

In Re: Punjab Communications

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SooperKanoon Citation : sooperkanoon.com/57679

Court : SEBI Securities and Exchange Board of India or Securities Appellate Tribunal SAT

Decided On : Jun-16-2004

Judge : T Nagarajan

Appellant : In Re: Punjab Communications

Judgement :

1.1 Punjab Communications Ltd. (hereinafter referred to as PunCom) is a public sector company, promoted by Punjab Information and Communication Technology Corporation Ltd. (hereinafter referred to as promoters).

PunCom made an offer to buy back from its existing shareholders, upto 40,07,855 equity shares through tender offer, which opened on February 23, 2004 and closed on March 12, 2004. A shareholder of the PunCom Smt.

Balbir Kaur, holding 200 equity shares of the PunCom submitted a representation dated March 12, 2004 to SEBI seeking its intervention to prevent the buy back offer on certain grounds. The shareholder also filed a writ petition (no.4945 of 2004) before Hon'ble High Court of Punjab and Haryana, inter alia, to direct the PunCom not to proceed further with the buy back offer and quash the said buy back offer, and also to direct SEBI to withdraw and cancel any permission granted by it to the PunCom in the matter. The Hon'ble High Court directed SEBI to decide the representation if already submitted by the complainant as well as any supplementaries, in accordance with the law, by passing a speaking order, within a period of two months of the receipt of a certified copy of the Court Order. This

order is pursuant to the direction of the Hon'ble High Court.

2.1 The representation made to SEBI dated March 12, 2004 by Smt. Balbir Kaur, (hereinafter called the Complainant) is briefly to the following effect:- (a) She is a holder of 200 equity shares of PunCom, since December 24, 1994. PunCom was set up by the Government of Punjab, to develop the electronic industry in the State of Punjab and was promoted by Punjab Information and Communication Technology Corporation Limited, (for brevity's sake hereinafter referred to as the promoter) which is a public limited company engaged in the business of manufacturing of telecom equipments. PunCom came out with a public issue, in October, 1994 in which 42,50,000 equity shares of PunCom with a face value of Rs.10/- were offered to the general public at a premium of Rs.240/-. In the said offer, an amount aggregating Rs.10,625 lacs was collected from approximately 28,000 public share holders by PunCom. The promoter of PunCom, had inflated its initial investment of Rs.74.01 lacs in PunCom through an artificially high bonus issue to Rs.1184.1 lacs just prior to an initial public offering of equity shares of face value of Rs.10/- at a premium of Rs.240/- amounting to a total of Rs.250/- per share. The same share cost the promoters a sum of Rs.0.625 per share. Consequent to the bonus issue, the reserves and surplus of PunCom fell from pre-bonus level of Rs.5057.70 lacs to Rs.3947.60 lacs, and the book value of the share went down staggeringly from Rs.680.35 per share to Rs.43.34 per share and in this light and with this background, the said public issue brought out the equity share of a book value of Rs.43.34 per share at a total consideration of Rs.250/- per share.

(b) Even after mopping up a sum of Rs.106.25 crores by way of the said public issue, the promoter continued to enjoy a majority shareholding of 70.22% of the post issue equity in PunCom keeping the public portion to a meagre 25.36%.

(c) The promoter wrongfully mis-utilised the proceeds of the said public issue and failed to enhance the fixed asset base of PunCom but instead plainly invested the proceeds of the issue in interest bearing fixed deposits with banks and other corporate bodies, in violation of the promises and representations made out in the prospectus of the public offer. Consequently, it has not been in a position to

generate the projected turnovers as committed at the time of the said public issue. The net block of fixed assets of PunCom as on 31st March, 1994 was seen as Rs.1526.98 lacs and the net fixed asset base was stated to be Rs.1654 lacs as on 31st March 2003, of PunCom. No value addition was achieved from the proceeds of the said public issue, and that it was able to sustain itself only on the basis of interest income derived from the hard earned money of 28,000 shareholders spread out in the country.

(d) The meagre dividend paid out by PunCom was primarily out of interest income received from the corpus of public issue proceeds, primarily consisting of the premium account, which represented at best, 0.2 to 0.5% interest at the hands of the small investor, who had invested @ Rs.250/- per share, on a face value of Rs.10/- per share.

(e) The promoter had earlier attempted to sell its stake in PunCom, through the disinvestment route, as announced by the Government of Punjab, and in the process received an offer of Rs.50/- crore, amounting to Rs.48/- per share, which would have been to the strategic advantage of the small investor. However, the said offer was not accepted by the promoter and having failed in its attempts to recover much more than its initial investment through the dis-investment process, the promoter devised a new plan, by resorting to a 'Buy Back of Equity Route', and in furtherance of the said plan, floated an offer of PunCom buying back 25% of its paid up equity while maintaining parity of shareholding of the public at 25.36% so as to ensure that a minimum sum of approx. Rs.27/- crore [if not more, depending upon the response to the said buy back offer] is siphoned off by the promoter from the corpus of funds directly invested by the small shareholders.

(f) The buy back offer was in gross violation of the settled provisions of law, in as much as the funds of the small investor/ shareholder were directly being utilized for the purposes of buy back of their own shareholding, albeit at a much lower value than invested by them in the first place.

(g) The affairs of PunCom were being manipulated by the promoter in an absolutely blatant fashion and was totally and conceptually against and contrary to the public policy of the country and against the interest of PunCom is as much as

the promoter was being allowed to get unduly and unjustly enriched to the absolute detriment and prejudice of the small shareholder/ investor, numbering about 28,000 across the country.

(h) The promoter had, admittedly, suffered losses and the products manufactured by PunCom had become uncompetitive. Rather than utilizing the said surplus amount available with PunCom to buy back its own shares, it would have been rather better and prudent on the part of the company and its promoters to utilize the said amount for the purpose of making its products and its manufacturing capabilities more competitive and profitable.

(i) PunCom has committed the violation of the mandatory provisions, more specifically section 77A of the Companies Act and the provisions of the Securities and Exchange Board of India Act, 1992 and the rules and regulations, framed there under from time to time.

The requisite permissions were taken by the promoter, without presenting the true and correct facts and by concealing the material information, thereby creating the prejudice qua the small investor/ shareholder.

2.2 On the basis of the above, the complainant had inter-alia requested SEBI to take immediate steps to restrain PunCom from taking any action pursuant to the buy back announced by it through tender offer and declare that the said buy back is non est and void and a nullity in law.

3.1 On receipt of the representation on March 19, 2004, SEBI forwarded it to M/s Karvy Investor Services Limited, (KISL) the merchant banker associated with the buy back offer on the very same day seeking their comments within 15 days from the date of the letter. KISL replied vide its letter dated March 23, 2004 that the buy back of shares of PunCom was in the best interest of its investors in as much as Puncom was in the process, returning back its money to the investors out of its surplus funds since no profitable utilization of the same had been found and the best possible price was being paid by making use of the available free reserves to benefit the investors who would opt to divest their shares in the buy back. KISL further stated that the buy back was being made in complete compliance of the

provisions under the SEBI (Buyback of Securities) Regulations 1998 (hereinafter referred to as the Regulations) and section 77A(1) of the Companies Act, 1956, in as much as the share buy back was being done out of the free reserves, which as per the 31st March 2003 audited accounts was Rs.46.62 crores, while the utilisation of funds for the buyback was to the tune of Rs.36.07 crores only and that due efforts were made to ensure that the buyback was not out of the proceeds of an earlier issue of the same kind of shares as required under the proviso of section 77A(1) of the Companies Act.

3.2 KISL further stated that the issue of bonus shares prior to the Initial Public Offer by PunCom was also in full compliance with the provisions of the Companies Act, 1956, and that the pricing of the public issue at Rs.250/- was done after complying with all the guidelines relating to the justification of the price and SEBI (Disclosure and Investor Protection) Guidelines, 2000. Drawing attention to the year 1994-95, when the opening up of the Telecom policy and licensing norms gave enormous growth opportunities to telecom companies entering the field, KISL submitted that all telecom issues during the relevant period had commanded very attractive premium for their issues. It was stated that PunCom was unable to pursue the businesses represented in the prospectus fully, since the erstwhile Department of Telecom (now BSNL) had not taken up the projected projects by it and consequently many companies in the Telecom sector, as also PunCom's investment plans got adversely affected. It was stated that keeping the interests of the investors in mind, PunCom did not proceed to invest the money in non-profitable ventures, but took a conscious decision to keep the funds invested judiciously in fixed deposits etc and after utilizing maximum possible funds in the best profitable manner, PunCom had taken the decision to return the money to the investors which it was not able to profitably deploy. It was stated that notwithstanding the same, the proceeds of the public issue as mentioned in the prospectus had been utilized in the projects to the extent they could be profitably deployed while the balance was judiciously invested in bank deposits etc. KISL clarified that PunCom had received substantial amounts of income by way of interest on deposits and keeping the interest of the investors in mind, had from time to time, paid dividends out of the said income. KISL stated that the dis-investment exercise taken by PunCom was in line with the policy decision of the

Central/ State Governments to dis-invest its stake from various businesses in the country and hence was an exercise, unconnected with the buy-back process.

3.3 As regards the issue of holding, KISL stated that in line with the latest buy-back guidelines requirements, PunCom undertook to maintain a post issue non-promoter holding equivalent to the levels at which it was at the time of listing.

4.1 The reply of KISL was forwarded by SEBI vide its letter dated March 25, 2004 to Smt Balbir Kaur. However in the meantime, Smt Balbir Kaur, filed C.W.P No 4945/2004 in the High Court of Punjab and Haryana at Chandigarh and the Hon'ble High Court, vide its ex parte order dated March 25, 2004, while disposing of the petition at the admission stage itself, directed SEBI to pass a speaking order on the representation of the petitioner pending before it as well as any supplementary representation, that the petitioner was at liberty to file before SEBI, if she so desired, within a period of two months from the date of the receipt of the certified copy of the order.

4.2 SEBI received the certified copy of the order on May 07, 2004.

Meanwhile on receipt of a faxed copy of the order from Shri Rohit Khanna, advocate of Smt Balbir Kaur on March 26, 2004, SEBI directed KISL not to proceed with the buy back offer till it received a further communication from SEBI in this regard.

5.1 The complainant as well as the PunCom and KISL were granted an opportunity of being heard in connection with the representation made by the complainant against the buy back offer of the PunCom. The Hearing was held on May 3, 2004 at SEBI, Mumbai. The complainant was represented by Shri Rohit Khanna, Advocate, PunCom by Shri Sanjiv Vashitha, Company Secretary, and the KISL, by Shri P. B. Ramanujan and Shri P. S. Shastri.

Shri Rohit Khanna stated that although the complainant was a small share holder of 200 shares of PunCom that were purchased and transferred in her name on February 17, 1997 at a price of Rs.58/- per share, SEBI ought to take a larger perspective of the issue of the present buy back of shares of PunCom in as much

as the public issue of shares purchased @ Rs.250/- per share resulted into the cost equivalent to 400 times the cost of shares to the promoters. Elaborating on the issue, it was stated that PunCom was paying a dividend in the range of 55 % to 200% prior to the public issue, which dropped in the range of NIL to 15% thereafter. Drawing attention to the explanatory statement annexed to the postal ballot notice sent to the shareholders on August 21, 2003, which clearly stated that the funds for the buy back would be available from the reserve and surplus, share premium account, cash balances and/or internal accruals of the company, it was stated that the balance sheet of PunCom for the year 1993-94 carried a general reserve of Rs.50.18 crores as on 31.03.1994, whereas as per the letter of offer, PunCom was having general reserves of 46.62 crores and a share premium account of Rs.101 crores. It was elaborated that the same clearly proved that PunCom had been consistently making losses in the years after the public issue and was now proposing to buy back the shares from the share premium account, which was created out of the share premium received in the public offer in 1994, in violation of Section 77(A)(1) of the Companies Act, which mentioned that no buy back of any kind of shares should be made out of the proceeds of an earlier issue of the same kind of shares. Shri Khanna also stressed upon the point that even if the buy back was made in compliance with all the laws existing as on date, it was not in compliance with the law of equity as the general shareholders were getting Rs.90/- per share for the shares they purchased at Rs.250/- while the promoters would get Rs.90/- per share for the shares which did cost them only Rs.0.62 per share. It was stressed that on that ground alone, the buy back should not be allowed. However, the complainant stated that in case the promoters were not allowed to participate in the buy back offer then the offer could be allowed to continue.

PunCom as well as the KISL reiterated their earlier written submissions and stated that the complainant had made a wrong statement as regards the date of purchase of the shares held by her in as much as the said shares had been transferred in her name by her husband Shri Karnail Singh, the original owner of the said shares, on 17th February, 1997 at a price of Rs.58/- per share, and not purchased by her for Rs.250/ in the public issue as contended by her, in her representation dated March 12, 2004. The transfer deed depicting the same was

annexed for my perusal. They further submitted that the share price of PunCom had gone upto Rs.163/- in the year 1999 and to Rs.221/- in the year 2000 and that PunCom had declared dividends @ 4.5%, 4%, 3%, 10% and 15% during the years 1997-98, 1998-99,1999-2000, 2000-2001 and 2001-2002 respectively. As such no loss had been caused to the complainant as a result of her purchasing the shares of PunCom.

5.4 It was submitted that the issue of bonus shares had taken place prior to the public issue in strict compliance with the provisions of the Companies Act, 1956 as was clearly mentioned in the prospectus along with the post bonus book value at Page no.12 & 16 of the prospectus under the heading "Notes to the Capital Structure" and "Company, Management & Project History and present Business of the Company". It was stated that as the complainant had made her investment decision after considering the said facts, it was not open for her to question it at this juncture. It was submitted that considering the cost of acquisition @ Rs.58/- per share by the petitioner and the share price having one upto Rs.221/- subsequently, the same did not put her or any investor into any loss as claimed. Referring to the charge that PunCom had not used its funds for the purposes for which they had been mobilized, or enhanced its turnover in terms of the projections brought out in the prospectus, the KISL gave a break up of the utilization of public issue proceeds, and drew my attention to the heading "Risk Factors external & Risk Factors internal to the company" in the prospectus of the company's public issue. The contents of page 16 of the prospectus under Point-IV, were also brought to my notice. It was submitted that in the annual reports for the years 1994-95, 1995-96 and 1996-97, the status of the representations made by PunCom in the prospectus had been updated and compared with performance, under the head "Projections V/s Performance" in the Directors' Report of the aforesaid years. It was clarified that for the above reasons, the net fixed assets as on date did not indicate investment in fixed assets for the projects as mentioned in the prospectus and that an amount of Rs.17.95 crores was deployed towards leasing the assets in the year 1995-96 but as the lease period had expired during the year 2002-2003, the net assets had come down by about Rs.18 Crores. It was stated that the normal depreciation being provided for on year to year basis had also contributed towards reduction of net assets.

5.5 It was stated that the then book value of shares at Rs.43.34 had been mentioned in the justification of price in the prospectus of the company along with other facts. With reference to the promoter holding being maintained at 70.22% post the public issue, it was stated that immediately after the public issue, the promoters shareholding, which was at 100% earlier, got reduced to 73.52% against the public shareholding of 26.48% (promoters had divested the minimum required 25% capital as per the IPO norms) and currently the promoters holding was about 70% and as stipulated by SEBI, the non promoters shareholding, post buy back would be maintained at a minimum of 26.48% and since the public issue in 1994, the public shareholding had increased over that of the promoters.

5.6 Referring to the alleged misuse of the public issue proceeds, it was clarified that the said funds were strictly utilized for the purposes stated in the prospectus. It was clarified that value addition was a derivative of the product mix, prevailing market scenario, competition etc and with increased competition, the margins/ value addition of PunCom had come under pressure but that was not specific to the company as it was global phenomenon. It was stated that although PunCom endeavoured to induct good products having profit margin in its product range, being into tender driven business, value addition normally depended upon the market dynamics i.e. a factor which was in turn highly dependent upon the bids made by competitors. It was stated that despite the same, there was a definite value addition in terms of new products introduced by the company such as V-Sats, OLTE, SDH line of business, PLCC etc and it was their sincere endeavour to add new products with good margin in its product line. The merchant banker stated that, what was most important was that PunCom had not spread itself too thin, by recklessly getting into loss making business ventures such as paging etc. and pending the deployment of its funds in fruitful business ventures, these funds were judiciously deployed in safe deposits.

5.7 Referring to the charge of a meagre dividend being paid out of the interest income received, it was stated that the dividend was payable at the recommendation of the Board of Directors after the same was decided by the share holders and that in any case, the reserves and surplus was very much a part and parcel of the shareholders fund.

5.8 Regarding the issue of PunCom making a futile effort at disinvestment, it was stated that the company did not have any control over the policies made by the Central/ State Governments and the disinvestment exercise for PunCom was in full compliance of the policy decision taken by the Government of Punjab in as much as PunCom was technically, a Government Company. It was elaborated that the disinvestment failure had no connection with the buyback exercise, which was done purely as an independent activity after fully complying with the guidelines under the Companies Act, 1956 and SEBI regulations, which requires the company doing a buy back to maintain the minimum percentage of public holding as at the time of listing, post buy back.

5.9 KISL reiterated that the funds of PunCom utilized for the buy back were in keeping with the requirements of the SEBI Regulations and the Companies Act, 1956 provisions and was being done out of the free reserves. It was stated that while the free reserves as per the 31st March 2003 audited accounts were Rs.46.62 crores, the utilization of funds for the buy back was to the tune of Rs.36.07 crores only and that they had endeavoured to ensure that the buy back of shares was not out of the proceeds of an earlier issue of the same kind of shares as required under the proviso of section 77A (1) of the companies Act, 1956. It was clarified that all the procedural requirements under sub section 77A (2) to (10) of the Companies Act, 1956 were being fully complied with and therefore the buyback was in full compliance with the relevant provisions of the Companies Act as well as the relevant regulations of SEBI in this regard and the pricing of the buy back was also fixed accordingly.

5.10 As part of their concluding remarks, it was stressed on behalf of PunCom that all their investors/shareholders who had responded to the buy back were following up for payment of consideration and were also seeking payment of interest for the delayed period. In view of the same, it was requested that they may be permitted to proceed with the issue at the earliest especially since the buy back was being carried out in due adherence with the provisions of Section 77A(1) of the Companies Act and the Regulations. KISL also submitted a copy of the submissions made before me in writing.

6.1 A copy of the written submissions made on behalf of PunCom and the KISL was forwarded to the complainant on the next working day i.e. May 5, 2004, affording an opportunity for her to furnish her comments if any. Meanwhile, the advocate representing the complainant sent a fax on May 5, 2004 to SEBI protesting that at the personal hearing he was not heard along with the KISL and PunCom and further stated that he should be given a copy of the submissions/ documents made during the hearing by the KISL/ PunCom and also be given an opportunity of hearing to counter the said submissions before the matter was adjudicated upon. It was further stated that in case any order, adverse to the interest of the petitioner was passed, then the operation of the said order should be stayed for the first 45 days, being the limitation period for filing an appeal before the Securities Appellate Tribunal and further that before the final order was pronounced, due intimation well in advance be provided to her as well as to her advocate to enable them to be present at the time of the pronouncement of the order and that the same should be received both by her and the other parties concurrently.

6.2 The complainant sent a fax dated May, 24, 2004, in which while reiterating the submissions made earlier, she objected to KISL making any submissions before me or being heard on the ground that KISL was neither a proper nor a necessary party to the present proceedings and further expressed her surprise that no reply had been filed by PunCom.

She stated that the submissions made by KISL were contrary and misleading to the averments and submissions made by them in their letter dated March 23, 2004 and that their contrary stand was an effort in their part to circumvent the issues involved in the matter in as much as the said reply was not only vague and evasive but also did not explain the position or state the reasons for the impugned conduct of PunCom. The complainant further stated that only 4000 shareholders consisting of 14.30% of the total non-promoter shareholder (total non-promoter shareholders being 28,000) had participated in the buy back offer, and that 85.70% of the general public had not participated in the present scheme for buy back, making it clear that the proposed scheme of buy back had not found favour with the majority shareholders of PunCom and in the back drop of such poor

response from the general public, the following pertinent questions needed to be raised and investigated : * Whether the said scheme of buy back was actually in the interest of the general public? * Whether the general public had given negative mandate to PunCom, on the impugned scheme of buy back? * Whether the consent of the general public was 'actually' taken by PunCom and the actual number of persons from the general public who had come forward approving the impugned scheme? * Whether it was advisable for PunCom to go ahead with the proposed scheme of buy back, when about 85.70% of the general public, had not participated in the present scheme? * Whether it would be appropriate for PunCom to abolish and scrap the impugned scheme for buy back altogether? * Whether the promoters should be allowed to take away from PunCom a sum of Rs.27 Crores (approx.) under the impugned scheme of buy back

6.3 The complainant further contended that the figure of Rs.46.62 crores of available free reserves was incorrect and stated that as per the declared accounting policy, the default amount of Rs.851.26 lacs of UPCSMFL must have been included in "Provision for Diminution in Investment" instead of its inclusion in free reserves, for the following reasons: * Chairman of the company had himself dubbed this as "doubtful of recovery" in Directors Report at page 6 of the balance sheet (2002-03) on which the buy back was based.

* At the instance of other creditors about 2 weeks back, the Bombay High Court had appointed a creditor to take charge of the assets of UPCSMFL.

6.4 It was stated that PunCom had failed to disclose all these vital facts from the shareholders in the Letter of offer and it was further reiterated that PunCom's contention that it was using its general reserves as on 31.03.2003 to the tune of Rs.46.62 Crores for the said buyback was self contradictory to the stand already taken by it as reflected in the statement made while seeking approval of the shareholders and was patently false and contrary to the actual facts.

It was stated that on 31.03.1994, PunCom had general reserves of Rs.50.18 Crores which came down in 2003 to Rs.46.62/- crores due to losses etc. in the intervening period and that the general reserves as on 31.03.1994 of Rs.50.18 crores were fully utilized in various fixed/ current assets as could be seen from the

balance sheet as at 31.03.1994. It was reiterated that PunCom was using the funds raised out of the public issue as share premium in October 1994 for the present buy back.

7.1 I have carefully considered the representations of the complainant, the submissions made by her counsel, the oral and written submissions made on behalf of PunCom and KISL and the documents submitted as well as material available on record.

7.2 It is observed that the complainant, holding 200 shares of PUNCOM, had chosen to file on 19th March 2004 a representation dated 12th March 2004 i.e. the closing date of the company's buy-back offer, seeking to stop the proposed buy-back, when the public announcement of the buy back offer had been made as far back as on 22nd October 2003 and the Letters of Offer had been despatched to the shareholders in the middle of February 2004. She has filed a Writ Petition before the Hon'ble High Court on 25th March 2004, two days before the scheduled date of despatch of consideration warrants by the Company in respect of the shares accepted for buy-back. The timing of the action on the part of the complainant is noted.

7.3 The complainant Smt. Balbir Kaur had stated in her representation to the effect that she had acquired the 200 shares of Rs.10/- each at a premium of Rs.240/- through the public issue in 1994. However, it transpired that the shares had been transferred by her husband Shri Karnail Singh to her in February 1997 for consideration of Rs.11,317/- @ Rs.56.85 per share. This discrepancy is ignored.

7.4 The counsel for the complainant has raised an objection against his having been heard alone and not along with Pun Com and KISL. He has also objected to KISL also being given an opportunity of being heard.

It is to be noted that before the commencement of the hearing on May 3, 2004, the counsel was informed of the manner of the proceedings. The counsel argued the case before me for more than an hour. The submissions of the other parties whom I heard were also communicated to the counsel for the complainant with a direction to submit her counter points, if any, within 7 days. The complainant's

rejoinder to the submissions of the other parties was received by SEBI on May 24, 2004.

I have also taken the contents of the rejoinder into account while dealing with the issues. In my view, therefore, the complainant has been given adequate opportunity of being heard in the matter. As regards the complainant's objection to KISL being also heard in the matter, it may be mentioned that KISL, a registered Merchant Banker, appointed by the company as the Manager to the buy back offer is expected to exercise due diligence to ensure that the company discharges its responsibilities in regard to the buy back offer.

Therefore, KISL was certainly a party necessary to be heard in the matter and accordingly KISL was also heard.

7.5 Now I proceed to deal with the representation of the complainant.

The main issues raised, in her representation seeking to stop the buy back offer are: * The promoters had "inflated" their initial investment through a large bonus issue, prior to the initial public issue in October 1994.

* The balance in general reserves of the company is not adequate to fund the buy back and the company is buying back its shares from out of share premium collected through the IPO. * As a result of the buy back, the promoters would get Rs.90/- per share as against their average cost of acquisition at Rs.0.625 per share, while public shareholders would get Rs.90/-per share as against the cost of Rs.250/- per share.

* The promoters misutilised the proceeds of the said public issue and invested the proceeds in FDs with the Bank etc.

* The promoters are resorting to buy back to recover a part of their investment after having failed in their attempts for 'divestment'.

* If the promoters are not allowed to participate, the buy back offer may be allowed to proceed.

6 Although the basic issue is whether the buy back is being effected in accordance with the legal and regulatory provisions, the above issues, too, are required to be dealt with so as to clear the cloud of confusion covering the basic issue. The petitioner's argument that the promoters had "inflated" their initial investment of Rs.74.01 lakhs by getting bonus shares issued in their favour before public issue in 1994 does not hold water. It is seen that the company had, by capitalising a part (Rs.11.84 crore) of its then free reserves (Rs.50.58 crores), issued to the then shareholders (promoters) prior to the bonus shares (15 shares for every one share held) in May 1994 - i.e. 5 months before the initial public issue in October 1994. This fact is found to have been duly disclosed in the prospectus relating to the said public issue. The promoters were the sole shareholders of the company prior to the initial public offer in 1994, and it would be unreasonable now to question the issuance of 15:1 bonus issue by capitalising a part of the then outstanding general reserves. The calculation of the average cost of investment of the promoters at Rs.0.625 per share (i.e. after reckoning the benefit of the bonus shares) is correct but its comparison with the initial public offer price of shares at Rs.250/- is inappropriate. The justification of premium of Rs.240/- for the shares issued under IPO is found to have been given in the prospectus. Hence, any subscriber to the public issue can be deemed to have subscribed to the issue based on the facts presented in the prospectus.

7.7 As regards the source of funds for the buy back, the explanatory statement annexed to the postal ballot notice sent to the shareholders stated that the funds for the buyback would be available from the reserves and surplus, share premium account, cash balances, internal accruals. I do not find anything wrong with this statement. In terms of Section 77A "the company may purchase its own shares or other specified securities out of its free reserves or share premium account or from sale proceeds of shares or other securities provided no buy back of any kind of shares or other specified securities shall be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities. According to the Letter of Offer, "the company has substantial accumulated free reserves as well as liquidity which is reflected in the cash and bank balances and the same would be utilised for the buy back. The funds required for the buy back will be drawn from the free reserves of the company". It is seen from the audited

balance sheet of the company, as on March 31, 2003, the company had general reserves to the extent of Rs.46.63 crores. The petitioner has disputed the figure of general reserves on the ground that the company had not provided for a sum of Rs.8.51 crore in respect of dues from UPCSMFL considered doubtful of recovery. In this connection, it is relevant to refer to the certificate of the auditors appended to the company's audited accounts for the year ended 31 March 2003 as well as their report dated 18 August 2003 to the Board, reproduced in the letter of offer. The auditors have observed that "the investment of Rs.851.26 lakhs (including overdue interest) in the bonds of U.P.Co-operative Spinning Mills Federation Ltd have been sub-judice matter and from the available information we are unable to form any opinion about the recoverability of the amount and its impact on free reserves and maximum permissible amount for buy back being 25% of the paid up equity capital and free reserves". This has been duly disclosed in the Letter of Offer. Irrespective of recoverability of the dues, even if this amount (Rs.8.51 crore) had been fully provided for, the balance in General Reserve at Rs.38.12 crores (Rs.46.63 crores minus Rs.8.51 crores), would have still been adequate to meet the consideration payable for the buy back at Rs.36.07 crore. It is also stated that the company had actually transferred the entire consideration amount of Rs.36.07 crores to a special account on 26 March 2004. In view of the above, the contention that the proposed buy back contravenes the provisions of Sec 77A of the Companies Act seems unsustainable.

7.8 It is observed that PunCom, a public sector company, had been generally a profit making company and recorded profits for seven consecutive years (1995-96 to 2001-02) aggregating Rs.23.59 crores while it incurred a loss of Rs.19.27 crores in 2002-03. As on 31 March 2003, the company had general reserves balance of Rs.46.63 crores.

Further, PunCom had declared dividend ranging between 3% and 15% during the period 1997-98 to 2001-02. It is mentioned that the share price of PunCom of face value Rs.10/- each had gone up to Rs.163/- in the year 1999 and Rs.221/- in the year 2002. The market price of the share, which stood at Rs.54.45 as on 7th July 2003 is currently hovering around Rs.45/- as against the price of Rs.90/- offered by the PunCom for the buy back. According to the complainant, the proceeds of

the public issue made in 1994-95 had not been utilised fully and were being deployed in investments. It is relevant to note that the said public issue had been made a decade back in October 1994 and according to the risk factors disclosed in the prospectus, "the company is heavily dependent upon order from DOT as it accounted for over 90% of its total sales"; "The liberalisation in the industry has increased competition from private sector and multinationals and the industry is prone to technological change". It has also been indicated in the prospectus (page 16) that in case DOT does not resort to leasing, the funds shall be kept in marketable securities. It is stated on behalf of the company that out of the total expenditure of Rs.109.26 crore envisaged at the time of IPO, a sum of Rs.82.24 crore has since been spent, leaving a balance of Rs.26.48 crore. It is observed that PunCom had been reporting in its annual reports the status of performance vis-à-vis projections. Mere deviation of the actuals from the projections of a company, by itself, cannot lead to inference of misuse of funds; for, such deviations can arise out of unanticipated factors like changes in business, market/ economic environment. In any case, this is an issue, falling outside the purview of examination of legality of the buy back offer in question. It is noted that the Letter of Offer has mentioned that the PunCom has surplus cash which is not expected to be deployed in any profitable venture in future and the buy back is intended to return surplus cash to shareholders to an extent.

7.9 The basic issue i.e. whether the buy back is being effected in accordance with laws and regulations is dealt with below. In terms of Section 77A of the Companies Act 1956, a company is permitted to buy its own shares in accordance with the relevant provisions of the Companies Act and SEBI (Buy Back of Securities) Regulations. As per the said Regulations, the promoters, too, are permitted to participate in the buy back offer made by a company through the route of Tender Offer and all that the Regulations require is that, in the event of the promoters offering their shares also for 'buy back', the explanatory statement annexed to the notice sent to the shareholders, shall contain certain disclosures. I note that the shareholders of PunCom had, by a special resolution, approved amendment to the Articles of Association of the company so as to enable it to buy back its shares and also approved the buy back offer. The Board of Directors of the PunCom also had approved the proposal. The explanatory statement annexed to the postal

ballot notice sent to the shareholders contained necessary disclosures. The PunCom had chosen the route of "Tender Offer" to buy back its shares upto 40,07,855 shares at a price of Rs.90/- per share.

Public announcement for this purpose had been made on 22nd October 2003. Karvy Investor Services Ltd (KISL), a registered Merchant Banker, retained by the Company as Manager to the Buy Back offer had furnished to SEBI, a due diligence certificate dated October 23, 2003. In the light of the observations made by SEBI on the draft letter of offer, the final letter of offer had been drawn and issued. The buy back offer opened on 23 February 2004 and closed on 12th March 2004. As per envisaged schedule, the consideration warrants for acceptance and return of share certificates for non acceptance/ partial acceptance was to be despatched on 27 March 2004 on which day the shares bought back had to be extinguished. It is noted that pursuant to the offer 4000 shareholders have lodged their shareholdings for the buy back. The complainant opines that response from only 4000 shareholders out of 28000 shareholders to the buy-back offer should mean negative mandate to the company's offer. Whether the response reflects the shareholders' preference to the buy back offer or their continued confidence in the future of the scrip is debatable. However, the issue at hand is the legality of the buy-back offer and not its popularity. According to the information made available, the company would be accepting more than 13 lakh shares from the non promoter - shareholders who have tendered their shares for the buy back.

7.10 The representation seems to have stemmed essentially, from the complainant's opposition to the promoters too tendering a part of their shareholdings for the buy-back. This deduction is supported by the petitioner's statement that if the promoters are not allowed to participate in the buy-back offer, the offer may be permitted to go through. The promoters' participation in the buy-back offer is sought to be linked with the failure of earlier attempts for "divestment" by the promoters, a State Government organisation. While the linkage is a matter of conjecture, what is relevant here is the question: Whether the promoters can also participate in the company's buy back offer. As observed earlier, the relevant regulations do permit such participation by the promoters. The disclosure

requirements in this regard are found to have been complied with. The Letter of Offer (page 6) clearly states that the "promoters intend to surrender 40,07,855 equity shares under the buy back offer". There is also a declaration that "the promoters have not traded in the equity shares of the company during a period of 12 months preceding the date of the Board resolution for approving the Buy-Back and during the period of 6 months prior to the Public Announcement for Buy-back". It has also stated that the aggregate shareholding of the promoter on the date of the Public Announcement of the Buy back offer was 1,12,57,463 equity shares (i.e. 70.22% of the paid up capital of the company). The Letter of Offer also contains an averment that the non-promoter shareholding will be maintained at 26.48% of the paid-up capital of the company. It is seen from the particulars made available by the PunCom that post-buy back, non-promoter shareholding in the PunCom would be 28.74%. So long as the promoters' participation in the PunCom's buy back offer is in accordance with the extant law and regulations there is no justifiable reason to disallow the same at this stage.

7.11 The 4000 shareholders (who had, in response to the buy-back offer, lodged their shares) have been awaiting receipt of the amount of consideration/ return of their unaccepted shares, if any. Having gone ahead with the buy-back offer, till its closure with no option to withdraw and having transferred the entire amount of consideration to a special account, the company, too, has been subjected to inconvenience.

7.12 It needs to be borne in mind that the buy back offer was only an "offer" made by the PunCom for buying back its shares on specified terms. There was no compulsion whatsoever on the part of any shareholder to tender his/her shares for buy back, if he/she was not satisfied with the terms of the offer. The shareholders of Pun Com, including Smt. Balbir Kaur, were absolutely free either to accept or to ignore the offer made by the company.

8. In view of the foregoing, I do not find any merit in the representations made by Smt. Balbir Kaur, a shareholder having 200 shares against the buy back offer made by the company to which 4000 shareholders have already responded and surrendered the shares.

9. I, therefore, in exercise of the powers conferred on me under section 19 of the SEBI Act 1992 direct that the representations made by Smt. Balbir Kaur be rejected and that Punjab Communications Ltd be let to proceed with its buy back offer in accordance with the provisions of the Companies Act and SEBI (Buy Back of Securities) Regulations.

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