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This newsletter seeks to highlight and provide an overview of contemporary issues pertaining to business and commercial laws to widen our understanding of business laws which presently is limited to an academic understanding

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AN INSTITUTIONAL APPROACH TO E-COMMERCE: ANALYZING ITS EVOLUTION AND NEED FOR A LEGAL FRAMEWORK

- *Anina D'Cunha*

India's retail market has witnessed an accelerated growth rate over the years and the penetration of the e-commerce in this market, albeit hardly ten years old, has revolutionized the platform of retail. According to Report of Digital Commerce, IAMAI-IMRB (2013), the e-commerce industry in India has witnessed a growth of US$ 3.8 billion in the year 2009 to US$12.6 billion in 2013.[1] There are many factors driving this sound growth; a growing population with a burgeoning middle class, improvements in lifestyle sweeping both urban and rural India, rise of dual income households, along with an evolution of the marketplace model online. E-commerce eliminates barriers of distance or travel, processing errors, labour cost and supervision expenses making it an efficient, cheap and convenient mode of business. This platform of marketing has expanded its reach beyond standard merchandise to far more creative avenues in the years, including even healthcare and housing and a renewed push has been given by the government's project "Digital India" which proposes extending the reach of broadband and setting up of e-networks, thereby increasing digital literacy. There is a buoyant optimism surrounding e-commerce, because with the spread of global Internet connectivity, the lowering of unit costs, and the internationalization of the markets for goods, labour, and information, it offers businesses in developing countries a chance to access global markets easily, operate efficiently, and compete fairly.[2]

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[1] *Discussion Paper on E-commerce in India*, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, available at <http://dipp.nic.in/English/Discuss_paper/Discussion_paper_ecommerce_07012014.pdf.>

[2] Molla, Alemayehu & Licker, Paul S, *Perceived E-Readiness Factors in E-Commerce Adoption: An Empirical Investigation in a Developing Country*, International Journal of Electronic Commerce, Vol. 10, No. 1, 83, (2005).

In this situation of the tremendous growth rate of e-commerce, concerns such as taxation, jurisdiction and taxation applicability are bound to arise in states. This will create hurdles for e-commerce businesses and the government's own proposed endeavor to devise a virtual platform which aids the delivery of goods and services. This marketplace model is distinctive when compared to a standard supply chain of goods and services; it conceptually resembles a combination of classified advertisements and warehouse-delivery businesses. The blurring of lines between ownership of merchandise, the location of physical stocking, the place where actual transaction takes place, and the actual point of delivery can rightfully be any tax administration's nightmare; and especially in a federal structure we have in India where sharing of tax revenues on each taxable activity between states and the central governments has always been a vexing matter in the best of circumstances.[3]

National Association of Software and Service Companies (NASSCOM) paints a bright future for e-commerce in India, stating that e-markets for the exchange of industrial goods and services will grow with the spread of Internet. Gartner, a global research firm, however, predicts failure of e-business for various reasons, such as being driven purely by the marketing department, technically weak solutions, non-awareness of internal channel conflict, discounted online prices against physical distribution, sites not being updated, and so on.[4] However, both projections overlook the factor lack of basic legal infrastructure in India, which is necessary for the growth of trade and commerce. Substantial legal protection is required to precede e-trade.[5]

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[3] Singhal, Arvind, *Don't Let Regulatory Issues Hamper E-Commerce in India; Constitute An 'Informed' Empowered Committee*, THE ECONOMIC TIMES BUREAU, September 21, 2014.
[4] Rao, Suneeti, *Information Technology Act: Consumers' Perspective*, Economic and Political Weekly, Vol. 36, No. 37, 3501, (Sep. 15-21, 2001).
[5] Id.

The unprecedented and explosive growth of e-commerce has brought with it many positive changes; it is now one of the largest generators of new jobs for not only employees and entrepreneurs alike is also providing recognition and prominence for small producers. The government must tread carefully in this regard, without an appropriate legal framework in place, this sector could be headed for failure. Lacunae of legislation could have devastating implications including tax evasion, jurisdiction overlap, copyright infringement, and credibility issues resulting from lack of privacy and security. Over-legislation on the other hand could create a regulatory labyrinth.

As per extant FDI policy, FDI up to 100%, under the automatic route is permitted in e-commerce activities.

The relevant paragraph 6.2.16.2.1 of Circular 1 of 2013, Consolidated FDI Policy, 2013[6], states: "E-commerce activities refer to the activity of buying and selling by a company through the e-commerce platform. Such companies would engage only in Business-to-Business (B2B) e-commerce and not in retail trading, inter-alia implying that existing restrictions on FDI in domestic trading would be applicable to e-commerce as well."

The Information Technology (IT) Act, 2000 provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies. India also has the Consumer Protection Act, 1986 which provides for regulation of trade practices, creation of national and state level Consumer

[6] Sl. No. 6.2.16.2.1 Consolidated FDI Policy.

Protection Councils, consumer disputes redressal forums at the national, state and district level to redress disputes, class actions and for recognized consumer associations to act on behalf of the consumers, however, nothing in the Act refers explicitly to e-commerce consumers.

The legal requirements for undertaking e-commerce in India also involve compliance with other laws such as Contract Law, Indian Penal Code, etc. Furthermore, online shopping in India also involves compliance with the banking and financial norms applicable in India.

Thus, it can be said that there is a lacunae in terms of specific legislation relating to e-commerce, and the jurisdiction of e-commerce is ambiguous, if not flawed.

The government has recently expressed its intention to modify the Information Technology (IT) Act, 2000 to remove legal obstacles in e-commerce transactions to boost the online shopping market.[7] The proposed Communications Convergence Bill of the government will hopefully fill in the gaping hole in e-commerce regulation and legislation which is much need in the country. This bill which was originally drafted in 2000 under the BJP led National Democratic Alliance (NDA) government but was put on hold due to differences between the Telecom Ministry and the Ministry of Information and Broadcasting. The bill needs to be flexible and technological neutral to keep with the changing innovations and times, and it must ensure transparency and predictability in the law.

Another recommendation would be that the government, which has already constituted an empowered committee to develop a conceptual framework for the Communications Convergence Bill, must involve leaders from related ministries such as finance, commerce, law and consumer

[7] *Govt. May Modify IT Act to Remove Legal Hurdles in E-Commerce*, available at <http://www.livemint.com/Politics/NXXTDGPhSxbs9SeslIPuzJ/Govt-may-modify-IT-Act-to-remove-legal-hurdles-in-ecommerce.html>

affairs at the Centre and also the revenue department bureaucrats from the states. A similar constitution was made for foreign direct investment (FDI) in physical retail; however the committee formed in that regard could not be said to be appropriately informed and educated. Workshops, conferences and seminars can be held to disseminate information and edify the proposed committee members on the finer and significant nuances of e-businesses.[8] Until such regulatory and taxation frameworks are put in place, e-businesses must be given the benefit of the doubt in "grey" areas; the areas which are in current need of monitoring and directing mechanisms. The empowered committee should furnish a creative and dynamic legal and financial framework for handling the new digital business with detailed provisions concerning the manufacturing, distribution, and delivery process.[9]

It is also important to pay attention to Business-to-Consumer (B2C) transactions as well as Business-to-Government (B2G) as these would not only bring about increased efficiency and revenues but would also give hands-on experience to government officials and policy-makers on the subject.[10]

[8] Supra note 3.
[9] Id.
[10] Hamid, Bushra, *Institutional Approach to E-commerce: An Integrated Framework for Pakistan*, The Pakistan Development Review, Vol. 41, No. 2, 189, (2002).

CLARIFYING THE LAW ON WILFUL DEFAULTERS

- *Prakhar Bhardwaj & Abhinav Kumar*

The term "wilful defaulter" has recently come to the fore with the noose tightening around India's flamboyant liquor baron, Vijay Mallya. Mr. Mallya's now-grounded Kingfisher Airlines (KFA) owes a consolidated debt of Rs. 8000 crore to a consortium of 14 banks. Of these lenders, state-run United Bank of India (UBI) recently declared KFA, Mr. Mallya and 3 directors of the company wilful defaulters. Reports indicate that other lenders, including UCO Bank[11] and IDBI[12] are likely to follow suit, while the State Bank of India has already sent KFA a show cause notice in this regard.[13] Against this backdrop, this article seeks to examine the present legal framework on wilful defaulters (WDs).

MEANING OF WILFUL DEFAULT

In the absence of any statutory provisions on point, wilful default at present is governed by the RBI Master Circular on Wilful Defaulters.[14] A "wilful default" occurs in any of the following events:-

a) The borrower has defaulted despite having the capacity to honour its obligations.

b) The borrower has not utilized the finances for the specific purposes for which they were availed, but has diverted them for other purposes.

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[11] Samasroy Chakraborty, *UCO Bank mulls tagging KFA a Dilful Defaulter*, Business Standard, September 20, 2014, available at: <http://www.business-standard.com/article/pti-stories/uco-bank-weighing-options-to-send-notice-to-kfa-114091900393_1.html> (accessed 27th September 2014).

[12] See <http://www.business-standard.com/article/reuters/banks-pile-pressure-on-liquor-baron-mallya-over-airline-loans-114090300103_1.html> (accessed 26th September 2014).

[13] See <http://www.business-standard.com/article/finance/guarantor-can-also-be-named-wilful-defaulter-rbi-114090901232_1.html> (accessed 27th September 2014).

[14] Reserve Bank of India, *Master Circular on Wilful Defaulters*, July 1, 2014, available at: < http://rbidocs.rbi.org.in/rdocs/notification/PDFs/73MCWD010714FL.pdf> (accessed 26th September 2014). [hereinafter, 'Master Circular'].

c) The borrower has siphoned off the funds such that they are not utilized for the agreed upon purpose, nor are the funds available with the borrower in the form of other assets.[15]

d) The borrower has, after defaulting, disposed off the movable/immovable property used by him for the purpose of securing the loan, without the lender's knowledge.

IDENTIFICATION MECHANISM

At the outset, the RBI prescribes an outstanding debt threshold of Rs. 25 lakhs for identifying a wilful default.[16] Such identification should be made not on the basis of isolated incidents of default, but in the context of the borrower's entire track record. Further, in order to be categorized as wilful, a default must be intentional, deliberate and calculated.[17]

As per the present norms,[18] a bank/financial institution (FI) is required to establish an objective identification mechanism for WDs. Such identification must be entrusted to a Board-appointed Committee of higher functionaries, headed by its Executive Director and two GMs/DGMs. Any decision taken by the Committee must be adequately supported by reasons and evidence. Once the initial decision is taken, the borrower is required to be accorded sufficient time (the Master Circular suggests 15 days) for making representations against the same before a separately constituted Grievance Redressal Committee consisting of the CMD and 2 other senior officials of the bank/FI. Subsequent to such representations, the Committee may finally declare the borrower a "wilful defaulter", as the case may be, and intimate him of the same.

[15] The Master Circular also defines 'Diversion and Siphoning of Funds' under Point 2.2.
[16] The Master Circular clarifies [in the *Explanation* to Point 2.9(d)] that banks need not report cases where the outstanding amount is less than Rs. 25 lakh, or when banks have agreed for a compromise settlement and the borrower has fully paid the compromise amount.
[17] Point 2.2, Master Circular.
[18] See Point 3, Master Circular.

A bank/FI is required to submit a list of WDs in respect of whose accounts suits have been filed, on a quarterly basis, to credit information companies (CICs) certified by the RBI. These CICs further disseminate this information on their websites. Where suits have not been filed, the quarterly list may be submitted to the RBI upto September 30, 2014; thereafter, all reporting is to be done to CICs alone.

CONSEQUENCES OF THE *WILFUL DEFAULTER* TAG

The purpose of declaring a borrower a WD is to prevent him from accessing capital markets and to caution banks/FIs against the defaulter. As such, the following are the consequences of being declared a wilful defaulter.[19]

First, the borrower cannot avail of the credit facilities of banks/FIs. Further, promoters of companies that have been identified for siphoning of funds, misrepresentation of accounts and fraudulent transactions become ineligible for availing institutional credit for financing new ventures for a period of 5 years. *Secondly,* the lender is entitled to initiate legal proceedings against the borrower/guarantor for recovery of dues. Criminal proceedings may also be initiated, where warranted, for instance, under S. 403 (dishonest misappropriation of property) or 415 (cheating) of the IPC. *Thirdly,* in case of a defaulter company, the lender may adopt "a proactive approach for a change in management". *Finally,* WD individuals become ineligible to continue on or take up fresh positions on the Board of any company, and the lender is empowered to secure the removal of any serving defaulter from such Board. The RBI also recently clarified that

[19] See Point 2.5, Master Circular.

if an individual on the Board of a company is declared a WD, any other firm on whose Board he serves will also become ineligible for institutional credit.[20]

Moreover, the WD tag runs deeper than the principal borrower. It is additionally prescribed that where the defaulter is a single company in a group, and where a letter of comfort or guarantee furnished by other companies within the group are not honoured when invoked by the lender, the entire group shall be considered a WD. This rule is also applicable to cases where the guarantors are not directors of the borrowing company or are non-group entities or even individuals.[21]

WILFUL DEFAULT AND THE COMPANIES ACT, 2013

There is no provision in the Companies Act that directly deals with wilful defaulters. However, a director who has been declared a WD may incur additional liability under Sections 447 and 448 of the Act, which deal with fraud. S. 447 provides that a person found to be guilty of fraud will be punishable with imprisonment between 6 months and 10 years, along with fine upto 3 times the amount involved. Similarly, S. 448 prescribes the same punishment for a person who knowingly includes false information in, or omits material information from any certificate, statement, filing or other document. This offence is particularly relevant in terms of wilful default, since banks/FIs often require certificates from borrowers as to the end-use of the funds borrowed.[22] Thus, any officer of a company who is labelled a WD and/or is knowingly involved in preparation of false certificates would be liable under this provision. Finally, provisions of oppression and mismanagement may also be attracted if wilful default shows mismanagement in the conduct of the affairs of the company.

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[20] See: <http://www.business-standard.com/article/finance/guarantor-can-also-be-named-wilful-defaulter-rbi-114090901232_1.html> (accessed 28th September 2014).

[21] See: <http://www.business-standard.com/article/finance/guarantor-can-also-be-named-wilful-defaulter-rbi-114090901232_1.html> (accessed 28th September 2014).

[22] Point 4.2, Master Circular.

CONCLUSION

It is therefore clear that the "wilful default" tag has disastrous commercial consequences for companies, their directors, promoters, directors and other individuals. At present, the relevant law is not only dispersed between the Master Circular and miscellaneous provisions, but recovery of loans is also often tough due to the tendency of borrowers to embroil banks in long-drawn out litigation. Therefore, in an effort to ease the recovery of bad loans by banks, the government plans introduce amendments to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the laws applicable to Debt Recovery Tribunals. These amendments will be considered by the Parliament in the upcoming winter session.[23] It is hoped that the existing loopholes can be plugged in order to strengthen the banking system in India.

[23] See: <http://www.business-standard.com/article/pti-stories/govt-to-amend-sarfaesi-drt-acts-to-help-banks-recover-money-114082001422_1.html> (accessed 27th September 2014).

SHAREHOLDERS' RIGHTS VERSUS THEIR CONVENIENCE – THE POSTAL BALLOT ISSUE ON VOTING LOOKED AT THROUGH THE PERSPECTIVE OF GODREJ INDUSTRIES LTD. JUDGMENT

- *Aashna Jain*

The Companies Act, 2013 was brought into existence with sweeping changes just for shareholders' protection and transparency in the company's functioning. The focal point of the changes being brought about was greater convenience and clarity to the shareholders regarding the internal matters of the governance of the Company. One such issue brought about under the head of shareholder convenience is postal ballot voting. This was done for greater inclusivity of the shareholders which are far spread across the country.

Section 110 of the Companies' Act, 2013 is in controversy ever since certain provisions of the said act came into being along with a SEBI circular dated 21st May, 2013. The essence of both these documents is making voting by the Postal Ballot compulsory in some specific events specified by the Central Government.

Postal Ballots as already mentioned, are a step towards the shareholders' convenience and corporate democracy gains momentum when such provisions are implemented. The very obvious advantage of this system could be greater participation of the shareholders in the decision making process. But on the flipside, there are many dis-advantages that come along. The first one being, hampered debating culture during the passing of resolutions. The shareholders now might not be able to gain clarity on the issue and hence, might render an uninformed decision. There are some proactive shareholders who want to voice opinions and make them known to others. Their interests will be hampered to a great extent. Such rights of effective participation

are captured by SEBI through the recent amendments made to Clause 49 of the Listing Agreement.

In the celebrated case of *Godrej Industries Limited* (applicant) where the Bombay High Court went into the interpretation of the said section in controversy, gave a judgment which still does not restrict the ambit of voting in meetings through postal ballots only. The interpretation of the section is done with regards to the amalgamation of the companies with the help of Postal Ballot Voting Scheme.

The facts of the case are as follows: - The Company Godrej Industries Ltd. wanted to merge with the company, Wadala Commodities and filed an application to dispense the requirements of court convened Shareholders meeting, pursuant to provisions relating to mergers and amalgamations under Companies' Act, 1956. They wanted to conduct the voting entirely by postal ballot under the relevant provisions of the Companies Act, 2013. Section 110 of the CA 2013 stipulates that certain items of business as notified by the Central Government ("**CG"**), shall be transacted only through a postal ballot. The question that arose was whether the use of the word 'shall' operates notwithstanding any other provision to the contrary, under the CA 2013 or the CA 1956.

The High Court Ruling:-

The counsel for the applicant contended that the legislative intention was to do away with the requirements of real meeting and hence to make the task simpler and, the provision relating to mandatory usage of postal ballot method of voting (also includes e-voting) was added to the new "Companies Act, 2013".

The court then further pointed out to the usage of word 'shall' in section 110(a), which makes it mandatory to allow for a postal ballot and Section 110(b) says that if a majority have assented to resolution of voting by postal ballot it is deemed to have been passed. On further interpretation of Section 110, the High Court noted that meetings called under Section 391 of CA 1956 or Section 230/232 of CA 2013 for approval of a scheme of arrangement, are not "called" by the company, but are instead "ordered" by the court and the court has the power to dispense with such meetings irrespective of any provisions for postal ballot.

The High Court also referred to the SEBI circular dated April 17, 2014, which was relied upon by the Applicant's counsel in his contentions, wherein SEBI mandates voting by postal ballot in cases pertaining to Clauses 35B and 49 of the Listing Agreement and clarified that though these amendments by SEBI have been deferred until October 1, 2014, any such notification by the SEBI which makes postal ballots the exclusive mode of voting on any scheme under Sections 230/232 of CA 2013 would be unlawful and against the legislative intent.

There are some "grey areas" identified by the honorable Justice Patel in the implementation of this section. The major one being the fulfillment of Quorum, under Section 103 of the Companies Act, 2013. If for e.g., there are certain issues which are always dealt through postal voting, then the two provisions (110,103) will not go hand in hand.

The amicus curiae in this case went on to say that this facility of postal ballot was over and above the original requirements of shareholders' meeting and hence it can just be used as a facility and not a requirement.

The judgment, thus rendered by the court, was in line with Corporate Democracy. The court said that nothing stops the people who have already voted through electronic media or postal ballot to attend the meeting and voice out their bona fide opinions.

Hence in my opinion, since this a very niche area of law, any narrow construction of any opinion would be very dangerous and against the interest of the shareholders and the company both. Therefore to avoid any confusion, the approach adopted by the Bombay High Court should be followed wherein the interpretation is done keeping in mind that the Companies Act, 2013 has evolved from the Companies Act, 1956 and hence cannot go against it and also that the new act aims at shareholders' convenience and clarity in their decision making.

MINORITY SHAREHOLDER PROTECTION UNDER THE COMPANIES ACT 2013

– Saahil Kaul

A. INTRODUCTION

The phrase "minority shareholders" is not expressly defined in the Companies Act, 2013 [Act]. However, certain sections in the Act could be used as reference to determine what could constitute a class of minority shareholders. For instance, sections 241-246 of the Act[24] define minority shareholders to be those holding not more than 10% of the shares or minimum 100 shareholders, whichever is less.

Unlike the west, where shareholding in public companies is substantially dispersed, protection of minority shareholders in India assumes greater significance since shareholding here is concentrated within the promoter group with the general public holding a very insignificant percentage of the total shareholding. It could therefore give rise to cases where the promoters might exploit the minority shareholders for their own vested interests. For instance, a controller[25] might try to squeeze out the minorities[26] realizing that the target is about to strike a profitable business deal in the near future and thus depriving the minority shareholders an opportunity to share the expected profits.

Thus, it becomes imperative to accord significant protection to minorities from such exploitation. This article critically analyzes the various changes that have been introduced in the Act with regard to related party transactions, class actions and increased clout of minority in corporate

[24] These provisions deal with *Oppression and Mismanagement.* The corresponding provisions in the 1956 Act were contained in sections 395-399.
[25] The terms "controller" and "controlling shareholder" are used interchangeably.
[26] The terms "minorities" and "minority shareholders" are used interchangeably.

governance to combat instances of minority victimization. In the subsequent section it argues how the Act has failed in regulating unfair squeeze out of minorities and finally concludes by commenting on the efficacy of the above reforms.

B. MINORITY PROTECTION UNDER THE 2013 ACT

I. RELATED PARTY TRANSACTIONS AND MINORITIES

A related party transaction [RPT][27] refers to a business deal where the transacting parties enjoy a personal or other similar kind of special relationship prior to the deal.[28] For instance, a transaction between the holding company and its subsidiary or a director and his relative would be a related party transaction. Under the Companies Act, 1956, there was no requirement of obtaining shareholder approval or consent for entering into related party transactions. As a result, the controlling shareholders unabashedly entered into transactions with related parties leaving the hapless minorities sans any direct remedy.

The new Act significantly empowers the minorities in this respect by providing that any RPT that is not carried out on an arm's length basis shall need the approval of the minorities by a special resolution. Also, interested or related parties to the transaction would not be allowed to vote on such resolution.[29] This essentially means that any RPT will now have to be approved by a majority of the disinterested outstanding shareholders. This "majority of the minority" rule

[27] Contained in Section 188 of the Act

[28] http://www.investopedia.com/terms/r/related-partytransaction.asp

[29] Rajesh Bhayani, *Minority Shareholders can Block Related Party Deals*, Business Standard, April 14th 2014, http://www.business-standard.com/article/companies/minority-shareholders-can-block-related-party-deals-114041300361_1.html

incorporated in the Act is in consonance with the practice that is followed in several other jurisdictions like the United States and United Kingdom.[30]

II. MINORITY REPRESENTATION ON THE COMPANY BOARD

The new Act has given the minorities increased say in corporate decision making by including a provision that requires all listed companies to appoint directors elected by "small shareholders" who are defined as shareholders holding shares, nominal value of which does not exceed twenty thousand rupees.[31] The director has to be elected from among the small shareholders either suo motu by the company or on receipt of a notice by not less than five hundred (500) or one-tenth (1/10) of the total number of shareholders, whichever is less.[32]

One might argue that the "small shareholders" are different from minority shareholders since the former have been defined based on their individual shareholding while the latter is determined collectively based on their non-controlling stake in the company. It is however submitted that "small shareholders" can be considered akin to minorities since they also hold a non controlling stake in the company by virtue of their insignificant shareholding.

III. THE CONCEPT OF CLASS ACTIONS

Taking a cue from jurisdictions in the west, the new Act has introduced the concept of "class actions".[33] Though the interpretation of the section is mired with controversy and uncertainty at present due to shoddy wording, nevertheless the concept as a whole is a big leap forward in the direction of minority protection.

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[30] Vinod Kothari, Shampita Das, *MCA Circular on Related Party Transactions*, Available at http://indiacorplaw.blogspot.in/2014/07/guest-post-mca-circular-on-related.html

[31] Section 151, Companies Act, 2013.

[32] Clause 11.5, Chapter XI, Draft Rules and Forms under Companies Act, 2013.

[33] Section 245 of the Act

A class action suit may be brought before the National Company Law Tribunal [Tribunal][34] by a certain minimum number of members, or depositors or any class of them[35] if they feel that the management of the company is acting in a manner that is prejudicial to the interests of the company, members or the depositors. A plain reading of the section points to the intent of the legislature in granting increased protection not only to the minority shareholders but also the depositors. Thus, a minimum of hundred depositors or at least ten percent of the total depositors in number or value can file a class action suit under the scheme of the new Act.[36] However, one principal deficiency in the Act viz a viz the 1956 act is that the Tribunal has not been granted the discretionary power to admit an oppression/mismanagement or a class action claim if the minimum threshold of required members or shareholders to file such a claim is not met.[37] The 1956 Act had vested the Central Government with similar powers in dealing with claims of oppression and mismanagement.

C. MERGERS/AMALGAMATIONS AND MINORITY SQUEEZE OUT

One area where the new Act was expected to bring about significant reforms was with regard to the minority squeeze out provisions. The regulation of squeeze outs has gained tremendous importance in the last few years since it is one of the primary means by which minorities can be

[34] The National Company Law Tribunal as envisaged to be setup under the Act.

[35] Section 245(3) of the Act prescribes a minimum number of hundred (100) members or such percentage of total number of members or depositors as may be prescribed by the Companies Rules under the Act.

[36] Clause 16.1(b), Chapter XVI, Draft Rules and Forms under Companies Act, 2013.

[37] Akshat Sulalit, *Companies Act 2013: Rise of the Minority Shareholder*, Available at http://www.indialawjournal.com/volume6/issue-2/article5.html

potentially exploited[38] and considering the fact that most firms in India are promoter controlled, this trend can only be expected to rise in the near future.[39]

There is only a single statutory provision that deals with minority squeeze outs[40] and it states that once an acquirer makes an offer to the minorities to buy out their stake in the company and once such offer is accepted by at least 90% of the total class of shareholders to whom such offer is made[41], the acquirer can notify the remaining dissenting shareholders to compulsorily acquire their shares on similar terms as the initial offer. However, the acquirers seldom take recourse to this method since getting the consent of 90% of shareholders to whom such offer is made proves to be quite onerous.

Minorities are therefore squeezed out by circumventing this provision and resorting to the method of reduction of share capital[42] which only requires shareholder approval of such a scheme by a special resolution at a general meeting. Since this provision only requires assent of 75% of the total shareholders of the company, it may be possible that the minority opinion is not adequately reflected in the final vote. The minorities are thus left with little or no remedy since courts on several occasions in the past have held that they would not withhold sanction to the

[38] Sachin Mehta, *Minority Shareholders and the Threat of Squeeze Outs*, The Mint (Sep. 1, 2008); Nishchal Joshipura, *Majority Beware: Minority Rules!*, The Firm: Corporate Law in India (Aug. 16, 2013), available at http://thefirm.moneycontrol.com/story_page.php?autono=936236.

[39] Shaun J. Mathew, *Hostile Takeovers in India: New Prospects, Challenges, and Regulatory Opportunities*, 2007(3) COLUM. BUS. L. REV. 800

[40] Section 235, Companies Act, 2013.

[41] The offer has to be accepted within four months of it being made.

[42] Section 66, Companies Act, 2013.

special resolution in favour of capital reduction as long as a fair process has been followed and a fair exit price been tendered to the minorities.[43]

D. CONCLUSION

The legislature has taken significant strides in protecting the interests of the minorities through the Act. However, it is important to realize that a proper balance has to be maintained between the conflicting interests of the controller group and the minorities. While exploitation of the minorities by the controllers should be closely scrutinized, it is also necessary to ensure that a handful of minorities do not hold the company to ransom and unnecessary create roadblocks in what could otherwise be a very profitable business venture for the shareholder group as a whole. Nevertheless, the abovementioned provisions are no doubt a welcome step in according greater protection to minorities and their efficacy will surely be put to test in the near future.

With regard to the squeeze out provisions, it is argued that the Securities and Exchange Board of India [SEBI] should play a more active role as a regulator in filling the lacunae in the Act and ensure that capital reduction schemes are not conveniently used merely as a way to bypass the usual squeeze out mechanism already provided. This could be done by rendering SEBI with supervisory powers over delisting and any subsequent squeeze outs conducted within one year (or any other appropriate period) of being delisted. This would check companies that delist with the intention to oust SEBI's jurisdiction over a subsequent squeeze out.[44]

Moreover, the courts can also play a more pro-active role in seeing that even in cases where capital reduction is resorted to, the minorities do get a fair deal. An encouraging step in this

[43] *Sandvik Asia Ltd. v. Bharat Kumar Padamsi*, [2009] 92 SCL 272; *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, AIR 1997 SC 506

[44] Several companies indulge in the practice of delisting and going private before conducting a squeeze out to escape the onerous legal regime applicable to listed companies.

direction was recently taken by the Bombay High Court[45] where the court, in a first of its kind move, approved a squeeze out through capital reduction at a price that was determined by an independent valuer appointed by the court itself. Also, the Andhra Pradesh High Court[46] has taken a "minority friendly" view in a recent decision wherein they held that there is no express bar on courts to go into a detailed scrutiny of a capital reduction scheme and it cannot be assumed per se that in every case, the majority shareholder would be interested in protecting the minority rights. The courts and the market regulator SEBI can thus work in tandem to ensure that minority rights are adequately safeguarded.

[45] *Cadbury India Limited v. Samant Group & Ors,* Company Petition No 1072 of 2009, Decided on 25th February 2014, Bombay High Court.

[46] *Chetan G. Cholera v. Rockwool (India) Limited*, [2010] 102 SCL 93 (AP)

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