BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 130 of 2011

Date of decision:12.09.2012

1. IP holding Asia Singapore PTE Ltd.
   a company incorporated under the
   laws of Singapore with its registered
   office at 1, Robinson Road,
   #17-00, AIA Tower,
   Singapore – 048542.

2. International Paper Company
   a company incorporated under the
   Business Corporation Law of the
   State of New York
   with its principal executive office at
   6400 Poplar Avenue, Memphis,
   Tennessee – 38197
   United States of America …Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C4-A, G-Block,
Bandra Kurla Complex,
Mumbai – 400 051. … Respondent

Mr. Janak Dwarkadas, Senior Advocate with Mr. Shank Sengupta, Mr. Zal Andhyarujina and Ms. Aditi Awasthy, Advocate for Appellants.

Mr. Kumar Desai, Advocate with Ms. Harshada Nagare, Advocate for the Respondent.

CORAM : P. K. Malhotra, Member & Presiding Officer (*Offg.*)
S. S. N. Moorthy, Member

Per : P. K. Malhotra

The issue that arises for our consideration in this appeal is whether the appellants are liable to pay to the public shareholders the non-compete fee that has been agreed to be paid to the outgoing promoters of the company being taken over. The facts of the case, which are not in dispute, may first be noticed.

2. Appellant no.1 is a company incorporated under the laws of Singapore. It is held by appellant no.2 i.e., International Paper Company of USA through its subsidiary IP International Holdings Inc. Appellant no.2 is said to be a global paper and packaging company and its business includes manufacturing of uncoated papers, industrial and consumer packaging.

3. Appellants entered into a share purchase agreement (SPA) with the promoters of Andhra Pradesh Paper Mills Limited (the target company) on March 29, 2011 to acquire 2,12,60,008 fully paid-up equity shares forming 53.46% share capital of the target company at a price of ₹ 523/- per share aggregating to an amount of ₹ 11,118,984,184. An exclusivity fee of ₹ 21.20 per share is also to be paid to the promoter group sellers and, therefore, it was decided by the appellants to add the same to the offer price. The equity shares proposed to be acquired under the share purchase agreement represents the equity shareholding of the promoter group sellers in the target company. In terms of regulations 10 & 12 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the takeover code), a public announcement dated April 1, 2011 was published with regard to the proposed open offer for acquisition of upto 85,67,521 shares of the target company from the existing shareholders representing 21.54% of the voting capital at a price of ₹ 544.20 per fully paid-up equity share of face value of ₹ 10 each. The said offer price was arrived at in accordance with the provisions of sub-regulation (4) of regulation 20 of the takeover code. Subsequently, in compliance with the requirement of regulation 18 of

the takeover code, the appellants, through their merchant banker, filed the draft letter of offer with the Securities and Exchange Board of India (the Board) on April 15, 2011.

4. It is the case of the appellants that the promoter group sellers of the target company have been the controlling shareholders and had extensive participation in the management and operation of the target company for a substantial period of time and have gained deep knowledge of the paper and pulp industry in India and experience in the business and affairs of the target company. Being the controlling shareholders and having knowledge of business of the target company, each of the promoter group sellers of the target company are capable of offering competition. In consideration for the non-compete undertakings of the sellers as set out in the SPA as well as in the Non-Compete Agreement, the appellants agreed to pay an aggregate amount of ₹ 2,77,95,30,000 to the promoter group sellers as non-compete fee. The said non-compete fee, to be paid to the promoter group sellers, comes to ₹ 130.74 per share. The non-compete fee is within the limits of 25% of the offer price arrived at in accordance with the provisions of the takeover code. The non-compete fee was to be paid to the promoter group sellers in the proportion set out below:

PURCHASE PRICE AND NON-COMPETE FEE TO EACH SELLER

No.	Name of the Seller	Purchase Price (INR)	Non-Compete Fee (INR)	Consideration (INR)
1	LAKSHMI NIWAS BANGUR	224,510,302	56,123,283	280,633,585
2	LAKSHMI NIWAS BANGUR (LN Bangur Family Welfare Trust)	4,231,070	1,057,687	5,288,757
3	ALKA DEVI BANGUR	70,940,766	17,733,835	88,674,601
4	YOGESH BANGUR	95,545,824	23,884,629	119,430,453
5	SHREEYASH BANGUR	40,573,817	10,142,678	50,716,495
6	SURBHI BANGUR	43,317,475	10,828,541	54,146,016
7	SHREEYASH BANGUR (on behalf of Anica Bangur Trust)	14,644,000	3,660,720	18,304,720
8	APURVA EXPORT PVT. LTD.	119,118,480	29,777,342	148,895,822
9	DIGVIJAY INVESTMENTS LTD.	5,136,914,368	1,284,126,926	6,421,041,294
10	THE PERIA KARAMALAI TEA	639,677,639	159,907,179	799,584,818
11	AMALGAMATED DEVELOPMENT LTD.	7,842,908	1,960,577	9,803,485
12	M.B.COMMERCIAL CO. LTD.	102,874,623	25,716,689	128,591,312
13	PLACID LIMITED	72,145,758	18,035,060	90,180,818
14	THE SWADESHI COMMERCIAL CO. LTD.	8,514,440	2,128,447	10,641,887

15	MUGNEERAM RAMCOOWAR BANGUR	7,862,782	1,965,545	9,828,327
16	SHREE KRISHNA AGENCY LTD.	1,344,110	336,002	1,680,112
17	THE KISHORE TRAIDNG CO. LTD.	3,405,776	851,379	4,257,155
18	THE GENERAL INVESTMENT CO. LTD.	1,880,708	470,141	2,350,849
19	SAMAY BOOKS LTD.	21,046,566	5,261,239	26,307,805
20	MAHARAJA SHREE UMAID MILLS LTD.	4,502,592,772	1,125,562,101	5,628,154,873
	Total	11,118,984,184	2,779,530,000	13,898,514,184

5. The key terms and conditions of the non-compete agreement as stated in the appeal memo are reproduced hereunder for ease of reference:

> "2. COVENANTS
> 2.1 Non-Compete Obligations
>
> Each of the Sellers hereby agrees and undertakes that for the period commencing on the Effective Date and ending on the date that is 3 (three years) from the Effective Date (the "Restricted Period"), he or she shall not, have the right to carry on the Business and in connection therewith shall not, directly or indirectly, either individually or in partnership with, as part of a joint venture with, or otherwise in conjunction in any other manner with any other Person and without prejudice to, or in any manner diluting, the generality of the foregoing, the Sellers' shall not:
>
> (a) Own, manage, operate, join, establish, develop, carry on, or participate in the ownership, management, operation or control of, or be otherwise connected in any manner with; or assist in carrying on or be engaged in, any business that is the same or similar to the Business and/or which competes with the Business of the Company or the Purchaser in any manner whatsoever, including, without limitation, as an employer, employee, owner, partner, consultant, adviser, principal, agent, stockholder, member, trustee or proprietor, or otherwise;
> (b) render any services or advise, assist, aid in establishing managing, operating, providing or developing or act as consultant or professional advisor to any Person engaged in any activity anywhere in India which is the same as and/or similar to the Business and/or which competes with the Business of the Company or the Purchaser, either on its own account or on behalf of any other Person whether as an agent, licensee, advisor, consultant or under any other relationship;
> (c) provide any technical know-how, expertise or any information in any manner or form whatsoever for the purpose of and/or relating to the manufacturing, selling, supplying, marketing or distributing of products or services constituting part of any business anywhere in India that is the same as and/or similar to the Business or which competes with the Business;
> (d) advise, consult with, invest in, lend money to, guarantee the debts or obligations of, or otherwise have any other financial interest in any Person engaged in any manner whatsoever in any business that is the same or similar to the Business and/or which competes with the Business of the Company or the Purchaser, other than wholly-passive investments in any such Person that is publicly-traded,

provided that, the Company's ownership of any such publicly-traded Person shall not exceed one percent 1%;

(e) deal with the clients, customers, suppliers of goods or services, agents, consultants, contractors of, or any other Person who has a business relationship with the Company or the purchaser in any manner which may directly or indirectly adversely affect the Business of the Company or the Purchaser; or

(f) use or allow to be used any trade names, trademarks, domain names used by the Company or any other name intended or likely to be confused with such trade names, trademarks or domain names.

The provisions of this Clause 2.1 are in addition to, and not in lieu or limitation of, any legal or other contractual obligations relating to non-competition that the Sellers may have to the purchaser under the Share Purchase Agreement; and in each case, without prejudice to the aforesaid, shall not be entitled, and shall be deemed to have waived, its right to carry out any of the foregoing activities in relation to the Business during the Restrict Period.

2.2 ***Confidentiality***

Each of the Sellers shall maintain and cause to be maintained strict confidentiality by them and their Affiliates, of all Confidential Information, data and materials relating to the Business and affairs of the Company and shall not disclose to anyone, after the Effective Date, such Confidential Information, data and materials without the prior written permission of the Purchaser. All such Confidential Information, data and materials relating to the Business and affairs of the Company that the Sellers are in possession of shall be given to the Purchaser on, or immediately after the Effective Date, and the Sellers shall deliver a certificate to the Purchaser certifying as to such delivery except where such information is required to be kept with the Sellers under Applicable Law or under an order or judgment of a court.

In the event any Confidential Information is required to be disclosed by the Sellers:

(a) in response to any summons or subpoena or in connection with any litigation; or

(b) to comply with any Applicable Law, order, judgement, regulation or ruling.

the Sellers shall promptly notify the Purchaser in writing of the same and of the action which is proposed to be taken in response and in such case, the Sellers shall only be entitled to disclose Confidential Information to the extent that (i) the Purchaser has consented to (which consent shall not be unreasonably withheld by the Purchaser), or (ii) the Sellers are advised by their legal advisers that the Sellers are required to disclose, in which case the Sellers will use commercially reasonable efforts to disclose only the minimum Confidential Information required to comply with the Applicable Law, rule, regulation, bye-laws, or order of any court, tribunal or, governmental or regulatory body.

The obligations of confidentiality shall not apply to any information that has become generally available to the public for reasons other than the breach of any of the confidentiality obligations contemplated under this Agreement by the Sellers."

In addition, the SPA dated March 29, 2011 also makes provisions in this regard and the relevant provisions of the agreement are reproduced hereunder for ease of reference:

> "6. **NON-COMPETE**
>
> 6.1 The Sellers acknowledge and agree that due to the nature of their association with the Company they have confidential and proprietary information related to the Business and operations of the Company. The Sellers acknowledge that such information is of material to the Business, and will continue to be so after the consummation of the transactions contemplated herein, and that disclosure of such confidential information to others, especially the Company's existing and/or potential competitors, or the unauthorized use of such information by others would cause substantial loss and harm to the Company. In addition, the Sellers acknowledge that they are capable of offering competition to the Business and the Company and, if the Sellers were to become substantially involved in any of the activities detailed in the Non-compete Agreement, such involvement would present a substantial risk of using the Company's trade secrets and confidential information and would have a detrimental effect on, and cause irreparable harm to the Business.
>
> 6.2 The Sellers undertake, jointly and severally, that from the date of this Agreement and for a period of 3 (Three) years following the Closing Date, none of them shall compete with the Business or any of the Purchaser Group Members or their Affiliates carrying on the same business in any manner as more particularly set out in the Non-Compete Agreement.
>
> 6.3 Each of the Sellers hereby agrees and undertakes that on and from the Closing Date and during the period of 3 years from Closing Date, he/she/it shall not, directly or indirectly, by itself or in association with or through any Person, either individually or in partnership with, as part of a joint venture with, or otherwise in conjunction in any other manner with any other Person in any manner whatsoever:
>
> (a) induce or attempt to induce any Person to leave the employment of the Company, or employ or attempt to employ any Person, who is or has been a Key Employee of the Company since the date of execution of this Agreement; or
> (b) induce or attempt to induce any Person, who is or has been at any time since the date of execution of this Agreement a supplier of goods or services to the Company, to cease to supply, or to restrict or vary the terms of supply, to the Company; or
> (c) canvass or solicit, or attempt to canvass or solicit, orders from any Person who is or has been at any time since the date of execution of this Agreement, a customer of the Company for any of the products supplied by the Company as part of its Business, or persuade such customer to cease doing business or to reduce the amount of business which any such customer has been doing or might propose to do with the Company.
> (d) Solicit, or attempt to solicit in any manner, any Person to invest in the Company or any client/customer of the Company, or in business of the type of or similar to the Business of the Company.
>
> 6.4 The Sellers acknowledge and agree that the restrictions in Clause 6.1, 6.2 and 6.3 and the Non-Compete Agreement are no more

> extensive than what is reasonable to protect the Purchaser as the purchaser of the Sale Shares, the Purchaser Group Members and their Affiliates, the Company and the continuing shareholders, the Business and goodwill of the Company being acquired by the Purchaser as a consequence of the purchase of the Sale Shares."

6. The Board called for further clarifications from the appellants on the issue of non-compete fee to the promoter group sellers which were provided from time to time and after considering the said information, the Board, vide its letter dated August 3, 2011, conveyed its comments on the draft letter of offer and, inter alia, asked the appellants to revise the offer price from ₹ 544.20 to ₹ 674.93, i.e., by adding the amount of ₹ 130.73 in the offer price, being paid to the promoter group sellers as non-compete fee, for the reasons stated below:

> "i. Out of the twenty promoter entities, only five entities (i.e. Mr. L.N. Bangur, Ms Alka Bangur, Mr. Shreeyas Bangur and two HUFs whose Kartas are Mr. L.N. Bangur and Mr. Shreeyash Bangur) are eligible to get the non-compete fees.
>
> ii. From the details furnished by MB, we have noted that apart from the aforesaid entities, the other promoter sellers i.e. 13 companies and two individuals (Mr. Yogesh Bangur and Ms. Shrbhi Bangur) are not eligible to get the non-compete fee for not competing with the acquirer/Target company as they do not have any experiences/expertise in the area of operation of the Target Company and are therefore not capable of offering any competition. They are mere shareholders of the target company. As regards the 13 companies, none of them are in the business of pulp and paper manufacturing which is the product line of the Target Comp[any. Furthermore, they don't to even have such business objectives in their main object clause. Further, the two individuals (i.e. Mr. Yogesh Bangur and Ms. Surbhi Bangur) are getting the non-compete fee merely for being the relatives of the Mr. L.N.Bangur who is a director of the target company, which does not seem to be logical.
>
> iii. Further, the MB has failed to furnish sufficient justification as to why the aforesaid 15 members of the promoter group are getting the non-compete fees.
>
> iv. It has been submitted by the acquirer/Merchant Banker that the acquirer on the ground of prudence and good corporate practice has decided to pay the exclusivity fees (i.e. the fees paid to the promoter group sellers for not to solicit acquisition proposals from, or enter into any negotiations with, any party other than the acquirer in relation to the sale of shares held by them in target company) to all the public shareholders. The \acquirer/Merchant Banker has failed to justify why the same logic has not been used while paying a different price per share (without the non-compete fee) to all the public shareholders."

7. The appellants are aggrieved with the aforesaid observations made by the Board under which, out of 20 promoter group sellers, the Board has stated that only 5

individuals are eligible to get the non-compete fee and further direction to revise the offer price by adding the non-compete fee.

8. We have heard Mr. Janak Dwarkadas, Senior Advocate and Mr. Zal Andhyarujina, Advocate for the appellants and Mr. Kumar Desai, Advocate for the respondent Board, who have taken us through the records. It is vehemently argued on behalf of the appellants that the Board has incorrectly observed that out of 20 promoter group sellers, only 5 individuals are eligible for payment of non-compete fee and that the remaining 15 promoters, 13 of which are corporate entities and two individuals are not capable of offering any competition. It was submitted on behalf of the appellants that the Board has misdirected itself in coming to the conclusion that two individuals namely, Yogesh Bangur and Surbhi Bangur are not eligible to be paid non-compete fee as they are mere shareholders in the target company and relatives of L.N. Bangur. It was submitted that these two promoter group sellers are part of the Bangur family and by virtue of their being associated with the management of the target company and being shareholders in the other corporate entities, they have acquired considerable knowledge of the pulp and paper industries and, are therefore, capable of competing with the business of the target company. The extended Bangur family has been for a long period of time associated with the pulp and paper business and there is no basis for creating a distinction between these two individuals and the other individual promoter entities who have been found to be eligible for non-compete fee. These two individuals are qualified individuals and are capable of setting up new competing business.

9. It was further submitted on behalf of the appellants that the Board has also misdirected itself in coming to the conclusion that the 13 corporate promoter entities are not entitled to non-compete fee as none of them are in the business of manufacturing and/or sale of pulp and paper. According to the appellants, these 13 promoter group sellers have substantial shareholding in the target company and have been involved in the business and operations of the target company for a substantial period of time. These corporate promoter group sellers, by virtue of being business entities, with the prime object of working for profit and being privy to confidential information about the

business of the target company, are capable of offering formidable competition. According to the appellants, the non-compete agreement does not merely prohibit the promoter group sellers from competing with the target company, it also prohibits each of the promoter group sellers from indirectly competing with the business of the target company, including investing in any business which is capable of competing with the business of the target company. It was further submitted that the impugned order is contrary to the takeover code and does not provide detailed reasons for not allowing payment of non-compete fee to all the promoter group sellers.

10. The leaned counsels for the appellants further submitted that payment of non-compete fee to each of the promoter group sellers protects the continuing shareholders of the target company by restricting potential competition from the promoter group sellers. It was also submitted that the Board cannot direct the appellants to make payment of non-compete fee only to certain promoters to the exclusion of other promoters. Merely restraining selected individual promoters will not ensure that the corporate promoters would also automatically be restrained from competing with the business of the target company. Each of the corporate promoters, although closely held in family business, is a separate and distinct legal entity in its own rights and non-compete covenant agreed to by an individual promoter will not necessarily bind other independent corporate entities forming part of the promoter group sellers.

11. Learned counsel for the appellants also relied on the orders passed by this Tribunal in the case of Tata Tea Limited v. Securities and Exchange Board of India [Appeal no. 136 of 2008 decided on 15.9.2009], Cementrum IB. V. v. Securities and Exchange Board of India [Appeal no. 28 of 2008 decided on 8.7.2008], and E-Land Fashion China Holdings Limited v. Securities and Exchange Board of India [Appeal no. 27 of 2011 decided on 24.5.2011], and submitted that the Board would have no occasion to interfere if payment is made to the outgoing seller within the limits prescribed under the regulation and is made to a seller who can offer competition to the business of the target company. It was further submitted that while examining the validity of the non-compete fee, the question to be addressed is whether the outgoing

sellers are capable of providing competition to the business, alone or in association with other parties. According to them, the promoter group sellers, being a part of the management of the target company, have the capacity and capability to offer formidable competition and are thus eligible for the non-compete fee and therefore, the Board erred in making observations to the contrary.

12. Mr. Kumar Desai, learned counsel for the respondent Board supported the observations made by the Board in the impugned letter and submitted that on the basis of information provided, the Board is entitled to determine whether a person is capable of competing or not and whether payment of non-compete fee, payable to the promoter group sellers, was only a device to reduce the price payable to the other shareholders. According to the learned counsel for the Board, non-compete fee is payable to a person who, after selling shares in the company, is capable of setting up the same business which will compete with the business of the company whose controlling shares were sold by him. He has drawn our attention to the terms of the share purchase agreement and submitted that the covenants for which the non-compete fee was payable were set out in two clauses which include non-compete obligations, maintenance of confidentiality and handing over the said confidential information. According to the learned counsel for the Board, maintenance of confidentiality and non-compete obligations are separate and distinct covenants though related to each other, which are normally supported by separate and independent considerations. Non-compete agreement does not segregate the amount payable for non-compete and the amount payable for delivery of the said confidential information. According to him, access to the confidential information related to the business and affairs of the target company will be available only with those persons who are handling day to day affairs of the target company and could not possibly be available with all the promoters of the target company who are mere shareholders of the company like any other shareholder. It is only those persons, who could have access to the information relating to the business or affairs of the target company and would be in a position to compete with the target company by setting up rival business, who would be entitled to non-compete fee and not any other shareholder of the company. It was further submitted by him that the

information made available by the appellants through its merchant bankers was examined by the Board and it is only after examining that information that the Board came to the conclusion that only 5 individuals are entitled to non-compete fee and the remaining two individuals and 13 companies, though part of promoter group, are not in a position to offer competition to the target company and hence not entitled to non-compete fee. It was further submitted by him that Yogesh Bangur and Surbhi Bangur who were shareholders of the target company and part of the promoter group sellers, were only family members of L.N. Bangur and were not directors of the target company or involved in day to day business of the target company. Both of them are being paid non-compete fee. On the other hand, Mrs. Sheetal Bangur, who is one of the directors of the target company and into day to day business of the company, is not being offered any non-compete fee. Similarly, 13 companies which are promoter group sellers are into different types of business which has nothing to do with the business of paper and pulp and are not into day to day business of the target company and so are not capable of offering any competition to the target company. It was therefore submitted that in the facts and circumstances of the present case and keeping in view the terms and conditions of the non-compete agreement and the information supplied by the merchant bankers, the Board came to the conclusion that from the promoter group sellers, only those promoters who are directors of the company and who are carrying on the business of the company and consequently had necessary knowledge, experience and expertise relating to the business of the company were entitled to non-compete fee. These persons were identified by the Board as L.N. Bangur, his wife Mrs. Alka Bangur, his son Shreyas Bangur, and two HUFs wherein L.N. Bangur and his son Shreyas Bangur were the kartas. If the total non-compete fee of ₹ 2,77,95,30,000 was to be divided amongst these persons, the price per share would come to ₹ 4096. Therefore, the Board has rightly directed the appellants to add ₹ 130.73 per share, being the non-compete fee, to the offer price of ₹ 544.20 as a non-compete fee payable which would be much above the 25% limit prescribed under regulation 20(8) of the takeover code.

13. Before we deal with the respective contentions of the parties, it is necessary to look at the relevant provisions of regulation 20 of the takeover code which deal with the offer price in a public announcement.

> "**Offer price**.
> 20.(1) The offer to acquire shares under regulation 10, 11 or 12 shall be made at a price not lower than the price determined as per sub-regulations (4) and (5).
>
> 2…….
> 3……
> (4) For the purposes of sub-regulation (1), the offer price shall be the highest of-
>
> (a) the negotiated price under the agreement referred to in sub-regulation (1) of regulation 14:
>
> (b) price paid by the acquirer or persons acting in concert with him for acquisition, if any, including by way of allotment in a public or rights or preferential issue during the twenty-six week period prior to the date of public announcement, whichever is higher;
>
> (c) the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the twenty-six weeks or the average of the daily high and low of the prices of the shares as quoted on the stock exchange where the shares of the company are most frequently traded during the two weeks preceding the date of public announcement, whichever is higher.
>
> 5…….
> 6…….
> 7……..
> 8.Any payment made to the persons other than the target company in respect of non-compete agreement in excess of twenty-five per cent of the offer price arrived at under sub-regulation (4) or (5) or (6) shall be added to the offer price."

It will be seen that sub-regulation (1) of regulation 20 of the takeover code thereof provides that the offer to acquire shares under regulation 10, 11 or 12 shall be made at a price not lower than the price determined as per sub-regulations (4) & (5) thereof. It is not in dispute that the price of ₹ 544.20 arrived at by the appellant is in conformity with the said provisions. However, sub-regulation (8) thereof further provides that any payment made to a person other than the target company in respect of non-compete agreement in excess of 25% of the offer price arrived at under sub-regulation (4), (5) or (6) shall also be added to the offer price.

14. This Tribunal had occasion to deal with the provision of sub-regulation (8) in the 3 cases referred to above (Cementrum IB.V., Tata Tea Ltd. and Eland Fashion China Holding) and this is what the Tribunal had observed in the case of Tata Tea Ltd.

> "5. The takeover code, as originally framed, did not contain any provision governing the payment of non-compete fee by the acquirers to the sellers of the business. The matter was referred to the Bhagwati Committee, which, on a consideration of the issue, recognised that an acquirer may legitimately pay non-compete consideration to the promoter shareholder(s) and made the following recommendations:-
>
> "Parameters for determining offer price
> On non-compete payment the Committee noted that there is a need to address the situation specially where the acquirer passes on a significantly large portion of the consideration to the outgoing promoter in the form of non-compete fee and only a token amount is shown as negotiated price for acquisition of shares under the agreement. The Committee felt that in such cases the offer price does not truly reflect the actual consideration paid and this could be used as a ploy for reducing the cost of acquisition through public offer.
>
> The Committee recommends that
> Any payment in respect of non-compete agreement in excess of 25% of consideration paid to persons other than the target company shall be deemed to form part of the consideration paid for acquisition of shares and should be factored in for the purpose of reckoning offer price."
>
> These recommendations were accepted by the Board and Regulation 20 of the takeover code was recast in September 2002 providing, inter alia, for a regulatory framework for payment of non-compete fee. Clause (8) of Regulation 20 was introduced for the first time with effect from 9.9.2002 and the same reads as under:-
>
> "(8) Any payment made to the persons other than the target company in respect of non-compete agreement in excess of twenty five per cent of the offer price arrived at under sub-regulation (4) or (5) or (6) shall be added to the offer price."
>
> A bare reading of the aforesaid provision makes it clear that any payment made to persons other than the target company in respect of non-compete agreement in excess of 25 per cent of the offer price shall be added to the price to be offered to all the shareholders. **While looking into the justification for the non-compete consideration, scrutiny by the Board cannot be ruled out though in inquiring into the rationale for allowing such fee to the promoter sellers, it would hardly have any role to play. To elaborate, if the non-compete fee is 25 per cent or less, the question whether it could be added to the offer price or not will have to be determined by the Board in the light of the facts of each case. Supposing, the fee is paid to a person who cannot compete, the Board may be entitled to say that it is only a device to reduce the offer price. In such a case the Board may justifiably direct its addition to the offer price. On the other hand, if the payment is made to an outgoing seller who can offer competition to the business of the target company, the Board shall have no occasion to interfere. (emphasis supplied)**
>
> 6. The recommendations made by the Bhagwati Committee clearly recognise the legitimacy of the non-compete fee payable to the outgoing sellers. Regulation 20(8) based on these recommendations puts a cap on such payments so that an acquirer could not reduce the cost of acquisition through public offer thereby depriving the public shareholders of their legitimate dues. **When examining the validity of the non-compete fee, the**

> **question to be addressed is whether the outgoing sellers are capable of providing competition to the business alone or in association with third parties and not whether the business was dependent on the outgoing sellers. (emphasis supplied)** When an acquirer takes over a business from the outgoing seller(s), it is obvious that the sellers have specific knowledge of that business and have access to and are in possession of crucial trade secrets of the target company which if disclosed or misused would be detrimental to and could cause irreparable harm to the target company and its continuing shareholders and by virtue of their association with that business, they (out going sellers) are capable of offering competition to the business being taken over. In such cases, it would be legitimate for the acquirer to enter into a non-compete agreement with the promoter sellers if he feels threatened by a lurking fear of competition from them. It is neither for the Board and not even for this Tribunal to analyse the threat perception of the acquirer. We are of the view that a non-compete agreement would then protect not only the target company but also its continuing shareholders. An acquirer has a right to protect his investment/business from competition by a seller of the business and this right is a long standing customary element in business sale transactions and is even recognised by law. Section 27 of the Contract Act recognises that non-compete agreements are not in restraint of trade if the restrictions placed are reasonable. The Law of Contract (Treitel, Sweet & Maxwell) 11th Edition at page 455 after relying on Connors Bros. Ltd & Ors. vs. Connors succinctly states the law as under:- "A person who sells shares in a company which he controls may covenant not to compete in respect of the business carried on by the company. Such a covenant may be valid if it was in substance the seller who, through his control of the company, carried on the business".
>
> Again, the terms of the non-compete agreement have necessarily to be decided between the acquirer and the outgoing promoter sellers and based as they are, on business considerations, the Board and this Tribunal have no role to play. However, if they agree to fix the non-compete fee in excess of 25 per cent of the offer price as determined under sub-regulations (4) or (5) of Regulation 20 of the takeover code, the amount in excess of 25 per cent of the offer price shall be added to the offer price which shall be offered to all the public shareholders."

While deciding the appeal in the case of Cementrum IB. V. (supra), this Tribunal had observed that the question of non compete fee – whether it should be paid and if so how much – is primarily a matter to be decided by the acquirer and the target company in the facts and circumstances of each case. The only restraint placed by the takeover code on the matter is that the quantum of fee cannot exceed 25% of the offer price. It was also observed by the Tribunal that the mischief of excessive non compete fee is sought to be curbed in the takeover code by limiting the quantum of non compete fee. Although the question whether further scrutiny into the justification for such fee in any given case can be undertaken by the Board was raised in that appeal, the Tribunal did not consider it necessary to attempt a general response to that question. However, in the case of Tata Tea Limited (supra), this Tribunal had specifically observed that **while looking into the justification for the non compete consideration, scrutiny by the Board cannot be ruled out. It was further observed by the Tribunal that if the fee is paid to a person**

who cannot compete, the Board may be entitled to say that it is only a device to reduce the offer price and in such a case the Board may justifiably direct its addition to the offer price. On the other hand, if the payment is made to an outgoing seller who can offer competition to the business of the target company, the Board shall have no occasion to interfere. The question to be addressed is whether outgoing sellers are capable of providing competition to the business, alone or in association with third parties and not whether the business was dependent on the outgoing seller. (emphasis supplied)

15. In the case in hand, we find that the material made available by the appellants through its merchant banker and the clarifications furnished by them were examined by the Board and the Board came to a definite conclusion that none of the 13 promote group seller companies carried on the business of paper and pulp which was the product line of the target company. It also came to the conclusion that there is no object clause in the memorandum of association of any of the said 13 promoter group sellers which permits them to carry on the business carried on by the target company. It was further noted that one of these 13 companies is only a charitable and religious trust namely, Mugneeram Ramcoowar Bangur Charitable and Religious Trust which had nothing to do with the pulp and paper business carried on by the target company and, therefore, not in a position to offer any competition to the target company. Yet another company namely, Samay Books Limited is in the business of printing and publishing and yet another company Maharaja Shree Umaid Mills Ltd. was carrying on business as composite textile mill which could not have the necessary knowledge or experience relating to paper and pulp business and therefore not capable of offering any competition to the target company. We have also looked into the information provided by the merchant banker to the Board. With regard to the justification sought by the board for non-compete fee to these thirteen corporate entities, we find that the merchant banker has stated primary reasons for entering into a non-compete agreement with the promoter group sellers as:

"1. Promoter Group Sellers have substantial experience and understanding of the paper industry in India. As such, their competency and ability to compete with APPM, the Acquirer and the PAC is, in our view, not in doubt.

2. By virtue of their association with APPM (their affiliation with APPM began in 1981) and knowledge of its business, understanding of the market, access to market information and industrial connections, the Promoter Group Sellers are capable of offering competition to the Business of APPM, which could cause irreparable harm to APPM.

3. The Promoter Group Sellers have acknowledged and agreed under the Non Compete Agreement that as controlling shareholders of APPM and by their extensive participation in the management and operations of APPM for a substantial period of time, they have acquired comprehensive expertise of the Business and the crucial trade secrets of the Company, and have been in possession of the confidential information relating to the Company and the Business. The Promoter Group Sellers have further acknowledged that by virtue of their association with the Company and by using their expertise and confidential information belonging to the Company, they are capable of offering competition to the Business of the Company, which could cause irreparable harm to the Company, its continuing shareholders and the Acquirer."

The information about the current business of 13 promoter group entities, as provided by the promoter group sellers, is as under:

"Summary Statement providing Current Business

Srl. No.	Name of the Company		Current Business
1)	Apurva Export Pvt. Ltd	:	To trade and Invest in Shares & Securities and grant loan
2)	Digvijay Investments Ltd.	:	To Invest in Shares and Securities and grant loan
3)	The Peria Karamlal Tea & Produce Co. Ltd.	:	To Plant, Grow and Produce Tea, Produce Co. Ltd. To Generate Wind Energy and To Invest in Shares and Securities and grant loan.
4)	Amalgamated Development	:	To Trade in Land and Shares and Limited Securities and grant loan.
5)	M.B. Commercial Co. Ltd.	:	To Trade in Shares and Securities and Land and Landed Property
6)	Placid Limited	:	To Trade & Invest in Shares & Securities and Land & Landed Property.
7)	The Swadeshi Commercial Limited	:	To Trade in Paper and Invest in Company Shares and Securities. To Acquire and grant Landed Property on Rent
8)	Mugneeram Ramcoowar Bangur Charitable and Religious Company	:	To grant Charity and Donation for Charitable and Religious purpose and to invest in shares and securities.
9)	Shree Krishna Agency Ltd.	:	To invest in Shares and Securities and Land & Landed Property and grant loan
10)	The Kishore Trading Co. Ltd.	:	To trade in Paper and Shares & Securities.
11)	The General Investment Co. Ltd.	:	To invest in Shares and Securities To acquire and grant landed property on rent
12)	Samay Books Limited	:	Printing and Publishing and to invest in Shares and Securities
13)	Maharaja Shree Umaid Mills Ltd.	:	A Composite Textile Unit for manufacturing Cotton and Blended Fabrics and Yarn and Invest in Shares and Securities."

Information made available to the Board with regard to 13 corporate promoter group entities shows that they are directly or indirectly controlled by the same promoter group and held significant equity share capital in each of the said companies but that by itself does not indicate that these promoter group companies which are into separate business are either involved in day to day business of the target company or are capable of competing with the business of the target company providing a threat perception to the business of the appellants. It was for the promoter group sellers and its merchant bankers to place material on record about the capacity of these promoter group corporate entities to compete with the business of appellants or their involvement into day to day business of the target company. The information made available by the merchant banker, as noted above, are only bald statements and it does not disclose as to how these entities are privy to the information relating to the target company. Even the information made available with regard to current business of these entities does not make us any wiser as to how they are in a position to offer competition to the business of the target company.

As the promoter group sellers have failed to place sufficient material before the Board in this regard, we cannot find any fault with the conclusions arrived at by the Board that payment of non-compete fee is a sham depriving other shareholders of their rightful claims to get just price for their shares.

16. It is also surprising to note that two of the family members of Mr. L.N. Bangur namely, Yogesh Bangur and Surabhi Bangur, who were only shareholders of the company are being offered non-compete fee but no non compete fee is offered to Mrs. Sheetal Bangur, another family member of L.N. Bangur although she is a director of the target company and involved in the day to day business of the target company. It was argued on behalf of the appellants that no such reason was given in the impugned order and consequently the appellants had no opportunity to submit their case on this point and, in any event, the argument made is purely speculative without reference to the facts concerning Sheetal Bangur’s position in the target company.

17. We are unable to accept this argument of the appellants. It is very much in the knowledge of the appellants and it is a matter of record that Sheetal Bangur is one of the directors on the board of the target company and she is not being paid non-compete fee. Be that as it may, the promoter group sellers have not placed any material on record either before the Board or before this Tribunal to show that Yogesh Bangur and Surbhi Bangur were either involved in day to day business or are capable of competing with the business of the target company or are even capable of giving threat perception to the appellants or existing shareholders of the company. We cannot find fault with the finding of the Board that they are not entitled to non-compete fee merely because they are family members of L.N. Bangur or belonged to the promoter group.

18. Here we may note another argument advanced by the parties. It was argued by the learned senior counsel for the appellants that the covenants in the non-compete agreement provide for both non-compete obligations as well as an obligation to maintain confidentiality. According to him, it is necessary and advisable to do so as a non-compete obligation without a corresponding obligation to maintain confidentiality, would render any non-compete agreement ineffective. Therefore, the promoter group entities are being paid non-compete fee for non-compete obligations as well as for maintenance of confidentiality. Learned counsel for the Board submitted that maintaining confidentiality and non-compete are two distinct and separate covenants though related to each other which are normally supported by separate and independent considerations. The non-compete agreement entered into between the appellant and promoter group sellers does not segregate the amount payable from non-compete fee and the amount payable for delivery of the confidential information.

19. We are of the view that this issue needs no elaborate consideration for two reasons. One, it is settled legal position that non-compete obligations without a corresponding obligations to maintain confidentiality would render any non-compete agreement ineffective. That is why even learned counsel for the Board very fairly stated that the two are related to each other. Secondly, in the case in hand, we have come to the conclusion that in spite of information sought by the Board, the appellants/promoter

group sellers or their merchant bankers have failed to place sufficient material on record to justify payment of non-compete fee to 15 entities on the basis of principles laid down in earlier orders of this Tribunal referred to above. Hence the Board was justified in making the impugned observations.

We, therefore, do not find any merit in the appeal and the same is dismissed with no order as to costs.

By an interim order dated August 11, 2011, we had directed the appellants to deposit in an escrow account a sum calculated on the basis of ₹ 130.73 per share payable under the open offer to the public shareholders and the appellants were allowed to go ahead with the open offer. The appellants may now pay the balance amount to the shareholders who had offered their shares in the open offer, within a period of six weeks from the date of this order.

Sd/-
P. K. Malhotra
Member &
Presiding Officer (*Offg.*)

Sd/-
S.S.N. Moorthy
Member

12/9/2012
ddg

After we have pronounced the order, learned counsel for the appellant prays that the operation of this order may be stayed for a period of four weeks to enable the appellant to explore the possibility of filing appeal before the Supreme Court. The prayer is granted.

Sd/-
P. K. Malhotra
Member &
Presiding Officer (*Offg.*)

Sd/-
S.S.N. Moorthy
Member

12/9/2012
Prepared & compared by-ddg