PROTECTION OF MINORITY SHAREHOLDERS UNDER THE COMPANY LAW OF INDIA

By
—SHYAM PADMAN[1],
ANJANA HARIDAS[2]

Abstract

Democracy is widely accepted as an ideal governance structure. It preserves the rights of everyone, both majority and minority. As most institutional set ups are keen on protecting and preserving the rights of those sections of society from whom they receive the most support and benefit, it is unsurprising that the oppression of the minority is normal; whether it is in economics, politics or ever in the corporate world. A company functions essentially in a democratic set up and hence the will of the majority is the decision of the company. However, like any democracy the company too necessitates that the will of the majority should not be exercised by undermining the rights of the minorities. Though it is presumed that the majority decision is inclusive of minority interests, this may not always be true.

The insatiable human want for personal gain often disrupts the very fabric of society, and this holds true even in the corporate sector. A democratic set up requires victory by a majority. Similarly, a company, which is essentially a large group of individuals having a separate and independent legal status, acts in accordance with the decisions taken by the majority of its members. The dissenting minority (if there is one) is bound to accept any such decisions unless and until they are able to show that the power, which vests with the majority, has been abused.[3]

Therefore, it is essential for any company to protect the minority shareholders from acts of oppression, mismanagement, squeeze outs *etc.* The best set up for a company is that in which the minority rights are protected while upholding majority interests.

The term minority shareholders has not been expressly defined under Indian corporate law. Neither the Companies Act, 2013 nor the erstwhile Companies Act, 1956, provided for an express interpretation of the term. A minority shareholder can be understood as a shareholder who owns less than 50 percent of the shares in a company. This in turn limits their role as they do not hold any voting rights and have no say in the running and control of the company.[4]

The concept of shareholders' democracy denotes shareholders' supremacy in corporate governance either directly or through their elected representatives. Democracy means the rule of people, by people and for people. In that context, shareholders' democracy means the rule of shareholders, by the shareholders, and for the shareholders in the company, to which they belong. Precisely it demotes the right to speak, congregate and communicate with co-shareholders and to be informed of the day-to-day corporate affairs.[5]

1. Advocate, High Court of Kerala, Founding Partner at M/s. Shyam Padman Associates, Advocates & Legal Consultants
2. Assistant Professor, KMCT Law College, Kuttippuram
3. Dr. *Sukhvinder Singh Dari*, *Majority Rule and Minority Protection under Companies Act, 1956 with special reference to Foss v. Harbottle*, International Journal of Research (IJR), Vol-1, (Issue-9 October 2014)
4. https://definitions.uslegal.com/m/minority-shareholder/
5. Available at : <https://www.icsi.edu/Docs/Webmodules/Publications/1.%20Company%20Law-Executive.pdf, accessed> on 10.3.2017

In this background, this article aims to address the protection given to minority shareholders under the current Indian corporate law and simultaneously look into the judicial interpretation of the same.

Introduction

A company is composed of different stakeholders. Primary among them are the company's shareholders who are the owners of the company. A shareholder is any person, whether natural or juristic that owns atleast one share of a company's stock.[6] In layman terms, majority shareholders are those persons who hold majority shares in a company, thereby exercising control and voting rights, unlike minority shareholders who hold minimum shares.

The corporate governance framework aims to ensure indiscriminate and equitable treatment of all shareholders. It presupposes the idea that all shareholders should have the opportunity to obtain effective redressal for violation of their rights. Minority shareholders often suffer oppression and abuse in the face of the dominant majority. Accordingly, their protection and grievance redressal are becoming increasingly important. The main objective of minority shareholders' remedies is to provide a mechanism to protect and enforce their rights when they have reasonable grounds to believe that they have been violate by the will of the majority.[7]

Like any democratic set up, even in a company it is often seen that only the majority decisions are considered fair and justified whereby, the minority concerns are overshadowed. Despite the statutory recognition and protection of minority interests against acts of oppression and mismanagement, the minority still remains largely subjugated. This has resulted in the domination by the majority shareholders and suppression of the minority shareholders or in squeezing them out of the decision-making process and eventually from the company itself.

At present, the term minority shareholders has not been defined by either of the Companies Acts. However, by virtue of Sections 395 and 399 of the Act of 1956 and Section 244 of the Companies Act, 2013, minority shareholders have been set out as 10% of shares or minimum 100 shareholders, whichever is less, in case of companies with share capital; and 1/5th of the total number of its members, in case of companies without share capital.[8]

One of the pillars of company law is the principle of majority rule. Victory by majority has been the rule at all levels of decision making and company governance. However, the potential for abuse of power under majority rule is one which cannot be overlooked.[9] The resolution of majority shareholders, passed in compliance with statutory laws, is binding upon the minority and consequently upon the company. Thus, the majority enjoy supreme authority to exercise powers and control of the company. This however, is subject to two very important limitations. Firstly, powers of majority are subject to the provisions of the Company's memorandum and articles of association. A company cannot legally authorize or ratify any act outside the ambit of the memorandum and thereby *ultra vires* of the company.[10] Also, the articles authorize

6. Available at : http://www.investopedia.com/terms/s/shareholder.asp#ixzz4apwMXEmY, accessed on 9.3.2017

7. *Priyanka Kanta Bose*, *Corporate Governance and Plight of Minority Shareholders : An Attempt to Reconcile*, Journal of Advances in Social Science and Humanities, (2016, 2:5), P.37-42

8. Available at : <http://www.indialawjournal.org/archives/volume6/issue-2/article5.html, accessed> on 9.3.2017

9. *Aishah HjBidin*, *Legal Issues Arising from Minority Shareholders' Remedies in Malaysia and United Kingdom*, Jumalundang-undang dan Masyarakat, 7 (2003) 5J-69

10. *Ashbury Rly. Carriage and Iron Co. v. Riche*, (1875) L.R. 7 H.L. 653

the directors to deal with any matters, except those which are outside the scope of the authority of the directors; or with which the directors, having power, are unable or unwilling to deal. Secondly, the resolution of a majority must not be inconsistent with the provisions of the Act or any other statute, or constitute a fraud on minority depriving it of its legitimate rights.[11]

Rule of Majority

The principle of majority rule was laid down in the case of *Foss v. Harbottle*[12]. This case was one which resulted from the refusal of the Courts to intervene in the management of the company at the instance of a minority of its members who were dissatisfied with the conduct of the company's affairs by the majority.[13] It states that resolutions are passed by the members on the basis of simple or three fourth majorities are binding on the rest of the company. As a result, Courts are not keen to intervene on company affairs to protect minority interests as their compliance to the majority will is implied once they become shareholders of the company. Thus, in case of any wrong to the company, the company itself in its capacity of being a juristic person has the right to sue and not the shareholders of the company individually.[14]

The said rule was reiterated in *Edwards v. Halliwell*[15] wherein *Jenkins*, LJ., held as follows :

(1) The proper plaintiff in an action for a wrong alleged to be done to a Corporation is, *prima facie*, the corporation.

(2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, *cadit quaestio*; or, if the majority challenges the transaction, there is no valid reason why the company should not sue.

(3) There is no room for the operation of the rule if the alleged wrong is *ultra vires* the Corporation, because the majority of members cannot confirm the transaction.

(4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority.

(5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the Court because the wrongdoers themselves, being in control, would not allow the company to sue.[16]

Affirming the above propositions in *Mac Dougall v. Gardiner*[17], *Mellish,* LJ., opined that, if the thing complained is something

11. *North-West Transportation Co. v. Beatty*, (1887) L.R. 12 A.C. 589

12. (1843) 2 Hare 461

13. *Robert R. Pennington*, *Company Law*, Sixth Ed., Butterworths, London, Dublin and Edinburgh, (1990), P.648

14. *A.K. Majumdar* and Dr. *G.K. Kapoor*, *Taxmann's Company Law and Practice*, 7th Ed., Taxmann Allied Services (P) Ltd., (2001), P.932

15. (1950) 2 All ER 1064

16. Available at : http://www.gilesfiles.co.za/02-Supreme-Court-of-appeal/foss-v-harbottle-rule-defined-and-explained/, accessed on 9.3.2017

17. (1875) 1 Ch. D. 13 at 25

which the majority is entitled to do either regularly or legally, then there can be no use in having a litigation about it. He further states that abuse of majority powers and depriving the minority of their rights is an entirely different thing."[18] The majority rule and the limited scope of remedy given to minority shareholders was recognized in *Pavlides v. Jensen*[19] and *Burland v. Earle*,[20-21].

The status of the company as a juristic person independent from its members and its power to sue and be sued can be adequately understood from the above precedents. Nevertheless, the practical application of the majority rule is a little more complicated. After all, there have been instances of fraud and jeopardizing of company interests. The company is composed of both majority and minority members and the loss caused to the company either. Why then should an individual member not be entitled to sue? This is because injury by itself is not enough. The plaintiff must show that the injury was caused due to breach of duty towards him. The individual or minority shareholders who try to show that the directors owe a duty to them personally in their management of the company's assets will fail. The directors owe no duty to individual members but to the company as a whole.[22]

The justification for the rule in *Foss v. Harbottle* (supra), is the need to preserve majority right in deciding company affairs are conducted. However, this is applicable only where there is any irregularity or illegality which can be cured by the majority by way of passing an ordinary resolution. Court interference is limited to instances where this cannot be done[23]. Moreover, a company is a person at law, the action is vested in it and cannot be brought by a single shareholder. Where a corporate body capable of filing a suit for itself against its directors or any other persons, then it alone is the proper and only plaintiff.[24]

The main advantages that flowed from the rule in *Foss v. Harbottle* (supra), were pragmatic such as (i) recognition of the separate legal personality of the company, (ii) need to preserve right of majority to decide, (iii) avoidance of multiplicity of futile suits, (iv) litigation at suit of a minority futile if majority does not wish it.[25]

The rule established a right based system which inhibited shareholders' suits and did little to counter-balance majority power. The scope of the exceptions was the subject of considerable uncertainty. Personal rights were ill-defined and the ambit of fraud on minority and its relationship to ratification by the general meeting were also the subjects of considerable controversy.[26]

Application of Foss v. Harbottle Rule in India

In *ICICI v. Parasrampuria Synthetic Ltd.*[27], the Delhi HC held that a mechanical and automatic application of *Foss v. Harbottle* (supra), rule to the Indian situations and conditions would be improper and misleading. The Indian corporate entity is not the multiple contributions of small individual investors but a predominantly and indeed overwhelmingly state-supported funding structure at all stages from financial

18. Available at : http://www.alastairhudson.com/companylaw/Shareholder%20rights%20-%20materials.pdf, accessed on 9.3.2017
19. (1956) Ch. 565
20. (1902) A.C. 83
21. *E.R. Hardy Ivamy*, *Topham and Ivamy's* Company Law, 16th Ed., Butterworth & Co. (Publishers) Ltd., Shaw & Sons Ltd., London, (1978)
22. Supra note : 14 P.933-934.
23. Supra note : 13, P.648.
24. *Gray v. Lewis*, (1873) 8 Ch. Appl. 1035
25. Supra note : 3
26. *PL Davies* (Ed) *Gower's Principles of Modern Company Law* (6th Ed., 1997) 666
27. 71 (1998) DLT 674, 1998 (44) DRJ 695

institutions, as opposed to the country of origin from which the rule owes its genesis. Thus, the interests of the financial institutions would not be adequately protected with such mechanical application of the *Foss v. Harbottle* (supra), rule.[28]

In *Rajahmundry Electric Supply Co. v. Nageshwara Rao*[29], the Hon'ble Supreme Court observed that Court interference in matters of internal administration of a company will be limited, so long as they are acting within the scope of the Articles of Association. The right of the corporation to sue as plaintiff was also recognized in this case. Any individual members of a corporation cannot assume themselves the right of suing in the name of the corporation. Law recognizes the independence of the corporation and its members.[30]

Personal Rights of Members

The rule in *Foss v. Harbottle* (supra), applies only in cases where the corporate right of a member is infringed and not in the case of individual right. Individual rights of members arise from the contract between the company and the member which is implied upon him becoming a member and becomes part of the general law. The line between personal rights and corporate rights is often hard to distinguish. Courts are more inclined to consider personal right of a member only if he has a special interest in a provision in the memorandum or articles distinct from the general interests of every member. A consequence of such distinction is that a member cannot bring a personal action for the loss he has suffered from the breach of provisions of the company's memorandum or articles which do not confer personal rights on members or from breaches of fiduciary duties owed to the company, even if the member can prove a conspiracy between the defendants to commit the breaches complained of, the diminution in the value of shares merely a reflection of the loss suffered by the company, and the proper remedy is to therefore to sue the defendants, or in appropriate circumstances for a derivative action to be brought.[31]

Representative and Derivative Action

In certain circumstances, an individual member may bring an action on behalf of or against the company even in the absence of a personal wrong and even without support of his peers. Here, the plaintiff sues in a representative capacity on behalf of himself and all the fellow members other than those against whom the action is sought. Here the company is either made the defendant or co-defendant depending on the case. On the other hand, derivative action refers to the action brought by an individual member to enforce a claim which belongs to the company and his right to sue is derived from it. This relief is sought against third parties for the company's benefit.[32]

In a representative action, the plaintiff does not act as an agent for the persons on whose behalf he sues. Consequently, he can discontinue the action without their consent; the defendant can raise any defenses against him which could be raised if he were suing in his own right alone and in case of an unsuccessful action, the persons on behalf of whom the action is filed incurs no costs. Derivative action will be successful only if it has been brought forth for the benefit of the company.[33]

The Companies Act, 2013, provides for class-action lawsuits under Sections 245

28. Supra note 14, P.934
29. AIR 1956 SC 213
30. Available at : http://journal.lawmantra.co.in/wp-content/uploads/2015/09/10.pdf, accessed on 9.3.2017
31. Supra note : 14, P.935
32. *Spokes v. Grosvenor and West End Railway Terminus Hotel Company*, 2 QB 124
33. Supra note : 14, P.935-936

and 246 and also recognizes the same under the National Company Law Tribunal Rules, 2016. It allows a large number of people with common interest in a matter to sue or be sued as a group. These suits may be instituted by investors, shareholders or depositors against the company, is directors, auditors or advisors in the National Company Law Tribunal. Despite its lack of clarity, it is seen that unlike its predecessor, the Act of 2013 intents not only to empower minority shareholder and/or members of the company but also the depositors. Though the Act of 2013, the term 'member' includes the subscribers, shareholders and person whose name is entered in the register of members; the term 'depositor' has not been defined. Further, the Tribunal is not empowered with any discretionary power to admit/allow any class suit wherein class of members or depositors are unable to comply with the minimum number of members/depositors requirement to be laid down in the law. The statute under Sections 241 and 245 also provides for duplication in the protection provided to the members in case affairs of the company are conducted in a manner prejudicial to the interest of the company/members.

Exceptions to the Foss v. Harbottle Rule

The exceptions of the majority rule laid down under *Foss v. Harbottle* (supra), gives the minority shareholder the right to bring an action to protect their interest. The rule of supremacy of the majority is subject to certain exceptions and thus, minority shareholders are not left helpless, but they are protected by :

(a) the common law; and

(b) the provisions of the Companies Act, 2013.[34]

These exceptions are also the rights and benefits provided to minority shareholders to protect their interests. These common law exceptions are (i) acts *ultra vires* to the company or illegal[35], (ii) breach of fiduciary duties[36-37], (iii) fraud or oppression against minority[38], (iv) wrong doers in control[39], (v) inadequate notice of a resolution passed at a meeting of members, (vi) qualified majority[40], (vii) infringement of personal rights.[41]

The statutory exceptions under Companies Act, 2013 are :

(i) Variation of Shareholders' Rights (Section 48)—Under this provision, where the minority shareholders (recognized in the Act as holders of not less than ten per cent shares) does not consent to variation of rights attached to different classes of shares, they may apply to the Tribunal within 21 days to have the variation cancelled, after the date on which the consent was given or the resolution was passed. Such application may be made in a representative capacity on behalf of other shareholders entitled to make the application by a representative appointed in writing and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal.

(ii) E-Voting (Section 108)—This provision provides for voting by means of electronic methods. This ensures that all shareholders,

34. Supra note : 5, accessed on 10.3.2017

35. *Bharat Insurance Ltd. v. Kanhya Lal*, AIR 1935 Lah. 792

36. *Daniels v. Daniels*, (1978) 2 WLR 73

37. *Satya Charan Lal v. Rameshwar Prasad Bajoria*, (1950) SCR 394, See also : *S. Manmohan Singh and others v. S. Balbir Singh and others*, ILR 1975 Del. 427.

38. *Edward v. Halliwell*, (1950) 2 All ER 1064; *Menier v. Hooper's Telegraph Works*, (1874) L.R. 9 Ch. App. 350; *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656; *Greenhalgh Arderne Cinemas Ltd.*, (1950) 2 All ER 1120; *In Re. Transval Gold Exploration and Land Co. Ltd.*, (1885) 1 TLR 604; *Burland v. Earle*, (1902) AC 83.

39. *Cf. Birch v. Sullivan*, (1957) 1 WLR 1274; *Edwards v. Halliwell*, (1950) 2 All ER 1064, 1067; *Glass v. Atkin*, (1967) 65 DLR (2d) 501.

40. *Baillie v. Oriental Telephone and Electric Co. Ltd.*, (1915) 1 Ch. 503 (C.A.); See also: *Nagappa Chettiar v. Madras Race Club*, (1949) 1 MLJ 662.

41. *Salmon v. Quin and Axtens*, (1909) A.C. 442; *Nagappa Chettiar v. Madras Race Club*, (1949) 1 MLJ 662 at 667.

both majority and minority are given a chance to cast their vote irrespective of their personal difficulties.

(iii) Appointment of Small Share Directors (Section 151)—This provision empowers small shareholders who are essentially minority shareholders to appoint one director on the board of a listed company. A small shareholder is one who holds shares in any company, the aggregate face values of which does not exceed Rs.20,000/-. To table such a proposal, atleast 1,000 such small shareholders or 10% of the total small shareholders of the company, whichever is lesser, should come together and submit a notice to the company alongwith their signatures. The individual, if appointed, will be classified as an independent director and will serve for a term of three years and is not eligible for reappointment nor can associate with the company once his term is over.[42]

(iv) Related Party Transactions (Section 188)—Certain transactions can only be undertaken by the company after receiving the consent of non-interested parties. While the Board of Directors and majority shareholders usually constitute the interested persons in a company, the minority shareholder acquires the right to consent in such transactions.

(v) Rights of Dissenting Shareholders (Sections 235 and 236)—The provision provides for the power to acquire shares of dissenting shareholders. The provision allows a transferee company to acquire the shares of a dissenting shareholder in case of his dissent in a scheme approved by the majority shareholders for the transfer of shares.

(vi) Oppression and Mismanagement (Sections 241 and 242)—The provision provides for Application to Tribunal for relief in cases of oppression, *etc.*, such an application can be filed by any member of the company who complains of (a) conducting company affairs in a manner prejudicial or oppressive to public interest or personal interest of the applicant or any other member(s) or company interests; (b) a material change in the management or control of the company whereby it is likely that the affairs of the company will be conducted in a manner prejudicial to the interests of the company or its members or class of members. The provision also grants the Central Government a right to apply for an order if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest.

(vii) Class Action Suits (Sections 245 and 246)—These provisions provide for class action or derivative action suits aimed at protecting minority interest as we have already discussed above.

Another right recognized under the provisions of the 2013 Act is the adoption of a fair valuation mechanism. This calls for appointment of an independent auditor to value the shares of a company at a fair value so as to protect minority shareholder interest.

Despite the presence of statutory provisions aimed at protecting and preserving minority interests, the shareholders have not been able to use them and these provisions for the most part remain inactive. An exception to this predicament is Government companies as all directors are appointed on the advice of the Government by the President of India or the Governor of a State. Hence, theoretically it can perhaps be said that the shareholders democracy is absolute in such companies. In other companies however, the shareholders democracy is dependent upon the voting strength of shareholders and also to a great extent on the availability of members attending their General Meetings either by themselves or through their proxy. Though

42. Rights and Benefits to Minority Shareholders under the Companies Act, Ingovern. Available at : http://www.ingovern.com/wp-content/uploads/2018/01/Minority-Shareholders-under-Companies-Act-2013.pdf, 1.9.2020.

the concept of shareholder democracy was recognized from the Companies Act, 1956 onwards, this could not be effectively implemented primarily due to the negligent and callous attitude of shareholders in addressing their rights.[43]

Prevention of Oppression and Mismanagement

The words "oppression" and "mismanagement" are not defined in the Act. The meaning of these words for the purpose of Company Law should be used in a broad generic sense and not in any strict literal sense.[44] The meaning of the term oppression as explained by Lord *Cooper* in the Scottish case *Elder v. Elder & Watson Ltd.*[45], was cited with approval by *Wanchoo,* J., in the Supreme Court case *Shanti Prasad Jain v. Kalinga Tube*.[46] "The essence of the matter seems to be that the conduct complained of should at the lowest, involve a visible departure from the standards of fair dealing, on which every shareholder who entrusts his money to the company is entitled to rely."

The complaining member must show that he is suffering from oppression in his capacity as a member and not in any other capacity. Oppression involves atleast an elemental lack of probity or fair dealing to a member in the matter of his property right as a shareholder[47].

In *Re. Hindustan Co-operative Insurance Society Ltd.*[48], the Court observed that where the majority exercised their authority wrongfully, in a manner burdensome, harsh and wrongful, and forced the minority to shareholders to invest their money in different kind of business against their will, it amounted to oppression. In *In Re. Bellador Silk Ltd.*[49], it was held that a member can complain of oppression only in his capacity as a member and not in his capacity as director or creditor.[50]

"Oppression must be a continuous process. In *Shanti Prasad Jain v. Kalinga Tube*[51], the Court said:... events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up-to-date of petition."

However in *Tea Brokers P. Ltd. v. Hemendra Prosad Barooah*[52], the Division Bench of Calcutta High Court observed that even a single act done on one particular occasion can be termed oppressive if the effect of such an act will be of a continuing nature and the member concerned is deprived of his rights and privilege for all time to come in future. The position was reiterated in *Ramshankar Prasad v. Sindu Iron Foundry (P) Ltd.*[53] and in *Bhagirath Agarwala v. Tara Properties P. Ltd.*[54]

In *P. Ratnkumar v. T.V. Chandran*[55], the Kerala HC held that the nature of oppression is to be tested in the context of cause for winding up. Complainant must establish persistent and persisting course of unjust conduct. Isolated acts cannot be considered and that there must be continued oppression over a period of time. The Courts have by way of judicial precedents have classified different activities as oppressive in nature.

In case of mismanagement if the affairs of the company are being conducted in a manner prejudicial to the interest of the company or public, or that by reason of

43. Supra note : 7 accessed on 10.3.2017.
44. Supra note : 5, accessed on 10.3.2017.
45. 1952 SC 49 Scotland.
46. (1965) 1 Comp. LJ 193, AIR 1965 SC 153.
47. *Kalinga Tubes Ltd. v. Shanti Prasad Jain*, (1964) 1 Comp. LJ 117.
48. AIR 1961 Cal. 443.
49. (1965) 1 ALL ER 667.
50. Supra note : 2, accessed on 10.3.2017.
51. (1965) 1 Comp. LJ 193, AIR 1965 SC 153.
52. (1998) 5 Comp. LJ 963 (Cal.).
53. AIR 1966 Cal. 512.
54. (2003) 51 CLA 57 (Cal.).
55. (1994) 79 Comp. Cas. 213.

any change in the management of control of the company, it is likely that the affairs of the company will be conducted in that manner it is called mismanagement. It usually occurs when the majority shareholders, who control the operation, cannot run properly in an effective way to keep up with a sound viable environment where rights of every shareholder are being protected.[56]

A very clear illustration of mismanagement was contemplated in *Rajahmundry Electric Supply Corporation v. A. Nageswara Rao*.[57] There should be present and continuing mismanagement. The charges of mismanagement in the past, even if proved, are not enough to establish an existing injury to the interest of the company or public interest.[58] Relief against mismanagement runs in favour of the company and not to particular member(s). It is not necessary for the Court to find a case for winding up in cases of mismanagement in order to grant relief. Proof of prejudice to the public interest or to the company is enough. The Court also takes into consideration outside interest affected by corporate operation.[59]

In addition to the protection afforded to the minority by the exceptions to the majority rule, the Companies Act also contains special provisions regarding oppression and mismanagement.[60] A company is an independent creation of law distinct from its members. As per the article of association, its powers are divided to be exercised by its directors and shareholders in general meeting respectively. In either case, the rule of majority is applied. Majority shareholders often abuse their power to oppress minority shareholders.[61]

The Act of 2013 provides for oppression and mismanagement under Sections 241-246. Section 241 articulates that an application for relief can be made to the Tribunal in case of oppression and mismanagement. Under Act of 2013, the Tribunal may also waive any or all of the requirements of Section 244(1) and allow any number of shareholders and/or members to apply for relief. This is a huge departure from the provisions of Act of 1956 as the discretion which was provided to the Central Government to allow any number of shareholders to be considered as minority is, under the new Act of 2013 been given to the Tribunal and therefore is more likely to be exercised. The provisions of Sections 397 and 398 of Act of 1956 are combined in Section 241 of Act of 2013 and accordingly applications for relief in cases of oppression, mismanagement *etc.*, will have to be directed to the Tribunal. While the powers of the Tribunal under Act of 1956 were limited, Act of 2013 granted additional powers to the Tribunal including (a) restrictions on the transfer or allotment of the shares of the company; (b) removal of the Managing Director, manager or any of the Directors of the company; (c) recovery of undue gains; (d) the manner appointment of Managing Director or manager subsequent to removal of the previous personnel; (e) appointment of such number of persons as directors, (f) imposition of costs. Further, the requirement of establishing existence of 'just and equitable' circumstances to waive any and all requirements of the section pertaining to the meeting the minimum minority limits and providing 'security' while allowing such an application are excluded from the Companies Act, 2013. The Act of 2013 has also introduced the concept of class action which was non-existent in Act of 1956.[62]

Squeeze Out

Though in theory the tall visions of the Indian corporate regime to indiscriminately empower every shareholder whether majority or minority, often they find themselves in a

56. Supra note : 73, accessed on 9.3.2017.
57. AIR 1956 SC 213. See also : *Richardson and Cruddas Ltd. v. Haridas Mundra*, (1959) 29 Com. Cases 547.
58. *R.S. Mathur v. H.S. Mathur*, (1970) 1 Comp. LJ 35.
59. Supra note : 5, accessed on 10.3.2017.
60. Supra note : 14, P.942.
61. Supra note : 7.
62. Supra note : 8, accessed on 9.3.2017.

position where they are forced to sell their shares in the company and exit the same. The term squeeze outs and freeze outs are usually used interchangeably. "Freeze out" has been defined as a transaction in which the controlling shareholder buys out the minority shareholders in a publicly traded corporation, for cash or the controller's stock. "Squeeze out" on the other hand refers to the conditional right of a majority shareholder to force the minority shareholder to surrender his financial instruments to the majority shareholder, who as a result acquires 100% ownership in the company.[63]

This is one of the most common threats faced by a minority shareholder of a closely held corporation. In a squeeze-out, the majority shareholders use their control to deprive the minority of any managerial control over and economic return from the corporation. Most often the minority shareholder is even deprived of his fair share of compensation.[64] *Wilkes v. Springside Nursing Home, Inc.*[65] provides a perfect illustration of a squeeze out. As in the case of *Wilkes's* case (supra), a squeeze-out often ends up in litigation. The minority shareholder generally has two available claims.' The first is that involved in *Wilkes's* case (supra), *i.e.*, for breach of fiduciary duty. This however is difficult to prove as the actions that most directly impact the minority shareholder do not involve a conflict of interest between the majority owners and the corporation.

Though in *Wilkes's* case (supra), an expanded concept of fiduciary duty was applied, not all jurisdiction subscribes to this notion. The alternate claim may be that of oppression or the like. Not all jurisdictions, however, have such provisions in their corporation laws. Some apply a "reasonable expectations" test which questions whether the majority's actions are contrary to the expectations the minority has when originally entering the venture, whether the majority knew of those expectations at the inception, and whether the actions were the plaintiff's fault.[66]

In India, squeeze-outs are carried out by three methods (i) compulsory acquisition of minority shares (ii) compromise on a scheme of arrangement (iii) reduction of share capital of a company.[67-68]

Though the Companies Act, 1956, provides protection to minority shareholders, it is silent with regard to the threat of squeeze outs. In the case of *SEBI v. Sterlite Industries (India)*[69], it was held that a company may either follow the procedure under Section 391 read with Sections 100 to 104 of the 1956 Act or the procedure under Section 77-A (now Section 68) for buying back its shares. The 2013 Act has refreshed the provisions relating to squeeze outs. Sections 66 and 236 of the 2013 Act has replaced the provisions of the 1956 Act which deals with reduction of share capital. Section 66 provides for squeeze out by way of reducing the company's share capital. An application has to be filed before the NCLT to affect the same. The provision of having to provide adequate notice to the Government and to SEBI and to prohibit such capital reduction in case of arrears of debt are further measures by which unlawful squeeze outs are prevented under the provision. The 2013 Act not only attempts to reduce the lacunas that were present in the 1956 Act but also endeavors to instill confidence in the minority shareholder with

63. *Aditya Pratap Singh* and *Ashu Garg*, *Squeezing-out of Minority Shareholders: A Comparative Analysis Between Companies Act, 1956 and 2013*, The Company Law Journal, Volume 3, Part 1-3, July-September, (2014).

64. *Garima Gupta* and *Abhilasha Malpani*, *Squeezing-out The Minorities: An analysis of the Judicial Review Process in India*, (2016) 2 Comp. LJ.

65. 353 N.E. 2d 657 (Mass. 1976).

66. *Franklin A. Gevurtz, Squeeze-Outs and Freeze-Outs in Limited Liability Companies*, Washington University Law Review, Volume 73, Issue 2, (January, 1995).

67. Supra note : 83.

68. *Abhishek Sarkar* and *Pracheta Kar*, *Squeeze-Outs : A Contemporary Indian Perspective*, (2016) 4 Comp. LJ.

69. 2005 (125) Comp. Cas. 14 Bom., (2004) 1 Comp. LJ 358 Bom., 2004 (1) Mh. LJ 1046, 2004 (49) SCL 660 Bom.

respect to the institutional and regulatory mechanism.[70] Section 236 of the Act enables the purchase of minority shareholding by a registered holder having 90% or more issued share capital in a company, either individually or alongwith a person acting in concert, by way of an amalgamation, share exchange, conversion of securities or other reason.[71]

The scope of Section 236 of the Act was recently addressed by the NCLAT in the case of Mr. *S. Gopakumar Nair and another v. OBO Betterman India Private Limited and another*,[72]

As a positive measure towards the same, the Ministry of Corporate Affairs in the month of February, 2020, added sub-sections (11) and (12) to Section 230 of the Act and also further enacted the National Company Law (Amendment) Rules, 2020 and the Companies (Compromises, Amalgamations and Arrangements) Amendment Rules, 2020[73].

Conclusion

Though a democracy is the will of the majority it does not in any way provide for the oppression of the minority. A perfect democracy, even in business, is one where the will of the majority is consistent to the minority interests and where the minority is given proper redressal of their grievances and protection of their rights. The Courts following the rule of *Foss v. Harbottle* (supra), does not usually intervene in the affairs of the company. This is because if Courts were to interfere or entertain all cases brought forth by minority shareholders alleging illegality or irregularity by majority shareholders, then most often this will cause oppression of majority. In comparison to the Act of 1956, the present law is a positive change in ensuring shareholder democracy. The provisions of the 2013 Act show that minority interests have been addressed in a more comprehensive manner.[74]

Corporate law has now evolved from its bygone era of simple transactions to more complex problems that require the frequent intervention of law either by way of statutes or by of judicial involvement. While the concepts of shareholder democracy are still much debated and deliberated upon, it can be understood that achieving the perfect democratic balance between majority and minority is probably more distant than we imagine.

THE SCOPE OF WORDS 'NOT BY SEPARATE SUIT' IN SECTION 47, ORDER 21 RULES 58 AND 101 OF CPC – JURISDICTION OF EXECUTING COURTS

By

–G. ANWAR BASHA,
X Additional District Judge, Tirupati

Introduction :

Jurisdiction in its classical concept means the power to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it; in other words by jurisdiction is meant the authority on which a Court has to decide a case that is litigated before

70. Supra note : 82.

71. *Harshil Matalia*, Comparative Analysis of Provisions Enabling Majority Shareholders to Squeeze out Minorities, *Vinod Kothari* and Company, 13.2.2020, http://vinodkothari.com/2020/02/minority-squeeze-out/, accessed on 1.9.2020.

72. NCLAT, 9.7.2019, Company Appeal (AT) No.272/2018.

73. *Mini Raman, Lex Orbis*, 29.2.2020, https://www.lexorbis.com/minority-squeeze-outs-under-the-companies-act-2013/, accessed on 1.9.2020.

74. *Akshat Sulalit*, Companies Act, 2013 : Rise of the Minority Shareholder, India Law Journal, https://www.indialawjournal.org/archives/volume6/issue-2/article5.html, accessed on 1.9.2020.