

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA**

**CORAM: DR. K.M. ABRAHAM, WHOLE TIME MEMBER**

**ORDER**

**DIRECTIONS UNDER REGULATION 44 READ WITH REGULATION 45 OF SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997 IN THE MATTER OF ACQUISITION OF VOTING RIGHTS OF OCL INDIA LIMITED**

1. Securities and Exchange Board of India (hereinafter referred to as SEBI) issued a show cause notice to the promoters of OCL India Limited (hereinafter referred to as the target company) namely, Mr. Raghu Hari Dalmia, Mrs. Padma Dalmia, Mr. Mridu Hari Dalmia, Mrs. Abha Dalmia, Ms. Sharmila Dalmia Parivar Trust, Mr. Gaurav Dalmia, Kanupriya Trust, Devanshi Trust, Aryamanhari Trust, Aanyapriya Trust, Raghu Hari Dalmia Parivar Trust, Ms. Vrinda Dalmia, Mr. Gautam Dalmia HUF, Vasumana Trust, Mrs. Kanu Priya Somany, Mr. Raghu Hari Dalmia HUF, Mr. Mridu Hari Dalmia HUF, Mridu Hari Dalmia Parivar Trust, Mrs. Usha Devi Jhunjhunwala, Ms. Rasalika Dalmia, Ms. Saudamini Dalmia (hereinafter collectively referred to as the acquirers) as they allegedly contravened Regulation 11(1) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the Takeover Regulations) in respect of their acquisition of 12.44% voting rights of the target company. The said show cause notice was an outcome of the examination of the matter by SEBI, pursuant to the Order dated February 7, 2007 of the Hon'ble High Court of Delhi made in Writ Petition (Civil) No.16007/2006 (in the matter of Jindal Securities Private Limited v/s. Securities and Exchange Board of India & Ors.) wherein, the Hon'ble Court directed *"This petition is disposed of with the direction that the petition be treated as a complaint/representation made to the respondent No.1 (SEBI). The Learned Counsel appearing on behalf of the respondent No.1 states that it shall so*

*consider this petition and shall deal with it in accordance with law indicating the outcome to the proceedings undertaken by the SEBI to the petitioner. This is without prejudice to the rights and contentions to the parties.”* The said writ petition was *inter alia* filed for a direction for quashing the decision of the target company to open the rights issue alleging that the same was done *inter alia* in violation of the Takeover Regulations. It was *inter alia* stated that the petitioner (Jindal Securities Private Limited), vide letter dated July 30, 2005 had informed the target company that the shareholding of its promoters mentioned in the offer document indicated the violation of Regulations 11(1) and 11(2) of the Takeover Regulations. It was further stated that the target company, vide letter dated September 3, 2005 had informed the petitioner that the main reason for increase in shareholding of promoter was because of the buy back of shares by the target company. In terms of the petition, it was stated that even if, the increase in the shareholding of promoters had occasioned on account of the buy back of shares, the law mandatory puts a obligation on such promoters to make an open offer for further acquisition of 20% shares.

2. In compliance with the direction of the Hon'ble High Court, the matter was examined by SEBI. It was observed that the target company came out with a buy back offer upto 11,83,708 fully paid up equity shares of face value of Rs. 10/- each in the year 2003. The said offer opened on March 14, 2003 and closed on April 7, 2003. Consequent to the said buy back offer, the shareholding of its promoters/acquirers in the target company increased from 62.56% to 75% of the voting rights. Though, the said increase in the shareholding of the acquirers triggered the provisions of the Takeover Regulations, they had not made a public announcement as required under Regulation 11(1) thereof. As the acquirers had not complied with Regulation 11(1) of the Takeover Regulations, SEBI issued a show cause notice dated July 17, 2007 to the acquirers *inter alia* alleging that the acquirers are liable for penal action under the Takeover Regulations and Securities and Exchange Board of India Act, 1992. Further, the acquirers were also called upon to show cause notice as to why they should not be directed to give an offer to the shareholders of the target company.

3. Thereafter, Mr. Mridu Hari Dalmia, vide letter dated August 24, 2007 filed the reply to the show cause notice on behalf of all the acquirers. The acquirers also appeared in the hearing before my predecessor on March 19, 2008 through their authorized representatives and made submissions. Subsequently, they filed also filed written submissions. Further, an opportunity of hearing was granted to the acquirers on April 1, 2009. However, on request of the acquirers, the same was adjourned to June 2, 2009, wherein Mr. V.S. Wahi, and Ms. Manju Sisodia, Advocates appeared before me on behalf of the acquirers. The learned counsel requested to consider the reply and the written submissions filed on behalf of the acquirers. Mr. R.K. Agarwal, Chartered Accountant of the target company was also present at the time of the hearing.

4. I have considered the oral as well as the written submissions made on behalf of the acquirers including their reply dated August 24, 2007. The issue for consideration is whether the increase in the voting rights of the acquirers from 62.56% to 75% in the target company would trigger Regulation 11(1) of the Takeover Regulations. The fact that the target company had come out with a buy back offer in the year 2003 and the consequent increase of the voting rights of the acquirers from 62.56% to 75% are undisputed before me. The contention of the acquirers is that they had not acquired any shares of the target company and hence the mere increase in the voting rights would not attract Regulation 11(1) of the Takeover Regulations as according to them, acquisition of shares is a condition precedent for attracting Regulation 11(1) of the Takeover Regulations. They further stated that the increase in the voting rights was only incidental to the buy back offer of the target company. In support of their contention, the acquirers stated that according to the Black's Law Dictionary, term 'acquire' means "*to gain by any means, usually by one's own exertion; to get as one's own; to obtain by search.*" The acquirers contended that no public announcement was required when the increase was only incidental to buy back and not due to acquisition of additional shares. The acquirers also claimed that they had not participated in the buy back offer. They further submitted that the word "or" in Regulation 11 (1) of the Takeover Regulations should be read as "and". According to

the acquirers, since they had not participated in the buy back offer, the expression “additional shares or voting rights” in Regulation 11(1), in the context of the present case, should be interpreted as “additional shares and voting rights”.

5. As the issue for examination in the present case is the applicability of Regulation 11(1) of the Takeover Regulations as it then was, the said Regulation is reproduced below:

*“No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15% 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% of the voting rights**, in any financial year ending on 31<sup>st</sup> March, **unless such acquirer makes a public announcement to acquire shares in accordance with the Takeover Regulations.**”*(Emphasis supplied)

6. The aforesaid provision would make it clear that the acquisition of additional shares or voting rights entitling an acquirer to exercise more than five percent of the voting rights cannot be done unless such acquirer makes a public announcement in terms of the Takeover Regulations. The contention of the acquirers was that since they had not acquired any shares and that their increase in voting rights was only incidental to the buy back, Regulation 11(1) of the Takeover Regulations would not be applicable in their case. I do not see any merit in their contention. Regulation 11(1) of the Takeover Regulation is very clear and unambiguous in this regard and the acquirers are well aware of the same. The acquirers in their reply dated August 24, 2007 stated *“Regulation 11(1) of the Takeover Regulations is not applicable unless the acquirer acquires additional shares or voting rights entitling him to exercise more than 5% of the voting rights in any financial year”*. Admittedly, in the present case, the acquirers had acquired additional voting rights which were more than 5%. Further, as per the scheme of Regulation 11(1) of the Takeover Regulations, it is not the mode of acquisition that matters. On the other hand, it is the

right which accrues to such acquirer to exercise such increased voting rights (more than 5%), acquired by whatever means, subject to the other provisions. The said acquisition can be direct or consequential. In such a case, it is the duty of the acquirers to make a public announcement in accordance with the provisions of the Takeover Regulations, unless the same is exempted under Regulation 3 thereof. The acquirers contended that the word “or” in Regulation 11 (1) of the Takeover Regulations should be read as “and” where the increase in voting rights is consequential to the action of shareholders. Even this argument does not carry much weight. It is expressly stated in Regulation 11(1) of the Takeover Regulations that “.....**additional shares or voting rights entitling him to exercise more than 5% of the voting rights.....**” There is no ambiguity in Regulation 11(1). I note that the Hon'ble Supreme Court of India in the matter of Puran Singh v. State of M.P.(AIR 1965 SC 1583) *inter alia* observed “*the reading of “or” as “and” is not to be resorted to, unless some other 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 unintelligible or absurd meaning, the use of “and” is not warranted in place of “or” in the said Regulation. The intention of the legislation is clearly to regulate not only the change in control but also the substantial acquisition of shares carrying voting rights to ensure transparency and complete disclosures about the changes in the shareholding pattern of the promoters whether by way of acquisition of **shares ‘or’ voting rights**. In this regard, the Hon'ble Securities Appellate Tribunal in the matter of Shri. Kiron Margadasi Financiers vs. Adjudicating Officer, SEBI, Appeal No. 21/2001, held “*it is not the manner in which the shares are acquired. It is the effect that triggers action. If the acquisition has no impact on the voting rights, regulation is not attracted.*” In view of the above, the increase in the voting rights of the acquirers by 12.44% consequent to the buy back by the target company clearly triggered Regulation 11(1) of the Takeover Regulations. Therefore, the acquirers were obligated to make a public announcement as stipulated in Regulation 11(1) and in accordance with the provisions of the Takeover Regulations. Admittedly, they failed to do so.

7. One of the other contentions of the acquirers is that SEBI had earlier granted exemption in cases of buy-back and relied upon SEBI Order dated June 29, 2006 in the matter of Assam Carbon Products Limited. The contention of the acquirers is that, if they had made an exemption application under the panel route, there would not have been any contravention of the Takeover Regulations. The said contention would not benefit them as in the stated case, the acquirers therein had filed an application, as required under Regulation 3 of the Takeover Regulations, in respect of their proposed acquisition of voting rights pursuant to the buy back offer of Assam Carbon Products Limited. The said application was also considered by the Takeover Panel, in accordance with the provisions of the Takeover Regulations, before recommending the grant of exemption. Thereafter, the said recommendation was considered along with the relevant application/documents, by SEBI before granting exemption. Admittedly, no application for grant of exemption was made by the acquirers in the present case. Hence, the case of the acquirers cannot be compared with the aforestated case.

8. Further, the reliance placed by the acquirers on the judgment of the Hon'ble Supreme Court of India in the matter of Hindustan Steels Limited vs. State of Orissa would also not support them as the Hon'ble Supreme Court in a subsequent case (*Chairman, SEBI v. Shriram Mutual Fund, (2006) 5 SCC 361*) had *inter alia* observed

“ 34. The Tribunal has erroneously relied on the judgment in *Hindustan Steel Ltd. v. State of Orissa* which pertained to criminal/quasi-criminal proceedings. That Section 25 of the Orissa Sales Tax Act which was in question in the said case imposed a punishment of imprisonment up to six months and fine for the offences under the Act. The said case has no application in the present case which relates to imposition of civil liabilities under the SEBI Act and the Regulations and is not a criminal/quasi-criminal proceeding.

35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. .... Hence once the contravention is established then the penalty is to follow.”

In view of the foregoing, I do not have any hesitation in holding the acquirers liable for contravening Regulation 11(1) of the Takeover Regulations.

9. 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 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.

10. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11 and 11B of Securities and Exchange Board of India Act, 1992 read with Section 19 thereof, and Regulations 44 and 45 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, hereby, direct that adjudication proceedings under the provisions of Securities and Exchange Board of India Act, 1992 read with Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 be initiated against Mr. Raghu Hari Dalmia, Mrs. Padma Dalmia, Mr. Mridu Hari Dalmia, Mrs. Abha Dalmia, Ms. Sharmila Dalmia Parivar Trust, Mr. Gaurav Dalmia, Kanupriya Trust, Devanshi Trust, Aryamanhari Trust, Aanyapriya Trust, Raghu Hari Dalmia Parivar Trust, Ms. Vrinda Dalmia, Mr. Gautam Dalmia HUF, Vasumana Trust, Mrs. Kanu Priya Somany, Mr. Raghu Hari Dalmia HUF, Mr. Mridu Hari Dalmia HUF, Mridu Hari Dalmia Parivar Trust, Mrs. Usha Devi Jhunhunwala, Ms. Rasalika Dalmia, Ms. Saudamini Dalmia. They may make submissions before the Adjudicating Officer, who shall consider the same on merits without being prejudiced by the observations made in this Order and pass an appropriate Order in accordance with law within a period of three months from the date of his appointment. A separate Order would be issued appointing the Adjudicating Officer.

11. Accordingly, the show cause notice dated July 17, 2007 issued by Securities and Exchange Board of India stands disposed of.

12. As directed by the Hon'ble High Court of Delhi, a copy of this Order shall be forwarded to Jindal Securities Private Limited [Petitioner in Writ Petition (Civil) No. 16007/2006].

**DR.K.M. ABRAHAM  
WHOLE TIME MEMBER  
SECURITIES AND EXCHANGE BOARD OF INDIA**

**PLACE: MUMBAI  
DATE: JANUARY 28, 2010**