Overcoming the Tyranny of Non-Interference: A Critique View with Reference to Various Cases

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***Abstract*—"Of all tyrannies a country can suffer the worst is the tyranny of the majority"- William Inge**

The Act came into force on 12 September 2013 and altered and reshaped the spectrum of the contemporary company law regime entirely. It also filled the several cavities that bedevilled the Companies Act, 1956. Akin to most democracies, the corporate world is also subject to the majority rule. However, this shareholder democracy becomes a curse when it gets transformed into majority tyranny. Many a times, the views and interests of the minority shareholders are overlooked owing to the majority-influenced decision making. This paves way for the suppression of the minority and the "squeezing out" of the minority from the decision-making process and, ultimately, from the company. The Companies Act, 2013 can be perceived as a turning point in the majority-minority strife. A detailed evaluation of the provisions of the Act elucidates that the legislative intent behind this enactment is to safeguard the minority interests thoroughly and exhaustively. These provisions have given rise to the "minority rule" that overcomes the historical tyranny of the "majority rule" and the "principle of non-interference". This research paper cruises through various statutory provisions and judicial pronouncements and finally culminates in the conclusive analysis of how the introduction of minority rule is a promising move in the direction of establishing a corporate governance framework that guarantees equal and fair treatment of all the shareholders.

***Keywords*— Company Act, Majority Rule, Minority Interest, Shareholders, Principle of non-interference.**

I. Introduction

The paradigm of 'unity in diversity' perfectly applies to the Indian democracy. In the context of democracy, the words of Mr. Mani Shankar Aiyar, an Indian politician, assumes a lot of significance- "democracy is only a necessary condition of good governance; it is not a sufficient condition of good governance. But if you don't have democracy you cannot have good governance" (Talib & Raza 2015-16, 30-31). The same paradigm also fits in the case of companies because most of the resolutions in a company reach finality after being passed by the majority shareholders and therefore, it is an institution that follows a democratic process in most of its operations. However, due to excessive centralisation of control in the hands of the majority shareholders, the minority shareholders suffer in terms of oppression and mismanagement or getting "squeezed out"/ "freezed out" (Bhasin 2011, 21). The minority shareholders of a private company or a close corporation end up in an especially disadvantageous and vulnerable position as they do not possess an exit option through which they can sell their securities in the open market in case they are discontented with the functioning and management of the company (Bhasin 2011, 21).

Under the rule of majority, once a resolution is passed either by a simple or a special majority, it has a binding effect on all the members. As an ensuant outcome of the "principle of non-intervention", courts do not normally intervene in the internal affairs of the company to protect the minority interest. However, under the Companies Act, 2013 [hereinafter, "the Act"], there are exceptions to the majority rule and the principle of non-intervention. Prevention of oppression and mismanagement is one such important exception and is dealt under Chapter VI of the Act. The Act bestows upon the minority shareholders the protection of their rights. Natural justice as well as various jurisprudential theories, including the Poundian theory, require that a company should not prejudice the rights of the minority. The corporate governance framework must safeguard minority rights and bring about a balance between minority and majority interests (Sahu 2015, 2).

II. Research Methodology And Limitations

A. Research Problem

This research paper cruises through various statutory provisions and judicial pronouncements and finally culminates in the conclusive analysis of how the introduction of minority rule is a promising move in the direction of establishing a corporate governance framework that guarantees equal and fair treatment of all the shareholders.

B. Collection Of Data

Several research journals including research papers and articles have been referred by the researcher. Additionally, various reports, websites and books have been referred during the study. The data collected is mainly secondary in nature.

The research is broadly classified into two parts. The first part delves into the analysis and discussion regarding the various statutory provisions and judicial pronouncements regarding the rule of minorities. The second and last part culminates in the conclusive analysis of how the minority rule is a promising move in the direction of establishing a corporate governance framework that guarantees equal and fair treatment of all the shareholders.

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C. Objectives Of The Study

The foremost objective of this study is to introduce the minority rule is a promising move in the direction of establishing a corporate governance framework that guarantees equal and fair treatment of all the shareholders

The undermentioned objectives are also carried out:

- To understand judicial construction of the term "oppression
- To determine the judicial approach towards protecting minority interest.
- To identify the alternatives approaches.
- To analyze the role of judiciary to protect minority interest.

D. Limitations

- The study is based mainly on secondary data as the researcher did not have sufficient access to primary data.

E. Research Question

- What was the traditional approach for measuring minority interest?
- What are the drawbacks of the judicial approach?
- What are the alternatives to the traditional approach?
- How can jeopardize the minority interest involved and the entire foundation of modern corporate governance.

III. Minority Shareholders And Their Rights

A. Understanding the term 'Minority'

The term 'minority shareholder' is not defined anywhere under the Act. What can be culled out from a literal understanding of the term is that minority shareholders are those shareholders who possess lesser number of shares than the controlling or majority shareholders (Cambridge Dictionary). Although 'minority interest' or 'minority shareholder' is not defined under any law, the Act reflects the minority interest by stipulating a criteria of "not less than 100 members" or "not less than one tenth of the total number of its members", whichever is less, or "holding not less than one tenth of the issued share capital of the company", in case of companies having share capital and a criteria of "not less than one-fifth of the total number of its members" in case of other companies not having share capital (§ 244, The Act).

B. Rights of Minority Shareholders

The Act of 1956 was enacted by the Bhabha Committee and similarly, the Act came into being on the recommendations of the J.J. Irani Committee. The J.J. Irani Committee had delved into the idea of protection of the rights of minority shareholders in 2005 and had introduced it as a concept on 31 May 2005. The Act provides numerous rights to the minority shareholders for the protection of their interests in their companies. The Act of 2013 is a sizeable and substantial improvement over the Act of 1956. It effectively tackles the critical situations wherein the majority shareholders takeover the control of the company and indulge in abuse of their powers. The new Act has not only bestowed upon the minority shareholders a blanket protection against the abuse exercised by the majority but has also introduced new provisions that confer upon the minority shareholders various benefits that were absent in the Act of 1956.

1. Protection against Oppression and Mismanagement- Chapter XVI of the Act

Sections 241 to 246 of the Act lay down the framework for extending protection against oppression and mismanagement to the minority shareholders (Pandey 2017). The term "oppression" has not been defined anywhere in the Act and the judicial interpretation and construction with respect to this term will be discussed in the next section of the paper. The grounds for filing an application against oppression and mismanagement can be found under Section 241 of the Act. Any member of a company who has the legitimate right to apply under Section 244 of the Act can apply to Tribunal if any of the following conditions are met:

(a) The affairs of the company have been or are being conducted in a manner prejudicial to public interest (§ 241(1)(a), The Act).

(b) The affairs of the company have been or are being conducted in a manner prejudicial or oppressive to the complainant or any other member or members (§ 241(1)(a), The Act).

(c) The affairs of the company have been or are being conducted in a manner prejudicial to the interests of the company (§ 241(1)(a), The Act).

(d) A material change (that is not a change brought about by or for the benefit of any creditors/debenture holders or any class of shareholders) has taken place in the management or control of the company in any manner and as a consequence of such change, it is possible that the corporate affairs will be carried out in a manner that is prejudicial to the interests of the company, its members or any class of members (§ 241(1)(b), The Act).

The Central Government can also apply to the National Company Law Tribunal [hereinafter. "the Tribunal"]. Subsection 2 of Section 241 provides that if the Central Government forms an opinion that the company affairs are being carried out in a manner that is prejudicial to public interest, it can itself apply to the Tribunal for an order (Section 241(2), The Act). The Central Government can apply to the Tribunal in the following cases:

(a) Found guilty of fraud

(b) Misfeasance: Wrongful exercise of power, misapplication or misappropriation of money or other property of the company.

(c) Persistent negligence and default in conducting the affairs of the company.

(d) Affairs of the company are being conducted not in accordance with sound business principles.

(e) Negative effect on the interests of business or creditors, etc.

The affected shareholders can approach the Tribunal to obtain proper relief in case of oppression and mismanagement

under Section 244(1) which extends the right to apply to the Tribunal to the members with a prescribed minority limit (as elaborated upon earlier- footnote no. 9) (Pandey 2017). Similar was the limit under the Act of 1956. However, the Act of 2013 provides certain discretionary powers to the Tribunal in this regard. These discretionary powers are prescribed under the proviso to Section 244 which provides that the members, who do not fit into the aforesaid criteria, can make an application to the Tribunal and the Tribunal has the power to waive all or any of the requirements that are specified under clauses (a) and (b) so as to enable them to apply under section 241. A waiver, pursuant to this proviso, was given in the case of Anup Kumar Agarwal v. Crystal Thermotech Ltd., wherein the petition of the applicant was allowed despite the shareholding being below 1/10th of the total shareholding.

2. Right to file a Class Action Suit

Section 245 of the Act encompasses the new concept of class action. This concept was absent in the Act of 1956. According to Section 245 of the Act, a certain number of members or depositors or any class of them can file an application before the Tribunal if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors. Section 245 is a comprehensive provision that comprises ten sub-clauses that detail down the procedure as well as the reliefs which can be sought. A combined reading of sub-section 3 of Section 245 and the NCLT Rules, 2016 (after the amendment that took place on 8 May 2019) provide the threshold limits for filing such class action suits-

	No. of Required Members/ Depositors	**Percentage of total Members/ Depositors**	**Percentage of shareholding/deposits owned**
	Whichever is less.		
Members (In the case of a company having a share capital)	100	5%	In the case of a listed company – 2% In the case of an unlisted company – 5%
Depositors	100	5%	5%

A class action suit can be filed against the company and its director or directors, auditors, the audit firm, experts, advisors, or consultants. This particular fact draws a line of distinction between Section 241 and Section 245. Section 245 thereby, circumvents the principle of "privity of contract" by permitting members or depositors to initiate action against third parties on account of any fraudulent conduct on their part (Tantravahi 2019). This particular distinction was also laid down in a National Company Law Appellate Tribunal [hereinafter, "NCLAT"] order wherein it was observed that while an application under Section 244 can be filed only against the company, board of directors, shareholders or its members, under section 245, an application can be filed against the statutory auditors and/ or advisors as well (Shanta Prasad Chakravarty & Ors. v. M/s. Bochapathar Tea Estate Private Limited & Ors).

The NCLAT has emphasized that in a class action suit, before assessing whether a particular conduct is prejudicial to the interests of members or depositors or a class of them, courts must first examine whether the minimum threshold as prescribed under Section 245 is met (Cyrus Investments Private Limited & Anr. v. TATA Sons Limited & Ors.). It has also been acknowledged by the NCLAT that "issued share capital" under Section 245 includes both equity and preference share capital and means "issued and subscribed share capital" (Id.). Courts and tribunals have elaborated upon the provision of Section 245; however, class action suits rarely get initiated under the Act.

3. Protection against "Squeezing Out"

3.1 Reduction of Share Capital (Section 66)

A company is allowed to undertake reduction of share capital, subject to the condition that it is approved by the shareholders by passing a special resolution and upon confirmation by the NCLT on an application by the company. Many a times, this particular provision of the Act is used by the majority shareholders as an instrument to squeeze out the shareholding of the minority shareholders by the way of cancelling their shares and subsequently, altering the memorandum of association of the company (Parikh & Toshniwala 2020) It is a common method opted by the majority shareholders or promoters to oust the non-promoter minority (Chetan G. Cholera v. Rockwool (India) Ltd.). As per the stipulation of Section 66, the Tribunal sanctions an application for reduction of share capital only if, among other things, the company has not defaulted in repaying any of the deposits accepted by it or any interest payable on the deposits. Such a reduction is approved only once the Tribunal is satisfied it is just and reasonable and, on such terms and conditions as it may deem fit.

The minority shareholders have the right to challenge the procedure of selective reduction of capital, however, one can

observe a judicial trend of upholding such a reduction of capital. The Bombay High Court, in the case of Cadbury India Ltd. v. Samant Group, had held that in order to ascertain that a selective reduction of share capital is just and equitable, courts examine the reason behind the selective reduction, determine if the reason is bona fide, ensure that the scheme is not against "public interest", and see to it that a fair valuation of shares has taken place.

As long as the intention behind the selective reduction of capital is just and reasonable and a fair value is being paid to the minority shareholders for their shares, the scheme for such a capital reduction is typically approved by the Tribunal (Parikh & Toshniwala 2020, Sandvik Asia Limited v. Bharat Kumar Padamsi & Ors.).

Support and cooperation of the company is needed if the majority shareholders intend to squeeze out the minority shareholders (Id.). As per the provision of Section 66, the onus is placed on the company proposing the squeeze out to to prove that the scheme of capital reduction is fair, just, and reasonable.

3.2 Scheme of Arrangement (Sections 230-234)

There exist There exist concerns regarding certain schemes of reconstruction, mergers, amalgamations, etc. that put the interests of the minority shareholders in jeopardy. To address this issue, the Act affords protection to the minority interests through various provisions that fall under Chapter XV of the Act. Before approving a scheme of merger or amalgamation, a notice inviting objections or suggestions is issued by the transferor and the transferee companies to the Registrar, Official Liquidators and persons affected by the scheme (§ 233(1)(a), The Act). If any objection or suggestion is raised by the Registrar or Official Liquidator, the same is communicated in writing to the Central Government within a period of thirty days (§ 233(4), The Act). After receiving the objections or suggestions or for any other reason, if the Central Government opines that the scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal stating its objections and requesting the reconsideration of the scheme under Section 232 by the Tribunal (§ 233(5), The Act). NCLAT had propounded that a scheme of arrangement can be rejected if it is not in "public interest" (Wiki Kids Ltd and Anr. v. Regional Director and Ors.; Gabs Investments Pvt. Limited v. Ajanta Pharma Limited).

3.3 Acquisition of Minority Shareholding (Section 235)

Section 235, that corresponds to Section 395 of the Act of 1956, lays down that any scheme of transfer of shares or any class of shares must be approved by at least 9/10th the number of holders of the shares whose transfer is involved, within four months of making the offer by the transferee company. It further provides that the transferee company may, at any time within two months after the expiry of the said four months, give notice regarding its desire to acquire the shares to any dissenting shareholder.

3.4 Purchase of Minority Shareholding (Section 236)

Section 236 provides that in case an acquirer, or a person acting in concert with such acquirer, becomes a registered holder of 90% or more of the issued equity share capital, or in case any person or group of persons assume 90% majority or hold 90% of the issued equity share capital, by virtue of a scheme of amalgamation, conversion of securities, share exchange, or for any other reason, it is mandatory for such acquirer, person or group of persons to notify the company of their intention of buying the remaining equity shares. It further provides that in order to purchase the equity shares of the minority shareholders, the acquirer, person or group of persons shall offer such a price to them that is determined on the basis of valuation by a registered valuer in accordance with the prescribed rules. It also provides that the minority shareholders of the company can themselves make an offer to the majority shareholders to purchase their shareholding at a price determined according to the rules prescribed under Section 236(2). For the purpose of making payments to the minority shareholders, the transferor company must act as a transfer agent.

4. Approval by the Majority of the Minority

As per the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015 [Last Amended On April 17, 2020], all material related party transactions shall be approved by the shareholders through a resolution and no related party is allowed to vote for the approval of such resolutions whether the said entity is a related party to the particular transaction in question or not (SEBI LODR Regulations 2015). This essentially means that in order to ensure that the business decisions taken by the majority shareholders or promoters do not put the interests of the small shareholders, all material related party transactions, with certain exemptions, have to be approved by a majority of minority shareholders (Laskar 2014)

5. Other Rights

- Right to Vote (§ 47 of the Act)
- Maintenance of Transparency and the Right to be Informed through Accurate Disclosures
- Variation of Shareholders' Rights (§ 48 of the Act)
- Right of Small Shareholders to Appoint a Director (§ 151 of the Act)
- Principle of Proportional Representation (§ 163 of the Act)
- Right to Obtain Information

IV. Judicial Construction Of The Term "Oppression"

The term 'oppression' has not been defined anywhere in the Act. It has to be understood through judicial pronouncements. It was held in the Scottish case of Elder v. Elder & Watson Ltd. that the member who complains about oppression must show that he has suffered oppression in not any other capacity but in his capacity as a member. Lord Cooper explained the essential meaning of the term 'oppression' in the following words:

"The essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure

from the standard of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrust his money to the company is entitled to rely."

Therefore, what can be understood is that there is a standard laid down that is visibly departed from or there is violation of fair play. The ratio laid down in the case of Elder v. Elder & Watson Ltd. was reiterated in the Indian case of Shanti Prasad Jain v. Kalinga Tubes.

Countermanding or countervailing decisions of the board by those who have control over majority voting power with the ulterior motive of retaining control over the company and not allowing the board to perform its functions amounts to oppression (In re H. R. Harmer Ltd.; Kumar Exporters P. Ltd. and Ors. v. Naini Oxygen and Acetylene Gas). Not calling a general meeting or a board meeting and keeping the shareholders in the dark amounts to oppressive conduct (In Re: Hindustan Co-Operative Insurance Society Ltd.). Not maintaining proper statutory records and conducting affairs of the company in violation of the provision of the Companies Act may amount to oppression (Bajirao G. Ghatke and Others v. Bombay Docking Co. Pvt. Ltd.).

It was held in the case of Mohanlal Chandu Mal v. Punjab Co. Ltd. that an attempt to deprive a member of his ordinary membership rights, such as depriving a member of his right to dividend, right to vote, right to call meetings, etc. may amount to oppression.

However, it must be fathomed that not every case of non-payment of dividend will amount to oppression and mismanagement. The company should have declared the dividend and there must be an apparent or a grave departure on part of the company as a result of which dividends are not paid.

The Punjab Haryana High Court had held in unequivocal terms that transfer of shares to a selective section of shareholders in a clandestine manner, that is to say otherwise than by making an offer to all is a case of oppression (Col. Kuldip Singh Dhillon And Ors. v. Paragaon Utility Financiers Pvt. Ltd.). Further, in another case it was held that the issue and allotment of shares by the directors of a company in a manner by which the existing majority shareholders are reduced to a minority and the existing balance of power in the company is disturbed amounts to oppression unless it is proved beyond reasonable doubt that such an allotment was inevitable and absolutely unavoidable and was resorted to as an extremely urgent measure with an object of pivotal importance, such as saving the existence of the company (In Re: Gluco Series Pvt. Ltd.).

It was held in the case of Ramashankar Prosad and Ors. v. Sindri Iron Foundry (P) Ltd. that the majority shareholders can also claim relief under the provisions of oppression and mismanagement. In another case the Madras High Court opined that when both the group are equally strong, there may arise a situation of deadlock, however it will not be a case of oppression (C.P. Gnanasambandam v. Tamilnad Transports).

V. Judicial Approach Towards Protecting Minority Rights

Initially, the majority rule had completely overshadowed the rights of minority shareholders. This was concretised in the case of Foss v. Harbottle by establishing the principle of non-interference, according to which the will of the majority is upheld, and the Courts abstain from interfering in the internal matters of the company. However, as a result of increasing concerns regarding majority tyranny and to ensure equality amongst all shareholders, certain exceptions to the majority rule were recognized under common law-

(a) When the alleged act is ultra vires or illegal.

(b) Fraud on minority or acts done at the expense of the minority by the majority (Menier v. Hooper's Telegraph Works Ltd; Estmanco (Kilner House) Ltd. v. Greater London Council).

(c) When the act or resolution in question requires special majority but is sanctioned by simple majority (Edwards v. Halliwell).

(d) When the alleged act has resulted in invasion of the personal and individual rights of the claimant in his capacity as a member (N.V.R. Nagappa Chettiar and Anr. v. The Madras Race Club).

(e) When the wrongdoer is in control of the company (Birch v. Sullivan).

The rights of the minority shareholders as discussed in the previous section have thrived in the form of exceptions to the principle of non-interference. The Indian Judicial System has strived to maintain a balanced view so as to safeguard the minority interest (Talib & Raza 2015, 38).

While maintaining a balanced view, it must also be ensured that minority activism does not take away the essential democratic rights of the majority shareholders (Talib & Raza 2015, 39). The Court had clarified in the case of Shanti Prasad Jain v. Kalinga Tubes Ltd. that a claim of oppression and mismanagement is maintainable only if there exist potent facts to support the claim. The Courts also ensure that where the scheme passed by a company is just, fair, and equitable and no minority interest is jeopardized then any individual personal interest of minority shareholders is of no concern unless it affects the interest of a class of equity shareholders (Talib & Raza 2015, 40).

VI. Conclusion

There has a been a massive legislative as well as jurisprudential development in the area of protection of minority rights and it is safe to conclude that the introduction of rule of minority to mitigate the principle of non-intervention is a welcome move in the direction of effective corporate governance. There are judicial precedents which ensure that the rule of minority does not become detrimental to the interests of the company or the majority shareholders including the case of Shanti Prasad Jain v. Kalinga Tubes Ltd. However, despite this development, even today it is mainly the majority shareholders who have a final say in decision making, owing to the dominance of corporate democracy. The rights of minority

shareholders are not only protected by statutory instruments but also by the principles of natural justice. One must not apply the Benthamite theory of utilitarianism in this context as it would ensure maximum pleasure of the majority while leaving the minority with the other 'P' that is pain (Talib & Raza 2015). It would be more judicious to employ the Poundian theory of "social engineering" which propagates a societal or legal structure that ensures "the satisfaction of maximum wants with the minimum of friction and waste," which further ensures balancing of interests (Pound 1967).

The end of company law must be to strike a balance between the 'effective control of the company' and the 'minority interest' in order to give a concrete form to the conception of 'of all, for all and by all' alive in the company (Talib & Raza 2015). Through the course of this paper, it is realized that additional efforts need to be made towards the endeavour of minority protection. The enactment of the Act was a major improvement in this area, however several statutory cavities continue to exist that need to be filled via cogent efforts on part of the Legislature. These statutory cavities give rise to ambiguities and uncertainties and eventually, unproductive litigation. There is also a need for the Judiciary and all other adjudicatory bodies to assume greater responsibility and ensure that they do not fall prey to unjust inclinations or biasness which can jeopardize the minority interest involved and the entire foundation of modern corporate governance.

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She has worked across various committees and journals at National Law University, Jodhpur including the Academic Support and Literary Committee, the Corporate Law Society, the Journal of Corporate Law and Governance, the Indian Journal of Arbitration Law, etc. Her certifications and accolades include the Gold Standard of the Duke of Edinburgh's International Award, A+ grade in LawSikho's Certificate Course in Competition Law, Practice and Enforcement, participation at the 27th Willem C. Vis International Commercial Arbitration Moot, Quarter Finalist at the CCI NUJS Moot Court Competition, Kolkata, etc.