An Insight into the Legal Framework of Takeovers of Public Listed Companies: A Comparative Study of Indian, Us and UK Laws

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ABSTRACT

From the perspective of the modern market, a successful business must be able to effectively perform competing business activities and must be endowed with various manoeuvre or business strategies. A business can endeavour to achieve this aim only with sufficient investment and a larger market share. Therefore, in order to pace up with the current economic situation the companies are frequently acquiring other companies to enhance their production efficiency, cost effective marketing of their products and services and to beat the stiff competition existing in the corporate space.

Takeovers are one of the most dynamic decisions taken in business practice. Therefore, there is a need to exhaustively examine the legal provisions governing takeovers and its procedure. The study strives to have a deeper insight into the concept and legal framework in Takeover of business for the protection of the rights of shareholders or investors.
The existing Takeover Regulations ensure that every member of the target company is given equality of treatment and opportunity during a takeover procedure. Also, they provide for the provisions for voicing of the dissenting views of the minority shareholders who do not agree to the takeover decision of the company. Thus, Takeover of listed companies is a complex procedure which must be effectively codified in a country without any space for ambiguity. Therefore, there is a need to look into the legal framework of developed and developing countries for coming up with a robust mechanism to regulate takeovers.

The scope of this article is the comparative study between the Corporate/ Security laws of India, UK and USA regulating the takeovers of companies within their specific jurisdictions.

INTRODUCTION

The corporations/ companies have always resorted to the strategies of mergers and acquisitions in order to expand their business and acquire a larger market share. But, the big corporations or giant companies started exploiting the opportunity which hampered the spirit of doing business and harmed the interests of the shareholders/ investors. Therefore, there must be an efficient Regulatory/ Legal framework to regulate the process of Takeovers in the Securities Market and safeguard the interests of all the stakeholders involved therein.

The need for Takeover Regulations has been felt since the time when business strategies evolved.[1] But, inspite of taking every care possible and all considerate views into account by the Legislators, there exists a number of inconsistencies in the legal provisions in Takeover regulations which needs to be addressed and rectified for an efficient business growth.

Review of Literature:

In this article, the author has discussed about the regulatory framework for takeovers in the UK. For a better understanding about the concept of takeovers, the various factors responsible for its emergence and the need for its regulation, the article gives a brief view about the historical background or overview of takeovers in the UK. For the purpose of examining the ability and extent of the protection available to the shareholders of Target companies, The EU Takeover Directive of the year 2004 and The City Code on Takeovers and Mergers are examined in the article.

The author has remarked that the regulations do not provide adequate protection to shareholders of target companies as the Persons in the management tend to preserve their own interests during takeover activity. Therefore, it raises the most important issue of the

[1]The Regulations reflects the collective opinion of those professionals involved in the field of takeovers as per the business standards for ensuring fairness and equality of opportunity and treatment for the shareholders.

Role of Directors in Takeover decisions. In the light of this, the author calls for amendment in the current takeover regime to protect the interests of the target companies.

I. UKEssays-"The US and UK Takeover Regulations"[2]-

The article primarily discusses about the significance of a takeover in the market as the resultant or combined entity yields better result than two separate entities because of savings in cost of production, combined offices, staff facilities, management etc. Further, the article discusses the historical development of takeovers in USA and UK and has carried out a comparative study between the legal framework of USA and UK Takeover regulations. It provides that the use of defensive devices by Target Company is not allowed, whereas the Delaware law of US arms the managers of the Target company to resort to any of the defence mechanisms to avoid a hostile takeover activity.

The article discusses about the role of the Securities Market Regulator in USA and UK. The Takeover Panel in UK and the Securities and Exchange Commission in the USA regulates takeover activities.

II. Umakanth Varottil- "Individual Triggers for Takeover Offers"[3]-

The author has discussed the role of The Securities and Exchange Board of India in regulating the takeover activities of Public listed companies in India by enacting the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 for providing mandatory requirements for the acquisition of shares or voting rights or acquiring control over the management of the Target Company. The article has

[2]*The US and UK Takeover Regulations,* UKEssays, Mar 23, 2015, https://www.ukessays.com/essays/economics/difference-between-the-us-and-uk-takeover-regulations-economics-essay.php. (Last access: 03/06/2018).

[3]Umakanth Varottil, "*Individual Triggers for Takeover Offers*", Indian CorpLaw, March 15, 2016,https://indiacorplaw.in/2016/03/individual-triggers-for-takeover-offers.html. (Last access- 11/04/2018).

further strived to highlight the difference in takeover procedure regulating a listed and unlisted company.

The article provides the situations wherein the Takeover Regulation gets triggered by exceeding the threshold. The author specifically focuses upon the requirement of an open offer in the event of the initial threshold is breached by the acquirer under Regulation 3.

III. Srinivas Raman- "Takeover Defenses In India"[4]-

The author appraises the developed capital markets prevalent in US, by specifically discussing about the existence of elaborate defense devices or mechanisms that the management of the Target company is armed with, in order to repel a hostile takeover situation. The defense mechanism has developed from the corporate jurisprudence in the State of Delaware in US. This way the capital market in US provides for a greater amount of protection and autonomy to the shareholders, managers, employees or members of the target company members as compared to other countries.

Therefore, the article casts a sharp difference prevalent in the Indian situation from that of the US which is majorly due to the lack of legally enforceable defense strategies or devices in India that renders the target company unarmed to repel a hostile situation. Moreover, the Indian companies are left to come up with their own innovative ideas of brand pill to protect its brand name even after the takeover, whereas US has elaborate mechanisms.

[4]**Srinivas Raman,"Takeover Defenses In India", Corporate Law Reporter, Nov 20, 2016.** http://corporatelawreporter.com/2016/11/20/takeover-defenses-in-india/. (Last access: 24/04/2018)

Need of the Study:

To evaluate the laws regulating Takeovers and its impact on Mergers and Acquisition in India by appraising the legal framework in UK and USA to determine the lacuna existing in legal provisions or the inefficiency to deal with the takeover implications.

Objective & Hypothesis:

"Despite having undergone several changes to cope with the prevailing economic conditions, the existing SEBI Takeover Regulation is suffering from various inconsistencies as compared to legal framework in developed countries."

Research Methodology:

The researcher has used the Doctrinal Method for the Article. The researcher has covered the issue by studying the various authorities on Corporate and Securities laws which were further analyzed in the light of various secondary sources i.e. expert opinions, journal articles, e-library resources, research papers, news articles.

1. LEGAL FRAMEWORK IN INDIA

For Public Listed Companies, the Stock Exchanges incorporates regulations that mandates a particular percentage of shares of a company to be held by the general public for getting the securities listed on the Stock Exchange. Thereafter, the securities of the listed companies are traded on that particular Stock exchange only. The Stock exchanges regulate the trading of securities through Securities Contracts (Regulations) Act, 1956 and Securities Contracts (Regulations) Rules, 1957 which prescribes various mandatory or disclosure provisions for maintaining transparency and accountability of public money being used for investment purposes in the public companies. An information furnished to Stock Exchange and SEBI amounts to information being disseminated to the public. The acquisition of shares can be only

upto the maximum non- public shareholding as provided under the abovementioned Act and Rules, otherwise it will result in delisting of the shares of that company from the Stock exchange.

The Securities and Exchange Board of India was established as statutory body by SEBI Act in the year 1992. Under Section 11 of the Act, the Board has a duty and powers to regulate Takeovers of public companies in India. Subsequently, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Code, 2011) was enacted to regulate the substantial acquisition of shares in Public Listed companies.[5]

Takeover is different from Mergers, amalgamations and acquisitions under the SEBI Regulations and it cannot be used interchangeably. The SEBI Takeover regulations provides for the subsequent acquisition of shares as well i.e. creeping acquisition, unlike the usual acquisition.[6] However, in Takeover, the acquirer has to first acquire or cross a particular threshold of shares in the target company and thereafter, it is mandated to make an open offer to all the shareholders (i.e. for all the remaining shares of the target company) to acquire atleast 26% more shares under Takeover Code, 2011.[7] Any dissatisfaction or dissenting opinion with regards to takeover activity gives right to the shareholders of the target company to appeal to SEBI and thereafter, the Securities Appellate Tribunal.

The Takeover Code is designed to ensure that shareholders and investors are not denied an opportunity to decide on the merits of acquisition and are afforded equivalent treatment by Acquirer company. It provides a systematic framework and guidelines within which takeovers are conducted. The Code of 2011 is a landmark

[5] The Takeover Code, 2011 came into force from 22-10-2011.

[6] In takeover, the acquirer holds some shares in the target company whereas, in most acquisition cases, the acquirer does not hold any prior shares in the target.

[7] Previously, it was 20% shares only as prescribed under Takeover Code, 1997.

development not only in Securities market but also in India's Mergers and Acquisition landscape by aligning it with the best business practices prevalent globally with increased measures for transparency and governance.

For a detailed understanding about the Takeover procedure and SEBI regulations, it is significant to look into the Takeover Codes and its development over the years, as discussed hereafter-

1.1 SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011-

i. Mandatory Open Offer- Regulation 3(1) of the Code makes it mandatory for the acquirer company to make public announcement of an Open Offer to the shareholders of the target company if it crosses the minimum threshold or acquires the statutorily prescribed number of shares or voting rights or which amounts to taking control of the target company by the acquirer. The minimum threshold is 25 % of shares or voting rights in the target company. It is known as the Initial Trigger point.[8] Subsequently, the Second Trigger point occurs when the acquirer already holding 25% or more of shares or voting rights but less than the maximum permissible non public shareholding[9] in the target company, further acquires 5% or more shares or voting rights in the target company in the next financial year, wherein the acquirer is mandated to make public announcement of an open offer for his further acquisition in the target.[10]

ii. Control Trigger- Control trigger is attracted when the acquirer company obtains a controlling interest in the target company wherein the acquirer is mandated to make

[8] Initial Trigger- The mandatory offer is triggered if the acquirer company attains 25% or more of shares or voting rights in the target company, when added with the stake in the company already held by the acquirer alone or with persons acting in concert.

[9]The maximum **permissible non-public shareholding** means such percentage of shareholding in the target company which is not exceeding the minimum public shareholding required under the listing agreement with the Stock exchange where its securities are listed.

[10] Regulation 3(2).

public announcement of an open offer to acquire the control irrespective of his percentage of shareholding or voting rights in the target company.[11] It is to be noted that the definition or ambit of the term "control" is quite unclear under the takeover regulations. It thus leads to ambiguity in the interpretation of statutory provisions relating the takeover process. A greater role with discretionary power is conferred upon the SEBI to determine the existence and degree of control acquired by the acquirer company over the target company by assessing the control over management, assets, policy decision making powers etc.

iii. Indirect Acquisition of shares- The acquisition of shares or voting rights or control over any company that would enable any person and PAC (Acquirer) to exercise of such percentage of voting rights or control over a target company, the acquisition of which would otherwise attract the obligation of making public announcement of an open offer for acquiring shares is considered to be an indirect acquisition of shares or voting rights in, or control in the target company as per the Code.[12]

iv. Delisting Offer- The Code provides that during the making of public announcement of open offer for acquisition of shares or voting rights in the target company, the acquirer can declare his clear intention for delisting the target company from the Stock Exchange as per the SEBI (Delisting of Equity Shares) Regulation, 2009. Delisting of the company can occur if the acquirer acquires shares exceeding the maximum permissible non public shareholding in the target company. Securities Contracts (Regulations) Rules, 1957 prescribes the minimum public shareholding which needs to be complied with by all the Public Listed companies in India.[13] Any

[11] Regulation 4.
[12] Regulation 5.
[13] Rule 19A of Securities Contract (Regulation) Rules, 2017 provides for the continuous listing requirement by maintaining the minimum public shareholding at 25% or must increase it within 4 years.

decrease in the percentage of minimum public shareholding would lead to delisting of that public company from the Stock Exchange.

v. Disclosure Requirements by the Acquirer- The disclosure or information furnished by the acquirer to the Stock Exchange and SEBI amounts to information being disseminated to the public. Also, the acquirer holding 25 % or more shares or voting rights and the promoter are mandated to disclose to the Stock Exchange and the target company[14] about their shareholding or voting rights as existing on March 31st in every financial year.[15]

vi. Competing Offer- Any person, other than the acquirer who has made a public announcement of an Open Offer, can also make a public announcement of an Open Offer within 15 days from the date of the Detailed Public Statement issued by the first acquirer in pursuance to his public announcement.[16]

vii. Withdrawal of Open Offer- The Act specifically provides that the open offer can only be allowed to be withdrawn if it is due to any reason which is outside the control of the acquirer. For example- any statutory approval is refused for such open offer.[17]

viii. Wilful Defaulter- The wilful defaulter declared as per the RBI Guidelines cannot make an open offer for acquisition of shares or voting rights in a target company. But the Act allows such wilful defaulter to make a competing offer to the target company.[18]

1.2 Competition Act, 2002-

[14] Regulation 30 (1). The disclosure must be made within 7 working days from the last date of financial year.
[15] It is the Continual disclosure requirement. Regulation 28(3) provides for disclosure requirement of pledged shares was incorporated in 2009 after the scam by the Satyam Computer Services Limited surfaced.
[16]Regulation 20 (1).
[17] Regulation 23 (1).
[18] Regulation 6A. SEBI (SAST) (Amendments) Regulations, 2016.

Under this legislation, the Competition Commission of India has wide powers to monitor and investigate the Mergers and Acquisitions and its appreciable adverse effect on competition in the market. If the combination has an adverse impact then it cannot be allowed to take place. CCI is assisted by the Director General to investigate into the complaints brought before it and decide upon the facts of each case. The Act makes it mandatory to give notice to CCI and disclose the information about the proposed combination.[19] Failure to give notice has consequences prescribed under the Act. Thus it ensures fair competition and transparency in the market.

1.3 Companies Act, 2013-

The provisions are business friendly and its enhanced disclosure norms ensure protection of investors and shareholders. The Act adequately provide for the representation and protection of the rights of the dissenting shareholders during any acquisition process.[20] There is also a mandatory requirement of sending notice to the dissenting shareholders to ensure transparency.[21]

2. LEGAL FRAMEWORK IN UNITED STATES OF AMERICA

This part deals with the legal framework of Takeover Regulations in USA. It is to be noted that the companies are incorporated under the State Laws in US. The regulation of takeover process and its regulation come under the domain of both State laws and Federal law. Therefore, there is a need to maintain coordination and coherence between the two, so that the corporate structure, ease of doing business and development of economy is not at stake.

The following Federal laws govern the takeovers of public companies:

[19] Section 6 provides for the Notice of Combination to the CCI by the parties.
[20] Section 235 provides for Acquisition of shares of dissenting shareholders.
[21] Rule 26 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

2.1 The Securities Exchange Act, 1934-

The Act establishes the Securities Exchange Commission (SEC) for regulating the securities market in US. It is the sole regulator of the trading of securities and it also checks the financial reports of public companies for legal compliances. The commission carries out investigates corporate frauds of public money and thereby ensures the protection of the interests of the investors/ shareholders in the market. The Commission is in place to regulate and monitor the takeovers in corporate space. It enforces the federal securities laws and regulations. It allows the dissenting members in a hostile takeover and shareholders can also bring an action on their own or on behalf of the company.

Sections 14(d) and 14(e) of the Exchange Act, governs the tender and exchange offers between companies. Section 13(d) requires the companies to abide by the mandatory disclosure of acquisition of 5% of equity shares in any public company. Registration requirements of the Act direct the companies proposing to sell their securities to first register the securities being offered in the transaction (in absence of any exemption prescribed).

2.2 The Clayton Act, 1914-

The Clayton Antitrust Act 1914 was established by the Federal trade Commission and was enforced in addition to the Sherman Anti-Trust Act. It regulated the corporate affairs that tend to interfere with the competition or does anti- competitive activities in market.

The following rules are incorporated under the Act to regulate the anti- competitive activities in the corporate sphere-

i. The Act does not allow a person to be appointed as a Director in more than one company if those companies are in direct competition with each other. If these

companies merge with each other then they are said to be in contravention of the US Anti- Trust laws.

ii. Any sort of discrimination among the purchasers is prohibited under the Act as it will tend to create a monopolistic trade environment which would hamper the interests of the consumers and other stakeholders in the market.

iii. The *Incipiency Doctrine* under the legislation enabled the Federal Trade Commission to prohibit those types of mergers and acquisitions that are not in the interest of the public or fair competition in the market.[22] The doctrine protects the target company to preserve their innovation or business as a whole.

2.3 The Williams Act, 1968-

The commission has implemented and enforced this legislation to regulate the acquisitions and tender offers. It was primarily enacted to prevent hostile takeovers in 1960s. The Act also makes provisions for the following disclosures, so as to maintain highest degree of fairness and equal opportunity for the shareholders to decide upon the offer such as the information regarding the purpose of offer must be made public. It provides that any fraudulent decision or act in connection with the offer will be illegal.[23]

The Act makes provisions for Best Price rule and All Holders rule, which means that the bidder must buy the tendered shares of the target company at the best price. This provision ensures transparency and equality of treatment during a takeover process. The target company is also required to abide by various compliances such as to

[22]Peter Carstensen and Robert H. Lande, "The Merger Incipiency Doctrine and the Importance of 'Redundant' Competitors", Wisconsin Law Review, Feb 2018. See further https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134480. (Last access: 18/03/2018). The enforcers and the courts have not implemented the merger incipiency doctrine in the manner Congress intended. The attenuation of the incipiency doctrine has allowed many mergers that have resulted in higher prices and lower levels of innovation. Moreover, other empirical work shows that significant mergers rarely produce significant efficiency gains and often result in losses to innovation.

[23] Fraudulent act includes insider trading.

refrain from making materially misleading statements. Sources of fund for facilitating takeover process must also be declared in the public disclosure.

The following State laws also apply to Takeovers in US:

2.4 Delaware General corporation law-

A merger is governed by the corporate law of the state in which the target company is incorporated. Under Section 252(d)[24] of the Act determines other factors such as the nature of a director's fiduciary duties when entering into a merger agreement. Any agreement of merger between the companies may contain a provision that the boards of directors of the constituent corporations may amend the agreement at any time.[25]

Anti-takeover laws-

Various states offer protection from corporate takeovers. There are few States who have incorporated various defensive devices or strategies for the Target companies to repel takeover offers and thereby, making the process more difficult. Sometimes, it poses a question as to whether these defensive devices are in the interest of the shareholders of the company by empowering them to take decisions in their best interests.

3. LEGAL FRAMEWORK ON TAKEOVERS IN UK

The European Council regulates the Takeover procedure of public companies in United Kingdom. The takeover of public companies is enforced and monitored by the City Panel on Takeovers and Mergers under*The City Code on Takeovers and Mergers*framed in UK in consonance with the European Union's Takeover Directive, 2006.[26] Before the year 2006, the

[24] Merger or consolidation of domestic corporations
[25]http://delcode.delaware.gov/title8/c001/sc09/index.shtml. (Last access- 10/04/2018).
[26] It is widely known as the Blue Book.

Code was not legally binding.[27]Following the implementation of the Takeovers Directive (2004/25/EC), the rules set out in the Code have a statutory basis and comply with the relevant requirements of the Directive.

3.1 The City Code on Takeovers and Mergers:

This code is in place to regulate the Takeover procedure by ensuring fairness and equal treatment of all the shareholders (both majority and minority). The Code strives to establish and maintain best business standards prevailing globally by taking into consideration the views of all the shareholders, investors and the experts having expertise in the takeover activity. It is the imperative of the Government to ensure the fair competition in the market and look into the public policy issues related to the takeovers. The Code applies to UK resident public companies which include both listed and unlisted companies and prescribed statutory and private companies as well.[28]

The Takeover procedure is governed by other statutes as well which does not fall under the scope of the present study but they need to be mentioned herein for better understanding of the legal framework in UK to regulate takeovers. These are as follows:

3.2 UK Companies Act, 2006-

Section 425 of the old UK Companies Act provided that a scheme of arrangement between the target company and its shareholders is prepared which reflects the cooperation for carrying out the Takeover procedure. It initially discusses about the takeover proposal. If the court permits or allows the scheme carry out then it becomes binding on all the shareholders to abide by the scheme.

Therefore, it raises the most important issue of the interests and rights of the minority shareholders who dissents to the scheme of takeover because it is quite obvious that not all

[27] The City Code and the Takeover Panel was established before the enforcement of the EU Takeover Directive.

[28] The condition for the applicability of the Code over private companies is that it must have been listed on any Stock exchange or had sold their equity share capital in the last 10 years.

the shareholders of the target company would agree to the scheme of takeover to carry out. Since there is mandatory involvement of the court to allow or dismiss the scheme of arrangement/ takeover of the company, thus, the whole procedure is long, expensive and time consuming.

In order to avoid this long procedure of abiding by all the complexed formalities, the public companies tend to go for mergers through public offer under the Code instead of the preparation of the scheme of arrangement for takeover proposal by the target company.[29]

The new Companies Act, 2006 has incorporated **Part 26[30], 27 and 28** which provides for the procedure to be followed in mergers and takeovers of public companies. The Part 28 on Takeovers is in consonance with the EU Directive on Takeover Bids, 2004.

Further, it is pertinent to note that the 2016 Amendment to the Companies Act, 2006 has mandated the companies to maintain a register of people with significant control (PSC) over the company which is known as the PSC Register. It will contain the information of those individuals who are holding 25% of the shares either directly or indirectly and persons having control over the management of the company.[31] This amendment is a progressive step towards maintaining a more transparent and accountable structure during and after takeover activities in UK.

3.3 The Competition Act, 1998-

The Act provides a legal framework for prohibiting restrictive business practices and abuse of a dominant position in the market. The provisions of this legislation have been framed in consonance with the UK with EU competition policy. The Competition and Markets

[29] Franks and Harris (1989) had studied and found that there were only 161 schemes of arrangement for the takeover procedure in UK, whereas, there were 1693 Public offers for initiating takeover of public companies.

[30] Sections 896 to 901 has incorporated the directives prescribed under section 425 of the earlier Companies Act, 1985

[31]This public register is supposed to replace the Annual Returns to be filed by the companies.

Authorityis responsible for prosecuting those companies who engage in any sort of anti competitive activities.

3.4 The London Stock Exchange Rules-

The London Stock Exchange was earlier known as the International Stock Exchange of the United Kingdom. The LSE can also mandate the offeror to abide by the obligations in class transactions.[32] The Listing Rules provides for the deadlines for the dispatch of the circulars, notification or sending of any relevant information for the shareholder approval. The UK Listing Authority is main authority responsible for approving the prospectus of companies for their admission to the official list. Thereafter, the LSE admits those companies to the main EU Market for security trading.

FINDINGS & RECOMMENDATIONS

In Indian scenario, the companies have been left alone to decide and come up with a solution to avoid a hostile takeover. However, in a developed market like that of USA, there are well established anti- hostile takeover defenses to combat the unfavorable situations by the target companies. Therefore, the article calls for the Legal recognition of sharp *Defense mechanism to combat Hostile Takeovers* in India like USA. Although the Takeover Regulations, 2011 and Companies Act, 2013 mandates several disclosure requirements to avoid hostile takeovers of target companies, the present legal framework renders the public companies unarmed to avoid hostile situation.

Also, the *Employees' participation in Management* for acquisition must be recognized like other developed countries. Law does not mandate the acquirer to take prior approval of employees of the target company in takeover activity. The employees must be ensured with

[32] The listing Rules issued by LSE divides the acquisitions, takeovers and mergers into Size Classes.

security of employment by SEBI by keeping their employment continue after the acquisition, so that they are not at disadvantageous position as compared to the employees of acquirer.

CONCLUSION

In the light of the research and findings, it can be observed that the Takeover Code has effectively managed to regulate the Takeovers of public companies through adequate disclosure norms and statutory compliances so that investors are shielded from being prejudicially effected by the takeovers activities, which has become the norm of the day or the most frequent business strategy for gaining larger market share. The various inconsistencies and the inability to cope with the current economic conditions prevalent globally had been tried to be addressed by the frequent amendments made by Securities and Exchange Board of India in the Takeover Regulations. With the current trend, it can be undeniably said that the Takeover regulations will be amended every now and then in the absence of an effective Legal framework or Takeover regime.

The Takeover Code of 2011 along with its subsequent amendments is a progressive regulation to facilitate the investments by investors. SEBI has made efforts to address the critical issues plaguing the business industry and hampering the economic growth of the country. It has worked to strike a balance between the interests of the investors and that of the promoters of the company.

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