

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present:- Hon'ble Justice I. P. Mukerji
Hon'ble Justice Aniruddha Roy

GA 6 of 2020
with
APD 63 of 2013
CS 467 of 1978

State of Rajasthan & Anr.

Vs.

I.K. Merchants Ltd. & Ors.

For the Appellant	:	Mr. Arijit Chakraborty, Mr. Debdutta Saha, Mr. Subhamoy Dewanji, Mr. M. K. Ghosh, Mr. S. Mukherjee.
For the Respondent	:	Mr. Siddhartha Mitra, Sr. Adv. Mr. Sudip Deb, Mr. Deepak Jain, Ms. S. Dey.
For the Respondent No.11(b)	:	Mr. Aniruddha Poddar, Mr. Anurag Bagaria.
Judgment on	:	26.04.2022

I. P. MUKERJI, J:-

The judgment and decree of the division bench of this court in this appeal made on 28th April, 2021 was challenged before the Supreme Court by the appellants on inter alia the ground that the valuation of the shares of the predecessor-in-interest of the appellant No. 2, Bikaner Gypsums Ltd., as on 31st March, 1973 as assessed by the court was flawed and ought to have been much lower. The respondents accepted the judgment and decree except the grant of interest @ 5% simple interest per annum on the decretal sum and the refusal to grant costs to the respondents. They wanted interest at a higher rate.

The Supreme Court by its judgment and order dated 1st October, 2021 read with the order dated 26th November, 2021 set aside the judgment and decree of the division bench. It remanded the issue of valuation of shares of the said company to this court. It was to be

made afresh according to the report of M/s. Ray and Ray, Chartered Accountants (the valuer). The court also remarked that “the cross-objection of the respondents as a natural corollary would have to be dealt with on merits” which simply meant that if the respondents were held to be entitled to a decree on the basis of the valuation of the shares, the question of award of interest on the decretal sum would also have to be gone into by the court.

With due deference to the said order of the Supreme Court, we heard out the appeal on the valuation issue, limited, as directed by the highest court to the valuation report of the valuer.

We may recount that the appellants during the pendency of the appeal before the division bench had taken out an application (GA 6 of 2020) taking exception to the report of the valuer. After the Supreme Court order they proposed to file a supplementary affidavit, which this court allowed them to do, to augment their case challenging the report. The respondents were also given an opportunity to file their response to the supplementary affidavit.

The evidence on which this court relied on its enquiry to make a valuation of the shares of the said company on 31st March, 1973 was the report of M/s. Ray & Ray, Chartered Accountants dated 8th January, 2020, the application of the appellants (GA 6/2020) affirmed on 18th November, 2020 by their company secretary, the affidavit-in-opposition to it filed by the respondents and the appellant’s supplementary affidavit.

Bikaner Gypsums Ltd. was incorporated on 7th May, 1947. It was located in the Bikaner district of Rajasthan. The principal business of the company was mining of gypsum. It expanded its business to mining of rock phosphate, limestone and setting up wind and solar power projects. From 39.50% of shares in 1966-67 the holding of the government of Rajasthan (the appellant No.1) in the company increased to 65.79% in 1973-74. On 31st March, 1973 the government acquired substantial

shares from the other shareholders of the company. After acquiring this shareholding, the name of the company was changed to the appellant no.2.

The question is: what was the proper valuation of the shares of this company on the date of its acquisition by the said government?

Both learned counsel assumed the factual data in the report of the valuer to be correct. Mr. Chakraborty, learned counsel appearing for the appellant on the basis of the basic factual data and the data brought on record in the application of the appellants and the supplementary affidavit tried to point out the flaw in the interpretation of the data by the expert and the resultant error or discrepancy in the report. On the other hand, Mr. Siddhartha Mitra, learned senior counsel assuming the basic data in the report to be correct, tried to justify the interpretation of the data by the valuer and the ultimate finding reached by them.

The firm relied on three methods of valuation of the shares, the net asset value, the value under maintainable yield basis and quoted price basis. The value of a share under each of the above three methods was computed. Thereafter, each such valuation was awarded a figure described as weight. The share value for each type of valuation was multiplied by weight. The average of the three values arrived at, was stated to be the weighted average value of a share.

Mr. Chakraborty pointed out that the valuer had erroneously assumed that the entire gypsum reserve in Bikaner was in the control of the appellant. He tried to demonstrate that there were other mine holders, one of which was Fertilizer Corporation of India which also had a significant amount of gypsum reserve. In those circumstances, according to learned counsel, the premise on which the valuer proceeded that the

entire gypsum reserve in Bikaner was owned or controlled by the appellant was not correct.

Furthermore, pointing out the factual statement by the valuer that the appellant mined only 3 to 3.5 tons of gypsum per year, learned counsel argued that if this was the fact, it would take the appellant numerous years to mine 69.94 million tons of gypsum. Hence, taking into account the value of the entire reserve of 69.94 million tons to calculate the net asset value of the company was not based on proper principles of asset valuation.

Let us analyse the report of the Chartered Accountants while dealing with the submissions of learned counsel for the parties.

The total amount of gypsum available in India on 31st March, 1973 was estimated at 1183.44 million tons. The largest reserve in a state, of 970.42 million tons which constituted 82% of the total Indian reserve lay in Rajasthan. Out of this quantity, 9% was located in Bikaner district. The total amount of available gypsum in Rajasthan was estimated at 69.94 million tons. All the mines where gypsum was located were owned by the government of Rajasthan.

He also submitted that as per the memorandum of agreement dated 24th September, 1969 between the government of Rajasthan and the company, the remuneration received by the latter for extraction of rock phosphate was Rs.46/- per ton which was subsequently enhanced to Rs.70/- per ton with effect from 1st January, 1974. Hence, the valuer had made an apparent error in valuing the contractual rights of rock phosphate at Rs.70/- per ton as on 31st March, 1973.

Learned counsel contended that the valuer had wrongly considered the value of the gypsum reserve and the contractual rights in mining rock phosphate. These were according to him “future contingencies/revenue streams” to be exploited over “200 years and could not have been made the basis of valuation of the equity shares.” Without these values, the

equity shares according to the Net Asset Value method (NAV) would be Rs.10.99/- per share which was even less than Rs.11.50/- per equity share which was admitted by the appellant. He also said that in calculating the weighted average value on 31st March, 1973, the valuer had ignored discounted cash flow and dividend yield methods. He also referred to Annexure A to the valuation report dated 19th July, 2002 of Narash Lakhota & Co., relied on by the respondents for the year 1971 and 1972 to submit that the company had suffered significant loss from mining rock phosphate as stated in the said statement and that it had not been taken into account by the valuer in making the valuation.

Mr. Siddhartha Mitra, learned Senior Advocate responded to the argument of Mr. Chakraborty, pointing out from the report itself that the valuer was only endeavouring to make “a fair value” of the equity shares of the company as on 31st March, 1973 with “conservatism and reasonableness” as declared by them in the document. Learned counsel pointed out from the report that after acquisition of shares by the appellant No.1, the latter increased the consideration payable to the company for its activities. The revenue of the company increased in the subsequent years which was not of benefit to the shareholders who sold their shares. In fact they had sold their shares under compulsion. Had the shares been sold at arm’s length this factor which was within the contemplation of the sellers, would have determined the price per share. This was taken into account by the valuer to compute the value per share. The respondents in their affidavit-in-opposition to the application GA 6 of 2020 affirmed by Salil Kumar Mukherjee on 14th February, 2022 had justified the report of the valuer in paragraph 4 thereof on the following terms:-

“4. With regard to the valuation, certain points have been suppressed by the appellants which are stated herein below:-

i) *The appellant no.2 had exclusive right over the gypsum reserves in the State of Rajasthan for its development. Reserve of some of the mines as on 31st March, 1973 was considered in our valuation. (Q. 849 to 852 of cross of P.W 1 and Q. 613 of the Chief of P.W. 1 may be looked into in this regard.)*

ii) *The estimate of exploited Rock Phosphate reserve has been assessed from Exhibit WW-5, which is the report of Civil and Mining Engineering Consultant Pvt. Ltd. While estimating the value of Rs.8 per tonnes of those exploited Rock Phosphate reserve the plaintiffs/respondents have considered much less than 12.5% profit recommended by the committee appointed by the State of Rajasthan (Question Nos.829 & 830 of Cross of PW 1 may be looked into in this regard.)*

iii) *The value of land and building in respect of gypsum division has been assessed considering the fact that land and building was acquired in 1946 onwards and the same has appreciated many times of its cost and the plaintiffs/respondents by adopting the conservative method have taken only four times the cost. In respect of land and building belonging to Rock Phosphate Sheet as the same were acquired in 1969 onwards. (Question No. 616 may be looked into in this regard).*

iv) *The value of work progress, closing stock, current assets, investments, prepaid expenses, claims for central subsidy has been taken from the balance sheet of 1973 (Exhibit VV 15).*

v) *The value of shifting the Jalasar village has been taken from the Directors' Report is Exhibit VVI.*

vi) *The value of development rebate reserve has been taken from the Directors' Report of 31st March, 1974 (Exhibit VV2).*

vii) The value of Railway siding at hanumangarh has been assessed on the basis of appreciation of the cost price as per Exhibit VV 15.

viii) It would appear from the Exhibit VV15 that the cost of Railway Siding is Rs.1.30 lacs. The plaintiff/respondents have valued the Railway Siding at Rs.2.50 lacs considering the subsequent expenditure incurred from preparing and making it ready for use and the plaintiffs/respondents have adopted the conservative view in calculating the same.

ix) The total liabilities, i.e., the figure in respect of several loan, unsecured loan, current liabilities and provisions have been taken from Exhibit VV 15 (Balance Sheet of 1973).

x) It would, therefore, appear that while valuing the mines as well as the land and building, plant and machinery and other assets the plaintiffs/respondents have mostly taken figures from the balance sheet of 1973, from the minutes of Board meeting and also from Directors' Report available with them. (Question Nos.608, 613, 614, 615, 616, 617, 626, 628, 630, 631, 632, 634, 635, 636, 637, 639 and 642 (chief) and 765-775, 779, 751 (Cross) P.W. 1 may be looked into in this regard).

xi) Therefore, the method and manner of valuing the shares and value as per share which has been assessed at Rs.795.60 has been proved item-wise.

xii) There is another report prepared by the expert valuer appointed by the plaintiffs/respondents, namely, Mr. Naresh Lakhotia, which is Exhibit 'YY'. The said valuer has assessed the valuation per share at Rs.874/-. It would appear from the report of the valuer that the same has been prepared after considering the Balance sheets of the company from 1971-1973. All the figures in respect of the reserve for gypsum deposits have been taken from the

balance sheet and the same would appear from the report of the expert valuer. It would also appear from Exhibit YY that the said valuer while also assessing the value of the shares has also considered the premium and the same has been taken into consideration in view of the fact that the plaintiffs, their friends associates were holding substantial block of shares in the company. It would appear that both valuation reports being exhibits 'XX' and YY' that both had been prepared on the basis of net asset value of a mining company (Question Nos. 598(Chief) and 780, 781, 782, 800-802 (cross) of PW 1 may be looked into in this regard.)

xiii) As regards to the Gypsum mines for which the company was holding lease, no geological survey reports were lying with the plaintiff company and the data was not made available indicating the quantum of reserves of Gypsum in this mines as on the date of conversion. Reserves of Gypsum was much more than what the plaintiff stated in his valuation report, because geological survey report was lying with the Government and not made available to the plaintiff in spite of request made earlier as well as at the time of Court proceedings also (Question No. 871 and 872). According to the plaintiffs the accounts for the year ended 31st March, 1973 and onwards and upto the year ended 31st March, 2001 were made available. Ongoing through the accounts we find that the mining activities of the respondent company from gypsum mines under the lease of the plaintiff company as at 31st March, 1973 were still continuing and the complete reserve of the minerals deposited from those mines were yet to be fully exploited. So the quantity of gypsum mines during the year ended 31st March, 1974 to 11th March, 2001 as the quality of mineral reserves available to the company for exploitation as at 31st march, 1973 have been considered.

xiv) For the purpose of value of the mineral (Gypsum) the average profit has been derived from the Balance Sheet for the three years

from 1972-1973. Thereafter, the same have been applied to the actual mining done from 1974-2001 as far as gypsum reserve was concerned.”

The respondents claimed the valuation of each share to be Rs.874/- as on 31st March, 1973.

Conclusions:-

A part of the duty of a court of law is fact finding. If this fact finding can only be made by a person having special knowledge or competence, that person is described as an expert. The court entrusts this fact finding work with the expert, because the judge does not have the competence to make an enquiry. The finding of fact by an expert is considered as a valuable opinion by the court. This valuable opinion is in turn under Section 45 of the Evidence Act considered to be a relevant fact to be considered by the court to draw its ultimate conclusions. It is not binding on it.

The issues on which expert evidence may be adduced, the level of competence expected from the expert on the subject and the weight of that evidence are summarised in Section 45 of the Indian Evidence Act, 1872. It is set out hereinbelow:-

“45. Opinions of experts.—When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting[or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting][or finger impressions] are relevant facts.

Such persons are called experts.”

The Supreme Court in **Ramesh Chandra Agrawal Vs. Regency Hospital Ltd. & Ors.** reported in **(2009) 9 SCC 709** spoke about the value of expert evidence in the following way:

“The test is that the matter is outside the knowledge and experience of the lay person. Thus cases where the

science involved, is highly specialized and perhaps even esoteric, the central role of expert cannot be disputed. The other requirements for the admissibility of expert evidence are:

- i) that the expert must be within a recognized field of expertise*
- ii) that the evidence must be based on reliable principles, and*
- iii) that the expert must be qualified in that discipline.*

.....Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.....

..... real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials.

An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case.”

Since, the court does not have the competence to evaluate the opinion of the expert, it is generally accepted by the court as laid down by the Supreme Court in **Veer Pal Singh Vs. Secretary, Ministry of Defence** reported in **(2013) 8 SCC 83**.

The expert is not a witness of fact. His evidence is of an advisory character. His opinion is a guide for the judge to evaluate the evidence of other witnesses. His credibility depends on the data and the documents relied upon by him and the reasons to explain them. The expert evidence is to be considered with other evidence. This was stated by the Supreme Court in **State of Himachal Pradesh Vs. Jai Lal 7 Ors.** reported in **AIR 1999 SC 3318** at paragraph 18 thereof (See also **Prem Sagar Manocha Vs. State (NCT of Delhi)** reported in **AIR 2016 SC 290** paragraph 20).

However, in a case where the opinion of the expert is sought to be contradicted by the opinion of another expert, the court has the choice as to which opinion it is to rely upon. In the above cases, the Supreme Court has also said that despite the value which the court attaches to an expert opinion, it is subject to judicial review.

In my view, unless the opinion appears to be patently wrong in comparison to other similar opinions, on the same subject or on the face of it perverse, biased or most unreasonable, the court should accept it.

In this case the appellant had no objection to the court appointing Mr. Ray & Ray, chartered accountants as the valuer. Neither have the appellants put forward the opinion of another expert to contradict the valuation made by M/s. Ray & Ray.

The Supreme Court in its judgment and order dated 1st October, 2021 has circumscribed the jurisdiction of this court to make the valuation of the shares on the basis of the report of the valuer. There was no scope of inviting other opinions or adopting some other method for valuation of the shares of the company. The parties also either tried to find fault with the report of the valuer or tried to support it.

There was some substance in the submission of Mr. Chakraborty that the net estimated gypsum reserve available for mining in Bikaner was 69.94 metric tons. The report of the valuer proceeded on the basis as if the whole of this resource was in the control of the company. In their supplementary affidavit at page 18 thereof the appellants brought on record an article on gypsum industry in Rajasthan by A.K. Sinha and T.P. Verma which stated that Fertilizer Corporation of India produced 5 to 5.5 lakh tons of gypsum a year in Rajasthan. Therefore, considering the gypsum reserve in Bikaner as entirely belonging to the company was not correct.

I am of the opinion that the reserve at the disposal of Fertilizer Corporation of India is very insignificant compared to that of the

company. Not taking that into account did not change the net asset value of the shares of the company on the material date.

Mr. Chakraborty also submitted that since the company produced only 3 to 3.5 lakh tons of gypsum a year, it would take numerous years for the company to mine 69.94 million tons of gypsum. Valuing its assets on the basis of the total reserve was not correct. I disagree with this submission. The valuer was concerned with valuing the assets of the company as a whole and not the annual utilization of the asset. Therefore, taking the entire gypsum reserve as the asset of the company could not be said to be ex facie a flawed method of valuing the assets of the company.

I come to the submission with regard to the rate at which phosphate was being sold by the company. It was Rs.46/- per ton in 1969 and Rs.70/- per ton in 1974. If on the basis of the data, the valuer has valued it at Rs.70/- per ton on 31st March, 1973, I do not think that there is something wrong in the valuation.

The valuer adopted, inter alia, three methods of asset valuation, the net asset value (NAV), maintainable yield basis and the quoted price basis. They had also adopted the discounted cash flow and the dividend yield methods. For cogent reasons given in the report, which are acceptable, the values obtained under the discounted cash flow and dividend yield were ignored by the valuer and only the net asset value, maintainable yield basis and the quoted price basis for such valuation were taken into account.

The values in each method are so variable that the valuer remarked that no single method of valuation could “adequately reflect the true value of the equity shares of the company.” The valuer added 10% to the weighted average of Rs.581.67 to arrive at the figure of Rs.640 per share.

I am of the view that the valuer has given a very reasonable opinion.

I uphold and reaffirm the valuation.

With regard to the claim of the respondents for interest, because of the long pendency on the matter, the interest burden on the government of Rajasthan is for a period of about 50 years on the above valuation. Taking this length of time and the total interest burden on the appellant No.1, in my view, 5% per annum simple interest on the enhanced valuation of the shares will more than adequately compensate the respondents. We reject the prayer for enhancement of the interest rate.

The appeal is disposed of accordingly.

The judgment and decree of this court dated 28th April, 2021 is reaffirmed.

Urgent certified copy of this judgment, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with all the necessary formalities.

I agree.

(Aniruddha Roy)

(I. P. Mukerji, J.)