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The Legal Analysis of Adani's Attempt at Hostile takeover of NDTV Group

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Takeovers have been part of the Indian corporate landscape from time immemorial but hostile takeovers are a rare practice in India. There have been numerous attempts at hostile takeovers but only two of them have been successful, which is quite surprising. The news of Adani Group's attempt at taking over India's most fearless news agency made many heads turn as it is not just any takeover attempt. In many ways, it is an attempt to take away the freedom of the press as these conglomerates have hidden agendas of changing narratives in their favour. This Article sheds light on the moves employed by Adani Group in its attempt at acquiring NDTV Group and how hostile takeovers can be prevented and what are the various laws that govern such takeovers and whether the Adani Group violated any of these laws in its attempt at this acquisition.

Keywords: *hostile takeover, acquisitions, corporate landscape, media.*

INTRODUCTION

Mergers and Acquisitions are fairly common occurrences in the business world as they act as mechanisms of growth and expansion. Mergers are generally a friendly procedure, where two entities come together to form a new entity. On the other hand, in acquisitions an entity takeovers the assets and liabilities of another entity and influences the voting rights. Takeovers

can be mutual or hostile. Mergers and acquisitions in India are at an all-time high of 80 per cent for the years 2020 and 2021, but in 75 years of independence, hostile takeovers are still a rare occurrence in India.[1] The corporate environment all over the world is filled with many examples of hostile acquisitions like Kraft Foods' takeover of Cadbury, Sanofi Aventis' takeover of Genzyme Corporations and the most recent one would be Elon Musk's takeover of Twitter. It is quite clear that India shies away from head-on battles in the Corporate Sector and prefers smoother transitions. That is why Adani's bid to take over the NDTV Group comes as a surprise to many. It is interesting to note that there have been only two successful hostile takeovers in India and this has the potential to be the third one.

BACKGROUND

The Promoters of the NDTV Group are Radhika Roy and Prannoy Roy and through their holding company RRPR Holding Private Limited (RRPL) they controlled a 29.18% stake in NDTV. In 2008, RRPL took a loan of Rs. 540 crores from Indiabulls Financial Services to fund an open offer. This loan was offset by another loan of Rs. 375 crores from ICICI bank and that was in return paid by another loan of Rs. 350 crores taken from Vishwapardhan Commercial Private Limited (VCPL) in 2009.[2] RRPR also borrowed an additional sum of Rs. 53.85 crores in 2010. The term of the loan was 10 years and it was an unsecured and interest-free loan. The VCPL was entitled to convertible warrants that could be converted into 99.99 per cent of the fully diluted equity share capital of RRPR and the conversion could be enforced at any time during the term of the Agreement.[3] This meant that Roys could lose their entire stake in RRPR.

The VCPL is a shell company which was earlier owned by the Mukesh Ambani Group. AMG Media Networks Limited, a subsidiary of Adani Group, acquired VCPL and announced on 23rd August that it is exercising its right to convert the warrants into equity and gave RRPR 48 hours

[1] Peerzada Abrar, 'India mergers and acquisitions volume in 2021 near all-time high' (*Business Standard,* 21 December, 2021) <https://www.business-standard.com/article/companies/india-s-mergers-acquisitions-volume-in-2021-is-near-all-time-high-report-121122100108_1.html> accessed 07 December 2022

[2] Ashima Obhan & Raunaq Kawatra, 'Hostile Takeovers in India- Part 2' (*Mondaq,* 1 September 2022) <https://www.mondaq.com/india/corporate-and-company-law/1226644/hostile-takeovers-in-india-part-2#:~:text=With%20Swaraj%20Paul%27s%20attempt%2C%20the,Takeover> accessed 07 December 2022

[3] *Ibid*

to carry on the conversion. As this conversion meant that Adani shall hold a 29.18 per cent stake in NDTV, therefore, AMG made an open offer of a further 26 per cent as per SEBI's Takeover Code and offered a discounted price of Rs. 294 per share. Firstly, the Roys tried to prevent this by saying that the warrants were exercised without their consent and secondly, that SEBI has barred them from personally trading in shares and for this reason they couldn't carry on the conversion.

THE PRESENT STATE OF AFFAIRS

The process of acquisition of RRPR by AMG Media Networks Limited has come into effect and NDTV promoters Radhika Roy and Prannoy Roy have resigned from RRPR as Directors of the board. Further, if the open offer of 26 per cent is accepted then Adani will own 55 per cent of the NDTV Group and the Roys who still holds a 32 per cent stake in NDTV may have to leave the company that they founded.

CONSEQUENCE OF THE TAKEOVER

Adani Group is a multinational conglomerate which has an intimidating presence in a myriad of sectors like energy, minerals, logistics, etc. Owning a National News Agency would be highly beneficial to them as it could aid them in changing narratives that are well-suited to their agendas. This is where the problem lies, as the independence of media will be affected and will have huge ramifications on the freedom of the press in the country. There has been an increasing trend of concentration of media houses, starting from Mukesh Ambani's acquisition of Network 18 which led to Ambani owning various media houses and now with Adani following the same path, freedom of the press is at risk. NDTV Group has been one of the very few unbiased and fearless news agencies in the Indian mediascape and due to this reason, its takeover by a capitalist regime poses a potential risk to the 4the pillar of democracy i.e. Media.

WHAT IS A HOSTILE TAKEOVER?

Hostile Takeover is also a form of acquisition but the hostile part comes into play when a company or a person tries to acquire a target company without the consent of the target

company's board/management.[4] This could be done by going directly to the target company's shareholders, either by making a tender offer or through a proxy vote or by buying a large stock.[5] A tender offer is a proposal by the acquiring company to the shareholders of the target company and the offer is priced at a higher price than the one prevailing in the market so that it acts as an incentive for the shareholders to sell their stocks. A proxy vote is a method where the acquiring company influences the shareholders of the target company to vote out the management so that it could easily take over.

Buying large stocks is the last resort for an acquirer to take over the target company. In this method, the acquirer purchases a large chunk of shares of the target company in the open market. The larger the share larger will be the sway of the acquirer over the management of the company. Adani Group employed the last trick of buying large stocks of NDTV Group to acquire the news agency.

SUCCESSFUL HOSTILE TAKEOVERS IN INDIA

There have been various attempts at hostile takeovers in India but only 2 attempts have been successful in their endeavour.

India Cements' takeover of Raasi Cements: In 1998, India Cements successfully acquired Raasi Cements by buying large stocks of the company and which finally led to circumstances where B.V. Raju the owner of Raasi Cements had to sell its 32 per cent stake in the company to India Cements. It was the first hostile takeover of the Indian Corporate landscape.

Larsen & Toubro's acquisition of Mindtree: In 2019, Larsen & Toubro Limited (L&T), one of the largest information technology firms in India acquired Mindtree which is a medium-sized information tech company. L&T acquired Mindtree, first by purchasing VG Siddhartha's 20.4% stake in Mindtree and then by buying additional shares through an open offer as large investors grabbed the opportunity to sell their holdings. An approximate share of 60% in Mindtree gave

[4] Satish Kaushik, 'Adani Group vs NDTV: A tale of hostile takeovers in Indian corporate industry' (*Livemint,* 24 August, 2022) <https://www.livemint.com/news/india/adani-group-vs-ndtv-the-tale-of-hostile-takeovers-in-indian-corporate-industry-11661307221684.html> accessed 07 December 2022

[5] *Ibid*

L&T the desired control over the management and the board of the company. The latest development in this corporate drama is that L&T and Mindtree have decided to merge and the merged entity will be called LTIMindtree with L&T holding 68.73 % of the merged entity.

WAYS TO PREVENT A HOSTILE TAKEOVER

The White Knight: Where the target company knows that it won't be able to outbid the hostile bidder, they bring in a friendlier company to purchase controlling shares in the company before the acquirer does. This friendlier company will act as the white knight (saviour) of the target company. A classic example of the white knight move is when GESCO a real estate firm took the help of Mahindra and Mahindra to prevent Dalmia Group from acquiring it.[6]

Greenmail: A defence mechanism where the target company buys back its shares from the acquirer at a higher price.

Crown Jewels: In this defence mechanism, the target company sells its most valuable asset to diminish its attractiveness to the buyers, which might be the reason that attracted the hostile bidders in the first place. This mechanism could be used along with the white knight.

Poison Pills: In this method, the target company devalues its shares to a point where the hostile bidder cannot purchase the shares without incurring a significant loss at its end. It is also called the "shareholder's rights plan".

Shark Repellant: In this defence mechanism, the target company makes amendments to its constitution or Articles of Association, to make the happening of the takeover impossible. The Companies Act, 2013 allows the shareholders to make changes to the Articles by passing a special resolution. For example, the shareholders can add a provision that in case of acquisition, approval by a special majority will be necessary. This move is also called an anti-takeover amendment.

[6] *Ibid*

Pac Man Defence: In this mechanism, the target company makes a counteroffer to the acquirer and buys the stocks of the acquiring company. The acquiring company gets distracted by this move as it is forced to protect its company. The acquiring process comes to an end with an agreement between the warring parties.

LAWS GOVERNING TAKEOVERS IN INDIA

Various regulatory bodies and legislations regulate the corporate sector of India. The most prominent legislation is the Companies Act of 2013, and other than that SEBI(Securities and Exchange Board of India) Act of 1992 and the Competition Act of 2002. Takeovers are also categorized according to the types of companies, like whether it is a private or public company and also if it is a listed or unlisted company. This categorization determines the applicability of different laws governing takeovers of different types of companies.

The Companies Act, 2013: The provisions of the Companies Act govern unlisted companies. Earlier Section 395 of the Companies Act of 1956 dealt with takeover/acquisitions, which provided for both the power and the duty of the acquirer company to acquire the shares of the target company. Sections 235 and 236 of the Companies Act, 2013 have similar provisions. Section 236 has the provision of buying the minority shareholding if the acquiring firm holds ninety per cent of the issued equity share capital of the target company. Overall mergers and acquisitions are covered under Sections 230-240 in the Companies Act, 2013.

The SEBI Code, 2011: The chief regulation that governs the takeover and acquisition of listed public companies is the SEBI (Substantial Acquisition of Shares and Takeover Code) Regulation 2011. The need for this regulation was to protect the interest of the shareholders of the target company along with the interest of the acquired company. The first Takeover code was enacted by SEBI in 1994 which was further amended in 1997. After partial acceptance of the recommendations of the Achutan Committee, the Substantial Acquisition of Shares and Takeover Regulation of 2011 was enacted and continues to date. The main provisions of the Takeover Regulation are:

Substantial Acquisition of share and voting rights: Acquisition of sizeable shares of a target company leads to the acquisition of control and ultimately leads to the takeover of the company. An acquisition by a company could be of shares, voting rights or control. Acquisition of shares could be of two kinds- direct or indirect. Direct acquisition occurs when the control of a listed company is by way of acquiring the shares of the target company directly. In indirect acquisition, the control is by way of acquiring the shares of the holding company or the parent company of the target company. The open offer process is mandated by the Takeover regulation for both direct and indirect acquisition if such acquisition prompts the threshold prescribed by the regulation. According to Regulation 3 of the code, the acquiring firm should make a public announcement for every acquisition of shares, voting rights or control which is more than 25 per cent but less than the maximum permissible non-public shareholding in a given financial year.

Voluntary Offer: Regulation 6 provides the acquiring firm with an option to make a voluntary offer to the shareholders who hold at least 25 per cent or more but less than 75 per cent of the shares or voting rights of the target company, to consolidate their existing shareholding in the company.

Offer Size: The Takeover code of 2011 provides for a fixed offer size. According to Regulation 7, "The open offer for acquiring shares to be made by the acquirer and persons acting in concert with him under regulation 3 and regulation 4 shall be for at least twenty six per cent of total shares of the target company, as of tenth working day from the closure of the tendering period".[7]

Completion of the Offer: Regulation 22 stipulates provisions for the completion of the offer. The acquisition process shall complete only after the expiry of the offer period. The maximum period for the acquirer to complete the acquisition process is 26 weeks from the expiry of the offer period. In the event of extraordinary circumstances, this period of 26 weeks can be extended by the Board. In Pramod Jain and Ors v SEBI, 2016, the Supreme Court said,

[7] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011

"adherence to the timeline provided under the Regulation is critical under the Takeover Code, Bhagwati Committee and the International Practice, time is of the essence in case of hostile takeovers".[8]

Withdrawal of the Offer

Under the following circumstances, the Takeover code permits the withdrawal of the open offer (Regulation 23):

- Statutory approvals required for open offers or for effecting the acquisitions attracting the obligation to make an offer under the regulations of the code have been refused provided that such requirements for approval have been specifically disclosed in the detailed public statement and the letter of offer.
- In case the acquirer is a natural person if he/she died.
- any condition that is stipulated in the agreement for acquisition which attracts the obligation to make the open offer is not met and for reasons which are beyond the control of the acquirer, and such agreement is nullified, provided that such conditions have been specifically disclosed in the detailed public statement and the letter of offer; or
- In certain circumstances where the Board merits withdrawal. In such a condition the Board shall pass a reasoned order permitting withdrawal, and such order shall be displayed on the official website of the Board.

ROLE OF INDEPENDENT DIRECTORS

The Takeover code mandates the constitution of a committee of independent directors by the board of directors of the target company, to provide a reasonable recommendation in writing on such an open offer, which is required to be published by the target company. The Committee has the authority to seek the counsel of an external expert in such matters.

The Competition Act, 2002: The Competition Act of 2002 replaced the Monopolistic and Restrictive Trade Practices (MRTP) Act of 1969. It was enacted to prevent monopoly and

[8] *Pramod Jain & Ors. v SEBI* (2005) 60 SCL 484 SAT

promote competition in the market by prohibiting any practices that cause an appreciable adverse effect. The Act prohibits anti-competitive agreements and abuse of dominance and also regulates combinations like mergers and acquisitions. Under Section 5 of the Act, mergers as a part of combinations are defined and under Section 6 provisions for the regulation of combinations are laid down. Section 6 also mandates that "No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void."[9]Powers of the Competition Commission to regulate Combinations under the Competition Act.

Mandatory Notice - It is mandatory for any enterprises that are entering into any combination to intimate the Competition Commission about the merger if the value of the aggregate assets and turnover exceeds the threshold limit stipulated in Section 5 of the Competition Act. The notice should be given to the commission within 30 days of the approval of the proposal of merger and amalgamation by the board of the enterprises so concerned or after the execution of any agreement or document for acquisition or on acquiring the control of the enterprise.

210 Days Waiting Period - it is provided under the Act that no combination will come into effect unless 210 days have been passed from the date of receipt of notice by the the Commission concerning combination or date of passing of the order, whichever is earlier.Form Filling and Cost- certain forms have to be filed along with the notice given to the Commission as mandated by it. The Commission can issue show-cause notices if it thinks that such a combination can cause an appreciable adverse effect on the relevant market.

Extra-territorial Jurisdiction - Section 35 of the Competition Act gives the Commission the power to inquire into any act concerning any agreement, abuse of dominant position or combinations that are taking place outside India but creating an adverse effect in India, giving extra-territorial jurisdiction to the Competition Commission.

[9] Competition Act 2002, s 6

Foreign Exchange Management Act, 1999: Foreign Exchange Management Act (FEMA) deals with cross-border mergers and acquisitions. Cross-border mergers are of two kinds-

- **Inbound Mergers -** a foreign company merges with an Indian company and all the assets and liabilities are transferred to the Indian Company.
- **Outbound Merger -** Indian company merges with a foreign company and all the assets and liabilities are transferred to the foreign company. In this case, the merger has to comply with both FEMA and foreign rules.

The SEBI (Substantial Acquisition of Shares and Takeover code) Regulation, 2011 is the major rule governing hostile takeovers and every acquirer has to comply with its provisions in its pursuit of acquiring control of the target company.

DOES THE TAKEOVER BID VIOLATE ANY LAWS OF THE COMPETITION ACT?

AMG Media Works Limited's acquisition of RRPR, the promoter entity of the NDTV Group has not violated any laws of the Competition Act till now. The open offer by the AMG, if accepted will give AMG the majority shares and the control of the NDTV group. The Competition Commission could declare the acquisition of the NDTV Group void, based on the fact that it causes an appreciable adverse effect on the relevant market. How will the Competition Commission adjudge this takeover shall be interesting to watch as this takeover bid unfolds.

CONCLUSION

More often than not, mergers and acquisitions create a buzz in the corporate industry and not in the general public but this takeover attempt is different in this way. It has been able to garner a good amount of attention from the general public and especially from the viewers of NDTV who regard this news agency as the embodiment of an unbiased and fearless news channel in India that they can trust. In recent years there has been a degradation in journalistic ethics, with news channels focusing more on TRP ratings than paying any heed to the quality of content they are streaming on their platforms. In such a scenario, an attempt at acquiring NDTV by one of the biggest conglomerates in India makes this takeover bid questionable.

The major regulation that governs takeovers is the SEBI's Takeover Code which has been adhered to by the Adani Group in its attempt at acquisition till now. Now, the fate of the news agency likely depends upon the acceptance of the open offer, which if accepted will give control of the company to the Adani Group. The options left for NDTV are that it can employ the White Knight defence where it can bring in a friendly company to acquire the controlling shares of the company before the Adani Group does and another way could be through the Competition Commission, where the Commission declares the takeover void because of the appreciable adverse effect it can cause in the market in its opinion. The founders of NDTV need to come up with some kind of defence as soon as possible or they may lose their company entirely. This takeover is also a lesson for other independent news agencies and the need to shift to a subscription model if they want to retain their ownership and discretionary power in streaming information which is true and unbiased.