other in Chennai. It decided to merge the Chennai Undertaking with Transferee Company. Accordingly, both Companies have sought approval of the scheme of arrangement under Sections 391 and 394 of the Companies Act, 1956.
- The Extraordinary General Meeting decided on the details of the scheme of arrangement. The said scheme of arrangement had defined the Chennai Undertaking of Transferor Company that had to be demerged. The specifics of the assets were also provided. The net assets had to be transferred at book value as a going concern, and the rest of Transferor Company's business and assets would continue to vest with it after the demerger.
- As payment for the demerged company's transfer and vesting with Transferee Company, the Scheme provided for the allotment of one equity share of Rs.10/- value in Transferee Company to Transferor Company's shareholders for every five shares held by them in Transferor Company.

- This scheme also provided that the shareholding pattern of the Transferee Company will be in the same proportion as the Transferor Company in respect of all the shareholders including the promoters.
- The Scheme of Arrangement was approved by a large majority of the shareholders.
- The Regional Director of the Central Government filed a report in March 2005 stating that both companies have their registered office in Chennai and that the shareholders of Transferor Company have approved the scheme by an overwhelming majority.
- The Regional Director also included the appellant's objections in the case. Despite the fact, the shareholder, who owned 3200 shares, attended the meeting and voted against the scheme, which was approved by an overwhelming majority. After reviewing the materials, the learned Single Judge granted the relief requested in both petitions.

2. Key Grounds of Appeal

The Appellant had objected to the Scheme based on the following grounds:

- It was contented that a valuation report is a critical document for demerger and that there are three methods of valuation:

  a. Yield,

  b. Market Price, and

  c. Net Asset Value of the Company.

  Further, Valuation should be undertaken by a professional auditor. However, in the current case, the auditor did not value both companies, but only the Transferor Company, and the details of the land are also unknown. The Auditor had carefully worded its Report which demonstrated that the information in their report was obtained from the sources mentioned in the Report and the auditor did not independently verify such information.
- It was argued that the most recent financial position of Transferor Company should have been filed with the company petition and that the book value could not be used.
- The scheme was against the interests of the minority shareholders and the Transferee Company was formed solely to take over the Transferor Company's valuable assets.

- It also argued that the Auditor should be independent of the Company's Board of Directors and act as a watchdog on behalf of the company's shareholders and act in a good faith on the behalf of every stakeholder.
- It was also argued that the valuation must be tested by two independent bodies, as established by the Supreme Court in the Hindustan Levers case.

3. Submission by the Respondent and cases relied upon

- The Respondent submitted that there was no concealment of the property's true value. All relevant factors were considered in the Valuation Report.
- The scheme of arrangement was approved by an overwhelming majority of the shareholders and the Scheme cannot be rejected because of a single object.
- Further, it was submitted that the term "demerger" is not defined in the Companies Act, 1956 and only Section 2(19AA) of the Income Tax Act 1956 and its Explanation states that the values appearing in the books of account immediately before the date of demerger should be considered. As, otherwise benefit under the Income Tax Act, 1961 cannot be taken.

Cases relied upon:

- The Supreme Court stated in the case of Hindustan Lever Employees' Union vs. Hindustan Lever Ltd. that the valuation of shares is a technical matter. This valuation requires considerable skill and experience. The case demonstrates that the test of fairness is not whether the offer is fair to a specific shareholder, but rather that even after these points were raised in the meeting, the overwhelming majority of shareholders vote for the scheme, and the fact that the explanatory statement was approved by the Registrar itself is a relevant factor, and thus, the Supreme Court accepted the determination of value.
- While dealing with the objections raised by certain shareholders in the case of Parke-Davis (India) Ltd., the Bombay High Court held that the Court had to see how the members, who were the best judges of their own interests, had voted on the Resolution and the overwhelming majority of the shareholders had voted in favour, which would not be interfered with.

- The Bombay High Court in the case of demerger of Larsen and Toubro Limited took a reference of the Sussex Brick Co. Ltd., wherein it was held that, "It must be affirmatively established that, notwithstanding the view of the majority, the scheme is unfair, and that is a different thing from saying that it must be established that the scheme is not a very fair or not a fair one; the scheme has to be shown affirmatively, patently, obviously and convincingly to be unfair.

4. Court's Observation and Decision

- The Court had observed that the term "demerger" is not defined in the Companies Act, 1956. However, Section 2(19AA) of the Income Tax Act and its Explanation defines "Demerger" and states unequivocally that the values appearing in the books of account immediately prior to the date of demerger should be considered.

  Accordingly, it is only the Book Value that has to be taken and therefore, the contention of the appellant cannot be accepted on this ground.

- The scheme was approved by an overwhelming majority, and the shareholders of the demerged company would hold shares in the same proportion as they would in the demerged company.

  Further, the Court observed that the transferor Company/shareholders' shares were not frequently traded, and the transferee company's shares were not listed at all, and the valuation of shares was also accepted by the majority of the shareholders; thus, the learned Single Judge was correct in not interfering with the exchange share ratio as being likely exchanged or illegal.

- For the argument, that the valuation must be tested by two independent bodies. The Court observed that the Hon'ble Supreme Court did not lay down any legal dictum through the Hindustan Levers case that at least two Independent Valuer should be appointed to value.

  Further, the Apex Court simply held in that case that the original valuer had used the three well-known methods of valuing the shareholders and that the overwhelming majority had approved of the valuation and therefore the Court should not interfere with such values.

- In view of the aforementioned reasons, the Court dismissed the Appeal.

5. Key Learnings for the Valuers from the above Case

- Valuer has to be appointed as per the requirement of the law specified for that particular purpose for which valuation is to be undertaken.
- There is no legal dictum by the Hon'ble Supreme Court wherein it mentioned that a minimum number of two Valuers are to be appointed. A single independent body of Valuer may also conduct the valuation.
- Where the scheme of arrangement has been approved by an overwhelming majority and the Valuer has conducted the valuation using well-known methods, the Court will not intervene in deciding/changing the exchange ratio as determined by the Valuer.

Case No. 5
Suresh Lachhmandas Raheja Ig Vs Ferrani Hotels Pvt. Ltd (2010)

IN THE HIGH COURT OF BOMBAY

Applicant: Suresh Lachhmandas Raheja

Vs.

Respondents: Ferrani Hotels Pvt. Ltd. and others

APPEAL NO.270 OF 2007

SUIT NO.3190 OF 2006

Decided on: 26th November 2010

1. Brief Facts of the Case

- Suresh Lachhmandas Raheja (Original Plaintiff/Original Respondent) was directed by the Order of the Divisional Bench of this Court to furnish security consisting of tangible assets of the value of Rs 200 Crores to the satisfaction of the Prothonotary and Senior Master.
- In order to provide the security, Plaintiff offered by way of security a total of thirteen flats which are owned by the two sons of Plaintiff, Mr. Rahul Raheja and Mr. Ashish Raheja.
- One set of seven flats was converted into a single flat while another set of six flats was similarly converted into a single unit.
- For the said offer of security, the Plaintiff relied on valuation reports by two Valuers:
  - ✓ The First Valuer has valued the flats at Rs.90.07 Crores and Rs.143.78 Crores, and
  - ✓ The Second Valuer has valued the flats at Rs.92.65 Crores and Rs. 147.90 Crores.
- On the other hand, the Third Defendant (Ferrani Hotels Pvt Ltd and others) relied on a valuation report of a third Valuer who has adopted a valuation of Rs.16.92 Crores and Rs.25.57 Crores.

- While accepting the valuation report placed on record by the First and Third Defendant, the Prothonotary and Senior Master accepted a valuation of the flats offered as security at Rs 44.27 crores.
- In the circumstances, Plaintiff was directed to furnish additional security to make good the deficiency.
- In view of the significant differences in both the values, the plaintiff as well as the third Defendant moved two applications before the Prothonotary and Senior Master for placing the matter before the Court.

2. Issue Raised by the Defendant

- **Issue No-1:** The offer placed by Plaintiff for offering security as thirteen flats belonging to the two sons of Plaintiff must be rejected in light of the provisions of Chapter 27 of the Rules and particularly on Rule 441
- **Issue No-2:** Further, the agreements for sale under which the two sons of the Plaintiff have obtained title to the flats contain two conditions, the reference of which is as follows:
  - ✓ Clause 33(1) imposes a condition to the effect that the written consent of the owner must be obtained before the flat is transferred or assigned. The owner in the agreement is described as a company by the name of Raheja Universal Private Limited. Whereas the present owner is a public limited company by the name of Raheja Universal Limited.
  - ✓ Similarly, clause 39 confers pre-emptive rights on the owner.
- **Issue No 3:** The Valuation Report adopted by the Defendant and the Valuer is significantly distinguished in terms of value.

  The brief particulars of the valuation report are as follows:

  - ✓ **Valuation Report of the First Valuer:**
    - o The valuation was done based on what is described as a saleable area.
    - o The built-up area of the two sets of flats was respectively 6703 sq. ft. and 10,566 sq. ft., however, the same was enhanced for the purposes of valuation to 12,868 sq. ft and 20,541 sq. ft. by including certain ancillary areas such as the lobby, servants' room, servants' toilet, common

passage, common AHU, AHUs, niches and walls. The total plinth area is thereupon reduced to which is added a pro-rata interest in the common areas.

- The report stated that the fair market value of the property has been assessed based on local inquiries using the market value method and taking into account other factors including location, accessibility, distance and development such as infrastructure.
- The valuation report does not rely upon even a single sale instance.

✓ **Valuation Report of the Second Valuer:**

- The second report was similarly based on the saleable area as opposed to the built-up area.
- The report relied on a solitary sale instance of a flat in a building described as Raheja Anchorage purchased by Godrej Industries Limited. The purchase price was Rs.43 Crores for a built-up area of 2850 sq. ft.
- However, the valuation report did not disclose whether the sale instance was similar in terms of amenities, construction, location and other associated advantages. (Which was submitted by the respondent, that the two properties were not similarly circumstanced).

✓ **Valuation Report of the Third Valuer:**

- The third valuer's report relied on the rate mentioned in the ready reckoner, for the purpose of stamp duty of Rs.18,718/- per sq. ft. of built-up area.
- The report then relied upon four sale instances where the valuation of the property varied between Rs.18,845/- and Rs.19,347/- per sq. ft.
- The valuer adopted a rate of Rs.25,000/- and after giving a certain discount of Rs. 800/- per sq. ft, the valuer adopted a rate of Rs.24,200/- per sq. ft.

- One of the sale instances on which the valuation report has relied pertains to premise under Development Control Regulation 33(7) i.e., development pertaining to cessed building in the island city of Mumbai which may not be at par with the valuation which is ascribed to a property, which to use a phrase of contemporary parlance is a 'free sale' project.

3. Court's Observation and Decision

- **Observation for Issue No-1:** The offer placed by Plaintiff for offering security as thirteen flats belonging to the two sons of Plaintiff cannot be rejected in light of Rule 441. As the said rule postulates the order of the Court requires that security should be furnished of a bond to be given by a surety or sureties. The order of the Court does not fall under the purview of Rule 441.
- **Observation for Issue No-2:** The issue raised by the Defendant is valid and hence, the properties should be accepted as security in terms of order of the Court only after receiving an undertaking from M/s. Raheja Universal Ltd through a duly authorized officer stating that the company has no objection to the aforesaid flats being offered by way of security and that the company waives its rights under clauses 33 (1) and 39 of the agreement for sale along with an undertaking from the flat owners stating that they shall not mortgage, lease, gift, or deal with the flats in any manner whatsoever without the orders of the Court.
- **Observation for Issue No-3:** All the Valuation Reports relied on by Plaintiff and Defendant cannot be accepted on the ground of material inconsistencies. Accordingly, a fresh Independent Valuer was appointed for the purpose of carrying out the valuation of the security.

  The proceedings were disposed of with directions to conduct a fresh valuation by an Independent Valuer accepted by both parties.

4. Key Learnings for Valuers from the above case

- While valuing a property, the valuer should base its report on certain sales transactions which should be similar in terms of amenities, construction, location and other associated advantages.

  Further, this fact should be clearly reported in the Valuation Report as well.

- Valuation of a property where redevelopment has taken place under Development Control Regulation 33(7) should not be considered at par with the valuation which is ascribed to a property.
- The rates mentioned in the Ready Reckoner for stamp valuation should not be relied upon for valuation of the property.

  It is a settled law that the Ready Reckoner merely provides an index for the Revenue Authorities for the purposes of levying stamp duty and therefore, valuation either under the Land Acquisition Act or even in proceedings such as the present case cannot be based on the Ready Reckoner.
- Valuation Report should justify the figures being arrived at and should not merely be based on guesswork or method which is not appropriate for valuation.

Orders Passed by the Ld. Appellate Tribunals and Tribunals

Case No. 6
Mr. Mahendra G. Wadhwani Vs M/s Reed Relays & Electronics India Ltd (2022)

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
Principal Bench, New Delhi

Appellant:

Mahendra G. Wadhwani

Respondents:

M/s. Reed Relays & Electronics India Ltd.
Securities and Exchange Board of India
Regional Director, Southern Region, Ministry of Corporate Affairs, Chennai
Registrar of Companies

Decided On: 16.11.2022

1. Brief Facts of the Case

- The appeal was filed under section 421 of the Companies Act, 2013 by Mahendra G. Wadhwani, a public shareholder of M/s. Reed Relays & Electronics India Limited against the order passed by the National Company Law Tribunal, Chennai on 18.9.2019.
- The company was listed under the Madras Stock Exchange ("MSE"). MSE was in the process of getting de-recognised. Hence, Exclusively Listed Companies (ELCs) with MSE, were required to either get listed on a nationwide stock exchange or provide an exit option to its public, non-promoter shareholders. The company did not wish to get listed on a nationwide stock exchange, hence provided an exit option to its non-promoter shareholders by way of reduction of share capital.
- The Appellant was aggrieved on account of the following issues and hence, raised an appeal with NCLAT:
    - ✓ The appropriate procedure/process was not followed by the Company.

- ✓ The shares were proposed to be compulsory buyback rather than voluntary exit by using Security Premium Account
- ✓ Manner of appointment of the Valuer was incorrect and further, Valuation Report had inconsistencies that have been overlooked.

- Initially, the Division Bench of NCLT had passed an order on 04.10.2017. Aggrieved by the said order an appeal was made to NCLAT. On hearing the matter NCLAT vide its order dated 17.04.2018 remanded the matter back to NCLT while setting aside its previous order.
- In view of the same, the matter was reheard by a Single Member (Judicial) of NCLT, Chennai Bench and an order was passed on 18.09.2019, which effectively maintained the earlier order of the Division Bench of the NCLT dated 4.10.2017 without any modification.

2. Issues Raised by the Appellant

- As per the direction of the NCLAT, the matter was heard by a Single Member (Judicial) of NCLT, whereas the earlier order was passed by the Division Bench of NCLT. Thus, the order passed by the NCLT suffers from the defective constitution of the bench.
- Further, a new order should have been passed by the Bench rather than passing the same order without any modification, as the previous order passed by NCLT has already been set aside by NCLAT.
- The votes cast by the promoters were clubbed with the votes cast by non-promoter shareholders during the Extra General Body Meeting (EGM) dated 12.12.2016 in which the decision for reduction of the share capital was taken. As per the appellant, the votes of promoter's shareholders and non-promoter's shareholders should have been shown separately to clearly show the views/opinion of the non-promoter shareholders, since promoter shareholders are interested parties in the buyback of shares.
- It was highlighted that the process of reduction of the share capital was initiated in the Board meeting dated 5.10.2016 and EGM was conducted on 12.12.2016. In between the SEBI issued an 'Exit Circular' on 10.10.2016, which established an unambiguous procedure to provide exit to shareholders. It was argued that the Board should have taken note of the said Exit Circular and should have followed the procedure

for exit, as stipulated in 'Annexure A' of the said Circular. Further, irrespective of the fact whether the company was listed or unlisted, it was bound to follow the guidelines as laid down by the SEBI.

- On the Special Resolution, on the reduction of share capital and permitting the use of the Security Premium Account for buy-back of shares, taken in the EGM dated 12.12.2016, the Appellant pointed out that the board should have taken note of the Exit Circular dated 10.10.2016, which made it very clear that the “promoters” will have to buy-back the shares of the exiting non-promoter shareholders and “company's funds” should not be used for the same.
- Referring to the Valuation Report, it was pointed out that there were many conditionalities and limitations that were placed for the valuation of equity shares. As per the report, the Valuer had mentioned the non-consideration of cash reserves and bank balance, non-current investments and liabilities which amounts to Rs.22,40,20,314/-, Rs.49,91,472/- and Rs.65,91,693/- respectively as on 31.3.2016. Valuer had pointed out that if such elements are considered for the valuation of shares, then an incremental amount of Rs.207/- per equity share will be added over and above Rs.107/- per share. Further, the Appellant referring to the Opinion Section of the Valuation Report, pointed out that it was left to the Company's discretion and decision to adopt the most appropriate value per equity share based on factors and reasons considered appropriate by the Company.
- It was argued that the non- promoter shareholders were paid according to the Valuation Report submitted by the Valuer who had valued the shares at Rs 107 per share, whereas based on Net Asset Value, the valuation of shares would come to be Rs 351 per share, hence the shares were undervalued, and non-promotors were offered with lesser compensation.
- Further, the non-promoter shareholders were to be provided a voluntary exit option, however, the action taken by the company was for compulsory cancellation and buy- back of the shares through reduction of share capital route, which was inconsistent with the modality established by Exit Circular dated 10.10.2016.

3. Court’s Observations

The Court has made the following observations w.r.t. the issues raised in the Appeal:

- **Issue 1: Whether the NCLT Single Bench was legally competent to consider the matter after remand by the NCLAT, which was earlier heard by the Division Bench of NCLT?**

  ✓ The Court observed that a decision rendered by the Single Member (Judicial) Bench is permissible in law and the jurisdiction cannot be held to be violative of provisions of section 419 of the Companies Act, 2013, as the Single Bench was constituted by the order of the Hon'ble President of NCLT and the Single Bench was competent to hear the cases related to Companies Act 2013 and the Insolvency and Bankruptcy Code 2016.

- **Issue 2: Whether the Special Resolution passed under the provisions of the erstwhile Companies Act 1956 and Companies Act 2013 is in the nature of buy-back of shares of non-promoters and whether such provisions are similar to the provisions of the Exit Circulars issued by SEBI?**

  ✓ The Company had made the reduction of share capital under sections 100- 104 of the erstwhile Companies Act, 1956 and had applied for the reduction of share capital under section 66 of the Companies Act, 2013, claiming that section 66 is similar to section 100 of the Companies Act, whereas it was noted that section 66 of the Companies Act 2013 cannot be used when a company buy-back its own securities, as was done by the Company.

  ✓ Further the Appellate Tribunal observed that the exit option to be given to the shareholders should be voluntary, whereas the Special Resolution adopted by the company in its EGM held on 12.12.2016 under Section 100 of the Companies Act, 1956 made the compulsory buyback of shares, which was not in consonance to SEBI guidelines issued for providing exit option to the public shareholders of the Company of a De-recognized Regional Stock Exchange.

- **Issue 3: Whether it was obligatory for Company to follow the various Exit Circulars issued by SEBI, upon de-recognition of a stock exchange where the Company was earlier listed?**

  ✓ SEBI had issued various Exit Circulars. Out of the said Circulars the first Exit Circular dated 29.12.2008, clearly stated that the

companies which were listed in derecognized regional stock exchanges have to provide an exit option to shareholders as per SEBI De-Listing Guidelines/Regulations after taking shareholders' approval for the option provided within a time frame.

- ✓ Further, the Exit circular dated 10.10.2016 issued by SEBI provided a detailed 'procedure to provide an exit to investors and has also mentioned that the same is to be followed by ELC.
- ✓ It was noted that the Company in its application for reduction of share capital had mentioned the various Exit Circulars but had failed to mention the circular dated 10.10.2016. Thus, the manner in which the public shareholders had been provided an exit option, was through the reduction of share capital and was not in accordance with the stipulations in the various Exit Circulars of SEBI.

- **Issue 4: Whether the valuation of shares was done by the company keeping in view the interest of the public shareholders who wanted to voluntarily exit the company?**
  - ✓ The Company had appointed the Valuer in its Board Meeting dated 05.10.2016 and the Valuer provided its Report on 08.10.2016 which pre-dates the SEBI Circular dated 10.10.2016. However, the Valuation Report was considered by the Board on 13.10.2016 (post-issuance of SEBI Circular).
  - ✓ The Valuer in its Report had itself pointed to severe and important deficiencies and drawbacks arising out of the assumptions in making the valuation.
  - ✓ The assumptions in the Valuation Report stated that the Valuer had not considered the present available cash and bank balances, non-current investments and liabilities for the purpose of arriving at the Enterprise Value, and if the same are considered, it will have an incremental effect of Rs. 207/- per share over and above Rs 107/- per share.
  - ✓ It was also mentioned that projected non-operative income and expenses had been ignored while arriving at the valuation, since the details were not made available.

- ✓ Nonetheless, the Valuation Report also stated that the Valuer had not studied the Company's Statutory obligations and procedures to be complied with regard to exit opportunities.
- ✓ Further, the Board has accepted the valuation of Rs 107/- per share ignoring the effect of limitations as mentioned in the Valuation Report had adversely affected the interest of the Company's non-promoter shareholders.
- ✓ Appellate Tribunal also observed that the Company had simply rushed through the appointment of Valuer, who was not even taken from the panel of valuers by SEBI and after receipt of the valuation report, finalized the payoff to the shareholders, all within a period of 7 days, which was contrary to the Exit Circular dated 10.10.2016 by SEBI which stimulates the available time of 75 days.

- **Issue 5: Whether the Promoters of the Company can use the fund available with the Company to buy back the shares of exiting non-promoter?**
  - ✓ The Exit Circulars dated 17.04.2015 and 10.10.2016 issued by SEBI (referred to above) made it absolutely clear that it is the responsibility of the promoters and directors of the Exclusively Listed Companies (ELCs) in a de-recognized regional stock exchange to provide an exit to the company's shareholders. The promoters of the company have to acquire shares of such company from public shareholders by paying them such value as determined by the Valuer.
  - ✓ Therefore, promoter shareholders cannot buy back shares of non-promoter shareholders using the Securities Premium Account reserve of the company, as it is non-compliance with the Exit Circular issued by SEBI.

4. Order Passed by the Appellate Tribunal

In view of the above facts, circumstances and observations, the Appellate Tribunal passed the following order:

- The order passed by the Adjudicating Authority (NCLT) was set aside and the Company was ordered to undertake valuation again by engaging an Independent Valuer from amongst the SEBI approved

panel who shall value the shares based on the financials as existed on 10.10.2016.

- It was directed to pay the difference amount (if any, i.e., if the valuation comes to be more than Rs. 107/- per share) to the non-promoter shareholders who had already encashed the previous warrant issued by the Company.
- For non-promoter shareholders who had not accepted any payment were entitled to the full value of their shareholding as per the accepted revised valuation.
- Further, the Appellate Tribunal directed that the non-promoter shareholders shall be paid interest @ 9% p.a. on the amount due to them for the period 10.10.2016 till the date of the Order.
- The Appeal was dismissed with the direction to complete the whole process within 75 days from the date of the Order.

Key Learnings for the Valuers

- The appointment of a Valuer should be as per the Act/ Rules/ Regulations/ Circulars etc. as applicable in the case. The Companies which are Exclusively Listed Companies in a De-Recognized Regional Stock Exchange have to follow Exit Circulars issued by SEBI which prescribe that valuation should be undertaken by Valuer from SEBI approved panel.

  Hence, while undertaking and assigning the task of valuation to a Valuer, it is imperative to consider the category of Valuer to be appointed under the applicable law.
- A valuer should keep the main assumptions in mind when preparing the valuation report, and he should mention all the assumptions while drafting the Valuation Report. Further, Valuer should obtain every necessary information from management and ask for their opinions, and in case the same is not provided, it should also be mentioned in the Report.
- While preparing a Valuation Report, the Valuer must not only refer to the Circulars issued under the Companies Act 2013 but also comprehend the other associated applicable laws and regulations.

As it has been seen in this case that the use of promoters' funds has been stipulated in the Exit Circular issued by SEBI, whereas the use of the Securities Premium Account in paying off shareholders was found to be permitted under the provisions of the Companies Act, 2013. Hence, knowledge of all applicable laws and regulations is required.

- It was learnt from the case study of judgment by the Hon'ble Supreme Court in the matter of GL Sultania vs SEBI regarding non-interference by the Court in the matter of valuation of shares that the said judgment would hold when the experts have valued the shares using their expertise and knowledge.

  For that valuer should refer to guidelines issued from time to time by various competent authorities and Valuers should maintain professional knowledge and skill at the level required to ensure that an intended user receives competent professional service based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical standards and code of conduct.

  In case, the Court observes any inconsistency in the Valuation conducted by the Valuer or its Valuation Report or any matter related thereto, the Court will intervene and may provide for the Valuation to be conducted again.

Case No. 7

Bharat Heavy Electricals Ltd Vs Anil Goel, Liquidator of Visa Power Ltd & Ors. (2020)

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Appellant: Bharat Heavy Electricals Ltd.

Respondent 1: Mr. Anil Goel, Liquidator of "Visa Power Ltd."

Respondent 2: Agrawal Structure Mills Pvt. Ltd. (Auction Purchaser)

Company Appeal (AT) (Ins) No.22 of 2020

Decided On: 10.08.2020

1. Brief Facts of the Case

- The case arose out of the order passed by National Company Law Tribunal (NCLT) Kolkata Bench on 13.12.2019.
- Visa Power Limited invited to bid for commissioning the Thermal Power Plant, for which the Appellant was awarded the Letter of Award (AOA) and thus, had supplied 26000 MT (approx.) of material and erected 9500 MT of material putting up the plant & machinery before the work came to be suspended as the Invoices remain unpaid.
- CIRP got initiated against the Corporate Debtor (Visa Power Limited), but it got suspended and a liquidation order was passed. Resolution Professional was appointed as the Liquidator.
- The assets of the Corporate Debtor were divided into four heads for the purpose of the auction:
    i. Land & Building
    ii. Plant & Machinery
    iii. Furniture & Fixtures, Equipment & Computers at Location 1
    iv. Furniture & Fixtures, Equipment & Computers at Location 2

- Two Surveyors/ Valuers were appointed at the time of CIRP and two Surveyors/ Valuers were appointed at the time of Liquidation to undertake the Valuation.
- The appellant had claimed to be a Secured Creditor of the Corporate Debtor and also claimed a lien on the plant and machinery supplied to Corporate Debtor.
- However, the Liquidator did not wait for the order of NCLT on the claim of lien and issued a Certificate of Sale to Respondent 2.
- Appellant appealed for cancellation of the auction sale and claimed restitution. It also raised various grounds showing various inconsistencies and discrepancies in the various Valuation Reports.
- However, NCLT passed the orders and upheld the auction sale done by the Liquidator even after finding anomalies in the Valuation Report and rejected the claim of restitution claimed by the Appellant, based on the various judgement and sections of IBC.
- Accordingly, the appellant being aggrieved had filed an appeal before NCLAT.

2. Key Grounds of Appeal

The Appellant had raised the appeal mainly on the following grounds:

- The Appellant (BHEL) claimed to be a Secured Creditor and had submitted the applications to Liquidator during the CIRP and at the time of the liquidation process of having the lien over the material supplied by the Appellant to the Corporate Debtor, however, the claim was rejected by Liquidator in both the occasions.
- BHEL had submitted that it was not aware of issues of such Sale Notice or Auction Process and when Respondent No. 2 went to remove material from the project site, it immediately issued notice to Liquidator and Respondent No.2 not to remove the materials from the site.
- Respondent No. 2 had forcibly removed the materials which were not even part of the Certificate of Sale, including goods lying inside BHEL's enclosure as well as lying outside at other locations. Further, the Liquidator also failed to ensure the safety of the material supplied by BHEL.

- On referring to the various contents of the Valuation Reports of different Valuers, it was highlighted that the different Valuers had approached the same asset in different manners by putting them in different categories and it was not clear what was valued and what was left out.
- Further the materials were undervalued.
- It was submitted that upon referring to the Annual Reports and Balance Sheets of the 2nd bidder, it could be identified that the bidder was not competent even to give a security deposit.

3. Submissions by Respondent (Liquidator)

- Liquidator agreed that he had received an application from the Appellant during the CIRP and at the time of the liquidation process claiming to be a Secured Operational Creditor. However, the same was rejected as the security interest was not created by way of transaction.
- Sale Certificate was issued to Respondent No-2 on deposit of the consideration amount as no stay was put on the process of auction and the liquidation being a time bound process, had to be completed in time.
- The auction was done only for the material which was lying outside the enclosed portion of BHEL. Further, complaint had been filed with the Police regarding the unauthorized and forceful removal of the material against Respondent no 2.
- As per IBC Code, the Liquidator is bound to accept the bid upon receipt of EMD.
- It was claimed that the materials were not undervalued as the higher price has been taken i.e., average of two CIRP Valuation Report over the average value presented by the two IBBI Registered Valuer. Further, the same was fixed pursuant to the directions of stakeholders in the meeting held.

4. Observations by Ld. NCLAT

- Appellate Tribunal observed that when the two documents namely Sale Notice, which was published in the newspaper by the liquidator for the public in general and E-auction Process Information Document which was for an interested bidder are compared then the three items which were part of the building as per sales notice are included in the Plant & Machinery in the Information Document. In spite of such difference the

Reserve Price for plant & machinery remained unchanged. Hence Tribunal observed that the auction held was vitiated as there was such a difference in the document.

- On observing the pre-bid Qualification of bidders, it was observed that the Liquidator failed to prescribe the pre-bid qualification as per the Regulations to secure real competition. This observation was made on the basis of looking into the annual report of the 2nd bidder, which did not have the capacity to bid even after depositing the 10% security deposit amount.
- Hence, the Appellate Tribunal observed that the auction process was defective and thus no actual bidding happened during the process.
- Further, Appellate Tribunal observed a discrepancy in the Valuation. Appellate Tribunal based on the material fact observed that there was confusion in categorizing the items in the asset blocks and also the Valuers treated different items differently, hence the reports were improper and not comparable to arrive at liquidation value.
- Appellate Tribunal observed that there was no system in place to look into the liquidation process. As ordered by the NCLT in operating order, no system was made to segregate the items and to handover the remaining items.
- Further on an investigation of facts Appellate Tribunal observed that Respondent No 2 had lifted material worth Rs 20 Crores which was not part of Sale Certificate without the permission of the Liquidator.
- Appellate Tribunal observed that Respondent no 2, based on the issued Sale Certificate enter the project site and removed materials free handedly. Documents also show that Respondent no 2 scared the guards when he questioned about removing of material from the site. Thus, the Appellate Tribunal stated it as criminal activity in the hands of Respondent no.2.

5. Orders passed by the Ld. NCLAT

- In view of the aforementioned observations, the Ld. NCLAT had passed the following orders:
- On having a claim of lien and statutory charge over material supplied, Appellate Tribunal rejected the claim of the Appellant of being a Secured Creditor.

- Claim of the Appellant seeking setting aside of auction was upheld by the Appellate Tribunal. The issued Sale Certificate and subsequent lifting of material by Respondent no2 are all set aside as illegal.
- Appellate Tribunal ordered the Liquidator to recover all the materials and directed Respondent 2 to return all the materials including materials which were part of the sale certificate within 15 days of the order.
- Appellate Tribunal asked the SHO of the area to assist the Liquidator in recovering the material. Also, to file the FIR against the complaint filed by the Liquidator if not done earlier.
- Appellate Tribunal directed the Liquidator to report inventory of all the plant and machinery and goods which were on the spot, which have been removed/missing and which were still available at the project site. Also directed the Liquidator to report the missing items to the police and report to the Adjudicating Authority to whom Appellate Tribunal remits back the matter.
- Appellate Tribunal requested the Adjudicating Authority to give further necessary directions from time to time to the Liquidator to ensure further actions to recover goods taken away by Respondent No.2.
- Appellate Tribunal directed Liquidator to put the materials for reauction after recovering the materials of the Corporate Debtor. Also directed to call for new Valuation Report from two new registered valuers as per the procedure. Further, directed to pay back the amount of consideration to Respondent no 2 or to forfeit the amount for illegal lifting and damage of materials.
- Appellate Tribunal further directed Liquidator to return any material/ goods belonging to the Appellant other than on which the Appellant has been claiming a lien.
- Appellate Tribunal said that the appellant will be entitled to the monitory claim admitted by the Liquidator.
- Further, Appellate Tribunal told the Adjudicating Authority that if the Liquidator does not cooperate with the orders, then the Adjudicating Authority can replace the Liquidator with another person.
- Appellate Tribunal ordered Respondent no 2 to pay the cost of the appeal quantified as Rs 5 Lakh to the Appellant.

6. Key Learnings for Valuers from the above Case

- Valuation base selected by a valuer shall be appropriate considering the purpose of engagement and the terms of the engagement. The valuer shall use the relevant valuation approach and adhere to other assumptions associated with the valuation bases.
- A valuer shall obtain ownership information regarding the asset to be valued to enable the valuer to determine the type of ownership interest being valued and ascertain whether that interest exhibits control characteristics.
- A valuer shall gather and analyse the relevant general information which may affect the Valuation directly or indirectly and which seems relevant to the valuer.
- A valuer may obtain written representations from the client regarding information for performing the valuation assignment. A written representation obtained from those charged with governance becomes part of the evidence obtained by the valuer which forms a basis for his valuation report.
- A valuer shall disclose the major factors considered by him in the valuation report to assist the readers to have a complete understanding of the valuation.
- Before submitting the valuation report for any purpose, the valuer must check if there are any inconsistencies and contradictions present in the valuation report which could possibly have a negative outcome in the future.
- A valuer shall ensure that the documentation is maintained in a form that is sufficient to enable another professional having no connection with the engagement or a reviewer appointed by any relevant professional body, to review the valuation process and conclusions.

Case No. 8
Ashwani Arora Vs Union of India (2020)

IN THE DISTRICT COURT, DELHI

Petitioner:

1. **Ashwani Arora**
2. **Smt. Kanta Kumari Arora**
3. **Sh. Vijay Arora**
4. **Sh. Amit Arora**

Respondents:

1. **Union of India, Through Land Acquisition Collector District-Shahdara**
2. **Delhi Metro Rail Corporation Ltd**

Decided on: 15.12.2020

1. Brief Facts of the Case

- A notification was issued by the Land Acquisition Collector (hereinafter referred to as "LAC") for the acquisition of land/properties coming in the way of construction of Delhi MRTS Project Phase II.
- On 17.08.2006, ancestral property owned by the petitioners in question had been acquired for the aforesaid purpose by the LAC.
- Area of 1433 sq. meters belong to four petitioners in the following ratio:-
  - ✓ Jagdish Kumar- 204 sq. meters
  - ✓ Amit Arora -83.615 sq. meters
  - ✓ Vijay Arora-83.615 sq. meters
  - ✓ Ashwani Kumar-1080.530 sq. meters.
- Being aggrieved from the lesser rate fixed by LAC for the acquired land, the petitioners filed an application/petition under Section 18 of L.A. Act, 1894 before the LAC on 11.03.2008.

- The LAC had initially dismissed the said applications as time-barred on 09.03.2011 and had referred only on 21.08.2015 in compliance with direction passed by the Hon'ble High Court of Delhi in the writ petitions filed by the petitioners.

2. Key Grounds of Appeal

The petition had been raised mainly on the following various grounds:

- The market value assessed by Ld. LAC was not as per specified norms.
- Valuation made by the Valuer does not reflect the true value of structures appurtenant to the lands in question.
- The Valuer had applied a cost index of 123 instead of a cost index of 261 issued by CPWD.
- LAC had erred in not awarding compensation under all sub-clauses of section 23 of L.A. Act, 1894.
- LAC had also erred in calculating days while awarding statutory interest in the award.

3. Issues Raised and Observations by the Court

Issue No. 1: Whether the claim was within limitation?

- The Petitioners were served with notice dated 08.01.2008 under Section 12(2) of L.A. Act, 1894 on 19.01.2008 without copy of award. It was informed that the limitation to file reference applications should have started from the date of constructive knowledge of the contents of the Award. Also, the petitioners had applied for a certified copy of the award on 24.01.2008 and the same was received by them on 12.02.2008. Thus, the reference applications filed before the LAC on 11.03.2008, were well within the period of limitation.
- Respondent No. 2 claimed that the petitioners did not prove that they had applied for a certified copy of the award on 24.01.2008 and received the same on 12.02.2008 to justify a delay of 29 days in filing the petitions. Further, as per section 12(2) of L.A. Act, 1894, the LAC only had to provide information regarding essential contents of the award and there was no requirement of supplying a copy of award along with the notice.
- On examining the contentions and referring to the judgement by the Hon’ble Supreme Court in the case of Premji Nathu Vs State of Gujarat

held that it is necessary to send a copy of the award along with notice u/s 12(2) of the LA Act 1894. Once, a copy of the award was not sent to petitioners, petitioners could not effectively file an application for seeking reference u/s 18 of the LA Act.

- Accordingly, the Court decided that the applications filed before the LAC was within the period of limitation. and decided in favour of the petitioners and against the respondents.

Issue No. 2: The compensation arrived at by Land Acquisition Officer was unfair in the circumstances of the case and calls for enhancement?

- The LAC assessed the market value of the land @ Rs. 6450/- per sq. mtrs. with respect to 14068 Sqr. mtrs. of land which came to Rs.9,07,38,600/-. Further, solatium at the rate of 30% of market value along with the additional amount @ 12% of market value w.e.f. 12.04.2006 to 17.08.2006 was allowed apart from the cost of structure appended to the said land and statutory interest under Section 34 of Act. Thus, an Award for a total amount of Rs.22,14,55,073/- was passed by the LAC.

Summary of the award dated 31.12.2007

Particulars	**Amount**
Rate of one Sq. Meter (Residential)	Rs. 6450/-
Market value of the land measuring 14068 sq. Mts.	Rs. 9,07,38,600/-
Solatium @ 30% of market value	Rs. 2,72,21,580/-
Additional amount @ 12% of the market Value w.e.f 12.04.2006 (date of Not. U/s4) to 17.08.2006 (Date of possession (128 days)	Rs. 38,18,479/-
Cost of structures	Rs. 7,35,83,520/-
Total amount of compensation	Rs.19,53,62,179/-
Interest U/s 34 of L.A. Act @ 9% for one Year	Rs.1,75,82,596/-
Interest U/s 34 of L.A. Act @ 15% for 106 days.	Rs. 85,10,298/-
Total	**Rs.22,14,55,073/-.**

- Both the Respondents informed that certified copies of sale deeds pertaining to the same area were obtained from Sub Registrar for the

period near to the notification issued under Section 4 of L.A. Act, 1894, which gave an average rate of sale varying from Rs. 2712.01 per sq. meter to Rs. 3907.18 per sq. meter while the LAC had fixed the market value @ Rs.6450/- per sq. meter which is more than the true and correct market value of land based on facts, circumstances and the prevailing market rate at the time of acquisition.

- Whereas, the Petitioners pointed that Section 23 of L.A. Act, 1894 mandates that LAC had to consider all the aspects as provided under sub-clause first to sixth of the said section. it was submitted that as per sub clause first, market value of the land had to be determined on the date of issuance of notification under Section 4 of L.A. Act, 1894, which was 12.04.2006 in the instant case. The LAC had fixed the market value of land @ Rs.6450/- per sq. meters vide award dated 31.12.2007, which is meager for the commercial land.
- For the assessment of the market value of land, the petitioners mainly relied upon the following documents:

  (a) Sale deed dated 20.03.2006 of nearby Industrial Complex admeasuring 2000 sq. meter which was sold for a sale consideration of Rs. 9.25 Crores i.e. @ Rs.45,000/- per sq. meters;

  (b) Office Memorandum/ Circular of the Ministry of Urban Development, Land and Development Office, Government of India dated 02.05.2017 which provided land rate as Rs. 30,000/- per sq. meters w.e.f. 01.04.2006 to 31.03.2007.

  (c) Circular of DDA dated 18.04.2006, which provided the conversion rates of commercial/ industrial properties from leasehold to freehold for 2006-2007.

  (d) Circular dated 11.11.2009 issued by the office of Commissioner of Industries, Govt. of NCT of Delhi, which notified the market rate for disposal of land and for charging unearned increase on industrial land allotted by the department for the year 2006-2007 as Rs. 22,289/- per sq mtr.

  (e) Document dated 10.07.2008, which provided conversion rate/charges in respect of industrial plots from lease hold to free hold for the year 2006- 2007 as Rs. 18,000/- per sq mtr.

(f) Auction sale of industrial property admeasuring 105 sq yds of nearby plot in Industrial Area by Debts Recovery Tribunal-II, on 21.12.2006 for Rs. 46,70,000/- i.e., @ Rs. 53,192/- per sq. meter.

(g) Valuation Report dated 17.01.1998, prepared by Government Approved Valuer in respect of property in the nearby area, as per which the market rate in Jan, 1998 was Rs.25,000/- to Rs.30,000/- per sq. yards which would be around Rs. 70,000/- per sq mtr in the year 2006.

(h) Record of office of the Department of Revenue regarding Circle rates.

(i) Copy of the Master Plan of Delhi-2021 to show the area where the property is located was in Category -'G'.

- Based on the contentions, exhibits and previous judgements, the Court had made the following observations:

a) The assessment of the market value of acquired land on the basis of the rate effective for the period from 01.04.1998 to 31.03.2000 as circulated by Land Division of Ministry of Urban Development was not legally sustainable as the LAC was required to assess the rate as prevalent on 12.04.2006 i.e., date of notification under Section 4 of L.A. Act, 1894. The grant of escalation of 10% on Rs. 5865/- per sq. meter for the period of six years would not justify the assessment of fair market value of land in question.

b) LAC should have considered the revised circular by the Land & Development office of Ministry of Urban Development for commercial land and commercial properties dated 01.04.2000. Since the rates stand notified w.e.f. 01.04.2000 onwards, therefore logically, any assessment had to be done on the basis of said rates for the relevant period.

c) To avoid financial burden from the enhancement of the compensation amount of the acquired land, DMRC approached the Sub Registrar, to provide certified copies of low value sale deeds near to the time of date of notification issued under Section 4 of L.A. Act, 1894 so that the same could be relied upon in evidence.

d) The properties in question were freehold commercial/industrial properties, therefore, the value of conversion rate from leasehold

to freehold also should have been taken into consideration by LAC while assessing its market value, which exercise was not undertaken by the LAC. The conversion rate from leasehold to freehold for industrial properties located in the area as per Circular dated 18.04.2006 was Rs. 18,000/- per sq mtrs. Therefore, upon adding a conversion rate of Rs. 18,000/- per sq mtrs. to Rs. 30,000/- per sq mtrs, which was the market value of commercial land as per Circular dated 02.05.2017 for the period of 01.04.2006 to 31.03.2007, the land rate came to Rs. 48,000/- per sq. mtrs. for the properties in question.

- Therefore, in view of the aforementioned contentions and observations, the Court had enhanced the market rate of lands in question from Rs. 6450/- per sq. mtrs. to Rs. 48,000/- per sq mtrs.

Issue No. 3: Whether valuation made by the Valuer does not reflect the true value of the structure appurtenant to the land in question?

- The Petitioners submitted that the LAC had awarded less amount towards the acquisition of value of structure appurtenant to the land in question. The valuation of the building structure got evaluated by PWD from Govt. Recognized Valuer and his Report and was adopted by the LAC in the impugned award. The said valuer had adopted the cost index of 123 instead of 254, which ought to have been applied as per cost index chart issued by CPWD. Further, as per Income Tax Department, Cost Index of 285 is applicable for valuation made on 20.04.2006 as per rates issued on 01.01.1992
- On the perusal of statement of Cost Index of CPWD, the Court directed that the cost of structure calculated by the Valuer vide Valuation Report dated 20.04.2006 on the basis of cost index of 123, should be modified by the LAC by applying the cost index as 236.

Issue No 4: Whether LAC had erred in not awarding compensation under 4th & 5th sub clauses of section 23 (1) of L.A. Act, 1894?

- The petitioners had testified that they had incurred losses by shutting down the operations in the premises, by selling out the plant and machinery, by paying salary and retrenchment expenses to the employees during the period of shifting and by also incurring expenses on transportation and on labour on transferring of plant & machinery.

Petitioners claimed that LAC has erred in not awarding compensation under 4th & 5th subclauses of section 23 (1) of L.A. Act, 1894.

- However, the Court observed that the petitioners did not place on record the inventory of plant and machinery as well as of stocks, which was available on 17.08.2006 i.e., date of possession. Further, no record or any document showing the labour incurred on removing the plant, machinery as well as stocks from the land in question and freight charges was placed.

  Hence, the Court did not accept the claim of the petitioners under the said sub clauses fourthly and fifthly of section 23(1) of L.A. Act, 1894 in as much as there were no legally admissible and relevant evidences to support the said claims.

Issue No 5: Whether LAC had also erred in calculating days while awarding statutory interest in the award?

- The Court observed that for the award of interest, LAC had calculated the interest from 17.08.2006 to 30.11.2007 i.e., for one year and 106 days. The LAC had erred in mentioning the date of award as 30.11.2007 and accordingly, not awarded interest to the petitioners for 31 days for which they were entitled to. The court commented that if one calculates the number of days from 17.08.2006 to 31.12.2007, same comes to one year and 137 days and thus, the applicants are entitled to interest for 31 days, in addition to period of one year and 106 days, in terms of Section 34 of L.A. Act, 1894.
- Further, the Court observed that the amount of compensation awarded by the LAC vide impugned award dated 31.12.2007 had not admittedly been paid to the petitioners. As per record, amount of compensation was deposited before Ld. Predecessor of the Court on 06.07.2009 and therefore, the petitioners are entitled to interest on the awarded compensation by the LAC from the date of award till the date of deposit in terms of Section 34 of L.A. Act, 1894.
- Court ordered that the claimants are entitled to payment of the enhanced award on pro-rata of their 1/4 share each with 15 per cent solatium and 4 per cent interest as awarded by the Civil Court.

4. Decision of the Court

- The Court had enhanced the market value of land from Rs. 6,450/- per sq mtr to Rs. 48,000/- per sq mtrs and accordingly, LAC was directed to rework the same.
- Further, it was directed that the petitioner would also be entitled to all statutory benefits, being 30% solatium on the market value in view of the compulsory nature of acquisition as per section 23 (2) of the L.A. Act, 1894 and an additional amount of 12% p.a. on the market value as provided under Section 23 (1A) of the L.A. Act,1894.
- Moreover, the petitioners would also be entitled to interest on the enhanced compensation @ 9% per annum from the date of dispossession till expiry of one year and thereafter @15% per annum till payment.

5. Key Learnings for Valuers from the above Case

- The Valuers, for fixation of fair and reasonable market value of any type of land, may carefully discard, abnormally high value or abnormally low value sales.
- While determining the market value of the land, a valuer should consider the following factors:
  a) Existing geographical situation of the land.
  b) Existing use of the land.
  c) Already available advantages, like proximity to national or state highway or road and/or developed area.
  d) Market value of other land situated in the same locality/village/ area or adjacent or very near to the acquired land.
- Valuers, while determining the market value of the acquired lands, should not consider auction sale prices, as element of competition or element of litigations in auction sales may make them unsafe guides.
- It is pertinent to note for a Valuer, that while valuing any land, it is important to check whether such land is freehold/ leasehold and the usage of the same i.e., residential/ commercial. As, the said factor may impact the valuation to a great extent.

Further, while opting for comparable method, valuation should be considered of the properties which are based on the same factors as similar to the property which is under valuation.

Case No.9

Intelligrape Software Pvt. Ltd. Vs. Income Tax Officer (2020)

IN THE INCOME TAX APPELLATE TRIBUNAL
NEW DELHI

Appellant: Intelligrape Software Pvt. Ltd., New Delhi

Respondent: Income Tax Officer, Ward 12 (3), New Delhi

ITA No. 3925/Del/2018

AY: 2014-15

Decided On: 30.09.2020

1. Brief Facts of the Case

- The Appeal has been filed by the Appellant against the order of the ld. CIT(A)-4, New Delhi dated 15.03.2018
- The Appellant is a Private Limited Company registered under the Companies Act, 1956 with the main object to provide Software Development/ IT services in India and abroad. It had issued unquoted equity shares at a premium to its Holding Company.
- CIT(A) had confirmed the addition of Rs.1,59,39,863/- as made by the AO under section 56(2)(vii)(b) of the Income Tax Act 1961 on account of the alleged excess value of share premium over fair value.
- In the Assessment Order, the AO had rejected the Valuation Report given by the Chartered Accountant (Valuer) which was arrived as per Discounted Cash Flow Method substantiating its fair market value of equity share being Rs. 6175/- per share. The AO had rejected the Report on the ground that the year-wise results projections are far from the actual results declared in the final accounts.
- Hence, the AO, recomputed the value of the shares of assessee company by Net Worth Method which came to be at Rs. 23.21 and thus, made an addition of the premium amount of Rs 1,59,39,863/- received in excess of the net worth of shares determined at a fair value of Rs 23.21 per share.

2. Key Grounds of Appeal

The Appellant has filed the appeal mainly on the following grounds:

- CIT(A) has erred on facts and under the law in confirming the addition of Rs.1,59,39,863/- under section 56(2)(vii)(b) of the Income Tax Act 1961 on account of the alleged excess value of share premium over fair value.
- The Valuation Report for such shares by the specified Valuers was conducted in accordance with valuation methodology as opted by the Appellant under Rule11UA of Income Tax Rules 1962 and hence, could not be disregarded by the Authorities.
- At the Option of the assessee, either the prescribed method of Rule 11UA(2) of Income Tax Rules 1962 or the DCF method as per Clause (b) of Rule 11A(2) can be adopted and the assessee has opted for the DCF method of valuation. So, the action of the ld. CIT(A) disregarding the valuation report submitted is against the provisions of the Income Tax Act 1961.
- Further, the AO/ CIT(A) cannot be considered as the Specified Valuer/ Independent Expert as per Rule 11UA of Income Tax Rules 1962 and accordingly, the AO has no right or authority to substitute his own valuation of unquoted equity shares and reject the Valuation Report by the Specified Valuer/ Independent Expert.
- Various observations made by the Authorities in their respective orders while making the addition of Rs.1,59,39,863/- u/s 56(2)(vii)(b) of Income Tax Act 1961 are either factually incorrect or legally untenable.
- The Appellant submitted that 2591 shares had been issued to one entity "Tangerine Digital Entertainment Pvt. Ltd." on 10.09.2013 at a premium of Rs.6165/- which was the group company of the assessee company. It was also explained that the reason for such premium was that the company had business plans to extend its operations, for which the assessee company needed more capital for investments and to meet its plan for future business expansions and to reduce the finance charges by using less external funds.

3. Arguments Presented by Ld. CIT(A)

- The Valuation Report provided by the Valuer does not contain the date

of the valuation. Under DCF Method, date of valuation is extremely significant as projections of free cash flows, terminal value, discounting etc. will all flow from the date of valuation. Additionally, Technical Guidance on Share Valuation issued by the Institute of Chartered Accountants of India has clearly mentioned that the date of valuation is critical for the report as valuation is time specific.

- While computing the cost of Equity, through Capital Asset Pricing Model, Beta coefficient has been estimated at 1.23. No reason had been stated in the report why it is estimated at 1.23 and why not above or below that. A small difference in BETA can have a significant impact on the Cost of Equity which can completely alter the valuation.
- Cost of equity was increased by 1.7% in the Report because there was no marketability. It was again an estimate without any basis. Further, the final valued price should be adjusted for liquidity or lack of marketability, and not the cost of equity.
- Weighted Average Cost of Capital (WACC) should be computed on the basis of the actual debt-equity ratio appearing in the balance sheet which should be applied to the cost of equity and cost of debt. As per the Balance Sheet, the Company did not have debt, therefore the 70:30 ratio violates the principles of valuation.
- The terminal value of the business was calculated using a growth rate of 3%. which was again an assumption. Further, the growth rate should be correlated with the date of valuation and the industry in which the appellant is operating on the date of valuation.
- The Free Cash Flows chart indicated that there was a projection that Capex would be only required in the first year and then no capex would be required even though the sale had increased from 97 crores to 284 crores. It is difficult to comprehend how the sale increased by three times without requiring a capital asset, even when the appellant is in the technology and computers business.
- The Valuation Report had shown a growth rate of 25% in revenue after the second year. Where the growth rate is taken at 25% year after year up to 2018 projections, a growth rate of only 3% for terminal growth is not justified. Also, no basis was provided for projecting the results for sales, cost, depreciation, capex or Net Working Capital for subsequent years.

- The company was a private limited company and not a listed company. The shares of private limited companies are to be discounted for their lack of liquidity and marketability, however, the Valuer had not considered the same. In view of the same, the valuation that had been determined was not a fair estimate.

4. Key Observations and Decision of Ld. ITAT

- The Ld. ITAT had observed that as per Explanation(a)(i) of Section 56(2)(viib), the Fair Market Value of the shares shall be the value "as may be determined in accordance with such method as may be prescribed'.
- Such method was prescribed in specific Rule 11UA(2) of the Income Tax Rules 1962, which states that the Fair Market Value of unquoted equity shares has to be determined as per clause (a) or clause (b) of Rule 11UA(2) at the option of the Assessee.
- Clause (a) refers to the book value method whereas clause (b) refers to the DCF method as supported by a Valuation Report of a Merchant Banker or a Chartered Accountant.
- The assessee had opted for clause (b) of Rule 11UA(2) of the Income Tax Rules 1962 by applying the DCF method and obtained Valuation Report from a Chartered Accountant thereby fulfilling both the requirements of such specific Rule.
- Accordingly, the Court decided that AO/ CIT(A) had no authority to change such valuation methodology and adopt a different book value method as prescribed under clause (a) of such Rule and hence, such action of the Authorities was not justified and the demand was required to be deleted.
- Further, the AO was also not able to pinpoint specific inaccuracies or shortcomings in the DCF Valuation Report of the Chartered Accountant/ Valuer.
- Accordingly, keeping in view the entire facts of the case, the appeal of the assessee had been allowed.

5. Key Learnings for Valuers from the above Case

- When a Statute requires, a thing to be done in a certain manner, it shall be done in that manner alone and not otherwise.

Section 56(2)(vii)(b) of the Income Tax Act, 1961 requires the FMV of the unquoted shares to be determined as per the method prescribed under Rule 11UA of Income Tax Rules 1962 at the option of Assessee. Clause (a) of the Rule refers to Book Value Method whereas clause (b) refers to the DCF Method as supported by Valuation Report of a Merchant Banker or a Chartered Accountant.

Accordingly, it is at the option of the assessee to select the method as prescribed under the Rule and the same cannot be challenged by any Authority.

- The DCF Method is based on the projections and the future aspects of the company considered at the time of the date of valuation. Accordingly, these projections should not be compared with the actuals to expect the same figures as were projected.
- The AO has no power to disregard the DCF valuation as carried out by the Valuer and such action of the Authorities of rejecting such valuation Report is incorrect and violative of the law.
- The Valuers should mention the date of valuation in their Valuation Report.

Case No.10

Rakita Overseas Pvt. Ltd. Vs Salter India Pvt. Ltd. And Ors. (2005)

IN THE COMPANY LAW APPELLATE TRIBUNAL

Appellant: Rakita Overseas Pvt. Ltd.

Respondent: Salter India Pvt. Ltd

Equivalent citations: 2007 139 Comp Cas 760 CLB,

2006 68 SCL 336 CLB

1. Brief Facts of the Case

- On 29.10.2004, the petition was filed, and it was agreed that the petitioner would go out of the company on receipt of fair consideration for the shares which would be determined by XYZ Valuer (Valuer-1), and the valuation would be completed by 30.12.2004.
- However, in 2005, the respondent filed an objection seeking the appointment of another valuer. In response to the said request, Second Valuer was appointed to determine the fair value of the shares based on the balance sheet as on March 31, 2004.
- Accordingly, the fair value of the shares was determined at Rs.91.58 per share by the Second Valuer.
- Thereafter, the valuation report was discussed at the hearing on 11.7.2005, where the petitioner agreed with the fair value determined, whereas the respondent sought to file an application challenging the valuation and for dismissal of the petition on various grounds.

2. Issues Raised by Respondent

- The Respondent argued that the valuation done by the Second Valuer is not fair and reasonable.
- For this purpose, a third valuer was hired who analysed the reports of the First and the Second Valuer and made the following observations:

- It was mentioned that the 1st Valuer had previously determined the fair value of the shares at Rs.40/- per share, and Rs.44/-per share as on 31st January, 2003 and 31st March, 2003 respectively as a result, the fair value determined by the second valuer within a year cannot be Rs 91.58 per share.
- The valuation was challenged primarily on the following grounds:
  - ✓ The Valuer has taken into account the business projections made by the petitioner as against the business projections by the Company.
  - ✓ The company being a private company, the shares have no marketability and as such the valuer should have discounted the fair value by a suitable percentage.
  - ✓ The valuer has not adopted the Discounted Cash Flow Method which is one of the most important methods of determining the fair value.
  - ✓ The valuer has not taken into consideration that the products manufactured by the company are low-technology items, that the trademark user agreement is nonexclusive and non-transferable and that the company does not have an exclusive contract with any of the customers and the existing arrangements with main customers are not likely to continue for a long period.
- The Valuer while determining the enterprise value has given weightage to three methods as follows:
  - ✓ Net Assets Value (20% weightage)
  - ✓ Comparable Companies Multiple (40% weightage)
  - ✓ Profit Earning Capacity Value (20% weightage)

  However, the weightage to the Comparable Companies Multiple Method should be restricted to 1/3rd only as the average share price of A very India during the last five years had been only Rs 20/-.

3. Court's Observation

The Court had made the following observations, in view of the aforementioned issues raised by the Respondent:

- The First Valuer had determined the fair value of the shares in 2004, which was based on the balance sheet as of March 31, 2003.
- During the year, 2004-2005, the profit of the company went up substantially which itself increased the fair value of the shares.
- Furthermore, the fair price was determined for the purpose of acquiring the shares of a non-resident shareholder by a resident shareholder. As a result, the fair value of Rs.40/- and Rs 44/- as of 31.1.2003 and 31.3.2003 respectively, reflected only 60% of the real fair value. As a result, the real fair value for transfer to a resident would have been Rs.54/- and Rs.59/-, respectively.
- Accordingly, if the fair value as on 31.3.2004 was computed in the same manner as was done by the First Valuer without any discounting, the transfer is from a resident to a resident, the fair value would come to Rs.137- which is much higher than the fair value computed by the Second Valuer.
- Regarding the non-adoption of the DCF Method, it was clearly mentioned that the DCF Method has not been considered, as the petitioner had expressed reservations about the financial "projections provided by management." (Reliance was placed on the Supreme Court Judgement in case of Dr Mrs. Renuka Dalta vs Solvay Pharmaceuticals.
- With regard to the objection of discounting the shares by an appropriate percentage, it was mentioned that the Valuer has duly discounted the fair value by 15% on account of ill-liquidity.
- After referring to the above-mentioned case, the court has developed the observation that valuation can be made even without considering the DCF method, if other methods adopted are fair and reasonable. Further, in the present case, the respondents have not shown as to what prejudice has caused to them in non-adoption of the DCF Method, despite the fact that the valuers have specifically stated the reason for not adopting the said method.

4. Decision of the Court

- The Court did not find much substance in the objections raised by the Respondent against the Valuation done by the Second Valuer except for the weightage assigned to different methods.

- Accordingly, the Court decided to omit the Comparable Companies Multiple Method and assigned the weightage as follows to the remaining methods:

  - ✓ Net Assets Value (1/3rd weightage)
  - ✓ Profit Earning Capacity Value (2/3rd weightage)

  Accordingly, the fair value of the shares of M/s Salter India Private Limited was determined as Rs 76.38 per share.

5. Key Learnings for Valuer from the above Case

- It is not necessary to apply the DCF method in every situation. Valuer should understand the circumstances and apply the relevant method which is fair and reasonable as per the circumstances.
- In the DCF method, the value is based on estimated future projections and these projections are based on various factors and projections. Therefore, if there are reservations about the financial projections of the Company, then the Valuer may consider any other method and approaches to arrive at a correct valuation after giving due weightage such as Net Assets Valuer and Profit Earning Capacity Value.

  There might be some situations where applying a single approach of the valuation would not be enough. There are various methods for valuation, each with its own set of advantages and disadvantages. Valuers need to incorporate one approach with another to accomplish the valuation task properly.
- Unless it is shown to the Court that what prejudice has been caused to the person on non-adoption of the DCF Method, where the Valuer has duly provided the reasons for the same, Court will not consider merit in consideration of such method.
- The value which is relevant today may not be relevant after a certain period of time. At the time when valuation is made, it is based on reflections of the potential value of the business at that particular time and also depends upon various underlying factors that may change over the period of time.
- The purpose of Valuation plays a crucial role while determining the Value. For instance, a resident shareholder's valuation for the purpose

of acquiring shares from a non-resident shareholder differs from that of a resident shareholder's valuation for the same company's shares.

- Valuation of shares is a complex exercise and that valuation of shares of the same company by two different experts could never be the same, as long as the Valuer is unbiased and has followed the accepted principles of valuation on proper materials and unjustifiable assumptions, the same cannot be questioned.

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