LEGAL AND REGULATORY FRAMEWORK FOR PROTECTION OF MINORITY SHAREHOLDERS IN INDIA

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In the recent times, corporate governance has gained significant attention and focus across the globe. Sound corporate governance norms are of utmost importance for developed as well as developing nations to achieve their economic goals. One of the most essential requirements of a sound corporate governance system is that the rights of shareholders should be effectively protected and they should be allowed to participate and influence the corporate strategic decision- making.

Shareholders invest their money in a company and in return the company issue shares to them. The ownership of shares entitles the shareholders to certain rights. Though they do not control the company directly but still they are considered to be the real owners of the company. Thus, it becomes imperative to protect the rights of the shareholders as they are the real contributor of the capital of a company. Protection also becomes important because company is a business structure that covers different classes of people and has more than one owner. Efficient protection of shareholders rights can be achieved only if there is a law that provides for such protection. Thus, there is legal as well as actual aspect of shareholders protection. The legal aspect i.e. protection of shareholders as given under the law determines the position of shareholders in the law and the various accompanying rules and regulations. Shareholders play a very crucial in a company and hence their protection is important. It is always seen that in almost all the areas majority usually dominates the minority and so is in the case of the shareholders. The interests of minority shareholders are tend to be overshadowed by the over-powered majority shareholders or promoters of the company. Though there are certain rights granted to minority shareholders under the legal regime still they become a subject of dominance by the majority shareholders and the company. Henceforth, the protection of minority shareholders becomes all the more important. Protection of minority shareholders can have some major effect on the valuation of the firm.While numerous factors play into whether a country has a dynamic financial market, there's one in particular that stands out. *Countries* *that offer a legal framework to protect minority shareholders tend to have more robust markets because investors are more willing to take risks.*[1]

In India, the shares of a Company are held predominantly by the promoter or their near and dear ones or sometimes also by their foreign business counterparts either in the form of investment or through institutional investments.[2] Nevertheless, this does not mean that company should turn a blind eye to the interests of the minority shareholders of the company.

Before dealing with the rights of minority shareholders in detail let us first look into the meaning of shareholders and minority shareholders.

1.1. Who is a Shareholder?

Companies Act, 2013, though does not define the meaning of the word shareholder expressly but section 2(55)(iii) states that 'member' in relation to a company means- *every person holding shares of the company and whose name is entered as a beneficial owner in the records of the depository*.

Thus, we can derive the meaning of the term shareholder from the above section to mean a person who holds the shares of the company and by virtue of this he is considered to be a member of the company.

1.2. Majority Shareholders:

Generally, the term majority shareholder is used to define a shareholder who owns most of a company's shares. Usually it is more than 50% of the shares of a company. They have a considerable degree of power as compared to other shareholders and tend to largely influence the decision-making process of the company.

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[1]*See* Mauro Guillén, *Why we need to protect minority shareholders*, (dated 16th Oct.2015), *available at*: https://www.weforum.org/agenda/2015/10/why-we-need-to-protect-minority-shareholders/ (last accessed on 12th April., 2018)

[2] *See India has third highest number of family-owned businesses*, THE HINDU, (dated 26th Oct., 2017), *available at* https://www.thehindubusinessline.com/economy/india-has-third-highest-number-of-familyowned-businesses/article9925495.ece (last accessed on 12th MaApril, 2018)

1.3. Minority shareholder:

Companies act, 2013, also does not define who is a minority shareholder but in common parlance, it is usually used to refer to a shareholder who is in possession of less than 50 percent of the total voting rights of a company and neither directly nor indirectly controls the management of the company.

According to the **Black's Law Dictionary** Minority Shareholder means a " Equity holder with less than 50% ownership of the firm's equity capital and having no vote in the control of the firm'.

In the explanation provided under section 151[3] of the Companies Act, 2013 the meaning of the term '**Small Shareholders'** has been given to mean means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed. But such meaning is confined to this particular section only.

Also, another question that now arises is that whether small shareholders and minority shareholders are the same or not and whether these terms can be used interchangeably or not? One of the answers that can be given for the above question is that small shareholders are different from the minority shareholders as small shareholders are determined as per their individual shareholding which according to the section should be less than rupees 20,000. On the other hand minority shareholding is determined collectively and viewed as having non-controlling stake in the company. Nevertheless, small shareholders may be considered as minority shareholders owing to the small amount of shares that they hold resulting in non-controlling stake in the company.

Though there is no statutory provision that defines who is a majority or a minority shareholder but the degree of control that may be exercised by them over the company can be used as determinant to distinguish between the two groups.

[3] Appointment of director elected by small shareholders.-A listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.

2. RIGHTS OF MINORITY SHAREHOLDERS UNDER THE COMPANIES ACT, 2013-

2.1. Right to appoint Small Shareholders' Directors-

The small shareholders[4] or minority shareholders as often construed, of a listed company have a right to appoint a shareholder of their choice on the board and such shareholder may be called as a 'Small Shareholders' Director' under section 151 of the Act.

The concerned company may on an application by not less than one thousand small shareholders or one tenth of the total number of such shareholders appoint a small shareholders director. The listed company also has the power to suo moto appoint such director. The director so appointed under this section is considered to be an independent director subject to his fulfilling the criteria under section 149(6) of the Companies Act, 2013. Such director is not eligible for reappointment once his term finishes.[5]

The provisions of this section were first brought into action by the minority shareholders of Alembic Limited. Unifi Capital one of the minority shareholders, holding 3% of the shares in Alembic, moved an application to appoint its vice-president as the small shareholders; director. But the same was rejected by the Board and it was also not considered in the Annual General meeting of the company.[6]

Although, this provision is important for the protection of small shareholders, it should be ensured that it is not misused by the large institutional investors who may act on whims of the promoters. Without appropriate checks and balance, the small shareholders may end up acting as pawns in larger corporate battles amongst groups of influential shareholders such as a large institutional investor and the promoters. This will end up compromising the interest of passive

[4] The explanation to section 151 of the Companies Act, 2013 gives the meaning of small shareholders as "For the purposes of this section ―small shareholders‖ means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed".
[5] Rule 7 of the Companies (Appointment and Qualifications of Directors) Rules, 2014
[6] *See* P.B. Jayakumar , *A Board Seat*, BUSINESS TODAY, (dated 10th Sep., 2017) *available at* https://www.businesstoday.in/magazine/focus/a-board-seat/story/258715.html (last visited on 16th April., 2018)

retail shareholders rather than protecting them, which was the reason for the small shareholder director in the first place.[7]

Legal experts say there is no provision under law that gives an automatic right to any shareholder to appoint a director on the board, based on certain threshold shareholdings. However, Section 151 of the Companies Act allows a listed company to have one director elected by small shareholders. Such a director is appointed by an ordinary resolution at a general meeting, for a single term of three years.[8]

2.2. Right to apply to NCLT for Oppression and Mismanagement-

Usually, a company operates through its Board of Directors, who are expected to work in a manner that would maximize shareholders' value and in the best interest of its shareholders. The general scenario in any company is that the shareholders of the same class have equal voting rights. And thus, it has become a cardinal rule that apparently the majority shareholders have greater powers as compared to that of the minority ones and are in a better position to control the affairs of the company. Those decisions of the majority that are well within the scope of law and are also not ultra vires of the articles of the company would have a binding effect on the minority shareholders also.

But there are chances that it may so happen that the decisions of the majority may not always be in the best interest of the minority. There might be cases where majority takes a decision that would advance their interests at the expense of the minority. In such cases the minority shareholders can approach the National Company Law Tribunal (hereinafter referred to the NCLT) under the provisions of the Companies Act, 2013. Chapter XIV of the Act lays down the remedies that minority shareholders can resort to in cases of oppression and mismanagement. Section 241, 242 and 244 that relates to oppression and mismanagement were made effective from 1st of June, 2016.[9]

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[7] *See* Umakanth Varottil, *Activism through Directors Elected by Small Shareholders*, INDIACORPLAW, (dated 25th July, 2017), *available at* https://indiacorplaw.in/2017/07/activism-through-directors-elected-by.html (last visited on 18th April., 2018)
[8] *See* Sudipto Dey, *When can a small shareholder appoint a director on the board*, BUSINESS STANDARD, (dated 25th July, 2017) *available at* http://www.business-standard.com/article/companies/when-can-a-small-shareholder-appoint-a-director-on-the-board-117072400789_1.html (last visited on 18th April., 2018)
[9] *See* Ministry Of Corporate Affairs, *Notification S.O. 1935(E)*, (dated 1st June, 2016) *available at* http://www.mca.gov.in/Ministry/pdf/Notification_02062016_I.pdf (last visited on 26th Mar., 2018)

Section 241[10] of the Companies Act lays down the cases wherein any member of a company may make an application for relief to NCLT in cases of oppression and mismanagement. A member can base his claims on any of the grounds as provided under the said section.

The meaning of 'any member of a company' has also been discussed in various case laws. One such case is *S.V.T. Spg. Mills (P.) Ltd. v. M. Palanisami*[11], where the court held that the term 'member' under section 2(27) of the 1956 act (corresponding to section 2(55) of the 2013 act) has to be construed on a larger connotation, which means persons other than bearers of share warrants are to be treated as members.The applicability of section 397 and 398 (corresponding to sections 241, 242 and 244 of the 2013 act) is an equitable jurisdiction which is intended to protect the minority members of the company from any oppression and mismanagement at the hands of majority of members.

The Madras High Court, in *Amalgamations Limited (Now Amalgamations (P) Ltd) & Others v. Shankar Sundaram & others*[12], cleared the position as to the question that *whether a member of a holding company can file a petition in the affairs of a subsidiary company?* The Madras High Court upheld the decision of the Company Law Board and said that it had rightly arrived at a conclusion that it will be improper and illegal to join subsidiaries in the company application on facts and circumstance of the case. It was stated that when a person is not a member of a company, his alleging oppression and invoking the provisions of section 397 (Companies Act, 1956) against that company does not arise. Therefore, a shareholder of a holding company cannot complaint of oppression by a subsidiary in which he is not a member as there is no legal relation between him and the subsidiary company.

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[10] section 241- Application to Tribunal for relief in cases of oppression, etc.— (1) Any member of a company who complains that—
(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or
(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members,
may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.
[11] (2009) 95 S.C.L. 112 (Mad.)
[12] C.D.J. (2011) M.H.C. 4938

Central government is also empowered to make an application to the NCLT.[13]

Maintainability of the suit filed under section 241-

Section 244 enlists the members who are eligible to make an application under section 241. As per the provisions of the section, in the case of a company having a share capital, at least one hundred members of the company or one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares and in the case of a company not having a share capital, at least one-fifth of the total number of its members.

But the eligibility criteria as given under this section may be done away with if it allowed by the tribunal on an event of an application made to it on this behalf. This is allowed under the proviso of the said section.

A very recent example of maintainability of suit under section 241 and waiver of the criteria given under section 244 is the ruling of the National Company Law Appellate Tribunal in the famous case of *Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd*[14]. The appeal arose out of the order of NCLT that rejected the petition filed by the *Mistry group* alleging oppression and mismanagement by the TATA sons on the basis that it held only 2.17% of the total share capital of TATA sons as against the minimum the requirement of 10% given under section 244 of the Companies Act.[15]

The appellate tribunal divided the issue into two parts. Firstly, whether the petition filed by the Mistry group is maintainable under section 241, 242 and 244 of the act. If not then, secondly, whether the petitioner has made an application for waiver under the proviso of section 244?

The NCLAT held that though the petitioner fails to fulfill the threshold limit as given under section 244 but it allowed the maintainability of the petition by waiving off the limit. The appellate tribunal while giving its ruling laid down certain parameters that would be considered

[13] Section 241(2) of the Companies Act, 2013
[14] Company Appeals (AT) No.133 and 139 of 2017.
[15] *See Cyrus Mistry vs Tata Sons: NCLT dismisses Mistry's waiver application*, FIRSTPOST, (dated 18th April, 2017) *available at* http://www.firstpost.com/business/cyrus-mistry-vs-tata-sons-nclt-dismisses-mistrys-waiver-application-3389692.html (last visited on 20th April., 2018)

while deciding an application waiver under this section. It further clarified that these parameters are not exhaustive but other factors may also be considered.[16]

In *Shanti Prasad Jain V. Kalinga Tubes Ltd*[17], the court held that, there must be continuous acts on the part of the majority shareholders, continuing up to the date of the petition showing that the affairs of the company were conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression a minority by a majority. It must involve at least an element of lack of probity or fair dealing to member in the matter of his proprietary rights as a shareholder.

2.3. Right to file a Class Action Suit-

It is another type of protection given to minority shareholders. A class action suit usually means a legal suit wherein a group of persons sharing a common interest can go to NCLT if they are of the view that the affairs of the company are conducted in manner that is prejudicial to the interests of the company or members or depositors.

The concept of class action suits in India finds its genesis in the J.J. Irani Committee Report.[18] The report suggested that *in case of fraud on the minority by wrongdoers, who are in control and prevent the company itself bringing an action in its own name, derivative actions in respect of such wrong non-ratifiable decisions have been allowed by courts. Such derivative actions are brought out by shareholder(s) on behalf of the company, and not in their personal capacity(ies), in respect of wrong done to the company. Similarly the principle of Class/Representative Action by one shareholder on behalf of one or more of the shareholders of the same kind have been allowed by courts on the grounds of persons having same locus*

[16] *See* Umakanth Varottil, *NCLAT Ruling on Maintainability in the Tata Sons Case*, *available at* https://indiacorplaw.in/2017/09/nclat-ruling-maintainability-tata-sons-case.html/amp (last visited on 20th April, 2018)
See also Shreya Agarwal, *Mistry firms win waiver from shareholding limit*, LIVEMINT, (dated 22nd Sep., 2017), *available at* https://www.livemint.com/Companies/zqmoOwOQKeGPYPVaDCSXcL/NCLAT-allows-waiver-plea-of-Cyrus-Mistry-firms.html (last visited on 25th Mar., 2018)
[17] A.I.R. (1965) S.C. 1535
[18] Expert Committee on Company Law, Ministry of Corporate Affairs, Government of India, *Report on Company Law*,(dated 31st 2005), *available at* http://resource.cdn.icai.org/8315announ854.pdf (last visited on 20th April, 2018)

standi. Though these principles have been upheld by courts on many occasions, these are yet to be reflected in Law. The committee highlighted the importance of this principle and its need to be placed in law.

The aim for insertion of this concept under the new Companies Act, 2013 was basically to protect the small shareholders, ensuring greater accountability of auditors and protection against the chances of corporate frauds and scams. "*The rationale offered by the Ministry of Corporate Affairs for insertion of this provision was to see that "the shareholder feels like a king" in matters such as managerial remuneration."*[19]

The satyam scam highlighted the urgent need for introduction of such class action mechanism in India. Though the promoters and members of the board and the key managerial personnel were prosecuted under the SEBI (Prohibition of Fraud and Unfair Trade Practices) Regulations 2003 and the SEBI (Prohibition of Insider Trading) Regulations 1992, there was an absence of provisions relating to the compensation of shareholders loss.[20] In a strive to recover the loss of shareholding value, a lot of investors knocked the doors of National Consumer Disputes Redressal Commission along with Supreme Court but failed to get the same as their claim was rejected for the lack of an existing law that authorizes recovery of shareholding value in such cases. The National Consumer Disputes Redressal Commission said that "*we do not have the infrastructure to deal with such kind of petition".*[21] The Supreme Court also on appeal turned down the matter.[22]

The absence of a provision on class action suit led to the suffering of Indian shareholders and investors as they failed to recover their loss of shareholder value, but on the other hand the investors in America were able to recover the loss through a settlement of $125 million and $25.5 million from Satyam and PwC respectively. The inconsistency of treatment between the

[19] *See Class Action Suits To Ensure Shareholder Democracy*, THE HINDU, (dated 8th Nov, 2009), *available at* http://www.thehindu.com/todays-paper/tp-business/class-action-suits-to-ensure-shareholderdemocracy/article134987.ece (last visited on 22nd April, 2018)

[20] *See* Order bearing no. WTM/RKA/SRO/64 - 68 /2014 under sections 11(1), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 in the matter of Satyam Computer Services Ltd,(dated 15th JUL., 2014), *available at* http://online.wsj.com/public/resources/documents/Satyam.pdf (last visited on 22nd April, 2018)

[21] *See Consumer body rejects Satyam shareholders' compensation plea*, ECONOMIC TIMES,(dated 12th May, 2009), *available at* http://articles.economictimes.indiatimes.com/2009-05-12/news/27651532_1_retail-shareholders-satyam-scamsatyam-shareholders (last visited on 24th April, 2018)

[22] Midas Touch Investors Association v. M/S Satyam Computer Services Ltd. & Ors, Civil Appeal No. 4786 of 2009 (S.C.)

security holders in India and in America drew the attention of Ministry of Corporate affairs regarding class action suits, which ultimately found its place under section 245 of the new Companies Act.

Section 245 empowers members and depositors to proceed against the company, the directors, auditors, or any advisor or expert if they are engaged in any wrongful, unlawful and fraudulent act or omission or conduct relating to the company.

Eligibility Criteria: section 245(3) lays down the minimum requirement for the purpose of filing a class action suit.

Type of Company	**Minimum Requirement**	**Depositors**
Company with Share Capital	At least 100 members or the prescribed 10%[23] of the total members whichever is less or member(s) holding 10% share capital at least. However, it is important to note here that such members should have paid all the calls due on their shares.	Minimum 100 or at least 10% of the total depositors, whichever is less or a depositor to which company owes 10% of the total deposits.

[23] Prescribed percentage has been defined as 10% under Rule 6(2) of the Companies (Prevention of Oppression and Mismanagement) Rules, 2016 which, however, is yet to be notified.

Company without Share Capital	1/5th of the total number of members	

Admissibility of Class action Suit:-

The Tribunal along with the factors stated in section 245(4) of the Act shall also take into account rule 85 of the National Company Law Tribunal Rules, 2016 which sets out the criteria for admitting a class action. The following factors shall be considered for the same:

a) That whether the member or the depositor who is making the application is doing it with bona fide intention or not;
b) Any evidence that shows the involvement of any other person except the directors or officers of the company in relation to the matters stated in section 245(1)(a)-(g);
c) That the cause of action is such that it can also be pursued by the member or the depositor in his individual capacity instead of taking the route under this section;
d) Any views of the members or the depositors that show that they neither have any direct nor any indirect personal interest in the concerned matter;
e) That the cause of action is such which has not taken place yet but is likely to happen and the chances are such that it may be authorized or ratified by the company before its occurrence;
f) That whether there are so many members in the concerned class that approaching them individually would be very difficult and hence class action preferable;
g) That there are questions either of fact or law that are common to that particular class;
h) That the claims made or the defenses put forward by the parties are such that they are typical to that particular class;
i) That whether it would be fair and adequate in the interest of the class to allow the representative on behalf of that class.

Benefit to Minority shareholders:-

Generally, the minority shareholders do not have sufficient rights individually and are often suppressed. Section 245 allows them to come together and file a legal suit and empowers them to claim damages from the company, its directors, auditors, experts and advisors. Such benefit may not be available to a shareholder if he goes to the tribunal in his individual capacity as compared to a class action suit.[24]

2.4. Class Action vs. Oppression and Mismanagement-

There have been questions as to the incorporation of class action suits under section 245 when already under section 241 (oppression and mismanagement) a suit can be filed by the members of a company if they are of the opinion that the business of the company is conducted in such a manner that is detrimental to the interest of the company. But there are certain differences that make its (section 245) important. One such is that section 245 also covers within its ambit depositors who are not included under section 241 i.e. depositors are also allowed to make an application under section 245. No doubt the remedies that are available under section 241 that includes order for purchase of shares by any member, restricting transfer or allotment, termination or modification of an agreement, removal or appointment of director etc is much more wider than that compared to under section 245 still section 245 is much more liberal with regard to award of damages and compensation.

Any order made under Section 245 is in nature of rem and is binding even on those members or depositors who are not party to the application as opposed to an order of oppression and mismanagement which is only binding on the parties to the application. While a Class Action can be invoked in case of any act prejudicial to the interest of the members, the depositors or the company; in case of oppression and management, public interest is also taken into account.[25]

Section 241 to section 245 gives the much required protection to the minority shareholders. It is a useful weapon in the hands of shareholders which can be used by them to make the negligent officers answerable for their acts. The enforcement of such sections shall open the

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[24] *See* Arjya Majumdar, *Class Action Suits – Genesis, Analysis And Comparison*, (dated 12th Dec., 2016), *available* at https://ssrn.com/abstract=2883976 (last visited on 25th April, 2018)
[25] *See* Varun Munjal, *India: Class Action Suits: Notified Yet Ambiguous*, (dated 30th Nov., 2016), *available at* http://www.mondaq.com/india/x/548850/Class+Actions/httpwwwmondaqcomcontentprarticleaspprid20550productid (last visited on 25th April., 2018)

eyes of the corporate bodies and its officers and shall make them more cautious while discharging their duties and making key policy decisions. [26]

2.5. Merger and Acquisitions and Minority Squeeze Out:

The decisions related to merger and amalgamation are generally taken by the management along with the majority of shareholders which means small shareholders do not have much say in the matter. If a shareholder is unhappy with the transaction at his best what he can do is that he may vote against the resolution. But the problem arises because they do not have much votes in their hands. If the majority shareholders agree to sell the company at a low price to a relative entity (usually seen in companies which are family run) or where there is reverse merger i.e. merger of a healthy company with a relatively unhealthy one then it may affect the interests of the minority shareholders. Also, the determination of fair price is also not easy because sometimes it may so happen that initially the price that seems to be unfair at the time of merger may prove to be a really fair one once the results of the merger comes out (acquisition of JLR by TATA Motors).[27]

The concept of squeeze out has emerged greatly in the past few years and thus it becomes important to regulate it. It used as tool to exploit the minorities and since most of the companies are controlled by families the regulation it becomes even more important.[28]

Squeeze out is a process of acquisition of the shares of the minority shareholders in exchange of compensation. It is an example of the immense power that the majority shareholders can use to flush out the minority shareholders. It is the demonstration of the significant control by the majority shareholders on the company. Squeeze out may prove to be beneficial for the company but may be harmful for the interests of the minority shareholders. Though it is done through a

[26] *See* Ashish Rukhaiyar, *Class action suits ripe for review?*, THE HINDU, (dated 27th Aug., 2017), *available at* http://www.thehindu.com/business/Industry/class-action-suits-ripe-for-review/article19570982.ece (last visited on 25th April., 2018)
[27] *See* Yogita Khatri, *How corporate mergers and acquisitions impact small investors* , THE ECONOMIC TIMES, (dated 17th July., 2017), *available at* https://economictimes.indiatimes.com/wealth/invest/are-mergers-and-takeovers-wealth-creation-opportunities-for-investors/articleshow/59606562.cms (last visited on 27th April., 2018)
[28] *See* Sachin Mehta, *Minority Shareholders and the Threat of Squeeze Outs*, LIVEMINT (Sep. 1, 2008), *available at* https://www.livemint.com/Money/dfzhNnJ17ARJB5lcAmTMEI/Minority-shareholders-and-the-threat-of-squeezeouts.html (last visited on 27th April, 2018)

legitimate process yet it is a threat to the minorities in the company.[29] Squeeze out may be effected through four ways under the Companies Act., 2013[30].

Section 236 of the Companies act makes provision for squeeze out which puts forward the criteria wherein the majority can buy the minority shareholding. If an aquirer or such person acting in concert with him by reason of any merger, exchange of shares or conversion of securities, becomes owner of at least 90% of the equity share capital (issued) of the company then such person has the right to inform the minority shareholders i.e. the remaining 10% shareholders about his intention to buy their shareholdings. The price offered for such purchase shall be determined through valuation by a registered valuer. Sub-section (3) of section 236 also empowers the minority shareholders to offer their shareholdings for purchase to the majority shareholders.

The legal position of squeeze out in India has been interpreted by the courts in many cases. In *Sandvik Asia Limited v. Bharat Kumar Padamsi*[31], the question that was put before the court for its consideration was that whether the decision to drive out the minority shareholders in exchange of a price can be said to be unfair and inequitable. The court while giving its decision said that "*once it is established that non-promoter shareholders are being paid fair value of their shares, at no point of time it is even suggested by them that the amount that is being paid is any way less and that even overwhelming majority of the non-promoter shareholders having voted in favour of the resolution shows that the Court will not be justified in withholding its sanction to the resolution*."

Certain guidelines were laid down by the Bombay High Court in the case of *Cadbury India Limited*[32] and it also defined the meaning of the word prejudice. The court said that in transactions involving minority buy-outs it is the duty of the court[33] to make sure that "*the*

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[29]*See* Tanvi Kini, *An Overview of Squeezing out of Minority under the Companies Act, 2013 Vis -À-Vis the Position in International Jurisdictions*, (dated 2nd Aug., 2016) *available at*: https://www.legalindia.com/overview-squeezing-minority-companies-act-2013-vis-vis-position-international-jurisdictions/ (last visited on 27th April., 2018)

[30] The primary methods of achieving a squeeze out are: (i) consolidation of share capital under section 61 of the Companies Act, 2013, (ii) reduction of share capital under section 66 of the Companies Act, 2013, (iii) acquisition of shares under section 235 of the Act, (iv) scheme of arrangement.

[31](2009) 3 Bom.C.R. 57.

[32] (1976) 1 W.L.R. 123.

[33] Under the 1956 Act the High Court was the authorised body but under the Companies Act, 2013 tribunal is the authorised body.

scheme is not against the public interest, is fair and just and not unreasonable, does not unfairly discriminate against or prejudice a class of shareholders and draws a balance between the commercial wisdom of the shareholders expressed at properly convened meetings. The term "prejudice" in relation to valuation of a scheme would mean something more than just receiving less than what a shareholder desires, being a concerted attempt to force a class of shareholders to divest themselves of their holdings at a rate far below what is reasonable, fair and just"

In another case of *In re Elpro International Limited,*[34] the squeeze out of minority shareholders through the route of reduction of share capital was challenged by the Bombay Stock Exchange on the basis that the silence of the minority shareholders was treated as their acceptance to the proposal. Though the court did not invalidate the proposal and approved the same but it stated that the stock exchanges have the freedom to take action under the listing agreements in case they are of the view that securities law has been violated. The stock exchange did not accept the squeeze out and as result of which the company had to take withdrew its proposal of squeezing out the minority shareholders[35]. This case is a classic example of how stock exchanges have come forward to protect the interests of the minority shareholders as and when needed.

The concern that still arises is that the role of SEBI is limited only to the regulation of the listed companies.[36] The squeeze outs that are done in unlisted companies fall outside the scope of SEBI. And in order to keep SEBI out of the transaction companies usually first go for delisting and then bring out a proposal for squeezing out and thus the regulatory supervision is least which the make the minority shareholders of such companies even more vulnerable.

2.5. Related party transactions-

In the recent years there have been growing concerns over the abuse of related party transactions in Asian countries and more particularly in India[37]. The problem stems from the

[34] (2009) 149 Comp. Cas. 646 (Bom)
[35] *See* Elpro International, Outcome of Board Meeting (dated 19th Dec., 2007), *available at* http://www.moneycontrol.com/stocks/stock_market/corp_notices.php?autono=146772. (last visited on 27th April, 2018)
[36] For example, the Elpro case involved a squeeze out by a listed company.
[37] *See* OECD, *Guide on Fighting Abusive Related Party Transactions in Asia*, (Sep., 2009), *available at* https://www.oecd.org/daf/ca/43626507.pdf (last accessed on 29th April, 2018)

structure of ownership that the Indian companies have. There is wide concentration of ownership which gives the controlling power in the hands of a single family or individual or it may also happen that the same promoter group is controlling a number of companies. Though related party transactions are not prohibited and may also prove to be value enhancing for the company but the there are chances that it may be used as a tool by the controlling shareholders to misappropriate the corporate value. Many times related party transactions are associated with unfavorable consequences for the minority shareholders. Such transactions have acted as a catalyst in certain corporate frauds.[38]

Section 188 of the Companies Act, 2013 does not prohibit related party transactions but attempts to regulate it. As per the 1st proviso any that has a minimum paid up share capital of rupees 10 crore or more or wherein the company seeks to enter into a transaction certain transactions then such company can only do so by passing a resolution to that effect.[39] Further, the 2nd proviso prohibits any member who is a related party from casting its vote on the said resolution. Which often leads to the empowering of minority shareholders in allowing a related party transaction and this assumes greater importance in India where most of the companies are family run i.e. majority shareholders are related parties. Regulation 23(4) of the SEBI (Listing Obligations And Disclosure Requirements) Regulations, 2015 also lays down such prohibition.

However, it has been clarified by the Ministry of Corporate affairs that 'related party' in the above context refers only to such related party as may be a related party in the context of the contract or arrangement for which the said resolution is being passed.[40]

Examples wherein the minority shareholders have blocked a related party transaction[41]:

[38] *See* A. *Galani & N. Rehn, Related Party Transactions: Empowering Boards and Minority Shareholders to Prevent Abuses*, N.L.S.I.R., (2010), pp. 134, 137, *available at* http://www.nlsblr.com/uploads/3/7/6/7/37673841/03.pdf (last accessed on 29th April 2018)
[39] Rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014
[40] *See* Government Of India Ministry Of Corporate Affairs, General Circular No., 3O/2O14, (dated 17th July, 2014), *available at* http://ebook.mca.gov.in/notificationdetail.aspx?acturl=6CoJDC4uKVUR7C9Fl4rZdatyDbeJTqg3uaDT7Vp4Q49CMLrjLkTdQ3Pyokn1IG4M1v2eQsahUIhbgQpxm44GdQtcvtvroFBL
[41] *See* Jyotindra Dubey , *Battling the giants: How minority shareholders are making the right noises*, THE HINDUSTAN TIMES, (dated 4th Mar., 2016), *available at* https://www.hindustantimes.com/business/battling-the-giants-how-minority-shareholders-are-making-the-right-noises/story-Chtl2NHrWE6SA2ofQwSBbI.html (last visited on 29th April., 2018)

- The case of PTL enterprise where the proposal related to the sale of its holding in hospitals. It was opposed by the shareholders on the grounds of low valuation. Also, KSIDC one of the minority shareholders in PTL was successful in restraining the proposal from being approved. As a result of which the company had to drop its plan.
- In another case in 2014, the management of Siemens India proposed to sell its metal technology business to its parent company Siemens AG. The proposed valuation was relatively low as compared to that of its earlier transfer to Siemens India. By reason of it being a related party transaction the same had to be presented before the shareholders for its approval and it was subsequently, rejected. Consequently, the management had to raise the valuation and it was again put before the shareholders who ultimately accepted it.

Though such changes in the new companies Act and its allied rules have been embraced by many in the legal fraternity but at the same time they have shown their concern over the harassment of promoters by the shareholders in genuine cases.[42]

3. COMPARATIVE STUDY ON MINORITY SHAREHOLDERS RIGHT UNDER COMPANIES ACT, 1956 AND COMPANIES ACT, 2013

3.1. Combined Provisions for relief related to oppression and mismanagement:

The following are some of the key changes that have taken place in the provisions related to oppression and mismanagement-

Protection of Minority shareholders form Oppression and Mismanagement	Provisions under Companies Act, 2013	Provisions under Companies Act, 1956

[42] *See* Rajesh Bhayani, *Minority shareholders can block related-party deals*, BUSINESS STANDARD, (dated 14th April, 2014), *available at* http://www.business-standard.com/article/companies/minority-shareholders-can-block-related-party-deals-114041300361_1.html (last accessed on 30th April, 2018)

Relevant provisions	The new companies act contains a combined provision for relief against oppression and mismanagement. Section 241 deals with both the concept.	The old act had two separate sections i.e. section 397 and section 398 separately contained the concept of oppression and mismanagement respectively.
Authorized body	NCLT is the authorized body and the application has to be made to the tribunal.	Under the earlier act, Company Law Board was the concerned authority to receive applications.
Waiver of eligibility criteria	The tribunal has the power to waive the eligibility requirement in certain cases as discussed earlier in this chapter.	Central government had the power to waive off the eligibility criteria.

Apart from the above changes there has also been an increase in the powers of the tribunal i.e. the tribunal has wider powers as compares to that of the Company Law Board. These include restriction on transfer or allotment of shares of the company, removal of the managing director or any other director of the company. The intent of the lawmakers is to improve the mechanism that though existed but needed certain amendments which have now been incorporated under the provisions of the new act.[43]

3.2. Class Action Suits:

The concept of class action suit which was missing under the old act has now been introduced under the new act. After the satyam scam there was a glaring need of such concept in India.[44]

[43]*See* Rebecca Furtado, *Oppression in the Corporate Sector- The Indian Perspective*, (dated 1st July, 2016), *available at* https://blog.ipleaders.in/oppression-corporate-sector-indian-perspective/ (last accessed on 30th April., 2018)

[44] *See* Anoop Kohli, *Class action suits: Why India needs them*, THE TIMES OF INDIA, (dated 25th May, 2015), *available at* https://blogs.timesofindia.indiatimes.com/Masquerader/class-action-suits-a-size-for-india/ (last accessed on 30th April., 2018)

the bitter experiences of the past has shown that the inability to file a class action suit led to numerous individual suits which creates additional burden on the judiciary which ultimately leads to an wanted backlog of cases. The potential effect of introducing such a concept seems to be promising as it will lead to lower costs of litigation as compared to that involved in the individual law suits, increased benefits to the minority shareholders, decreased cases which mean fewer burdens on the judiciary. But the role of NCLT has been increased in the sense that there is no definite definition of "good faith" and it has to be determined on a case to case basis. There is greater amount of responsibility on the tribunal to pursue the case with respect to the threshold requirements, the bona fide of the petition and of the applicants so that it is not abused.[45]

The introduction of class action suit has been a great achievement of the Ministry of Corporate affairs. It has been highly embraced by the shareholders, depositors and the members. In addition to the increased protection of the minority shareholders it also ensures that the companies are now more cautious while discharging its various functions. The third parties that deal with the company for example advisors would also be more careful with their acts. Inclusion of auditors and experts liability for any misrepresentation would create a better corporate governance regime in the country. Additionally, it also casts a duty on the shareholders and the members of the company that this mechanism is not used as a tool in furtherance of the self-interest or personal gain of the minority shareholders and shall avoid frivolous suits.

Apart from the above measures the 2013 act also makes provision for the institution of Independent director. Schedule IV of the Act, lays down the 'Code of Independent Directors' which states that the that independent directors shall inter alia work towards promoting the confidence of minority shareholders.

Companies Act, 2013 has sought to invariably provide for protection of minority shareholders rights and can be regarded as a game changer in the tussle between the majority and minority shareholders. Various provisions have been introduced in Companies Act, 2013 to essentially

[45] *See* Lalit Kumar, *India: Get Ready For Class – Action*, (dated 28th Sep., 2016) *available at* http://www.mondaq.com/india/x/530880/Shareholders/GET+READY+FOR+CLASS+ACTION (last accessed on 30th April, 2018)

bridge the gap towards protection and welfare of the minority shareholders under Companies Act, 1956.[46]

Further, in the year 2017, India's rank in the area of 'minority investors protection' improved to four, on the back of several policy changes undertaken by market regulator SEBI to increase investor protection and market integrity.[47]

4. WHAT INDIA CAN ADOPT FROM OTHER JURISDICTIONS?

Though in india, there is no provision that specifically talks about the fiduciary responsibilities of the controlling shareholders but there are jurisdictions where such concept has been recognized and incorporated into law. The Securities and Exchange Board of India, in a consultative paper on review of Corporate Governance Norms in India (2012), had also recognised the fiduciary duty owed by the controlling shareholder to the minority shareholder, and proposed that the controlling shareholder of listed companies should enter into relationship agreements with the listed company, and the minority shareholders, which will specify the duties and responsibilities of controlling shareholders.[48]

In U.K., the listing rule extends greater protection to the minority shareholders of a premium listed company. These rules apply to premium listed companies with controlling shareholders. As per the rules a controlling shareholder is any person who exercises or controls on their own or together with any persons with whom they are acting in concert, 30% or more of the votes of the company". under the rules such companies are required to enter into a Controlling shareholder agreement, and there are certain undertaking in the agreement that includes that if any transaction takes place between the company and the controlling shareholders then it must be based on the arm's length pricing, the controlling shareholder will not take any action that would prevent the issuer from complying with its obligations under the Listing Rules and the controlling shareholder will not propose or procure the proposal of a shareholder's resolution

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[46] *See* Akshat Sulalit, *Companies Act, 2013: Rise of the Minority Shareholder*, I.L.J., *available at:* http://www.indialawjournal.org/archives/volume6/issue-2/article5.html (last visited on 1st May, 2018)
[47] *See* Pavan Burugula, *Ease of doing business: India scores on minority investor protection*, BUSINESS STANDARD, (dated 1st Nov., 2017), *available at* http://www.business-standard.com/article/economy-policy/ease-of-doing-business-india-scores-on-minority-investor-protection-117110100042_1.html (last visited on 1st May, 2018)
[48] The Securities and Exchange Board of India, C*onsultative Paper on Review of Corporate Governance Norms in India, (2012),* available at https://www.sebi.gov.in/sebi_data/attachdocs/1357290354602.pdf (last accessed on 1st May, 2018)

that is intended or appears to be intended to circumvent the proper application of the Listing Rules. In case of cancellation of such listing agreement a majority of 75% is required which further protects the minority.

As already seen there is prevalence of such controlling shareholders in many Indian Companies. Such a provision can also be made on the same lines in India for listed entities in India. This will ensure that these controlling shareholders do not exercise any undue influence over the company and its actions