Takeover modes through arrangement under the Companies Act, 2013-

Bringing out the true colors of difference between the takeover provisions

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Background

The syndrome of the majority trying to gobble up the minority may be reminiscent of the era of raiders, kingdoms and fiefdoms, but the corporate world still has the same avarice for complete control that has lived through ages. There may be various reasons and circumstances where the majority may want to throw out the minority and gain absolute control over the company. The minority may have been marginalised over years of creeping acquisition by the promoter block, or it may be a rival group, or it may just be shareholders who have become disinterested in the running of the company over time.

The Companies Act, 2013 ('Act, 2013' or 'Act') contains several provisions for minority protection; the Act also contains some provisions for fortification of majority control. Sections 230 (11), 235 and 236 are those provisions for what may result into "ek chhatra raj" of the majority

Even though sections 230 (11), 235 and 236 have a similar nature of giving a forceful exit, however, each of these are very different from the other in terms of its applicability and approach which is worth discussing!

Generally a company is taken over with an intention to oust hostile group of shareholders or minority shareholders and thus continue or establish complete control over the acquired entity (Target Company). There can be various means to provide an exit opportunity offer to the shareholders of the Target Company like buy back offer, reduction of share capital, consolidation of share capital. While the aforesaid means are not in the nature to force the exit of the target group, however, if we look at the provisions of Chapter XV, the nature of exit offer mentioned therein is more of an expulsion tied with the payment of fair value to the outgoing shareholders (target group).

Chapter XV of the Companies Act, 2013 ('Act, 2013' or 'Act') deals with the said modes under three separate sections viz.:

- Section 230 (11)[1]
- Section 235; and
- Section 236

While the prima facie nature of all the three sections is same, however, there lies significant difference between the three w.r.t to the involvement of scheme, applicability of each of these section, procedure, etc. to name a few, which is worth discussing in this write up.

Sec 230 (11) – Takeover of an unlisted company through an arrangement

Some of the features of the arrangement procedure:

[1] Enforced vide MCA notification dated 4th February, 2020
Further Companies (Compromise and Arrangement) Rules and NCLT Rules have been amended to give effect to the said enforcement.

- This section can be used for takeover of shares of an unlisted company considering the fact that SEBI (Substantial Acquisition of Shares and Takeover) Regulations as well as the SEBI (Securities Contract Regulation Act) and other relevant regulations are already in place to look after and regulate the takeover of shares of a listed company. Further, looking at the threshold for being eligible acquirer(s), this section becomes useless for listed companies since public category shareholders may not find a way to propose takeover.

- The acquirer(s)needs to be a member of the Target Company and is required to hold atleast 75% of the total share capital of such company where the term shares have been defined to mean securities having voting rights

- The offer of acquisition has to be for the remaining portion of shares not held by the potential acquirer(s).

- A scheme of arrangement needs to be drafted for the said takeover and an application has to be filed with the Hon'ble National Company Law Tribunal.

- The application is required to be accompanies with the various relevant documents including the valuation report given by the registered valuer wherein the value arrived at should have been post the consideration of the following:

    - Highest price paid for the shares of the Target Company by any person in the preceding 12 months;
    - Consideration of the possible pricing parameters (PPP) for arriving at the fair value of the shares.

- The application shall also contain the details of the bank account wherein atleast 50% of the total consideration is deposited. As far as the question of the time by which the amount is supposed to be deposited, is concerned, in our view, it should be ideally done at the time of filing the application for takeover (i.e. once the requisite approval has been secured from the creditors and members.

- Since the takeover is a compromise and arrangement falling under section 230, the complete set of compliances as required to be followed under section 230 for any mainstream compromise and arrangement is also required to be followed for the application filed under this sub-section which prima facie involves the following:

    - Filing of application with NCLT;
    - Calling of the meeting of the members and creditors by the NCLT;
    - Approval of the scheme by members holding three-fourth in value of the total value of creditors and members;
    - Sending out the copy of the application to the applicable regulatory authorities like the Registrar of Companies, Regional Director, IT Authorities, etc.
    - Filing an application with NCLT for approval of the scheme of arrangement

- Once the application is approved, the outgoing shareholders are supposed to take their requisite share of consideration and transfer their shareholding in the name of the applicant(s) (potential acquirer(s)).

- Two fold minority protection -
    - During the hearing of the application, the minority can be one of the respondents objecting to the takeover
    - In case the takeover has been approved, the minority being an aggrieved party can file an application.

- Since the provisions are silent on the time period within which the aggrieved party can file an application, the law of Limitation Act should ideally be followed wherein a time frame of 3 years can be allowed for filing the said application.

Meaning of the term 'aggrieved party' under section 230 (12)

While the language of the said section seemingly allows any aggrieved party to file an application, however, one needs to understand the intent of the said provision and then refer to the proviso to sub-section(4) which reads as follows:

"Provided that any objection to the compromise or arrangement shall be made only by ***persons holding not less than ten per cent. of the shareholding*** *or* ***having outstanding debt amounting to not less than five per cent. of the total outstanding debt*** *as per the latest audited financial statement."*

Further, para 19 of the J.J. Irani Committee Report also discusses the part that any obstructing shareholder should not be allowed to raise objections. The obstructing minority should also a significant stake which would be *to streamline the procedure of articulation of the minority interest while restricting obstructionist attitude on the part of any section of minority.*

Section 235 –Corporate acquirer with majority approval

Following are the features of the acquisition under this section:

- Any company with the intention of acquiring the shares of another company will make an offer through a scheme or contract.

- There is no provision under the section which prescribes the minimum shareholding of the proposed acquirer. However, the flavour of takeover under this section seems to be a friendly rather than hostile since, 90% in value of the total shareholders are anyway in agreement with the takeover by the acquirer company.

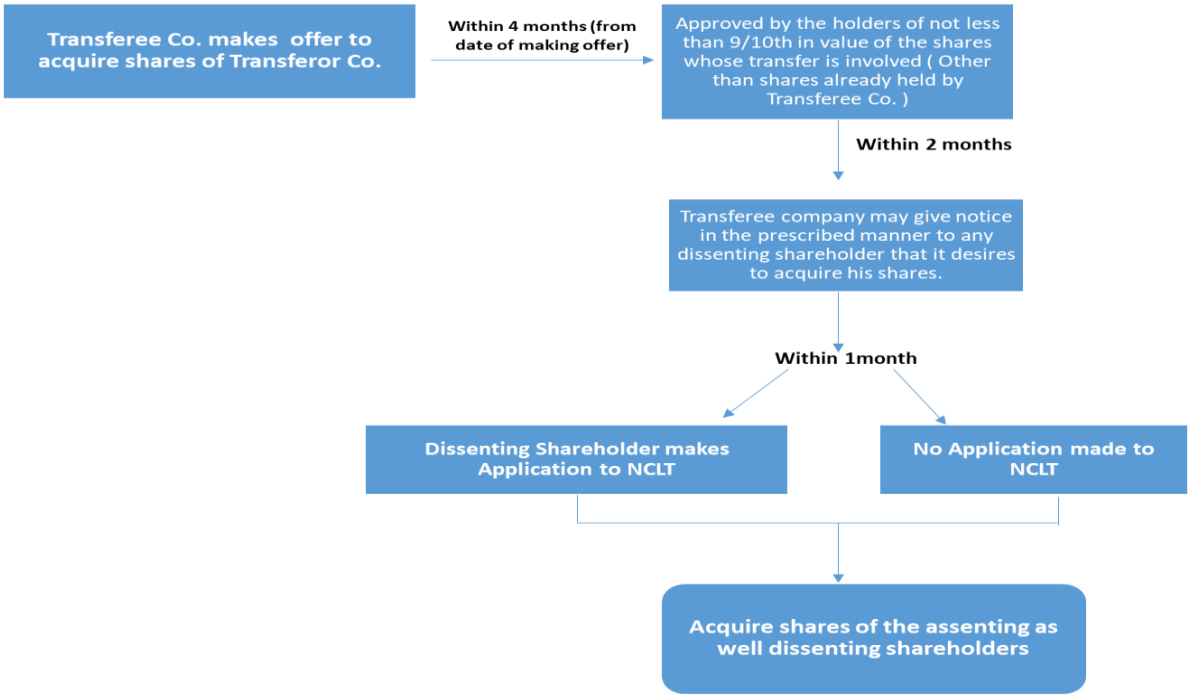
- Within 4 months from the date of offer for acquisition, the shareholders holding 90% of the value of total shares of the Target Company is required to approve the scheme (excluding the shareholding of the proposed acquirer along with the shareholding of its nominees or that of its subsidiary company.

- Once the scheme is approved by the requisite majority, the proposed acquirer shall send notice to acquire shares of the dissenting shareholders in form CAA-14 to such shareholders within 2 months from the expiry of the four month.

- On the expiry of the said one month, the proposed acquirer shall acquire the shares of the Target Company unless such dissenting shareholder makes an application to the NCLT within one month of the date of notice and the NCLT disposes the application otherwise.

- The acquirer shall send a notice along with instrument of transfer and pay the amount of consideration to the Target Company who shall deposit such amount in a separate bank account and make arrangements to disburse the same within 60 days.

- Finally the Target Company shall send an intimation to the dissenting shareholder informing them about share transfer registration and receipt of consideration.



Section 236 – Takeover through minority squeeze out by the majority shareholders

Section 236 is an extremely powerful section that showcases the might of the super majority shareholders of a company. It is has the simple intent of gaining the complete control of a company in which the acquirer already has 90% shareholding. This section has the features as follows:

- Fair value fixed by following the valuation provisions under the Act, 2013;
- *Suo moto* offer for acquisition of the minority shares;
- Issue of duplicate share certificates in lieu of undelivered share certificates;
- Price negotiation by the majority of the minority.

Our detailed write on minority squeeze out discussing the concept with global provisions can be viewed here.

Comparing the features for forceful exit

Now that we have discussed the basis features and procedures of each of these three sections, it will be interesting to bring out the differences between the three sections.

Sr. No.	Basis of difference	Section 230 (11)	Section 235	Section 236
1.	**Eligible acquirer**	Any member who holds shares along with any other member not less than 75% of the shares of the Target Company.	No minimum shareholding prescribed for being an eligible acquirer, however, recourse under this section is possible only with the approval of 90% shareholding.	Any member holding shares along with its person acting in concert of not less than 90% issued equity share capital.
2.	**Eligible Target Company**	Can be used by unlisted company.	Any company.	Any company.
3.	**Threshold for approval**	Scheme is required to be approved by members holding not less than 3/4th in value of the shares and creditors holding not less than 3/4th in value of creditors.	Approval by members holding 9/10th in value of the shares of the Target Company.	No approval required since the offer for acquisition is made by 90% shareholders.
4.	**Meaning of shares**	Equity shares as well as securities having voting rights on all matters.	Equity shares.	Equity shares.
5.	**Involvement of scheme**	Drafting of scheme is involved.	Drafting of scheme is involved.	No scheme is involved.
6.	**Involvement of NCLT**	NCLT is involved in the very first stage when the application for acquisition is filed. Further, the application by dissenting shareholders can also be filed in the NCLT.	NCLT is not involved in the first stage when the offer for acquisition is made. However, the role of NCLT comes into picture when any dissenting shareholder files application with the NCLT.	On the face of the provisions, NCLT is not involved at any stage.

Sr. No.	Basis of difference	Section 230 (11)	Section 235	Section 236
7.	**Suo moto offer by minority shareholders**	No such provision.	No such provision.	Can be made.
8.	**Exclusion of related parties**	Related parties are not excluded for the purpose of considering the votes.	The acquirer company along with its nominees and the subsidiary company of such acquirer are excluded for the purpose of determining the result of voting by majority.	Related parties are not excluded for the purpose of considering the shareholding.
9.	**Scope of filing application by dissenting/ minority shareholders**	There is scope for filing application as given under sub-section (12) of section 230.	There is scope for filing application by dissenting shareholders.	No explicit provisions, however, one may argue that the minority in this case being holders of not less than 10% shares of the Target Company may file an application under section 241 (case of oppression and mismanagement).
10.	**Payment of purchase consideration**	50% of the total purchase consideration is required to be deposited in a separate bank account. This deposit in our view, is required to be made only when the approval by the shareholder and creditors have been secured.	Consideration has to be paid only when the time allowed to the dissenting shareholders for filing application with NCLT or in case application has been filed then once the NCLT has decided the case in favour of the acquirer company, has expired and the company has sent the instrument of transfer to the Target Company for registration of transfer.	Consideration has to be paid only when the offer for acquisition has been and the time for delivery of share certificates by the minority has expired.
11.	**Time period for keeping the purchase consideration**	Immediate disbursement on approval of the application.	No time period for keeping the purchase consideration in the separate bank account. However,	Purchase consideration has to be kept for one year in a separate bank

Sr. No.	Basis of difference	Section 230 (11)	Section 235	Section 236
			the disbursement has to be made within 60 days.	account where disbursement has to be made within 60 days.
12.	**Scope for price negotiation**	No scope for price negotiation by the minority.	No scope for price negotiation.	Price negotiation by majority of the minority can be done.
13.	**Delivery of share certificates**	No specific provision.	Not required as the Target Company can on behalf of the shareholders execute the transfer.	Specific delivery required, however, in the event of non-delivery then Target Company can do the needful as an agent for transferring the shares in favour of the acquirer.

Conclusion

Looking at the differences between the three provisions of takeover through an arrangement, it becomes evident that each of these section has its own suitability for each type of case. While prima facie it appears that each of these sections have identical provisions, it actually differs when one looks deep into the language of the same. The only similarity in all the three provisions is the intent of takeover through an arrangement with the members and paying them a fair price for entering into the same.

Further, it will also be interesting to dig into the possibility of combined implementation of one or more sections amongst the three discussed above to fulfil the objective of “ek chhatra raj”, which we may take up in our next write-up.