

IN RE OCL INDIA LTD. - AN ANALYSIS

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I. INTRODUCTION

Buy Back of securities means where the company or the promoters of the company buyback the shares issued by them from the shareholders.

The provisions regulating buy back of shares are contained in Section 77A, 77AA and 77B of the *Companies Act, 1956*. These were inserted by the Companies (Amendment) Act, 1999. The Securities and Exchange Board of India (SEBI) framed the *SEBI(Buy Back of Securities) Regulations, 1999* and the Department of Company Affairs framed the *Private Limited Company and Unlisted Public company (Buy Back of Securities) rules, 1999* pursuant to Section 77A(2)(f) and (g) respectively.¹

A company may undertake buy back of shares for number of reasons major amongst them being (i) To increase promoter holdings (ii) To increase earnings per share (iii) Rationalizing Capital structure (iv) To support share value (v) To thwart takeover bid (vi) To pay off surplus cash not required by business.²

The Buy Back of Share undertaken by a listed company is regulated by *SEBI (Buy Back of Securities) Regulations, 1999* and also by the *SEBI (Substantial Acquisition of Shares and Takeover) regulations, 1997* (takeover code).

This case note analyses the recent order passed by the SEBI in the matter of acquisition of voting rights of *OCL India Limited* pertaining to question that whether buy back of Securities triggers an open offer

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¹G.P. Sahi, *Buy back of Shares under the Companies Act, 1956* (Mar. 16, 2010), <http://www.legalserviceindia.com/articles/shares.htm>.

²*Id.*

under the takeover code. The case deals with the interplay of buy back of shares and takeover code. This order becomes all the more important in the current scenario wherein SEBI has appointed a Takeover Amendment Committee to examine the existing takeover code and to give recommendations for its overhaul. The case basically deals with the question that whether buy back of shares which entitles the promoters to exercise voting rights beyond the benchmarks prescribed by the takeover code would trigger the open offer for further acquisition of shares or not?

II. IN RE OCL INDIA LIMITED

A. *Facts*

- 1) The Securities and Exchange Board India issued a notice to the Promoters of OCL India Limited (collectively known as the Acquirer³) in respect of their acquisition of 12.44% voting rights of the Target Company⁴ and subsequent alleged contravention of Regulation 11(1) of the takeover code. The show-cause notice was an outcome of examination undertaken by SEBI pursuant to the order of the Delhi High Court in the matter of Jindal Securities Pvt. Ltd v. Securities and Exchange Board of India and Ors. The High Court disposed off the petition stating that *“The order be treated as a petition to the Respondent No. 1 (SEBI), the learned counsel appearing on the behalf of Respondent No. 1 states that it shall so consider this petition and deal with it in accordance with the law indicating the outcome to the proceedings to the parties.*

³Regulation 2 (b) of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 defines Acquirer as “any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer.”

⁴Regulation 2(o) of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 defines Target Company as “means a listed company whose shares or voting rights or control is acquired or is being acquired.”

This is without prejudice to the rights and contentions of the parties.”⁵

- 2) The writ petition was filed for a direction quashing the decision of the target company to open the Rights issue alleging it was done in violation of the takeover code. It was alleged that the petitioner has informed the target company that the shareholding of its promoters showed the violation of Reg. 11(1) and 11(2) of the takeover code. In pursuance to this the Target Company has communicated it to the petitioner that the increase in the shareholding of the promoters is by virtue of buy back of shares. The petition stated that even if the increase in the shareholding of the promoters is because of buy back of shares, the law makes an obligation on the Acquirer to make an open offer to shareholders for acquisition of further 20% of the shares.
- 3) SEBI in pursuance to the order observed that the target company came out with a buy back offer for 11, 83,708 at a face value of Rs. 10/- each. Pursuant to the Buy back offer the promoter shareholding increased from 62.56% to 75%. As per the provision of the takeover code in the year 2003, the Acquirer is supposed to make an open offer. On their failure to do so SEBI issued a show cause notice to the Acquirer stating the following:
 - (i) The Acquirer is liable to penal action under Takeover code and SEBI Act, 1992.
 - (ii) To show cause as to why the Acquirer should not be directed to make an open offer to the shareholders.

B. Issue

The issue under consideration in the present case is whether increase in voting rights of the promoters from 62.56% to 75% in pursuance to a buy back is in violation of 11(1) of the *SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997* as existed in

⁵The order of SEBI in the matter of OCL India Limited, 2010 S.C.C. OnLine SEBI 188.

the year 2003 made it imperative on them to make an open offer for acquisition of further 20% of the shares from the shareholder company and the failure to do so makes them liable of contravention of Regulation 11(1) of the takeover code.

C. Law on the Point

The present case is governed by Regulation 11(1) of the *SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997* as it existed in the year 2003. It is stated as follows “*No acquirer who, together with persons acting in concert with him, has acquired, in accordance with provisions of law, 15% or more but less than 75% of shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares and voting rights entitling him to exercise more than 5% of the voting rights, in any financial year ending on 31st March, unless such acquirer makes a public announcement to acquire shares in accordance with the takeover regulations.*”

D. Contentions Put Forward by the Acquirer

- 1) The Contention put forward by the Acquirer is that they have not acquired any shares in the target company. According to them acquisition of shares is a condition precedent to trigger the takeover code. They relied on the meaning of the word ‘Acquirer’ as stated in the Black’s Law Dictionary. It defines Acquirer as “*to gain by any means, usually by one’s own exertion; to get as one’s own; to obtain by search.*”
- 2) They contended that the increase was incidental to Buy Back and not due to acquisition of shares; hence public announcement is not required.
- 3) They had further submitted that the promoters had not participated in the buy back.
- 4) The Acquirer also contended that the word ‘or’ used in Regulation 11(1) shall be interpreted as ‘and’. They contended that since they

have not participated in the buy back the word '*shares or voting rights*' shall be interpreted as '*shares and voting rights.*'

- 5) The Acquirer also contended that they are not liable of contravention of Regulation 11(1) as they would have achieved an exemption from making the open offer under Regulation 3 of the takeover code.

E. Order

SEBI after examining the contentions raised by the Acquirer observed that what was required to establish in the matter was whether the Acquirer are liable for contravention of Regulation 11(1) of the takeover code. It observed Regulation 11(1) clearly lays down that acquisition of additional shares or voting rights that entitles Acquirer to exercise 5% or more voting rights in a year shall not be allowed unless the Acquirer makes an open offer for acquisition of further 20% shares from the shareholders of the target company. In the present case the voting rights of the Acquirer increased from 62.56% to 75% which amounts to an increase of 12.44% voting rights. Hence the contention of the Acquirer that 11(1) would not be applicable to them would not hold good. The law laid down in Regulation 11(1) is unambiguous and clear and also under the scheme of Takeover code it is not the mode of acquisition but the resultant of acquisition that matters. The right accrued upon the Acquirer to exercise such additional voting rights (more than 5%) is what matters irrespective of whether it is a direct acquisition or consequential acquisition; subsequently it becomes imperative for the Acquirer to make an open offer unless he is exempted under Regulation 3 of the takeover code.

It further observed that the contention of the Acquirer that the word '*or*' in Regulation 11(1) of the takeover code shall be read as '*and*' in a case where the increase in the voting rights is consequential to the action of the shareholders. This contention of the Acquirer was also rejected by SEBI on the ground that Regulation 11(1) clearly states that “.....*additional shares or voting rights entitling him to exercise more than 5% of the voting rights....*” There is no ambiguity

in the provision. It also relied on the judgment of the apex court in *Puran Singh v. State of Madhya Pradesh*⁶ wherein the court observed that “*the reading of ‘or’ as ‘and’ shall not be resorted to unless some part of the same statute or the clear intention of it requires that to be done.*” As the use of the word ‘or’ in Regulation 11(1) does not give any absurd or unintelligible meaning the use of ‘and’ is not warranted in place of ‘or’ in the said regulation. The regulation clearly lays down that the transfer of control either by acquisition of shares or acquisition of voting or by both shall trigger the takeover code if it goes beyond the prescribed benchmarks. It further relied on the judgment of Securities Appellate Tribunal in the matter of *Shri. Kiron Margadasi Financiers v. Adjudicating Officer, SEBI*, wherein it was observed “*it is not the manner in which the shares are acquired. It is the effect that triggers the action. If the acquisition has no effect on the voting rights, regulation is not attracted.*”

The Acquirer also contended that they are not liable as if they would have applied for exemption they would have been eligible to be exempted from making an open offer under Regulation 3 of takeover code. It further stated that SEBI had in the past granted exemptions in similar cases. SEBI observed that this contention of the Acquirer would also not hold well because in all cases where SEBI has granted exemption under Regulation 3 in the past, an application from the side of the Acquirer was made through the panel route. The application was considered by the takeover panel and the takeover panel had recommended that Acquirer shall be granted exemption thereafter the recommendation along with said documents and application was examined by SEBI before granting an exemption. In the present case admittedly there was no application for exemption under Regulation 3 was filed by the Acquirer.

It finally concluded that the Acquirer is liable for the contravention of Regulation 11(1) of the takeover code. It observed that the value of shares of the target company during 2002- 2003 was at its lowest at

⁶A.I.R. 1965 SC 1583(India).

Rs. 40 per share (September 2002) and highest at Rs. 77 per share (March 2003) as compared to the present market price that is Rs. 134.90 per share. The pricing formula as prescribed in the takeover code will not benefit the shareholders and hence the Acquirer was not ordered to make an open offer. SEBI in furtherance of the power granted to it under Regulation 11 and 11B of the SEBI Act, 1992 read with section 19 thereof along with Regulation 44 and 45 of the takeover code directed that adjudication proceedings shall be initiated against the Acquirer.

III. CONCLUSION

The rapidly advancing Indian economy provides huge opportunities for companies and enterprises to grow organically and inorganically. Organic growth is limited in nature and hence it is the inorganic growth that is most sought after. The companies grow inorganically by takeover, amalgamation or merger. The *SEBI (Acquisition of Shares and Takeover) Regulations, 1997* is the legal framework governing and regulating takeovers and acquisitions of listed companies in India. The legislative intent behind the takeover code is to regulate the transfer of control. The control could be transferred by acquisition of either shares or voting rights by an Acquirer. The control could also be consolidated by the promoters by buy back of securities issued to the shareholders. Any kind of buy back that increases the voting rights of the promoter beyond the benchmark prescribed in the takeover code shall trigger the takeover code.

In the afore discussed case it has been laid down by SEBI that even if the promoter does not participate in the buy back directly or they do not acquire any shares but if the buy back results in increase in the voting right beyond a certain limit they would be liable to make an open offer. The case basically lays down that any form of transfer of control of a listed enterprise either by way of acquisition of shares by an outsider or by way of buy back of shares by the promoters shall be

governed as the provisions laid down in the takeover regulations. It reiterates the fact that changes in control of a listed enterprise shall be regulated by the takeover code. It further establishes that it is not the mode of acquisition but the effect of the acquisition that would trigger the takeover code. This case though gives effect to Regulation 11(1) of the takeover code, 1997 as it prevailed in 2003 can be used as a guiding light in deciding cases of creeping acquisitions by buy back of share under the present takeover code.