BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No.134 of 2011

Date of Decision: 21.11.2011

1. Mr. Raghu Hari Dalmia
2. Mrs. Padma Dalmia
3. Mr. Mridu Hari Dalmia
4. Mrs. Abha Dalmia
5. Sharmila Dalmia Parivar Trust
6. Mr. Gaurav Dalmia
7. Kanupriya Trust
8. Devanshi Trust
9. Aryamanhari Trust
10. Aanyapriya Trust
11. Raghu Hari Dalmia Parivar Trust
12. Ms. Vrinda Dalmia
13. Gautam Dalmia HUF
14. Vasumana Trust
15. Mrs. Kanupriya Somany
16. Raghu Hari Dalmia HUF
17. Mridu Hari Dalmia HUF
18. Mridu Hari Dalmia Parivar Trust
    4, Scindia House,
    New Delhi – 110001.

19. Mrs. Usha Devi Jhunjhunwala
    59, Mumbai Samachar Marg,
    Mumbai – 400 001.

20. Ms. Rasalika Dalmia
21. Ms. Saudamini Dalmia
    P.S. Site No.3, Institutional Area
    Sector D, Pocket -3, Vasant Kunj
    New Delhi – 110 070. ….. Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A,
G-Block, Bandra Kurla Complex,
Mumbai – 400 051. …...Respondent

Mr. Janak Dwarkadas, Senior Advocate with Mr. Ankit Lohia, Mr. Sharad Vaid, Mr. Chakrapani Misra, Ms. Suruchi Rungla and Ms. Meghna Rajadhyaksha, Advocates for Appellants.

Mr. Vikram Nankani, Advocate with Mr. Abhishek Punglia and Ms. Aparna Kalluri, Advocates for the Respondent.

CORAM : Justice N. K. Sodhi, Presiding Officer
P.K. Malhotra, Member
S.S.N. Moorthy, Member

Per : Justice N. K. Sodhi, Presiding Officer

The appellants herein are the promoters/members of promoter group of OCL India Ltd., a company incorporated under the Companies Act, 1956 having its registered office in the State of Orissa. It shall be referred to hereinafter as the company. Its equity shares are listed on the National Stock Exchange of India Limited and on the Bombay Stock Exchange Limited, Mumbai. On February 24, 2003 the company announced a scheme to buy back its equity shares up to a maximum of 11,83,708 fully paid up shares of the face value of ₹ 10 each representing 16.59 per cent of its issued and paid up capital at a price of ₹ 80 per share. As per the buy back scheme, the shareholders were given an option of tendering their shares to the company. The letter of offer issued in this regard specifically states that the promoters would not participate in the buy back. The buy back offer opened on March 14, 2003 and closed on April 7, 2003. When the buy back scheme was announced, the appellants (promoters of the company) held 44,64,770 equity shares representing 62.56 per cent of the paid up equity capital of the company and they were in control of the company. The buy back was successful and the company bought back 11,83,708 equity shares as a result whereof the percentage shareholding of the appellants in the company increased from 62.56 per cent to 75 per cent of the total paid up capital. This increase in the voting rights was not a consequence of any acquisition of shares or voting rights by the appellants but was only a passive increase incidental to the buy back of shares by the company. As a result of this increase, there was no change in the control of the company which was already with the appellants. The Securities and Exchange Board of India (for short the Board) did not receive any complaint against the buy back or against the consequent increase in the percentage of shareholding of the appellants nor did it raise on its own any objections while processing the buy back offer document of the company. One Jindal Securities Private Limited filed on October 9, 2006 a writ petition in the Delhi High Court against the company stating that due to the increase in the percentage shareholding of the promoters/appellants from 62.56 per cent to 75 per cent pursuant to the buy back offer, the promoters/appellants had triggered regulations 11(1) and 11(2) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the takeover code) and that they were required to make a public announcement to

acquire shares in accordance with the takeover code. The writ petition was disposed of by the High Court on February 7, 2007 with a direction to the Board to treat the same as a representation on behalf of the petitioner therein and deal with it in accordance with law. It was thereafter that the Board issued to the appellants a show cause notice dated July 17, 2007 alleging that they had to make a public announcement to acquire shares from the shareholders of the company and not having made a public offer, they violated regulation 11(1) of the takeover code. The appellants were called upon to show cause why they should not be directed to make an offer to the shareholders for acquiring shares in accordance with the takeover code. The appellants filed their detailed reply dated August 24, 2007 denying that they had violated regulation 11(1) of the takeover code and took the plea that they had not acquired any additional share or voting right in the company and, therefore, regulation 11(1) of the takeover code was not attracted. After affording an opportunity of hearing to the appellants, the whole time member by his order of January 28, 2010 held that the provisions of regulation 11(1) as they then stood had been violated and having regard to the fact that the market price of the scrip of the company was much more than the offer price, the shareholders of the company would not benefit from the public announcement. Instead of directing the appellants to make a public announcement as was contemplated in the show cause notice, he initiated adjudication proceedings against them for violating the aforesaid provisions of the takeover code. This is what he said in para 9 of his order:

> "Having held so, I note that the acquirers are the promoters of the target company having control over it and the increase in their shareholding was consequential to the buy back of shares by the target company. The said buy back took place in the year 2003. I also note that the share price of the target company was in the range of Rs.40/- (low price in September 2002) to Rs.77/- (high price during March 2003) as compared to the present market price which is around Rs.134.90 as on January 25, 2010. The share prices of the target company mentioned above are as per the information provided in the website of the Bombay Stock Exchange Limited. The pricing formula as specified in the Takeover Regulations when applied to the present case, would not benefit the shareholders. Considering the case in its totality, I do not consider the present case, a fit one to direct the acquirers to make a public offer to the shareholders of the target company, as inter alia contemplated in the show cause notice. However, as the acquirers had violated the provisions of Regulation 11(1) [as it stood as on the date of acquisition] of the Takeover Regulations in respect of the aforesaid acquisition of voting rights, I am of the view that the ends of justice would be met if adjudication proceedings are initiated against the acquirers, in respect of the said violations, as ordered hereinbelow."

Feeling aggrieved by the aforesaid order, the appellants filed Appeal no.55 of 2010 before this Tribunal which came up for our consideration on October 26, 2010. On a suggestion made by us, the appellants in that appeal agreed to make an application to the Board seeking exemption from the provisions of the takeover code under regulation 3(1)(l). The Board through its counsel also agreed to consider the same in accordance with law. We did not examine the issue whether regulation 11(1) was attracted or not. The appeal was accordingly disposed with a direction to the Board to consider the application seeking exemption. That application has now been rejected by the whole time member by his order dated July 19, 2011 on the ground that he has no power to grant exemption from the provisions of the takeover code post acquisition. It is against this order that the present appeal has been filed.

2. We have heard Shri Janak Dwarkadas, learned senior counsel for the appellants and Shri Vikram Nankani learned counsel for the Board. The facts as stated hereinabove are not disputed. It is the case of the appellants that regulation 11(1) of the takeover code did not get triggered in the instant case as the appellants had made no acquisition of shares or voting rights and that it was only as a consequence of the buy back that their voting rights increased. It was also argued on behalf of the appellants that the whole time member was in error in holding that the Board had no power to grant exemption from the provisions of the takeover code after the acquisition. According to the Board, regulation 11(1) was applicable to the facts of the present case and that the appellants had violated the same since they did not come out with a public announcement to acquire shares in accordance with the takeover code. The learned counsel for the Board also relied upon the words “proposed acquisition” appearing in regulation 4(2) of the takeover code and argued that an application seeking exemption could be filed only before acquiring the voting rights.

3. Before we deal with the rival contentions of the parties it is necessary to refer to the relevant provisions of the takeover code which concern us. Regulation 2(b) defines an acquirer and regulations 3 and 4 deal with situations where regulation 11 of the takeover code would not apply. Regulation 11(1) deals with creeping acquisition and all these provisions are reproduced hereunder for facility of reference.

"2. (1) In these Regulations, unless the context otherwise requires:—

(a) ……

(b) "acquirer" means 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;
……..

Applicability of the regulation.

3. (1) Nothing contained in regulations 10, 11 and 12 of these regulations shall apply to:

(a) to (ka) ……

(l) other cases as may be exempted from the applicability of Chapter III by the Board under regulation 4.

……..

Takeover panel.

4. (1) The Board shall for the purposes of this regulation constitute a panel of majority of independent persons from within the categories mentioned in sub-section (5) of section 4 of the Act.
(2) For seeking exemption under clause (1) of sub-regulation (1) of regulation 3, the acquirer shall file an application supported by a duly sworn affidavit with the Board, giving details of the proposed acquisition and the grounds on which the exemption has been sought.
(3) The acquirer shall, along with the application referred to under sub-regulation (2), pay a fee of fifty thousand rupees to the Board, either by a banker's cheque or demand draft in favour of the Securities and Exchange Board of India, payable at Mumbai.
(4) The Board shall within 5 days of the receipt of an application under sub-regulation (2) forward the application to the panel.
(5) The panel shall within 15 days from the date of receipt of application make a recommendation on the application to the Board.
(6) The Board shall after affording reasonable opportunity to the concerned parties and after considering all the relevant facts including the recommendations, if any, pass a reasoned order on the application under sub-regulation (2) within 30 days thereof.
(7) The order of the Board under sub-regulation (6) shall be published by the Board.

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Consolidation of holdings.

11. (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than 75% of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5 per cent 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 these regulations."

4. On a consideration of the aforesaid provisions we are in agreement with the learned senior counsel for the appellants that regulation 11(1) of the takeover code was

not attracted to the facts of the present case and that they were not required to come out with a public announcement. Regulation 11(1) is applicable to an acquirer who acquires additional shares or voting rights in a company by himself or through or with persons acting in concert with him. The word "acquire" as used in regulation 11(1) is a verb and according to Black's Law Dictionary (Sixth Edition) it means "To gain by any means, usually by one's own exertion; to get as one's own; to obtain by search, endeavor investment, practice or purchase". In this context the word 'acquire' implies acquisition of voting rights through a positive act of the acquirer with a view to gain control over the voting rights. In the case before us, it is the admitted position of the parties that the appellants (promoters of the company) did not participate in the buy back and that there was no change in their shareholding. The percentage increase in their voting rights was not by reason of any act of theirs but was incidental to the buy back of shares of other shareholders by the company. Such a passive increase in the proportion of the voting rights of the promoters of the company will not attract regulation 11(1) of the takeover code. The argument of the learned counsel for the Board that merely because there is increase in the voting rights of the appellants, regulation 11(1) gets triggered cannot be accepted. He also referred to the definition of 'acquirer' in regulation 2(b) of the takeover code and strenuously contended that a passive acquisition of the kind we are dealing with is indirect acquisition and, therefore, the provisions of regulation 11(1) are attracted. We have no hesitation in rejecting this argument outright. The words 'directly' and 'indirectly' in the definition of 'acquirer' go with the person who has to acquire voting rights by his positive act and if such acquisition comes within the limits prescribed by regulation 11(1) it would only then get attracted. Passive acquisition as in the present case cannot be regarded as indirect acquisition as was sought to be contended on behalf of the Board. If the argument of the learned counsel for the Board were to be accepted that mere increase in the voting rights would attract regulation 11(1), it would not only lead to absurd results but would make the provisions of the takeover code unworkable. We may illustrate. The provisions of the takeover code apply to both promoters and non-promoters of a company. Regulation 14(1) of the takeover code requires the merchant banker of the acquirer to make a public announcement within four working days of "an agreement for acquisition of shares or voting rights or deciding to acquire

shares or voting rights." An increase in percentage shareholding of a non-promoter pursuant to a buy back scheme or forfeiture of shares of other shareholders would lead to a situation where a non-promoter may not know as to when the takeover code gets triggered as non-promoters have no access to the records of a company regarding the number of shares tendered from time to time. This would make it impossible for such a person to make a public announcement within four working days of the takeover code getting triggered. Again, a non-promoter shareholder may increase his percentage of shareholding without participating in the buy back over which he has no control. In such an event he would be burdened with an onerous liability to make a public announcement. It is well settled principle of law that a provision ought not to be interpreted in a manner which may impose upon a person an obligation which may be highly onerous or require him to do something which is impossible for no action of his. In this view of the matter, we are of the firm opinion that passive acquisition does not attract the provisions of regulations 11(1) of the takeover code.

In view of our finding that regulation 11(1) was not attracted to the facts of the present case, it is not necessary for us to go into the question whether the Board has the power to grant exemption to an acquirer from the provisions of the takeover code post acquisition.

In the result, the appeal is allowed, order dated January 28, 2010 set aside and prayers (i), (iii) and (iv) in para 6 of the memorandum of appeal granted. Consequently, the order dated July 19, 2011 has become infructuous. Parties shall bear their own costs.

Sd/-
Justice N.K.Sodhi
Presiding Officer

Sd/-
P.K. Malhotra
Member

Sd/-
S.S.N. Moorthy
Member

21.11.2011
Prepared and compared by
RHN