CORPORATE GOVERNANCE IS A PART OF CORPORATE SUSTAINABILITY FOCUSING ON PROFESSIONAL MISCONDUCT

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ABSTRACT

Corporate Governance is a process that aims to administer corporate resources which will maximizes the value of all stakeholders like shareholders, investors, consumers and the public at large. The idea of maintaining good governance in company is to provide transparency, equitability, accountability and responsibility. The research paper will highlight on the importance of Corporate Governance and its impact on Corporate Sustainability. A company needs to sustain for a longer period of time and in this process corporate governance plays an important role in maintaining sustainability. The corporate governance codes and principles have framed to maintain the sustainability of the corporates by complying with the governance standards and disclosures. But how far the rules, codes, regulations are implemented in a proper and efficient manner. The paper will highlight on cases where the corporate governance standards are not complied with and which lead to corporate scams. And the most important factor which affects the corporate sustainability is the Professional misconduct in the company . The misconduct may be by the directors or shareholders or investors etc but in some how it affects the existence or sustainability of a company. Earlier research have failed to consider the contributions of sustainability in the process of Corporate Governance focusing on Professional misconduct.

The paper will highlight on the professional misconduct by the company stakeholders and violations of the corporate governance standards. Professional misconduct plays an important role in maintaining governance standards in company. The stakeholders of the company are required to disclose information which will help the company to operate for a long term. But

due to the failure in complying with the professional standard and ethics , the sustainability of the company gets affected . The paper will highlight on how professional misconduct which is a part of Corporate Governance standards affects Corporate sustainability.

Keywords – Corporate Governance, Misconduct, Fraud , Corporate Sustainability, ethics, standards,

INTRODUCTION

Corporate sustainability is understood as long term goals. Sustainability can only be achieved if corporate governance practices are followed in appropriate and proper manner. It is the ability of the companies to influence economic , social and environmental development through the governance and market practices. Big and top companies believe that focusing on sustainability is a method to earn profits and win customer loyalty.[i] In the 21st century corporate structure , the external stakeholder includes shareholders, debt holders, trade creditors, suppliers, consumers and communities affected by the business activities while the internal stakeholders are the directors, executives and other stakeholders. The most important parties involved in corporate governance include government agencies and authorities, stock exchanges, management (the board of directors , the Chief Executive Officer or the equivalent, other executives and line management, shareholders and auditors). Other influential stakeholders may include lenders, suppliers, employees, creditors, customers and the community at large. A board of directors is expected to play a key role in corporate governance. The board has the major responsibility of initiating the organization's strategy, ensuring transparency and accountability of the company developing directional policy, appointing, supervising and remunerating senior executives, and to its investors and authorities. The board of directors has primary duty towards the company external financial reporting functions. The Chief Executive Officer and Chief Financial Officer are crucial participants and boards usually have a high degree of reliance on them for the integrity and supply of accounting information. They verify the internal accounting systems, and are dependent on the company's accountants and internal auditors. A standard of conduct is considered as appropriate to a professional is often dignified by reference to behaviour in accordance with professional ethics.

Professional misconduct is a behaviour where the professionals are expected to behave as per the standards and code of conduct prescribed. [ii]

The Indian Corporate Governance framework is in compliance with the OECD Principles .These principles of corporate governance Under OECD are as follows :

1. Ensuring the basis for an effective corporate governance framework;
2. The rights of shareholders and key ownership functions to be protected and facilitated
3. Equitable treatment of shareholders;
4. Stakeholders role needs to be recognized;
5. Disclosure and Transparency by the independent directors or by the Company
6. The responsibility of the board-monitoring management and accountability to shareholders.[iii]

Serious corporate misconduct, as defined for the purposes of this report and the OECD Survey on Business Integrity and Corporate Governance. It relates to corporate conduct, whether directly or through business relationships which will include in the supply chain, that violates national or international laws and regulations, including and also includes anti-trust/competition, bribery of foreign public officials, private sector bribery, cybercrime, data protection and privacy, environment, fraud, human rights, industrial relations and labour, intellectual property, money-laundering, terrorism and proliferation-financing, product/service safety, sanctions and export controls, securities and finance, sustainability, tax and workplace safety.[iv]To maintain the sustainability of the company, the company has to adhere the Corporate Governance standards majorly focusing on the professional misconduct or corporate misconduct or misconduct by corporation or companies.

The criminal domain was viewed as an instrument fundamentally designed to deal with human deviance , as a result of which various modes of thinking and patterns of behaviour existed . Since , 40 years an American jurist said on the concept of Corporate Criminal liability “nobody bred it , nobody cultivated it , nobody planted it . It just grew”. The principles of corporate liability emerge from complex matrix of statute and common law doctrines. The liability of the company is founded on the concept of vicarious liability which is based on the maxim respondeat superior. This principle demonstrates the responsibility of the company for the acts and omission done by the employee of the company. In other word we can interpret as when any employee on behalf of the company does any unfair practices , misconduct, irregularities – the internal and external parties to the company as explained above will be liable .[v]

Professional crimes or professional misconduct by the companies are not a new concept. In old times , professional crimes are prevalent in various forms like fraud, cheating, ,misappropriation , false weight and measures and they are considered as an act of severe punishment . Dishonest and unscrupulous practices in the profession are treated as crimes which are equivalent to theft. Corporate sustainability depends upon following Corporate Governance standards and practices. The main reason why till dates most of the corporate scams comes into is due to the misconduct done by the employees of the company. And professional misconduct plays a vital role in the Corporate Governance system and Corporate Sustainability. Professional Misconduct can be held by directors, shareholders, promoters, and other employees of the company.

The existence of such behaviours places the businesses at continued risk of illegal conduct, which could lead to subsequent enforcement action and reduces the longevity of a company . Regulators are focusing particularly on financial fraud, including the manipulation of books and records by the stakeholders of the company . Transparency and Accountability are the important functions where the professional misconduct happens. The interesting story of economic growth, however, also has its dark side. Like other jurisdictions, India is no stranger to corporate scams and Corporate frauds. The reason behind the same is significant cultural differences in how Indian companies function vis-à-vis their international counterparts. Indian companies are often seen to be less professional. Though the scenario may be changing, the "family business" outlook of many Indian enterprises and an occasionally lackadaisical approach to various compliance and disclosure requirements continue to prevail. Be it Satyam Scandal, Kingfisher Scam , PNB Scam, Sahara Scam numerous instances of management irregularities and non compliance standards come into limelight. The Companies Act ,2013 provides statutory recognition to the duties of a director such as exercise of due and reasonable care, skill, diligence, and independent judgment.

One of the key concepts of the Companies Act is the meaning of the term "**officer who is in default.**" Under the act, liability for default by a company has been imposed on an officer who is in default. By virtue of their positions in the company - the managing director, the whole-time director, and the company secretary directly fall within the scope of this term. Under the

1956 Act, certain crucial employees such as the chief executive officer and chief financial officer did not directly come within the ambit of the term. These officers raised serious concerns on the transparency and accountability of the company . The 2013 Act extended the scope of the definition of the term “officer in default” . the 2013 Act also specifically defines “fraud” and states that a person who is guilty of fraud may be punished with imprisonment for up to 10 years, and where fraud involves the public interest, the minimum sentence prescribed is 03 years. Section 447 of Companies Act,2013 defines fraud. This provision provides any act or abuse of position committed with an intent to deceive , to gain undue advantage from or to injure the interest of a person , company, creditors . Impliedly , it all includes under professional misconduct . Any irregularities or dishonest activities done on behalf of the company by any participants of the company in the course of their professional tenure is liable for professional misconduct and the same lead to corporate sustainability. One of the landmark scam of 21st century is the Satyam Scam, the alleged confession by Ramalinga Raju, then the chairman cum founder of Satyam Computer Services Ltd., regarding the financial irregularities and accounting fraud in excess of one billion dollars led to a number of prosecutions. In the scam many employees of the company who manages the day to day affairs of the company were involves in the scam for showing inflated books of accounts, non disclosure of actual financial records, fake invoices, fake bank accounts , etc. Since then, independent directors have been accused in several similar cases and have faced a severe backlash given their failure to detect the fraud. Professional misconduct in a company plays a vital role in the sustainability of a company. In order to achieve long term goals , a company is required to adhere to the Corporate Governance standards. A company well being lies with the participants of the company .[vi] Though most of the corporate crimes are considered crimes in India but majority of the cases were handled by administrative tribunal, commissions, and boards. The offender of the crime has been awarded with civil penalties and the offender has no fear of going to police custody. As a result of which they commit crimes in the nomenclature of professional misconduct without any fear of stigma and loss of reputation in the society.[vii]The methods adapted by the corporate in doing professional misconduct is through managing the affairs of the company and manipulation in the financial statements like overstating the revenue of the company, understating the expenses and liabilities, inadequate disclosure, non disclosure of poor financial health, fudging of heads of accounts in the balance sheet.

Financial statement fraud is a serious threat to the users confidence in published audited financial statements. The capital market expects vigilant and active corporate governance to be ensured to maintain integrity, transparency and quality of financial information.

CORPORATE DEVIANCE AND LEVEL OF ANALYSIS

Business Crime is a loaded term which will excite titillating images of exotic, conspiratorial intrigues, laundered money , lavish entertainment , dramatic suicides and unfathomable dealing in financial circles. The origin of those practices needs getting down to the daily reality of managers and the dilemmas they face in the modern corporations. Work, culture and organisation shape the experience of the managers and other stakeholders of the company. Kanter remarked "Behaviour in organisations can only be fully understood when there is adequate appreciation of the self perpetuating cycles and inescapable dilemmas posed by the contingencies of social life". Corporate deviance involves touching on society , inter organisational relations , legal system , ethics, politics, the media , culture , work, identity and change over time .When the interest of powerful corporate institutions, regulatory agencies , government and concerned groups such as consumers and the media clash , then the ensuing struggles may be bitter, prolonged and difficult to resolve. Analysis is necessarily multilayered, wide ranging and definitely open for multiple interpretations.

Revelation of deviancy in corporations is concerned with wide spectrum of activities, genuine accidents, unavoidable accidents and human errors. But when it comes to persistent and deliberate deviance which damages the assets of the corporation and creates victims then we should not believe the cunning, ruthless and deviousness of managers. And those competent, respectable, established executives and eminent members of the business community who violates the rules ostensibly in the interest of the company.[viii] A corporate scandal is depleting confidence among shareholders and investors. The Satyam fraud has taken the World by surprise. The company had made distinction of being the first IT Company enlisted in NASDAQ. But the magnitude of the financial fraud as well as clandestine efforts in portraying misleading and overrated financial accounts and statements of the company was alarming in nature. It is astonishing to note that many high profile directors and senior executives of the company were the brains behind the fraud.[ix]

In the early 2000s, India was rocked by many financial scandals. The Sarbanes –Oxley reforms were introduced which transformed the auditing and financial reporting requirements. Sarbanes – Oxley has a major impact on the Corporate Governance standards, Corporate reporting and implementation of internal controls. Corporate misconduct can be considered as a failure of corporate governance standards. Corporate misconduct may be a continuing process which begins at the top of the organization and the same needs to be consistently carried out through all the stakeholders of the Company.[x]

In India, Naresh Chandra Committee (2002) has made recommendation relating to definition of Independent Director and for the establishment of Corporate Serious Frauds Office in order to establish proper relationship between the company and statutory auditors. In consonance with these recommendations, the Government has set up a Serious Frauds Investigation Office (SFIO) in the Ministry of Company Affairs. It is a multi-disciplinary unit capable of investigating corporate crimes. The SFIO will investigate frauds characterized by

- complexity and having inter-departmental and multi-disciplinary ramifications
- Substantial involvement of public interest in terms of misappropriation and number of persons affected in the offence and
- Possibility of investigations which will result in developed system, laws and procedures.

The SFIO team will only investigate corporate fraud cases. The SFIO will consist of experts in the fields such as accountability, forensic, auditing, taxation, law, IT, capital market etc.

CSR AS ONE FACTOR FOR CORPORATE MISCONDUCT

Corporate Social Responsibility is to be considered as one of the factor which lead to Corporate Misconduct. A string of corporate misconduct and failures, and growing threats from business operations to environmental sustainability, all of which have created a 'trust deficit' between corporations and other stakeholders. [xi] Due to proper and effective non disclosure and improper implementation or failure to implement proper CSR regulation by the professional in the company, the standards to follow proper rules and procedures are not followed by the Corporations. The corporation fails to do the required procedure in order to save money and earned the same in terms of profits. This factor again leads to one type of professional misconduct by the top executives of the company. Ethics is business is nothing new its about what to be done and what not to be done by the Company. And the company don't follow or implement any procedure or standard prescribed by law and the act is done by the stakeholders of the company, we consider the same as professional misconduct or business misconduct by the company. Through avoiding Corporate Social Responsibility would mean endangering business success in the global world and its market. Corporate Social Responsibility and responsibility towards environment are themselves large and important matters for any company today. A company can only grow when certain societal standards are fulfilled in terms of employment, revenue generation ,growth and sustainability. Violation of any prescribed laws and statutes may lead to Corporate sustainability in long run. And it may affect the Indian economy may be impliedly or directly.[xii]

MISCONDUCT UNDER COMPANIES ACT, 2013

Section 132 of the Companies Act, 2013 provides the Central Government to introduce a new regulatory authority named as **National Authority for Financial Reporting** known as National Financial Reporting Authority (NFRA) with wide powers to recommend, enforce and monitor the compliance of accounting and auditing standards. The Companies Act, 1956 empowers the Central Government to form a Committee for recommendations on Accounting Standards which is National Advisory Committee on Accounting Standards (NACAS). This is now being renamed with enhanced independent oversight powers and authority as **National Financial Reporting Authority (NFRA)**. NFRA shall be responsible for monitoring and enforcing compliance of auditing and accounting standards and for that purpose, oversee the quality of professions associated with ensuring such compliances. The Authority shall investigate professional and other misconducts which may be committed by Chartered Accountancy members and firms. There is also a provision for appellate authority.

The National Financial Reporting Authority shall be a quasi – judicial body to regulate matters related to accounting and auditing. With increasing demand of non – financial reporting, it may be referred to as a National level business Reporting Authority to regulate standards of all kind of reporting- financial as well as non – financial, by the companies in future. National Financial Reporting Authority shall give its recommendations on accounting standards and auditing standards. It shall only recommend and it is the Central Government who shall prescribe such standards.

The National Financial Reporting Authority shall have jurisdiction over bodies corporate and persons for matters of professional and other misconduct committed, by any member or firm of Chartered Accountants registered under the Chartered Accountants Act, 1949. No other institute or body (including professional institutes) shall initiate or continue any proceeding in such matters of misconduct where the authority has 254 EP-CL initiated an investigation under this section.

The Authority shall have powers as are vested in a civil court under Code of Civil Procedure in respect of following matters such as Discovery and production of books of accounts and other documents ,Summoning and enforcing the attendance of persons and examining them on oath, Inspection of any books, registers and other documents of any person and lastly issuing commission for examination of witness or other related documents.

INDIA WHISTLE BLOWER POLICY

A whistleblower is a person who publicly complains about any concealed misconduct on the part of any organization or a body of people, usually from within that same organisation. The misconduct may be classified into many ways like a violation of a law, rule, regulation and/or a direct threat to the public interest, such as fraud, health/ safety violations, and corruption. Whistleblowers usually face retaliation - sometimes at the hands of the organisation or the group which they have accused, unless a system is in place that would ensure confidentiality. Employees are more likely to take action with respect to unacceptable behavior within an organization, if there are complaint systems which will ensure confidentiality and indemnity. It is in this context whistleblowers are often protected under law from employer’s retaliation. In India, Clause 49 of the equity Listing agreement provides as Whistle Blower policy which directs the company to establish a vigil mechanism for directors and employees for complaint for unethical behaviour and professional misconduct.

CASES INVOLVING PROFESSIONAL MISCONDUCT

In India , there are cases where the companies have failed to adhere Corporate Governance standards and which lead to Corporate fraud.

Satyam Scandal

One of the famous professional misconduct held by a company was in the case of Satyam Scam involving about Rs 7,000 crore by fudging the book of accounts of the company and later admitting the manipulation are inflated highly. The fraud that was committed was not happened overnight . It was planned continuously for years . Besides the Chairman the auditors, financial officier and some other employees holding key position in the company were also involved in the manipulation of the financial accounts. As per the report submitted by Central Bureau of Investigation , the blatant deviations done by the auditors (PWC) showed that the manipulation was conspired between many key professional employees of the company including the founder of the company. And the genuineness of the financial statement of the company was affected and so also it affected the trust , believe and money of the investors and shareholders. The following factors contributed to the scams were greed for money, deceptive corporate reporting practices , lack of transparency, executive incentives, nature of accounting rules , ESOPs issued to the the person who prepared fake bills and invoice. The Satyam Computer scandal brought to light the importance of business ethics or corporate ethics and its relevance to Corporate culture. The scam has been the biggest example of failure to comply the corporate governance standards and mis-management of company affairs.

Bank of Baroda Scam

Another case is of Bank of Baroda in the year 2015. This case is of money laundering where the amount involved of Rs 6,172 crore. The money was illegally remitted to foreign countries like Hong Kong and the UAE and the bank official were involved in the scam . The owners of the company in connivance with the bank officials created fraudulent trade circuit where the exporters claimed the duty drawback on inflated exports bills on non existed imports. In order to make payments against the exports , the amount was deposited into 59 bank accounts of Bank of Baroda. The transaction was happened in the new branch of Bank of Baroda and which had permission to accept forex transaction only for the year 2013. Within a year the transaction of the branch shot upto Rs 21,529 Crore. The main branch officials intimated the government investigative agencies to investigate the matter and it was found by CBI and Enforcement Directorate that Rs 6000 crore amount was misappropriated by the Bank officials. After investigation the bank officials admitted that they helped the accused in remitting a part of over Rs 6,000 crore through Bank of Baroda on the commission of 30:50 paisa per dollar sent abroad through banking channels. This is case of gross professional misconduct for not adhering to the banking regulation as prescribed by the Government.

The major reason for corporate governance failure is the professional misconduct in the companies. And due to professional misconduct all allied activities and transactions of the company get affected. Accounting fraud includes forgery, falsification of accounts, professional misconduct including failure to disclose a material fact which is not disclosed in a financial statement, and failure to report a material misstatement which is to appear in a financial statement. Under the Companies Act 2013, the Central Government is empowered to inspect the books of accounts of a company, direct special audits, order investigations and launch prosecutions which has already existed in the CompaniesAct,1956. The Indian Penal Code provides punishment for forgery and falsification of accounts.[xiii]

A robust control environment is now an urgent requirement to reduce the risk on account of Corporate fraud and misconduct within companies and their dynamic business environment. Corporates should be more stringent in regard to their code of conduct and ethics and should make the rules and principles more simpler and convenient. [xiv] Corporate misconduct usually involves several factors either in active or in passive way. It reflects the values, approaches, and principles that define an organization’s operating culture. Hence, ethics has everything to do with management, and the organization/ Corporation is also responsible for an individual’s wrong-doing as the individual himself. Organizations that fail to establish robust systems that will help to facilitate ethical conduct .Undoubtedly , the onus to create a culture that promotes ethical behaviour lies squarely with the top management of an organization. And in most of the scams we see , the top management executives are mostly involved in the offence in manipulating accounts, showing inflated transactions , forgery and cheating in the company matters. [xv]

SUGGESTIONS AND CONCLUSION

India has enough and sufficient laws to maintain integrity and sustainability of the company. But implementation of the rules and regulation in proper manner is a difficult task by the companies or corporations. Sustainable approach to Corporate Governance can be a source of competitive advantage and long term factor. Sustainable governance in the company requires the internal managers of the company like Board of Directors should consider economic, social and environmental utilization in an appropriate manner and at the same time comply with the Corporate Governance standards. Professionalism is an integral part of business . A company sustains for a longer term when proper implementation of law and procedures are followed and proper disclosure is made to the public at large. After the enactment of the new Companies Act,2013 many new provisions were added to regulate proper code of conduct in the business or companies. As rightly said by great philosopher and economist , " If people of one's own side have good conduct , it add power to oneself . The misconduct on the contrary renders one powerless. The enemy takes advantage of it . A skilled statesman never allow enemy to will over". The quotation pointed out that it all depends upon the person who manages the day to day affairs of the company to be more vigilant and responsible. A skilled professional will never do any thing in violation to company rules and practice. As a company operates through the Board of Directors and other employees , all the company activities as whole depends on the way the managerial persons manifest it. Corporate Ethic is a complex interplay of three types of dimensions. The foremost dimension is towards the legal norms, societal atmosphere and the mandates. The second dimensions is the companies implicit and explicit code of conduct and thirdly the individual employee values towards the company.

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