POTENTIAL ROLE OF INVESTOR VOTING RIGHTS IN CORPORATE CONTROL

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INTRODUCTION

The Securities and Exchange Board of India, acting as the gateway to the Indian Financial System, has devised a set of Substantial Acquisition of Shares and Takeover Regulations (SAST) which are triggered as soon as there is substantial acquisition of shares or voting power in a target company (company wherein acquisition is made) with a view to acquire control over it. The primary aim of these regulations is to make sure that the investor makes a public announcement of an open offer so as to provide an exit option to the existing shareholders in the target company. The need for the public announcement of an open offer becomes mandatory in two conditions – one when the trigger level is touched upon and the other when "control" has been transferred to the investor company. The trigger level limits have been explicitly mentioned in the regulations but what comes within the ambit of "control" still remains a controversy. Although the definition of control has been provided under SAST Regulations[1], but the lines of its interpretation cannot be fixed and hence the ambiguity prevails. The term "control" has been defined under SAST Regulations, 2011 as: *"The right to appoint majority of the directors or to control the management or policy decisions"*. Deciphering this definition, there comes out two major components of it – **right to appoint majority of directors** and **control the management or policy decisions.** Gower[2] also clarified the situation regarding the de facto control being in the hands of minority shareholders. The modern day fashion of dispersed and minority shareholding was emphasised as he went on to say that de facto control can be exercised without legal power at all. Even a small percentage of shareholding can control the enterprise or the Board by virtue of

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[1] S.A.S.T. Regulations, 2011 Regulation, 2(1)(e).

[2] GOWER, THE PRINCIPLES OF MODERN COMPANY LAW 197-198 (3d edn.).

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other voting rights or privileges that are granted to them.

Although the brackets of the first component can still be defined, but defining the contours of "management or policy decisions" is a strenuous task.

Right to Appoint Majority of Directors

"Director"[3] is a person that is appointed to the Board of Directors of a company, which is a type of nucleus selected according to the procedure prescribed in the Act and the Article of Associations, out of the entire mass of its shareholders and even non shareholders, if the Articles permit.[4] They shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.[5] Under Clause 49 of the Listing Agreement, issued by Bombay Stock Exchange, when the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent director.[6] Thus, there would a large number of listed companies in which at least half of the board members are independent and thereby, right to appoint majority of directors would not be applicable to such cases. An entity having the right to appoint majority of non-independent directors, which in the case of takeovers will be nominee directors,[7] may be considered to be in control of the company.[8]

There are many circumstances where the investor doesn't have a right to appoint the majority but possesses some quorum[9] rights, according to which the meetings of the board could not be convened unless some minimum number of directors are present. So if the presence of nominee director is mandated in every meeting of the board, then such a provision should be a fillip of control in favour of the investor. In case of *Jet - Etihad* [10], SEBI ruled that there was no presence of control in favour of Etihad (Acquirer) as there were no quorum rights regarding meetings of the board.

The right to appoint majority of directors straightaway mandates control in favour of investor. The existence of quorum rights should be an impetus towards considering control in favour of investor. The transfer of control should not be solely considered on this criterion as the mere quorum rights would not be sufficient in determining control but if they are

[3] Companies Act, 2013, §2(34).
[4] J.C. VERMA, *Corporate Mergers, Amalgamations & Takeovers* (5th edn., Bharat Law House 2008).
[5] Companies Act, 2013, §179.
[6] Companies Act, 2013, § 2 (47) read with § 149 (5).
[7] Companies Act, 2013, §161.
[8] Discussion Paper on *"Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations"*, SEBI, http://www.sebi.gov.in/cms/sebi_data/attachdocs/1457945258522.pdf.
[9] Companies Act, 2013, §174.
[10] Tailwinds Ltd., Re, 2014 SCC OnLine SEBI 283.

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supported by other protective provisions (veto, affirmative vote etc.), they would have a stronghold in ascertaining transfer of control.

Control Management or Policy Decisions

The *Achuthan Committee*[11] noted that in 2010, 8.4 per cent of the listed companies were declared to be controlled by promoters holding less than 15 per cent. This specific argument was advanced before the SEBI under the 1997 Regulations in *Ashwin Doshi v. SEBI*[12], where the acquirer had only obtained 14.7 per cent of the shares of the erstwhile promoter. The contestability of the issue is regarding whether the holding of the potential voting rights are actually meant for protection of minority shareholder's interest or latently transfer control in due course, in favour of investor. Since the domain of what comes under control has not been specified in the regulations, hence it is to be interpreted rationally, on the basis of regulations and judicial precedents.

NEGATIVE RIGHTS AND THE NATURE OF POLICY DECISIONS

Negative rights, governing the core part of the investor's acquisition agreement, connote those rights which are reactionary in nature and have a primary aim to block an action. Their powers are limited to act on the action but not to initiate any action voluntarily. A nexus can be drawn to the existence of such rights in the corporate world. They majorly comprise of two rights – veto and affirmative vote. They are generally listed under the head "protective provisions" in the agreement.

Firstly, it is necessary to understand the power given under "veto" and "affirmative vote" in the Shareholders and Subscription Agreement. "Veto" is a latin term which means *I forbid / to reject.*[13] It is a power in the hands of the holder to unilaterally stop an action from taking place, despite the majority agreeing to do so. The ultimate authority also depends on the type of veto that is being exercised, which varies from case to case. Articles of Association[14] are one of the fundamental documents of the company. As per S. 5(1) of Companies Act, 2013, the articles of a company shall contain the regulations for management of the company. Hence the authority of veto should be in consonance with the articles of the company.

[11] *Report of the Takeover Regulations Advisory Committee under the Chairmanship of Mr C. Achuthan*, SEBI, (July 19, 2010), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1287826537018.pdf.

[12] Ashwin Doshi v. SEBI, (2002) 40 SCL 545.

[13] NEW WEBSTER'S DICTIONARY (1828), http://www.merriam-webster.com/dictionary/veto.

[14] Companies Act, 2013, §5.

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The corporate "veto" is generally of 3 types – Absolute, qualified and Suspensive.[15] Absolute veto has the real last say in determining decisions, and hence if exercised, the decision or the action would be straightaway rejected, leaving no scope for review. Qualified veto is one which if exercised, doesn't out rightly forbid the decision to be passed. If a director has vetoed (qualified) an action in the meeting, the decision would be referred back to the Board of Directors who would then review the director's rationale for vetoing such a decision, and if found appropriate and reasonable, the decision would be forbidden from being passed and vice versa. The suspensive veto as the name suggests is the power to stop a policy decision from being passed and hence, lets it remain suspended or pending for a period of time.

The raison d'être for existence of vetoes is that these rights are basically for the protection of the rights of the investor, so that the investor is aware about the day to day operational activities of the business but the decisions which fall under its ambit decide the fate of transfer of control. If the voting rights (veto, affirmative action) have been given to the investor in major policy actions of the business, which are fundamental to the functioning or are the day to day operational activities of the business, then these voting rights accentuate the position of the investor from a mere financier[16] to that of control holder.

When it comes to substantial investment or acquisition of shares of a company, the veto that is generally provided for in the Subscription and Shareholders Agreement, is "absolute veto". The predominant reason for the existence of absolute veto in such cases generally is the dominance character exercised by the investor. The basic purpose to invite investment from other companies is that the target company is not witnessing favourable circumstances in the market (e.g. decline of market share), so there is a need to invite investment or further issue capital through allotment of shares.[17] The investor company is actually investing in the target company to save it from witnessing a potential exit from the market, and hence even it being a minority shareholder, its shareholding is necessary to help survive the rest of the majority shareholding. As a result of which, the investee company has to concede to the demands of the investor which maybe the exercise of absolute veto in certain decisions because if not for absolute veto, there exists a bleak possibility that the specified decision would not be passed under the ambit of qualified or suspensive veto,

[15] BLACK LAW DICTIONARY (2nd ed., 1910).

[16] Rhodia S.A. v. SEBI, [2001] SAT 30.

[17] Companies Act, 2013, § 62.

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thereby eradicating the possibility of protection of investor's rights. Veto is an exerting force for determining the transfer of control. There have been many judicial decisions in this regard. In *Rakesh Agrawal v. SEBI*[18], the SAT Mumbai ruled out respondent's contention of the compensation on the ground that the appellant, in the process of Bayer's procurement of 51% stake in ABS, was well justified in not wanting to bring down his share of 26% because had the share gone below 26%, the power to veto certain major decisions of the company by defeating the special resolution proposed for such purpose would have been done away with and the appellant would have lost control in the proposed company. The power of veto should be explicitly provided for in the Shareholder's agreement as it is liable to misuse on its further application. There have been instances where, the veto has been provided in the Shareholder's agreement, but decisions have not been specified or terms like "major" or "minor" or "vital" management decisions have been mentioned. This invokes an element of ambiguity as what constitutes major/ minor/ vital management decisions have not been specified by the investee company[19] and hence the same is prone to be misused. The major decisions will always remain subjective, vary from one case to another and depend on facts and circumstances of each case. A decision integral to the functioning of one business may not be essential to the other, and hence the variability. There have been a plethora of judgments wherein the veto/ affirmative voting rights were allotted to the investor after the acquisition of shares, on some areas of decision making of the business which were even characterised by the courts in some decisions as "basic structural changes", and hence these rights even though reactionary rights, conferred control over to the acquirer.

For example, if veto/ affirmative vote is present with respect to the amendment of MOA/AOA then it can be very instrumental in determining the transfer of control as memorandum and Articles of Association are the founding legal documents of a company. The Hon'ble SC in *Swedish Match AB v. SEBI*[20] enlisted down two situations wherein the transfer of control can take place. The first one is the general acquisition of majority voting rights or shares and the second when this doesn't happen. It went on to clarify that in the latter part, some form of control over the target company can be achieved by amending the memorandum of association or any other method which mandates a resolution to be passed in the shareholder's meeting. The veto or

[18] Rakesh Agrawal v. SEBI, 2003 SCC Online SAT 38.
[19] Dr. N. Sethuraman v. S.M.I.L.E. Microfinance Ltd., 2013 SCC OnLine Mad. 3817.
[20] Swedish Match A.B. v. SEBI, (2004) 11 SCC 641.

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affirmative vote is only a reactionary power and not an initiation power but it does confer control over the investor as the resolution would not be passed if not for such reaction by the investor. The main determinant of control should be the end step in it, and who is finally exercising it, such that it becomes the driving force of such a decision being passed.

In *Rhodia SA v. SEBI*[21], the investor had affirmative rights like veto regarding the declaration and payment of dividends, significant investment, merger and acquisition, change in business strategy, etc. The SAT Mumbai came to a conclusion that major structural and strategic changes required the approval of Rhodia, whereas the decisions on the day to day management activities of the target company were not covered by Rhodia's rights. Still the SAT held that it was "in a predominant position to exercise control over the management and the policy decisions" because of the fact that it covered the re – organisation scheme of the target company within the domain of the "control" under SAST Regulations.

Vetoing a fundamental decision may give the investor certain power or control over the target company. These fundamental decisions are sometimes construed as day to day policy decisions but leave the basic re – organisation scheme out of its ambit. The decisions falling under basic re – organisation scheme are amendment of Memorandum/ Articles; consolidation, subdivision or alteration of any rights attached to any share capital of the Company and any of its subsidiaries, any capital calls on shareholders; any redemption, retirement, purchase or other acquisition by the Company of any Shares of the Company; approval of annual business plans and any deviations, revisions there from; the acquisition by the Company through subscription, purchase or otherwise, of the securities of any other body corporate; any amalgamation, splitting, reorganization or consolidation of the Company; the winding up, liquidation or dissolution of the Company etc. The list of such decisions can never be an exhaustive list because of two reasons –

- There are numerous of re – organisation patterns that can be brought about in the company, and hence every such decision cannot be enlisted.
- If an exhaustive list is prepared, it is bound to be put to misuse as people will try to take advantage of the loopholes in it by circumscribing their decisions within the purview of the mentioned decisions of re – organisation scheme to establish control.

[21] Rhodia S.A. v. SEBI, A.P. No. 36 of 2001.

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The Brightline Test[22] enlisted certain decisions (like amendment of Memorandum/ Articles; consolidation, subdivision or alteration of any rights attached to any share capital) under veto/ affirmative rights as protective rights for the investor but went ahead with saying that the list of decisions is an indicative list and not a mandatory one, hence the question whether the rights are participative or protective in nature or control over the target company has been transferred is to be decided on the facts and circumstances of each case.

There is a basic difference between veto and affirmative rights (positive veto). The latter one mandates an approval from the investor for the decision to be passed whereas the former gives the authority to straightaway reject the decision/ resolution and not allow it to be passed. However, the end result is more or less the same. The respective/ concerned decision would not be passed and if passed in the absence of such a nominee director or the affirmative vote is not obtained, then such an action would be ultra vires the articles of the company.[23] Moreover, the articles regulate the internal management of the company and define the powers of its officers. The articles also establish a contract between the company and members and between the members *inter se*. The contract governs the ordinary rights and obligations incidental to the membership in the company.[24]

According to the author, the power of veto is superior to affirmative rights because there has been a general norm and policy of the companies to reconsider the decision, wherein the affirmative vote has not been granted, to the Board of Directors so that they evaluate the rationale behind the refusal of or non grant of affirmative vote. This modus operandi has been adopted so to do away with the misuse of power that comes along with such an affirmative vote power. There might be a condition wherein the investor director, just for the sake of blocking a decision might exercise this power and hence there needs to be a counter mechanism to handle it. But the same condition doesn't exist with veto. The decision/ resolution once vetoed would not at any cost be passed or come into effect. Control over the day-to-day activities of the target company is not necessary for establishing control. Instead, requirement of consent for changing business strategy and similar decisions may constitute "control".

[22] Discussion Paper on *"Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations"*, SEBI, (October 04, 2016), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1457945258522.pdf.

[23] I.L. and F.S. Trust Co. Ltd. v. Birla Perucchini Ltd., [2003] 3 BomCR 334.

[24] Naresh Chandra Sanyal v. Calcutta Stock Exchange Association, AIR 422 SC 422.

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INTENTION TO ACQUIRE CONTROL

The rights that are available to minority shareholders are merely in form of investor protection rights but sometimes these voting rights effect transfer of control, even when the investor had no intention of doing so. In *Clariant International Ltd.,*[25] SEBI held that it is clear that the Acquirer not only intended to acquire the control over the Target Company but had actually acquired control over the Target Company pursuant to the draft stock purchase agreement.

One of the major factors emphasised upon by the SAT was the "intention to acquire control" over the target company. The Tribunal held that the intention to acquire control is irrelevant at the time of acquisition of shares. It pointed out the regulations 4 and 5[26] which talked about the direct and indirect acquisition of control of the target company. It drew a deduction that since both direct and indirect acquisitions are being mentioned in the regulations, intention of the acquirer is irrelevant and should not be a conclusive parameter in examining the question of transfer of control. The author hereby agrees with the above contention as the investor may not have the intention of acquiring control but the potential voting rights of certain management or policy decisions might have played a determining role in transfer of control, although those voting rights were initially meant just for the protection of the interests of minority shareholder. Hence the investor's role is not confined to that of a financier but that of an acquirer of the target company.

There have been cases where intention was taken into account for determining the question of control. In *Sandip Save v. SEBI*[27], the issue was whether IDBI (an Indian government-owned bank) exercised control by virtue of its voting rights amounting to 17.42 per cent and the associated financial agreement. The Agreement that without the prior approval of IDBI, the company shall not undertake any new Project, diversification, modification, or substantial expansion of the Project; change capital structure, create charge on assets, give guarantees, issue debentures, raise loans, accept deposits from public except raising of loans from banks or granting as in the ordinary course of business; repay any loans availed of from any other party; undertake any scheme of amalgamation or reconstruction; carry on any general trading activity other than the sale of its own products, that unless otherwise agreed to by IDBI, the company shall maintain an accounting and cost control system satisfactory to IDBI;

[25] Clariant International Ltd, In Re, 2002 SCC OnLine SEBI 148.

[26] S.A.S.T. Regulations, 2011.

[27] Sandip Save v. SEBI, [2003] 41 SCL 47 (SAT).

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provide all such information at the request of IDBI; carry out alterations to Memorandum and Articles of Association as may be required by IDBI to safeguard the interests arising out of this agreement; modify or terminate the existing selling/purchasing arrangements in such a manner as may be required by IDBI. The Agreement also specifically gave IDBI the right to appoint and remove from time to time, one director on the Board of Directors of the company and also stipulated that, no change in existing management or in terms of their appointment without IDBI's approval; in future all change in management and key persons to be made as and when required by IDBI and no such changes should be made without approval from IDBI; IDBI can appoint professionals to inspect and examine working of the company, financial and accounting systems, to carry out concurrent audit etc., - the cost of which would be borne by the company; the company to constitute such committees of the Board as required by IDBI; the company shall not recognise transfer of shares by promoters and the company shall furnish to IDBI undertaking for non-disposal of shares by Promoters; the company will offer the shares held by IDBI subscribed in terms of the agreement to the public whenever required by IDBI. Despite *the elaborative list* of matters in the Shareholder's agreement which required approval, the SAT considered that IDBI had no intention to acquire control of the target company. It referred to the P.N. Bhagwati Committee[28] which mentioned about the intention to acquire control. The report made it imperative upon the investor to inform the directors of the target company about his motive to eventually take over the company, pursuant to the process of acquisition of shares.

SAT considered the general principle that lending institutions refrain from taking part in the management of the companies and interfere only when their interest is adversely affected. Also, since the IDBI considered selling back the shares it had acquired, SAT came to a conclusion that the intention to acquire control could be deduced from this fact and hence, IDBI was not in "control".

Time and again the parameter of "intention" creates a new dimension for determining control. The main reference is made to the clause (a) of Regulation 2 (1)[29] which defines the term "acquirer" as *any person who, directly or indirectly, acquires or agrees to acquire.* The deduction of intention is made from the term "agrees to acquire" which implies that the investor must have conveyed his

[28] *Report of The Reconvened Committee on Substantial Acquisitions of Shares And Takeovers Under The Chairmanship Of Justice P. N. Bhagwati,* SEBI (May, 2002), http://www.sebi.gov.in/takeover/takeoverreport.pdf.
[29] S.A.S.T. Regulations, 2011 Regulation 2.

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willingness to acquire control (in form of notice as in CCI Combination Regulations[30]) to the target company in some form or the other. The same can be done through the addition of the clause in the Shareholder's agreement or the intimation of the same to the target company. But the main problem is in the solution itself.

Normally, in the process of acquisition of shares, the investor and investee don't add clause in the agreement because of the fact that investee wants to secure its position in the market and therefore, gives enough voting rights to the investor so that his interests are secured. The decisions which come within these voting rights, are sometimes so integral to the functioning of the business, that they confer control to the investor, despite both the parties being unaware of it. This is required when an objection is raised by the other shareholders because if control is being transferred, then a public announcement of an open offer is required under Regulation 4. The announcement of an offer is required so as to provide an exit option to the shareholders of the target company, the owners of which are someone else. The Hon'ble Supreme Court in *District Mining Officer v. Tata Iron and Steel Company*[31] had held that "*a statute is an edict of the legislature, and in construing a statute, it is necessary, to seek the intention of its maker. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the legislature.*" The objective of the Regulations is to protect the interests of investors in securities. It is with the said objective that regulations have been framed providing an exit option to the existing share holders of a company under acquisition, and that exit option cannot be denied by resorting to such interpretation which might defeat the purpose of the regulations.[32]

CONTROL UNDER COMPETITION ACT

For the purposes of combination[33] under Competition Act, control defined under Explanation to S. 5 has made a reference to "affairs or management" as opposed to "management or policy decisions" under SAST regulations. Under the Competition Act, control is defined as controlling the affairs or management of a group or enterprise by one or more than one enterprises, either jointly or singly. The definition under the Competition

[30] Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

[31] District Mining Officer v. Tata Iron and Steel Company, (2001) 7 SCC 358.

[32] N.R.B. Bearings India Ltd., In re, (SEBI, May 29, 2003), http://www.sebi.gov.in/cmorder/nrbbearings.html.

[33] Competition Act, 2002, §5.

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Act is pari materia to the one in SAST regulations.

In an order passed by the CCI, in the case of the acquisition by *Alpha TC Holdings Pte Ltd.*[34], the proposed combination involved acquisition of shares by the investors, by way of subscription up to 17.36 percent of the post issue equity share capital of target company on a fully diluted basis. The Investment Agreement reserved certain matters in respect of which no action may be taken without the prior written consent of the investors. The Reserved Matters inter-alia included appointment and removal of the Managing Director and the Chief Financial Officer of SGSPL, increasing or decreasing the number of Directors, modifying annual business plan, amending Memorandum/ Articles. Etc. Further acquirer was entitled to appoint one director on the Board of Directors with quorum rights. The acquirers also stated in the investment agreement that the right conferred are largely investor protection rights, with no control being granted over strategic commercial decisions of the target company, indicative of the absence of intention to acquire control. It was observed that the Reserved Matters, for which consent of the Acquirers is required, included strategic commercial decisions of SGSPL and the same, therefore, cannot be considered as mere minority protection rights, envisaging joint control of the acquirers over the target company. The Competition Appellate Tribunal, in *Thomas Cook (India) Limited v. CCI*,[35] has ruled in favour of control, when the investor company represented 22.86% of the equity share capital of SHRIL on a fully diluted basis, along with a set of affirmative voting rights, right to nominate three non-executive directors and three persons as independent directors on the board. There have been cases wherein the tribunal has held "no transfer of control" despite the affirmative/ veto rights being granted. In the case of acquisition by General Atlantic Singapore Fund Pte Ltd.[36], which related to the Acquirer acquiring up to 21.61% of the equity share capital with certain rights, including affirmative veto rights, CCI held that the acquirer doesn't have control over Indus Ind Bank.

Shubhkam Ventures v. SEBI[37] - A Case Study

Shubhkam Ventures case is one of the leading cases on "negative rights amounting to control" issue in India. It is about Shubhkam

[34] Alpha T.C. Holdings Pte. Ltd., [2014] CCI 129.

[35] Thomas Cook (India) Limited v. CCI, [2015] Comp AT 981.

[36] General Atlantic Singapore Fund Pte. Ltd., In re, (CCI, Dec. 16 2015), http://www.cci.gov.in/sites/default/files/Notice_order_document/C-2015-11-340.pdf.

[37] Shubhkam Ventures (I) Private Limited v. SEBI, [2010] 99 SCL 159.

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Ventures Pvt. Ltd. which acquired 17.9% stake in a listed company along with some veto and affirmative rights in business decisions. When the question of control arose, SEBI tribunal ruled that these rights amounted to control and gave the judgment in favour of SEBI. But when Shubhkam Ventures appealed in SAT, it stated that control in its true essence should be a proactive power and not a reactionary power, thereby pushing the negative rights (veto/ affirmative) out of the ambit of control. SEBI appealed to the Apex Court which maintained an ambivalent stand on the same, stating that this question of law is still open and the SAT ruling cannot be considered as a judicial precedent as it has stayed its order.

Interpretation & Views On SAT's Order

The agreement entered into between the parties had veto regarding crucial policy matters and affirmative vote on a list of decisions like amendment of the Memorandum/Articles of the Company; any acquisition by the Company of any shares of the Company; approval of annual business plans; any amalgamation, splitting, reorganization or consolidation of the Company; to alter the composition and strength of the Board; winding up of the Company; appointment of key officials such as CEO, COO etc. Justice N.K. Sodhi considered that the voting rights were merely meant for the protection of the interests of investor because they give only a right to block certain decisions, rather initiate them in the board meetings, and hence no controlling interest in favour of investor.

The affirmative vote and veto rights are surely in form of "reactionary rights" and not "initiation rights" but the fact which is to be considered is that the decision at the end of the day will be passed only if the investor director chooses to agree with it. It is true that he cannot lay down any proposal, according to the agreement, but effective control lays with the investor director. If his assent is not recorded, then the decision cannot be passed or even if passed in his absence, will be declared ultra vires the Articles of the company. The "reactionary rights" scope doesn't confine to that of reaction but becomes a tool in the hands of the investor to exercise control over the target company. Moreover, a lot depends on the kind of decisions that are guaranteed to the investor director. The "management or policy decisions" as stated in the regulations, should not be interpreted in a narrower sense rather in a broader sense. Its scope should not be limited to just day to day operations but also the basic structural/ integral changes[38], which are necessary for the survival of the business. In the

[38] Rhodia S.A. v. SEBI, A.P. No. 36 of 2001.

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above mentioned case, the affirmative vote was given in core operational decisions of the company. Whether it be the amending of memorandum/ articles (foundational documents of company), approval for entering into any joint venture (general transactions with affiliates as well), approval for annual financial statements (profit loss accounts), appointment of key officials (ones vested with the enormous power), alteration of composition or strength of the board and many more. The fact lies herein that although, these are just powers meant for the involvement for the investor company in the decisions of the target company, they confer control simply by virtue of the nature of the decisions that come within its ambit and not by anything else. The author hereby disagrees with the SAT order, which was ultimately stayed by SC, because the tribunal has restricted itself to the narrow interpretation of the definition of "control" and therefore has failed to take notice of various material facts, one being the true intention of the legislature to enact such regulations.

When the voting rights are being given for the protection of the interests of investor, there should be a mechanism that deals with the protection of target company's interests. Generally, the target companies set a threshold or the minimum shareholding of the investor company, that below such a shareholding, the rights conferred upon him will not be applicable. SEBI in its "Discussion Paper on Brightline Test for Control" had set the same limit as 10% of the entire shareholding. Still, there has been no mandatory requirement for keeping such a limit by SEBI in its regulations. So the target companies are at their discretion to exercise it. The intention behind inserting such a clause is the "misuse of power". The investor may very smartly withdraw his shareholding/ investment from the target company and still continue to exercise his affirmative vote/ veto in the target company, which would be blatant exploitation of powers that have been conferred upon him.[39]

CONCLUSION

The debate over corporate control has been a burning issue since the past decade. The domain of "control" in the corporate world is subject to a wide interpretation, decided on a case to case basis and hence the controversy persists. The Apex Court also left the question of law open to interpretation while disposing off the appeal in Shubhkam Ventures case. The main question that arises still is whether negative rights constitute control. Many other parameters have also entered the scenario such as intention to acquire control, nature of

[39] Kavita Gangar v. Bialetti Industries S.P.A., 2016 SCC Online Bom 862.

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decisions on which negative rights are allotted, quorum rights, etc. The ideal approach should be a broad interpretation of the term "control", rather a limited one, and hence one or all of the dimensions should be placed concurrently to arrive at the decision of control. It is true that initiation rights are likely to have a greater stronghold than the negative rights on the management of the company but that doesn't negate the influence of negative rights. A bunch of decisions that are fundamental to the operation of business or classify under the basic re – organisation scheme will definitely accentuate the position of the investor as a controller of the company. Time and again, court has sometimes laid emphasis on "intention" to acquire control which in view of the author, should be kept out of the purview of "control" because of the fact that the SAST Regulations clearly talk about indirect acquisition taking place. Also, there have been many cases mentioned above, wherein there has been a recital in the agreement that control would not be transferred, still court has held it in favour of control. The "intention" should be considered in cases where the investor does any act pursuant to the acquisition of shares that undermines his position as a controller. For example, selling back of shares immediately after such an acquisition or withdrawing an investment etc. The author would highlight the importance of clarity regarding the Shareholders' agreement that is entered into between the investor and investee. There should be no ambiguity as regards the decisions over which negative rights are to be exercised. Terms like major, crucial, integral decisions etc. in the agreement add to the confusion. The mere existence of quorum rights or affirmative vote or veto should not be the sole criterion for determining control, rather the concurrence of such rights should be considered. This element of subjectivity invokes a bundle of questions about the absence of a benchmark for adjudicating such questions of law. In many countries, there are objective tests to establish control. SEBI's discussion paper on Brightline test was surely a step in this direction but it is not binding. Further the exhaustive lists would invite more litigation as law evaders will find an easier way to avoid the regulations in force.

A more liberal approach should be adopted in the process of acquisition of shares. The rights should not be restricted to that of negative rights but also some initiation rights in the management. Reacting to the changes/ decisions brought about in the company definitely confer control in the hands of investor but what if the existing management is satisfied with the status quo and investor wants to bring about changes. The evolution of corporate democracy has seen reservation of certain rights

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for the investor but it should move positively in the direction of including the rights of initiation for the investor in the target company. This would not only expand the scope of the protection of interests of investor but also clear the air surrounding the ascertainment of control in the corporate world.

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