INVESCO DEVELOPING MARKETS FUND AND ORS VS ZEE ENTERTAINMENT ENTERPRISES LIMITED AND ORS

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INTRODUCTION

Shareholder activism or shareholder engagement is one way by which the principle of corporate governance can be ingrained in a company. Shareholder activism refers to a set of proactive efforts taken by the shareholders to bring about the desired change in the operations or decisions of a company. There have been several instances in the recent past in India, where shareholders have exercised their influence to attain desired changes in the decisions taken by the management. For example, a class of shareholders had opposed a related party transaction between Raymond Ltd and its promoters, involving the sale of an asset at a significant undervalue[1]. Activism amongst shareholders has been a catalyst in blocking undesired transactions. The current case specifically deals with the right of shareholders to call for an Extraordinary General Meeting **(EGM)** as a part of shareholder activism.

FACTS OF THE CASE

Invesco Developing Markets Fund & OFI Global China Fund LLC **(Appellants)** collectively hold 17.88% of the total paid-up share capital of Zee Entertainment Enterprises Limited **(Respondent No.1)**. On 11.09.2021, the appellants issued a requisition notice to Zee to convene an EGM to remove three non-independent directors of the Company, viz. one Mr. Ashok Kurien, Mr. Manish Chokhani and Mr. Punit Goenka **(Respondent No.2)**. The requisition further sought the appointment of six Independent Directors on the Board of Zee, "*subject to the approval of the Ministry of Information and Broadcasting*". On 13.09.2021, Zee informed the Stock Exchanges that it had received resignation letters from Mr. Chokhani and Mr. Kurien. On 29.09.2021, the Appellants filed a petition under Section 98 (1) read with Section 100 of the Companies Act, 2013 before the National Company Law Tribunal Mumbai Bench **(NCLT)** seeking an order for an EGM to be held and conducted on or before 28.10.2021. On 30.09.2021, NCLT directed Zee to consider the requisition and listed the petition for

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[1] Ganguly S, 'Impetus to Shareholder Activism in India - Invesco v. Zee Case' (*Lexology*, 20 April 2022) <https://www.lexology.com/library/detail.aspx?g=5e5d5741-ad65-4f4e-90ad-ec730f222826> accessed 11 June 2023

hearing on 04.10.2021. On 30.09.2021, Zee's Board concluded that the requisition was invalid/illegal and accordingly, recorded its inability to convene the EGM. On 01.10.2021, Zee filed a suit before the Bombay High Court praying for declaring that the requisition notice issued by the appellants is in contravention of the Companies Act, 2013, Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 **(SEBI LODR)**, Policy Guidelines for Uplinking of TV Channels, 2011 by Ministry of Information and Broadcasting **(MIB Guidelines)**, Articles of Association of Respondent No.1 and to restrain the appellants, their employees, and agents by way of an injunction from taking any further steps towards the realization of requisition. On 26.10.2021, the Ld. A single Judge granted the injunction. Upon an appeal, the Division Bench had set aside all of the Ld. Single Judge's findings[2].

LEGAL ISSUES

1. Whether the shareholders' right to hold an EGM could be curtailed.
2. Whether the validity of the requisition notice can be examined by the High Court.

OBSERVATIONS OF THE DIVISION BENCH (BOMBAY HIGH COURT)

The Bench had first considered Sections 98 & 100 of the Companies Act, 2013. Section 98 empowers a member of a Company to approach the NCLT requesting it to pass an order calling for and holding an EGM. Section 100(4), on the other hand, vests an additional right upon members to proceed to hold the EGM themselves when the Board fails to do so. The question of whether an injunction could be granted on the presumption that the contents of the requisition notice are illegal was also looked into. For this purpose, the Court referred to various case laws. In the case of **Bentley Steven Vs Jones**[3], it was held that a shareholder had a statutory right to move a resolution to remove a Director and that the court was not entitled to grant an injunction restraining him from calling a meeting to consider such a resolution.

DECISION

The Division Bench held that a "*valid requisition*" can be adjudged only by looking at the numerical and procedural compliance and nothing further. For this, the Bench had relied on the

[2] Jadhav MN and Kathawalla SJ, 'Invesco Developing Markets Fund ... vs Zee Entertainment Enterprises ...' (*Indian Kanoon*, 22 March 2022) <https://indiankanoon.org/doc/156438221/> accessed 11 June 2023
[3] *Bentley Stevens V Jones* (1974) 2 653 (All England Reports)

judgment in the case of **Cricket Club of India Ltd. Vs Madhav L. Apte**[4], wherein it was held that: "*The word or the adjective "valid" in Section 169 has no reference to the object of the requisition but rather to the requirements in that section itself. If these requirements indicated in the earlier part of the section are satisfied, then the requisition deposited with the company must be regarded as a valid requisition on which the directors of a company must act*". Given the absolute bar under Section 430 of the Companies Act, the Division Bench held that the Single Judge of the High Court did not have the jurisdiction to grant an injunction restraining Invesco and OFI from calling an EGM.

Ultimately, the Division Bench had concluded that the proposed resolutions contained in the requisition were neither illegal nor incapable of being lawfully implemented and consequently. The appeal as such was accordingly disposed of.

ANALYSIS AND CONCLUSION

As regards the first issue, Section 100 (2) of the Companies Act, 2013 establishes the right of a shareholder to regulate the working of the Company by calling an EGM after submitting a notice of requisition. But, in order to avail the benefit under Section 100 (2), the requisition shall necessarily be made by members who hold 10% of the total paid-up share capital of the company accompanied by a right to vote. Section 100 (4) places discretionary power in favor of the shareholders to call for the requisitioned meeting, in case the Board fails to do so within the prescribed time limit (i.e.); within 21 days from the date of receipt of a valid requisition notice. Section 98 of the Act also empowers a member of a Company to approach the NCLT requesting it to pass an order calling for and holding an EGM. Further, as per Rule 17 (7) of the Companies (Management and Administration) Rules, 2014, where the meeting is not convened, the requisitionists shall have the right to receive the list of members together with their registered address and number of shares held and the company concerned is bound to give the same as on the twenty-first day from the date of receipt of valid requisition together with such changes, if any, before the expiry of forty-five days from the date of receipt of a valid requisition. A plain reading of the aforementioned provisions would lead to the understanding that the shareholders do indeed have the right to call as well as convene an EGM and the Board is bound to convene the same. Whether or not the proposed requisition should be given effect, is to be decided by the members at the general meeting.

[4] *Cricket Club Of India Ltd And Ors vs Madhav L Apte And Ors* (1974) 45 574 (Company Cases)

This again brings us to the question of whether this statutory right of shareholders could be curtailed. The short answer is no. The long answer is that shareholders are the owners of a company. Therefore, they do have a right to call for meetings within the company. Section 100 of the Companies Act, 2013 also intends to promote what is known as Corporate Democracy or Corpocracy. The concept of corporate democracy or shareholder's democracy in simple terms, is nothing but the rule of shareholders, by the shareholders and for the shareholders in the corporate enterprise, to which the shareholders belong[5]. The right of the shareholders to call/convene an EGM is to be construed as a part of corpocracy.

In **LIC Vs Escorts Ltd**[6], the Supreme Court held that: "A *Company is, in some respects, an institution like a state functioning under its 'basic constitution' consisting of the Companies Act and the Memorandum of Association. The members in general meeting and the directorate are the two primary organs of a company and comparable with the legislative and the executive organs of a Parliamentary democracy where legislative sovereignty rests with Parliament, while the administration is left to the Executive Government, subject to a measure of control by Parliament through its power to force a change of Government. Every shareholder of a company has the right, subject to statutorily prescribed procedural and numerical requirements, to call an extraordinary general meeting in accordance with the provisions of the Companies Act.*"

The Hong Kong High Court in the case of **China Investment Fund Company Ltd Vs. Guang Sheng Investment Group Ltd and Ors**[7] had held that: "The *very point of an EGM is to see whether the requisitioning shareholders have the support of the majority of the members. It is the members who own shares in the company and they are generally the most appropriate persons to decide what is best for themselves.*"

I do not agree with the stand taken by the Ld. Single Judge. If a civil court were allowed to grant injunctions restraining shareholders of a company from exercising their statutory right to call for and hold an EGM, the resultant consequences would constitute a horrendous attack on corporate democracy. The result would be that any unwilling Board of a Company, which

[5] Dakhole A, Jain P and Choudhary P, 'Shareholder's Democracy & Corporate Disputes' (*CS Cart India*, October 2019) <https://cscartindia.com/wp-content/uploads/2019/10/rcd.pdf> accessed 12 June 2023
[6] *Life Insurance Corporation Of. vs Escorts Ltd & Ors* (1985) 2 1289 (SCALE)
[7] HCA 411/2016

intends to obstruct its shareholders from exercising their statutory right, will file a suit in a Civil Court of appropriate jurisdiction. The decision of the trial court will then be subjected to rounds of appeal. Shareholders will be repeatedly restrained and injuncted from exercising their statutory rights. In the present case, the appellants have been unable to call for and hold the EGM despite the requisition being addressed as early as September 2021. For the past 5-6 months, the parties have been arguing illegalities contained in the requisition, whilst shareholders of Zee have been suffering from the injunction. Henceforth, the shareholder's right of calling an EGM cannot be curtailed/ restrained in any situation whatsoever.

As regards the second issue is concerned, we will first have to understand the roots of both NCLTs as well as NCLAT. Previously, company law matters were dealt with by three forums (i.e.); the Company Law Board, the High Court, and the Board of Industrial and Financial Reconstruction **(BIFR)**. However, the existence of such multiple forums led to more confusion and delay. To resolve this issue, the Eradi Committee suggested the formation of a single national tribunal[8]. The NCLTs and the NCLAT were thus the brainchild of this Committee.

Section 430 of the Act provides jurisdiction to the NCLT and expressly excludes the civil courts in dealing with company law-related matters. This section reflects the legislative intent of having a single forum. In short, Section 430 ousts the jurisdiction of all civil courts with reference to those matters which only the NCLT and NCLAT are determined to try. Now, the term *"High Court"* is defined as the highest Civil Court of appeal (not including the Supreme Court) in the part of India in which the Act or Regulation containing the expression operates[9]; A perusal of this definition would mean that High Court is also a civil court and that is the case, it can also not exercise jurisdiction in company law matters as per Section 430 of the Act. In the case of **Shashi Prakash Khemka (D) By Lrs. Vs. Nepc Micon**[10] , the Supreme Court had clarified the stance that Section 430 is widely worded and absolutely bars the jurisdiction of civil courts in matters for which powers have been conferred on the NCLT.

In another case by the name **SAS Hospitality Pvt Ltd. Vs. Surya Constructions Pvt Ltd**[11], the Court held that: "The *NCLT would be empowered to pass any such orders as it thinks fit,*

[8] Chhabra N and Kathuria G, 'Zee V. Invesco: Jurisdiction Battle between the High Court and the NCLT' (*IndiaCorpLaw*, 15 April 2022) <https://indiacorplaw.in/2022/04/zee-v-invesco-jurisdiction-battle-between-the-high-court-and-the-nclt.html> accessed 12 June 2023
[9] Section 3 (25) of the General Clauses Act, 1897
[10] CIVIL APPEAL NOS.1965-1966 OF 2014
[11] CS COMM--1496/2016

for the smooth conduct of the affairs of the company, which would include an injunction order. These powers are extremely broad and are more than what a Civil Court can do. Even if in the present case, the Court grants the reliefs sought by the Plaintiff, after a full trial, the effective orders in respect of regulating the company, and administering the affairs of the company, cannot be passed in these proceedings. Such orders can only be passed by the NCLT, which has the exclusive jurisdiction to deal with the affairs of the company".

I totally disagree with the findings made by the Ld. Single Judge. Firstly, the Companies Act. 2013 is the Parent Act and the NCLT Rules, 2016 is an example of what is known as delegated legislation. The doctrine of ultra vires holds that delegated legislation must be in consonance with the parent act and it cannot be used to limit the scope of the parent act. Thus, the NCLT Rules, 2016 cannot circumvent the intention of the legislature behind Section 430. It is also pertinent to note that, Serial No. 30 of the Schedule of Fees under the NCLT Rules provides for "*Application under any other provisions specifically not mentioned herein above*". That being the case, Section 100 could be said to be very well included within Serial No. 30.

Henceforth, it could be said that the validity of the notice as such could not be examined by the High Court due to the express bar under Section 430. Parallel proceedings cannot be initiated in corporate disputes, thereby reaffirming the legislative intent behind the enactment of Section 430 and the rationale behind having a single forum for adjudication of all company disputes[12]. To conclude, the ruling, in this case, re-establishes the importance of shareholder primacy. This ruling will significantly raise the bar for corporate governance and lessen the knowledge asymmetry between promoters and investors by motivating institutional and non-promoter investors to take aggressive steps to preserve their assets. Shareholder activism will undoubtedly help companies expand and grow when carried out responsibly.

[12] Vasani B and others, 'Bombay High Court's Judgment in Invesco v Zee– A Major Boost for Shareholders' Rights in India' (*CyrilAmarchandBlogs*, 4 April 2022) <https://corporate.cyrilamarchandblogs.com/2022/04/bombay-high-courts-judgment-in-invesco-v-zee-a-major-boost-for-shareholders-rights-in-india/> accessed 12 June 2023