SEBI TAKEOVER CODE, 2011 & THE PROTECTION OF MINORITY SHAREHOLDERS IN TARGET COMPANY: A STUDY

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INTRODUCTION

The entire business world started revolutionising in the twentieth century wherein the economy of the country was opened by removing the barriers of government controlled laws and regulations. The concept of globalisation invited foreign investors which in turn widened the economy. One of the requirements of the progress was to increase the scale of the business in order to stand at par with the other companies in competition wherein mergers and acquisitions proved to be the best alternative. The rationale behind the changes in the sector of mergers and acquisition is mainly the access to the different geographical sectors (63 percent) or increasing the scale of the business (57 percent).[2]Though this scheme proved to be an asset for all the companies in progressing but it also became a tool for the wealthy businessmen for exploiting the retail investors. It was to control this sabotage of the scheme and the investors that the government resolved to establish certain regulations and laws. The main focus was on to protect the investors and the shareholders of the company who are directly affected by the affairs of the

company. The Takeover Code, as laid down by the Securities Exchange Board of India for the listed companies in India, mainly focuses on monitoring acquisitions of shares and voting rights and control.[3] The scheme of mergers, acquisitions and takeovers are being driven by the companies who are willing to go an extra mile.[4]

The Takeover Code works in furtherance with the corporate governance principle of "protection of minority shareholders" which proves to make more sense in a listed company so that the shareholders are not taken advantage of in the execution of such schemes of takeovers and amalgamations, irrespective of the fact that they fall into the majority category or the minority category, when a takeover or an acquisition takes place.

The need of robust security laws to protect the interest of shareholders and investors come from the towering competitive business environment which requires the shareholders to safeguard their interests and profit in priority than the third party interferences and interest. The key to robust corporate governance comes from the existence and evolution of efficient and well-administered set of takeover regulations and laws.[5] The Takeover laws intend to prescribe and lay down a systematic and an efficient framework for acquisition of stake in companies, focussing more on the listed companies and the interests of the shareholders in the scheme, so that they are not bound to compromise their interest due to lack of governance and regulations.[6]

In accordance with the international jurisprudence, Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as the SEBI Takeover Code, 2011), fulfils the abovementioned requirements of corporate governance in India. and administer the acquisition of stake in the listed companies of the country. It provides a clarity and transparency in the operations of the company and also protects the interest of the public shareholders (minority shareholders) by obligating the acquirer company to provide exit opportunity to the public shareholders in case of takeover or substantial acquisition. It also makes sure that the security market in India works in a fair, equitable and transparent manner.[7]

This paper talks about the Takeover Code and the need for the same in relation to the protection of the minority shareholders at the time of takeover or acquisition of a company.

BRIEF OF THE SEBI TAKEOVER CODE, 2011

A takeover bid, in the simplest of language, is defined as an acquisition of shares carrying voting rights, with the sole purpose of gaining control of the management and affairs of the company, in a manner which is direct or indirect in nature. Such acquisitions may be friendly or hostile in nature. [8]'Takeover' in general terms means the acquisition of control over the assets or management of one company by another, directly or indirectly, through a transaction or a series of transactions.

The SEBI Takeover Code, 2011 Regulations, in furtherance of the said objective, mandatorily directs the acquirer company to offer an exit option to the from the listed company, to the shareholders who are not in favour of the acquisition or takeover in question, with the best possible terms and offer. The need of such takeover code arises from the opportunity to be given to the foreign investors which results into the announcement of policy of globalisation and the changing market situations around the world. These regulations are applicable on the acquisition of voting rights or control over the listed company.[9]

The SEBI Takeover Code, 2011 Regulations is the amendment of the original Takeover Code that was enacted in 1997 and was revolutionised from the SEBI Act, 1992, which clearly mandated the Securities Board to regulate the substantial acquisition of shareholding of a company by the best measures possible. Prior to these regulations, the transferability was governed by the Clause 40 of the Listing Agreement which was later substituted by Clauses 40A and 40B of the same which altered the threshold from 25 percent to mere 10 percent of shareholding. [10]As till then the regulations and laws relating to corporate restructuring were absolutely unorganised, the Board established and appointed a committee under the experience of Justice P.N Bhagwati, also known as the Bhagwati Committee, to review the code and recommend necessary changes.[11]These recommendations were shaped into the Substantial Acquisition of Shares and Takeovers Regulations, 1997 which repealed the 1994 code.

Subsequently, the SEBI Takeover Code, 2011 Regulations, changed the entire takeover regime in the country and re-formulated the rules applicable to acquisition and takeovers. The major difference in the framework of the Codes of 1997 and 2011 is that the latter code is much simpler, precise and unambiguous than the former code. It has provided a more clear code and book of regulations for the scheme striking a balance between the interests and benefits of the target company as well as the shareholders of the company.[12]

SEBI TAKEOVER CODE, 2011 REGULATIONS WITH RESPECT TO THE INTERESTS OF MINORITY SHAREHOLDERS

The interests of the minority shareholders are mainly safeguarded by three primary enactments and regulations, namely, the Companies Act, 2013, SEBI Takeover Code, 2011 Regulations and the Listing Agreement.[13] The Companies Act, 2013 talks about the same under Section 186 whereas the Listing Agreement's Clauses 40A and 40B deal with the said subject. The SEBI Takeover Code, 2011 Regulations takes into account one of the most important corporate governance principles, "protection of minority shareholders", while laying down the various provisions so as to regulate the schemes of acquisitions and takeovers in India. This principle finds more relevance in cases of listed companies is designed in a manner so that the shareholders, being a party to the scheme, are not affected adversely and are not exploited. These regulations warrant an equitable and fair treatment to the public shareholders of the target company, in cases of execution of such schemes. Majorly, the code ensures that the stakeholders of the company are not refused the opportunity to look into their stature, *i.e.* the merits and demerits that the deal of acquisition or takeover has to offer and get an equitable and fair treatment from the acquirer company as well.[14] The most significant step taken for the interests of the minority shareholders under the SEBI Takeover Code, 2011 Regulations is that of the exit opportunity that needs to be given to them before execution of such schemes. The code mandatorily gives an exit route and also mandates the acquirer company to do the same in cases of takeovers or substantial acquisition. To add more, the code also ensures a proper manner of execution of such schemes so as to help the public shareholders in their execution of rights and so that the securities market, too, works in a transparent and fair manner.

The exit opportunity given to the minority shareholders and the steps taken to protect their interests, finds a solid justification as there is no assurance or guarantee given to the class of shareholders that they would be given favourable and beneficial terms while their exit following the takeover, in case where the acquirer's policies and terms for the company and its people are considered to affect the interests of the minority adversely.[15] The rationale behind the exit opportunity is that same should be naturally provided when the change in control of the company, because of the restructuring schemes, is value-reducing for the minority shareholders. Whereas, in cases where the change is value-enhancing, the same change of control should not be impeded.[16]

The said objective of protection of the minority shareholders was explicitly stated in the case of *Kishore Chhabana v. Chairman, SEBI*[17]wherein the role of the code was stated to be remedial and regulatory and the main functions included the assurance that the minority group of shareholders and investors are offered an opportunity to exit the scheme profitably or remain for the merits of the scheme.

Further, the SEBI Takeover Code, 2011 Regulations has also done away with the non-compete fees for the small investors, in accordance with the recommendation of the TRAC Committee, which proves to be a merit for the minority pubic shareholders.[18] This provision would level the ground for both promoters and the minority shareholders, giving them the price of the share at par with the price of the promoter's share. They would not be at a disadvantage due to the minority.

In addition to these, the SEBI Takeover Code, 2011 Regulations also gives the power to SEBI to initiate an investigation by appointing an investigating officer in a case wherein complaints are received them by any investor, shareholder or person on the subject matter which has direct relevance to the substantial acquisition of shares or takeovers. The same can also be carried out *suo moto* based on the information or knowledge of the board. Under section 395 of the Act, once 90 percent of shares of the transferor company are acquired by the means of a contract or scheme, the remaining 10 percent are entitled to the transferee company. In such scenarios, the dissenting shareholders are entitled to approach the court or the tribunal to address their grievances. This opportunity is given to the shareholders in order to give them an equitable right and choice.

On the other hand, the Companies Act, 2013 also takes steps in the view of protecting the rights of the minority shareholders. The Act permits any shareholder, creditor or the any other "interested person" to object to the proposal of the scheme of acquisition or takeover. This right enables the minority shareholder to voice his opinion in case of lack of majority in his favour. Though, the only condition attached with the same is that, only the person who holds not less than 10 percent shares of the company or not less than 5 percent of the total debt outstanding of the company can object. As on one hand, the provision takes a step ahead with the objective of the principle of 'protection of minority interest, on the other hand, the provision is also capable of taking away the rights of the minority shareholders and affects them adversely in case of restructuring schemes.[19] To overcome this drawback, the Act has introduced the opportunity of exit to the shareholders who have a dissenting opinion about the scheme to be executed. Though not enough, the provision provides some degree of security to the minority group of shareholders.

The analysis of the new takeover code stands to the ground, that it has been designed in furtherance of the stated objective of the enactment, *i.e.,* to protect the interests of the parties, especially the minority shareholders and also balance the interests of all the shareholders, investors, promoters and acquirers. The schemes of restructuring are inevitable in order to promote and develop the industry, yet, the protection of the interests of the shareholders in the process is also the need of the hour.[20]The prime intention of protecting the interests of the minority shareholders come from the view that though some degree of discretion is required so as to fulfil the said objective, yet it should be done keeping in mind the feasibility of the acquirer, so as to promote more of such restructuring schemes wherein it is proved beneficial for both the, shareholders and the target, as a whole. This applies mainly on those acquirers, who tend to acquire the target without influencing the same much.

CONCLUSION

Various attempts were made by the authorities so as to regulate the schemes of corporate restructuring in most effective manner and to abide by the principle of the protection of minority shareholders in the form of Clause 40 in the Listing Agreement which was later replaced by the Takeover Code which in turn after constant changes and amendments intends to provide utmost clarity and transparency to the deal makers and also strike a balance between the interests and benefits of the acquirers, investors and the minority shareholders. As quoted by the Justice Bhagwati Committee, *"No rule, no regulation, indeed no law, which deals with dynamically evolving economic situations and circumstances and seeks to resolve constantly varying economic interests and problems in a fast growing economy, can possibly hope to have a permanent not even a long ending life"*[21], the need for a constantly changing law in tune with the changing economic scenarios is felt. The most important aspects of achieving the above mentioned goal are, firstly, to allow them an exit opportunity so as to give them a fair choice and decision regarding their involvement in the scheme. Secondly, the fair price for their shares should be given so that they are not dominated by the powers of acquirer and they stand at par with the other majority stakeholders like the promoter. Various judicial pronouncements like that of *Sultania (GL) v. SEBI*[22] and *K.K Modi v. SAT*[23] have emphasised on the same subject matter and have expressly stated the importance of such protection.The Code has referred the public opinions and surveys, international takeover practices and tried to fill in all the loopholes of the previously enacted code focusing especially on the stakeholders who are not on the greener side of the deal and providing them with the most fair opportunities and offers and try to place them at the same footing as that of the majority.

(Endnotes)

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