

SECURITIES AND EXCHANGE BOARD OF INDIA

DIRECTIONS UNDER SECTION 11B AND SECTION 11 OF SECURITIES AND EXCHANGE BOARD OF INDIA, ACT, 1992 READ WITH REGULATION 44 AND 45 OF SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997 AGAINST KOSHA INVESTMENTS LTD IN THE MATTER OF SNOWCEM INDIA LTD

BACKGROUND

1. Securities and Exchange Board of India (hereinafter referred to as SEBI) had ordered an investigation into the dealings of Snowcem India Ltd (hereinafter referred to as SIL) covering the period from June 1999 to August 1999. During the course of investigation, it was noticed that Kosha Investments Ltd (hereinafter referred to as KIL) had purchased / acquired substantial quantity of shares of SIL (Target Company) from the secondary market.
2. KIL had traded in the scrip of SIL through various brokers of NSE and BSE during the investigation period. The dealings of KIL, as stated in its letter dated 17th April 2002, in the scrip of SIL with various brokers of BSE and NSE, are mentioned as under:

Name of Broker	Sett. #	Purchases	Sales	Gross	Net
Bishwanath M Jhunjhunwala (BSE)	11	2,900	-	2,900	2,900
	12	5,000	-	5,000	5,000
	13	3,600	-	3,600	3,600
	14	34,200	-	34,200	34,200
	15	900		900	900

	16	53,300		53,300	53,300
	17		5,000	5,000	- 5,000
	18	48000		48,000	48,000
	19	-	1,100	1,100	- 1,100
	Total	1,47,900	6,100	1,54,000	1,41,800
M J Patel Share & Stock Brokers Ltd. (BSE)	14	1,00,000	-	1,00,000	+1,00,000
	15	1,00,000	-	1,00,000	+1,00,000
	16	50,000	-	50,000	+50,000
	17	-	1,25,000	1,25,000	-1,25,000
	18	47,900		47,900	+47,900
	19	-	400	400	- 400
	Total	2,97,900	1,25,400	4,23,300	1,72,500
Triveni Management Consultancy Services Ltd. (NSE)	26	39,000		39,000	39,000
	27	42,500	-	42,500	42,500
	28	45,000		45,000	45,000
	GA-18	1,25,000	--	1,25,000	1,25,000

	29	50,000	-	50,000	50,000
	Total	3,01,500		3,01,500	3,01,500
Kasat Securities Pvt. Ltd. (NSE)	23	-	1,02,000	1,02,000	-1,02,000
	A/14	-			
			110000	110000	-110000
	25	-	95,000	95,000	-95,000
	26	-	50,000	50,000	-50,000
	A/16	-	100000	100000	-100000
	27	-	1,00,000	1,00,000	-1,00,000
	28	-	1,25,000	1,25,000	-1,25,000
	29	-	1,00,000	1,00,000	-1,00,000
	SPOT/99 /03	--	100000	100000	-100000
	Total	-	8,82,000	8,82,000	-8,82,000
Indraprastha Holdings Ltd. (NSE)	N/23	102200	--	102200	+102200
	N/24	200	-	200	+200
	N/25	100100	--	100100	+100100
	27	60,000	-	60,000	+ 60,000
	28	76,900	-	76,900	+76,900
	29	50,000	-	50,000	+50,000
	Total	3,89,400		3,89,400	3,89,400

Grand Total		11,36,700	1013,500	21,50,200	123,200
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3. It was found during the investigation that KIL had consistently bought and sold shares of SIL prior to June 1999 and also after August 1999. It was also observed that maximum purchases from the market took place during the period of investigation i.e. June 1999 to August 1999 during which period scrip of SIL witnessed substantial movement both in terms of price and volume. Investigations also established that the trading activities of KIL were largely responsible for the price movement in the scrip of SIL. It was also observed that as per a letter dated 31st May 1999 addressed to the stock exchanges by SIL regarding the details of shareholders of the company holding more than 5% stake, KIL was holding 21,32,900 shares of SIL constituting 20.29% of the total paid up capital of SIL as on 31st March 1999. It was observed that the share capital of SIL was Rs. 10.50 Crores (represented by 1,05,08,100 equity shares of Rs 10 each). The details submitted by KIL to the investigating team regarding their purchases and sales in the scrip during the period April 1999 to March 2000 indicated that KIL had sold roughly 1lakh shares of SIL during the months of April 1999 and May 1999. Further, the Registrars of SIL viz. M/s Bigshare Services Pvt. Ltd. confirmed to the investigating team that KIL was holding 21,32,900 shares of SIL as on 25.5.99. The acquisition of the shares of the target company from the open market by KIL through different brokers during the period June 1999 to August 1999 is mentioned as under:

Particulars	Purchases
Holding as on April 1 st 1999	21,32,900 constituting 20.29% of the total

	paid up capital of the Target Company
Purchases through M J Patel share and stock brokers, BSE during the period June 1999 to August 1999	2,97,900
Purchases through M/s Bishwanath Murlidhar of BSE during the period June'99 to August'99	1,47,900
Purchases through Indraprastha Holdings Ltd, NSE during the period June 1999 to August 1999	3,89,400
Purchases through Triveni Mgt Consultancy Services Ltd, NSE during the period June 1999 to August 1999	3,01,500
Total Purchases of KIL during the period June 99 to Aug 99	11,36,700 shares
Total	32,69,600 shares

4. It is observed from the above table that KIL had acquired from the market 11,36,700 shares of the target company during the period June 1999 to August 1999. KIL was already holding 21,32,900 shares of SIL constituting 20.29% of the total voting capital of SIL as on March 31st 1999.
5. KIL, by acquiring 11,36,700 shares of the target company during the period June 1999 to August 1999, acquired shares constituting 10.81% of the paid up capital of SIL. It was also observed that KIL was already holding more than 15% of the voting capital of SIL immediately prior to the acquisition from the market. It was also found during the course of investigation that KIL transferred substantial number of shares in their name entitling them for voting rights against those shares. Therefore, it was alleged that the conduct of KIL is in violation of Regulation 11(1) of the SEBI (Substantial Acquisition of Shares and

Takeovers) Regulations, 1997 (hereinafter referred to as the said Regulations).

SHOW CAUSE NOTICE AND REPLY

6. Pursuant to the said investigation, a show cause notice dated 14.11.02 was issued to KIL asking them to show cause as to why one or more or all actions under Regulations 44 and 45(6) of the said Regulations read with the provisions of Section 11 and Section 11B of the SEBI Act should not be initiated for its failure to make public announcement in terms of Regulation 11(1) of the said Regulations. KIL vide its letter dated 16.7.03, inter alia, submitted that their shareholding in SIL was 31,84,228 shares as on 31.3.99 but not 21,32,900 shares and also submitted that the said shareholding was inclusive of the shares pledged by them with various parties for loans / advances. It was further submitted by the KIL that certain shares were pledged by them in favour of various lenders in respect of monies lent by such lenders to Killick Nixon Ltd and SIL. As such, on pledge of shares by KIL, the lenders in whose favour the shares were so pledged did not become the “owners” of the said shares and the interest of KIL in these shares continued to subsist. Vide the said letter, KIL also submitted that when a pledge is created by a shareholder in favour of a lender, the shareholder does not cease to be the owner of the shares even in a case where the shares are transferred by the lender in its own name by way of security for the loan given by it to/at the behest of the shareholder. Return of pledged shares does not amount to an “acquisition” by reason that as in the case of the redemption there is merely a restoration of beneficial interest to the original owner.

HEARING

7. In the interest of natural justice, an opportunity of hearing was granted to KIL on 6.11.03 before me. The representatives of KIL appeared before me and submitted that out of the 6,61,800 shares which were transferred in the name of KIL, 3,90,300 shares were returned by the pledgees with whom the said shares had been pledged. The representatives also submitted that they had transferred the shares which were given to the pledgees in the demat form in the name of the parties with whom the said shares had been pledged. The representatives of KIL admitted that there was no pledge agreement entered with the alleged pledgees. They also pleaded ignorance of the provisions of Regulation 58 of SEBI (Depositories and Participants) Regulations, 1996 which prescribes the procedure and manner of creating pledge or hypothecation by a beneficial owner in case of securities which are in demat form.

FINDINGS

8. I have carefully considered the material available on record. I find that the said 3,90,300 shares which were in demat form were transferred in the name of parties. At this juncture, the provisions of law vis-à-vis the concept of pledge are discussed hereunder :-

According to section 172 of the Indian Contract Act "The bailment of goods as security for payment of a debt or performance of a promise is called pledge. The bailor is in this case called the 'pawner' and the bailee is the 'pawnee'". It is seen from the definition that there are three essential ingredients of a pledge (1) there must be a bailment of goods as defined in section 148 of the Contract Act, that is, delivery of goods (2) the bailment must be by way of security (3) the security must be for

payment of a debt or performance of a promise. It is thus clear that a pledge is the delivery of goods by the pledger to the pledgee by way of security upon a contract that they shall, when the debt is paid or the promise is performed, be returned or otherwise disposed of according to the directions of the pledger. A pledge would, therefore, create an estate, which vests in the pledgee, which is distinguishable from ownership. The title of ownership of the pledged property remains with the pledger.

9. I do not find any merit in the contentions of the KIL that they had pledged 3,90,300 shares with private parties in view of the admission made by the representatives of KIL during the course of hearing to the effect that there was no pledge agreement with the parties in this regard. I also note that formalities for creation of a pledge under Regulation 58 of SEBI (Depositories and Participants) Regulations, 1996 have also not been completed. The said Regulation 58 reads as under :-

“Manner of creating pledge or hypothecation

- (1) If a beneficial owner intends to create a pledge on a security owned by him he shall make an application to the depository through the participant who has his account in respect of such securities.
- (2) The participant after satisfaction that the securities are available for pledge shall make a note in its records of the notice of pledge and forward the application to the depository.
- (3) The depository after confirmation from the pledgee that the securities are available for pledge with the pledger shall within fifteen days of the receipt of the application create and record the pledge and send an intimation of the same to the participants of the pledger and the pledgee.

- (4) On receipt of the intimation under sub-regulation (3) the participants of both the pledger and the pledgee shall inform the pledger and the pledgee respectively of the entry of creation of the pledge.
- (5) If the depository does not create the pledge, it shall send along with the reasons an intimation to the participants of the pledger and the pledgee.
- (6) The entry of pledge made under sub-regulation (3) may be cancelled by the depository if pledger or the pledgee makes an application to the depository through its participant

Provided that no entry of pledge shall be cancelled by the depository without prior concurrence of the pledgee.

- (7) The depository on the cancellation of the entry of pledge shall inform the participant of the pledger.
- (8) Subject to the provisions of the pledge document, the pledgee may invoke the pledge and on such invocation, the depository shall register the pledgee as beneficial owner of such securities and amend its records accordingly.
- (9) After amending its record under sub regulation (8) the depository shall immediately inform the participants of the pledger and pledgee of the change who in turn shall make the necessary changes in their records and inform the pledger and pledgee respectively
- (10)
- (11) No transfer of security in respect of which a notice or entry of pledge or hypothecation is in force shall be effected by a participant without the concurrence of the pledgee or the hypothecatee, as the case may be."

- 10. I find that KIL did not follow the specified procedure as mentioned in Regulation 58 of the SEBI (Depositories and Participants) Regulations, 1996 in creating pledge in favour of the parties thus giving rise to the conclusion that there was no pledge transaction. I also find that KIL had transferred the shares which were in demat form in favour of the parties

which indicates that the ownership of the shares had been transferred in the name of the parties. I find that the parties became the rightful owners of the said shares in SIL. In view of this, I am convinced that there was no pledge transaction and the subsequent purchase of shares by KIL from the secondary market resulted in triggering of Regulation 11(1) of the said Regulations. Therefore, the contentions of KIL are devoid of any force. I conclude that the subsequent purchase of shares from the parties after the repayment of the loan would amount to acquisition of shares in terms of the said regulations.

11. In view of the above, I do not find merit in the contentions of the KIL that return of pledged shares does not amount to an acquisition in terms of the said Regulations. The factual position is that 3,90,300 shares were transferred in demat form in the name of the parties and it was an outright sale of shares but not a pledge transaction. The subsequent purchase of the said shares by KIL from the parties through market mechanism by way of structured / synchronized deals was an acquisition of shares in terms of the said regulations.

- (12) I note that Regulation 11(1) of the said Regulations reads as follows :-
“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 per cent 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 the regulations.

(2)

(3)

13. In other words, an acquirer who holds shares of the Target company between 15% to 75% can acquire additional shares of the target company upto 5% during any period of 12 months (through creeping acquisition mode). In case the acquirer acquires shares constituting more than the stipulated 5% during the said period of 12 months, the acquirer is liable to make a public announcement to acquire shares in accordance with the said Regulations.
14. KIL by acquiring 11,36,700 shares of the target company during the period (June 1999 to August 1999) acquired shares constituting 10.81% of the paid up capital of SIL (i.e. more than the stipulated percentage of 5%). I find that KIL was already holding more than 15% of the voting capital of SIL immediately prior to the acquisition from the market. Therefore, I find that KIL is liable to make public announcement in terms of Regulation 11(1) of the said Regulations.

DIRECTIONS

15. In view of the findings made above and in exercise of the powers conferred upon me under Section 19 read with Section 11B of SEBI Act read with regulations 44 and 45 of the said Regulations, I hereby direct the Acquirer viz. Kosha Investments Ltd to make public announcement in terms of regulation 11(1) of the said Regulations taking June 29, 1999 as the reference date for calculation of offer price. The public announcement shall be made within 45 days of passing of this order.
16. Further, in terms of Regulation 22 (12) of the said Regulations, the payment of consideration to the shareholders of the Target Company has to be paid within 30 days of the closure of the offer. The maximum time period provided in the said Regulations for completing the offer formalities in respect of an open offer is 120 days from the date of public

announcement. The public announcement in the instant case ought to have been made taking June 29, 1999 as the reference date and thus the entire offer process would have been completed latest by October 27, 1999. Since no public announcement for acquisition of shares of the Target Company has been made, which has adversely affected interest of shareholders of Target Company, it would be just and equitable to direct the Acquirer viz. Kosha Investments Ltd to pay interest @ 15% per annum on the offer price. The Acquirers are hereby accordingly directed to pay interest @ 15% per annum to the shareholders for the loss of interest caused to the shareholders from October 28, 1999 till the date of actual payment of consideration for the shares to be tendered and accepted in the offer directed to be made by the Acquirers.

17. It is also noted that an order dated 3.12.03 was passed by me restraining the Kosha Investments Ltd from buying, selling or dealing in securities in any manner, directly or indirectly, for a period of two years for violating the provisions of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995. However, I direct that the said order dated 3.12.2003 shall not hamper the implementation of this order.

This order shall come into force with immediate effect.

A.K BATRA
MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA

DATE : 27th January 2004

PLACE : MUMBAI