Research Ambition
An International Multidisciplinary e-Journal
(Peer Reviewed, Open Access & Indexed)
Impact Factor: 3.071 (IIJIF) Web: www.researchambition.com; Email: publish2017@gmail.com
ISSN: 2456-0146
Vol. 2, Issue-IV
Feb. 2018
e-ISJN: A4372-3068

IS THE INITIATION MADE TO INCORPORATE THE CLASS ACTION SUITS UNDER SECTION 245 OF THE COMPANIES ACT, 2013, WORKING OR NOT FOR THE SHAREHOLDERS IN THE COMPANY?

Moonmoon Malik
Research scholar in ph.d. In law
Alliance school of law, Alliance University, Bangalore, India

ABSTRACT:

In this new development era there is a member of issues which are one of the gaining importance in this period. The Corporate World is surrounded by the two entities namely the Directors and the Shareholders. There are a number of legislation which have been incorporated for these entities. As they are two important pillars and they should be given equal importance as well as protection. It has been noticed that the Directors and Shareholders, as always been creating an issue as to whom authority has been given equal justice. The relationship between the Directors as well as the Shareholders has been sometimes friends and sometimes "good enemies'.

The Corporate world is always dreams of a healthy relationship between the Directors and Shareholders. Similarly, type of relations also exists in the society is the relationship of the employer and employee. For example, the relationship between the employer and employee in the labour unit. There is also a similar kind of fight which has been experienced in this particular. It has been noticed that the labourers form trade union in order to fight against the in justice in a legal way. There is a particular law which has been incorporated long back i.e. the Trade Union Act, 1926, where the number of members need to register themselves, under this Act which will provide protection to them, where there is a justice.

So looking in the particular situation, i.e. between the employer and employee in the labour unit, a legislature provide justice. One important concern which need an importance is that a trade union needs to form i.e. it is a structure of members which has been created for the purpose of securing and protection the interest of the workers on a collective voice. Same can be incorporate in Corporate World? Therefore, this article would revolve around the issue whether forming of class of shareholders will be appropriate in the corporate world.

Key words: Company, Directors, Shareholders.

INTRODUCTION

In this globalizing world, there are several issues which are being dealt every day. The corporate world is changing every now and then, and accordingly there are several legislations which has been made to handle the concerned situation. The Corporate World revolves around two important entities without them it is nearly impossible to run a company. To rewind the situation that there have been several issues between the Directors and Shareholders, such as scams and scandal's. The Corporate Governance norms has several loopholes, which were has been faced by the Corporate World. The Indian Government has taken a number of steps to improve these problems and therefore, one of the issue which has been taken into consideration.

The issue was about the Shareholders[1] of the Company. the Shareholder's in the Company is always an entity whose voice has been oppressed and their interest has always been in stake. The Shareholders always have to face problems due to the decisions taken by the Directors. The Directors are the one who take the decisions and run the Company. The Board of Directors is formed by the Shareholders[2] and other authorities to take the necessary decision of the Company. The Shareholders are very huge in number which include both national and international. Therefore, it is necessary that the legislature is such that it suits both the sections of the world i.e. national and international markets. As it is not possible for all the Shareholders to be individually present at the meeting's held in the Company. The Shareholders are huge in number.

Another problem which arose is that the fact that there is a huge number of Shareholders. And the directors are very less in number as compared to the Shareholders. There may be a coarse in the meeting and the business would run in loss. Thus they will not reach in any decision. It will create a termination in the regular day to day activities.

Thus we can see that in both the situations the Shareholders are helpless in the Company in taking decisions. They are very dependent on the Directors of the Company and therefore a Board of Director's team is formed which follows the guidelines mention in the Articles of Associations (AOA).

The Role played by the Directors in the Company

As responsible individuals, the Directors of the Company is given the power to make decisions which is for the Company and such decisions take should protect the interest of the Shareholder of the Company. The Company has other issues which the directors have to take into consideration but it is necessary and one of the important issue to protect the voice of the Shareholders.

Due to such concerns has been an amendment in the Company to input the concept of Independent Directors. To give a brief explanation about the Independent Directors, are those

[1] Shout, L. A. (2012). The Shareholder Value Myth. San Francisco: Berrett-Koehler Publishers, Pg 33.
[2] Jesse Eisinger, "Challenging The Long-Held Belief in 'Shareholder Value", New York Times (June 27, 2012); Joe Nocera, "Down With Shareholder Value," New York Times (August 10, 2012); Andrew Ross Sorkin, "Shareholder Democracy Can Mask Abuses," New York Times (February 25, 2013).

individuals which are Independent in real terms i.e. these individuals should not have any monetary values and should not have any interest in the Company.

They are the ones who are inserted in the team of the Board of Directors i.e. 3 members must be Independent Directors out of which 1 member should be women and the other two members will be male. So that the decision taken by them should be not against anyone including both the Directors and Shareholders. The decision should be neutral.

There are many cases which has been came up regarding the insertion of the Independent Directors. The condition was that there should be an Independent Director in the Company. So the Companies in order to appoint an Independent Director, who do not have any pecuniary interest in the Company, a member of its own group, for example, Mukesh Ambani, Reliance Industries Chairman, in order to fulfil such requirement has appointed his wife Nita Ambani, as a member of the Independent Directors, to fulfil the criteria of one Woman Director in the Board of Directors.

The given requirement for the Independent Directors under the Companies Act. 2013 is one-woman Director and two male Directors, i.e. total three members, who should not have any pecuniary interest in the Company. Another condition is that these members have not worked with that particular company for at least the previous year. Additionally, these members must not have any shares owned in the same Company.

Then in the amendment of the Companies Bill, 2016, there has been a suggestion that the Independent Directors should have the permission for the monetary relationship, which should be up to 10% of the Independent Directors total income of the Company and the minor transactions of the Independent Directors should not compromise their independence, in the Company.

Therefore, the fact which is seen that any legislature rules and laws made by the Indian Government for the Corporate World.

Another law has been incorporated in the Companies Act, 2013, under Section 245 which is still not in force. This Section 245, provides that a Class Action Suit can be initiated by at least 100 members or depositors.

Similarly, kind of law has been incorporated for the “unfair trade practices” for the principles of consumer under the Consumer Protection Act, 1986. The Section 12 (1) (c) of the Consumer Protection Act 1986, provides laws to file a class action suits.

The researcher in this paper has tried to portrait’s the protagonist shareholder, for filling the class action suits under the Section 245 of the Companies Act, 2013.

Section 245 of the Companies Act, 2013.

The legislation incorporated by the Companies Act, 2013, has in critically analyse by the researcher.

WHAT EXTENT DO SHAREHOLDERS CONTROL THE ACTIVITIES OF A CORPORATION?

An enterprise is possessed by its shareholders and as a gathering they conceivably have an incredible measure of control over corporate operations. Nonetheless, much of the time, shareholders don't practice control over day to- day operations or over any however the most imperative kinds of choices. Shareholders can vote their offers at a Shareholder's meeting, which is for the most part held once per year, albeit uncommon gatherings might be called at whenever. Shareholder's rights are administered by state company's laws and the company's local laws.

CLASS ACTION SUIT

Class action suit, as it passes by name is for a gathering of individuals documenting a suit against a litigant who has made basic mischief the whole gathering or class. This isn't care for a common case litigation where one respondent records a case of evidence or charges against another respondent while both the gatherings are accessible in court. On account of class action suit, the class or the gathering of individuals documenting the case require not be available in the court and can be spoken to by one petitioner.[3] The advantage of these kind of suits is that if a few people have been harmed by one respondent, every last one of the harmed individuals require not document a case independently yet the majority of the general population can document one single body of evidence together against the litigant, known as class action suit. Toward the begin, it is important to manage a delusion that class activities are not reasonable in India. That isn't valid in any way. The common law has dependably permitted a mix of suits that pass on to the same reason for activity, and subsequently it is feasible for offended parties to bring suits which are very like class activities in the U.S. Be that as it may, there is a catch to it. The Contingence expenses charged by the legal lawyers in the US are not allowed in Indian Legal System, which is profoundly in charge of the nonappearance of an offended party bar. Likewise, since there is no assurance with respect to recuperation, the offended party (Small and Minority Shareholders) are not spurred enough to document these class action suits. All the more along these lines, there is a noteworthy danger of the offended party not just losing and not getting remunerated but rather over that may wind up bearing the legitimate cost of Defendant Company also in India.

This is the motivation behind why SEBI has stepped up with regards to make an Investor Education and Insurance Fund direction, which is a compulsory reserve to be made by a company according to the arrangements of the 2013 Act. It needs to repay the legitimate charge of such class action which helps the affiliations battling the legitimate cases in the interest of financial specialist associations in ensuring the privileges of little and minority investors. The legitimate guide by this reserve can be to the tune of 75% of aggregate use in a lawful continuing as expressed previously.

[3] http://smallbusiness.chron.com/classaction-vs-derivative-shareholder-lawsuits-72779.html (last accessed on 12-02-2018)

REQUIREMENT FOR CLASS ACTION SUITS

The requirement for these kinds of suits was first felt with regards to securities showcase amid the time of Satyam Scam[4], where an expansive gathering of individuals was deceived with respect to their hard earned cash put resources into Stock Market. Amid that time, it was felt that it was not at all viable in regards to cost viability for a little partner to document a case autonomously against the respondent. A huge number of deceived investors amid that time framed a huge gathering also, documented the body of evidence against the company, yet since there was no accessible lawful cure or law which can really bolster this sort of suit of a gathering recording charges, it moved toward becoming intense for those financial specialists to take a plan of action or pick up advantage in the Indian Judicial System by this strategy. Class action suits in India were so far recorded under the appearance of open intrigue suits. Courts were allowed to expel these. These investors ran column to post appropriate from the National Consumer Disputes Redressal Commission up to the degree of Preeminent Court and had their cases rejected. Be that as it may, incidentally, the US investors of Satyam could guarantee about Rs 675 crore from the company leaving Indian investors fairly disappointed with no cure offered to them by Indian Judicial Framework. This offered ascend to the idea of class action suits in Indian Judicial System which was presented formally in companies' demonstration 2013.

CONDITIONS TO FILE A CLASS ACTION SUIT

Conditions, are essential to be followed for filling a Class Action Suit, as mentioned below

For companies having a share capital, or members –

- 100 member's minimum of such company can file the case against that company for any type of
- At least 10% of the total members can file the case against the company/management
- Member holding 10% of issued share capital can file the case against the company/management

For companies not having share capital –

- At least 1/5th of the members can file the complaint against the company under class action suit for any misconduct of management regarding running the company

The class action suits are documented in National Company Law Tribunal (NCLT). An application is documented before the NCLT against the directors of the company, or the company, the auditors, or the audit firm or the consultants in the event that where the class of members or depositors, have the point of view that the administration or lead of the undertakings of the company are not conducted legitimately and is biased to the interests of the company, and a remedy may be arranged for them.

[4] https://www.thehindubusinessline.com/markets/stock-markets/satyam-scam-pws-saga-of-ignored-red-flags/article10027012.ece (Last accessed on 2-02-2018)

Any organisation, which does not consent to the order go by NCLT under said section, is punishment up to the tune of Rs. 25 Lakhs. Additionally, management of the company who are identified by NCLT as been in default, might be punishment with imprisonment for a term up to three years and fine up to Rs. 1,00,000/ -

Under important sections of the Companies Act, 2013, NCLT is met with a similar purview, forces and expert as a High Court under the Contempt of Courts Act, 1971. Presently, the inquiry emerges, how achievable are the class action suits in Indian legitimate framework. Is it extremely a practical solution for the retail financial specialists in India? How great would it be able to ensure the retail investor's interests against offense or misrepresentation practiced by the companies or its management with regards to the securities market?

Above all else, before we begin scrutinizing the class action suit, we have to ask ourselves with respect to how much active is the retail investor specialist in India in contrast with its US partners. The essential issue with Indian Retail Investor is, they are not so much educated, instructed and need activism with regards to putting resources into companies. By idea, an investor is a proprietor of the company, however would he say he is the proprietor in Indian Context?

The majority of the listed companies in India are controlled by generation, essentially controlled by a promoter. These companies are doing whatever they can not to lose control over the overseeing of the company. Also, they exploit the way that larger part of the retail financial specialists in India need top to bottom information about securities advertise and are exceptionally segregated from each other. Likewise, since they have little possessions, the certainty to challenge against the controlling investors is insignificant and relatively invalid and void, despite the fact that each and every speculator is having comparative rights and proprietorship where contrasts are chosen by greater part vote.

Indeed, even Supreme Court in their judgments has recognized and maintained the forces of most of the investors in this manner, not leaving much space and powers for little financial specialists regardless of whether every one of the investors convey similar forces. Any and each rational personality realizes that in Indian setting a large portion of the subsidizing is finished by budgetary foundations along these lines leaving little space for retail financial specialists, and the framework not dealing with those little investors is exceedingly savage, despite the fact that specific shields have just been given in the past demonstrations.

Presently, according to companies Act 2013, investors may apply to National Company Law Tribunal (thus after alluded as NCLT) against any mistreatment and blunder. NCLT is a profoundly intense council which has all the specialist to leave arranges behind to the best degree included however not restricted to evacuation of executives, apportioning of offers. NCLT can even request recuperation of cash from executives on the off chance that it considers it as undue increases created by chiefs amid their residency.

In continuation of the same, a class action suit can likewise be documented in NCLT by minority investors against persecution submitted by chiefs of the company OR the company itself. They will look for equity by getting individuals who are looking for solution for a similar reason against protectors, dissimilar to regular law where the offended party is person. This is to a great extent imperative with regards to a defective lawful framework or an administrative not ready to deal with the veritable instances of legitimate cases, against the wrongdoing of capable administration. In this situation, the achievability of battling the case as a gathering or class turns out to be more practical.
Under relevant sections of the Companies Act, 2013, NCLT is conferred with the same jurisdiction, powers and authority as a High Court under the Contempt of Courts Act, 1971. Therefore, there are several questions comes, that how feasible are the class action suits in Indian legal system. Is it really a viable remedy for the retail investors in India? How good can it protect the retail investor's interests against misconduct or fraud exercised by the companies or its management in the context of the securities market?

First of all, before we start questioning the class action suit, we need to ask ourselves regarding how much active is the retail investor in India in comparison to its US counterparts. The basic problem with Indian Retail Investor is, they are not really informed, educated and lack activism when it comes to investing in companies. By concept, a shareholder is an owner of the company, but is he the owner in Indian Context?

Most of the listed companies in India are run by families' generation after generation, basically controlled by a promoter. These companies are doing whatever they can not to lose control over the governing of the company. And they take advantage of the fact that majority of the retail investors in India lack in-depth knowledge about securities market and are highly isolated from each other. Also, since they have very small holdings, the confidence to contest against the controlling shareholders is minimal and almost null & void, even though each & every investor is having similar rights and ownership where differences are decided by majority vote. Even Supreme Court in their judgments has acknowledged and upheld the powers of the majority of the shareholders thereby, not leaving much space and powers for small investors even if all the shareholders carry the same powers. Any & every sane mind knows that in Indian context most of the funding is done by financial institutions thereby leaving very small space for retail investors, and the system not taking care of those little investors is highly cruel, even though certain safeguards have already been provided in the previous acts.

Now, as per companies act 2013, shareholders may apply to National Company Law Tribunal (herein after referred as NCLT) against any oppression and mismanagement. NCLT is a highly powerful tribunal which has all the authority to pass orders up to the greatest extent included but not limited to removal of directors, allotment of shares. NCLT can even order recovery of money from directors in case it considers it as undue gains generated by directors during their tenure.

In continuation of the same, a class action suit can also be filed in NCLT by minority shareholders against oppression committed by directors of the company OR the company itself. They will seek justice by bringing in people who are seeking remedy for the same cause against defenders, unlike conventional law where the plaintiff is individual. This is largely important in the context of an imperfect legal system or a regulatory not able to handle the genuine cases of proper claims, against the misconduct of powerful management. In this scenario, the feasibility of fighting the case as a group or class becomes more viable.

In light of the proposal of JJ Irani Committee, a few arrangements were acquired Company's Act 2013 to secure the interests of the said little and minority investor from the capable controlling dominant part investors. At last, the class action suits discovered its direction under Section 245 of Companies Act 2013.

The methodology for class action suit is that all the affected gatherings ought to take an interest in a single response. One lead part may speak to the whole class before NCLT.

With regards to US showcase, we as a whole have perceived how this has engaged to sue all the parties associated with cases identified with misrepresentation and misquotes in regards to managing securities. In earlier days, when there was no response accessible, for example, that of class action suit in India, millions lost their well-deserved cash when a large number of companies vanished with the IPO cash of financial specialists basically from 1992-1996. We as a whole know with respect to how a "promoter run company" works in an Indian domain.

Going resolutions through company sheets and investors are a cake stroll for a promoter controlled condition, regardless of whether it is identified with using the assets for the reason other than that for which reserves were gathered, in this manner deluding the investors, all the more so little and minority investors. This sort of choices needs to prompt serious misfortunes to the investors previously.

Presently with the entry of companies' demonstration 2013 having the arrangements of class action suit, the retail investors can document class action suits against the executives and administration of the company on account of issuance of outline for cases, for example, misquotes, and any consideration or rejection if improved the situation the motivation behind preoccupation of assets. This has effectively ingrained a kind of dread and greater obligation in the brains of the guarantors as far as assets used for the proposed reason just, there by trained the financiers and backers.

Additionally, the organization demonstration 2013 likewise provides guidance that any progressions at all if wanted by the organization to be made in the plan, must be done through an uncommon determination gone at the general gathering. On the off chance that any investor does not consent to the said transforms, they are offered a leave choice on a leave cost as dictated by SEBI. This will give trouble to the executives and promoters in the event that they wish to get an adjustment in the contract or questions in the outline.

Unexpectedly, one of the real avoidance in this exemplary character is that the banks are not made mindful and can't be indicted under this demonstration, despite the fact that they have a noteworthy part to play in the general population issue process however are not influenced responsible in the class to activity suits.

Huge penalties and imprisonment chances will also act as a deterrent for the wrongdoers against any fraudulent acts. Investors need to be more vigil and alert against any misdoings of management. The investor's associations need to display more activism, which has successfully led to many amendments in the laws in the past.

It will also successfully reduce the number of lawsuits since it has allowed the group of people to file the case against one defendant on common grounds. This has also helped in increasing the efficiency of the legal process in India.

Class actions suits in India will become a highly beneficial place for stakeholders to raise complaints if any against the management for the unlawful & wrong acts, as it will act as a redressal tool for people having a common interest against the mighty management of companies.

However, on the divergent, such a notion may be open to misuse by dishonest minority shareholders in the continuance of their vested interest thereby impeding the proper functioning of the company. Keeping this in mind, it could be said that the government failed to consider the negative consequences of class action suit as it is evident by the absenteeism of provision to check its misuse.

For time being, the incorporation of the concept of class action suit is a highly welcomed step for the betterment of the Indian society in general and Indian corporate industry in particular, however, its victory in the industry is still indeterminate, reason being the exclusion of key class of stakeholders mainly creditors, bankers and debenture holders. Other reasons which have acted as a hindrance for the community was the elimination of banking companies from the scope of this Section as mentioned before as well. Further, even the regulatory authorities have been kept out of the ambit of class action suit as they are not entitled to file a case under this law, which has been widely criticised throughout India.

Other major challenges for the minority stakeholders are the delays observed during the constitution of NCLT, because of which the serious cases of the class action were filed in the civil courts, now delaying those further due to long queue in those courts.

Nevertheless, on reading the provision of this Section and further analysing it, it can be said that the suit may indeed prove to be a powerful tool to keep a check on the culpability of a company and contain any likely bias against the minority & small shareholders. It is also concluded that class action suits will be a beneficial platform for small & minority shareholders to raise their grievance against the company including its managing director, directors, auditors, consultants, etc. for acts or omission that is own & unlawful to the enthusiasm of the organization and its investors. Minority

investors may embrace class activity suit as a redressal for those having a typical enthusiasm for the advancement of legitimate corporate administration.

Aside from the specialized and procedural aspect, there are heaps of changes required in securities laws on the off chance that class activities suits are to be effective in India. The present standards on different fronts, for the most part in zones, for example, insider exchanging and value control require offended parties to hold a generally high weight of confirmation. Just by offering support to class activities alone may not be satisfactory, and may require tending to a portion of the substantiate issues too.

Last however not the slightest, however this class activity suit is by all accounts a combat hardware in the hands of the minority investors, the genuine quality must be estimated by giving it full impact upon the constitution of NCLT.

CONCLUSION

Till at that point, it isn't defended to regard it as a legitimate advance towards a superior lawful framework with respect to activity suit. We as a whole ought to likewise recollect that, an investor, class activity suit, would mean five to seven years of unique court suit trailed by an additional three years of division seat claim and took after by an additional three years of offer in the Supreme Court which in all out makes in no less than an eleven years' process if not more to get a last assurance.

We as a whole can dare to dream that class activities suits will act the hero of little and minority investors when they require it, to maintain a strategic distance from another Satyam-like disaster. It is still to be checked whether organizations in India are winding up more cautious with regards to change in business and ensure that whatever for sure is should have been unveiled is done as such according to the law.

****