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THE UNJUSTNESS OF THE 'JUST AND EQUITABLE' REQUIREMENT WARRANTS ITS DELETION

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I. INTRODUCTION

Due to the existence of the majority rule¹, corporate democracy, much like political democracy, risks the possibility of becoming a 'tyranny of the majority'. Usually, this leads to the oppression of the minority group.² In the Indian corporate world, however, the Companies Act, 2013 (hereinafter referred to as the "Companies Act") comes to the rescue of these minority groups and provides them with various recourses like filing a claim for prejudice, oppression, or mismanagement. In this paper, I argue that although the law has provided these recourses, it has also made it insurmountable to claim them by setting a 'harsh'³ requirement under Section 241 (1) (b) of the Companies Act⁴ and the same should be deleted.

The recent judgment delivered by the Supreme Court of India in the matter of *Tata Consultancy Services Limited v. Cyrus Investments Private Limited and Others*⁵, has

brought to the foreground many debates surrounding the requirements for filing a claim on the grounds of oppression and mismanagement. The requirement of the 'existence of just and equitable grounds for winding up the company' has predominantly been a part of these debates, attracting negative responses. Through this paper, I attempt to critique this requirement and provide the suggestion for deleting the same.

II. DEFINING THE PROBLEM

To file an application under Section 241 read with Section 244⁶ of the Companies Act, the petitioning shareholder has to fulfill a dual requirement⁷, i.e., the substantive limb and the conditional limb⁸, stated under Section 242 of the Companies Act⁹.

The Substantive Limb

The substantive limb, expounded under Section 241 and Section 242 (1) (a) of the Companies Act¹⁰, requires the petitioning shareholder to prove that the affairs of the company, in the present or in the past and continuing in the present¹¹, are conducted in a way that they 'prejudice' the interests of (the public, the petitioning shareholder, other member (s), or the company)¹², or are 'oppressive' to (the petitioning shareholder or other member (s))¹³ or that 'mismanagement' took place through a

¹ Foss v. Harbottle, (1843) 2 Hare 461.

² JOHN STUART MILL, ON LIBERTY 9 (Batoche Books 2001).

³ Scottish Co-operative Wholesale Society Limited v. Meyer, (1959) A.C. 324.

⁴ Companies Act, 2013, § 142 (1) (b), No. 18, Acts of Parliament, 2013 (India).

⁵ *Tata Consultancy Services Limited v. Cyrus Investments Private Limited* (2021) SCC OnLine SC 272.

⁶ Companies Act, *supra* note 4, at § 241 and § 244.

⁷ *Shanti Prasad Jain v. Kalinga Tubes Limited and Others* AIR (1962) Ori 202.

⁸ Umakanth Varottil, "Unpacking the Scope Of Oppression, Prejudice And Mismanagement Under Company Law In India", *NUS Law Working Paper 2020/020*.

⁹ Companies Act, *supra* note 4, at § 242.

¹⁰ *Id.* at § 241 and § 242 (1) (a).

¹¹ *Power Finance Corporation Limited v. Shree Maheshwar Hydrel Power Corporation Limited* (2019) 213 Comp. Cas. 560.

¹² Companies Act, *supra* note 4, at § 241 (a).

¹³ *Id.*



material change in the management or control of the company by altering the board, manager, ownership, or membership which will prejudice the interest of the member (s). Additionally, it should also be proved that such a change was not brought about by or done in the interest of any shareholder (s) or creditor (s) of the company.¹⁴

The Conditional Limb

Although an application can be filed under Section 241 of the Companies Act, the Tribunal can only pass an order on the same if the requirements mentioned under Section 242 (1) (a) and Section 242 (1) (b) are met.¹⁵ The conditional limb, expounded under Section 242 (1) (b)¹⁶ of the Companies Act, possess an additional, a rather harsh burden on the applicant to prove that the nature of the prejudice, oppression, or mismanagement so contended in the substantive limb are of such severe nature and the conditions of affairs of the company are so substandard that the facts justify winding up on the grounds of it being a ‘just and equitable remedy’. However, this would unfairly prejudice the member (s).

The Conundrum

The problem that this dual requirement poses is specifically in relation to the conditional

limb. Briefly put, one cannot succeed in an oppression and mismanagement application merely by proving that the company’s affairs were conducted in a prejudicial or oppressive manner to them or vice versa.¹⁷ For giving the Tribunal the jurisdiction to pass an order and getting a relief under this application, along with proving a prejudice or oppression they would also have to prove that this prejudice or oppression was so grave in nature that winding up of the company becomes just and equitable. Unfortunately, where the grounds of the petitioning shareholder fall short of warranting a winding-up order, their claim under Section 244 cannot succeed.¹⁸

This puts an extremely high threshold on the petitioning shareholder as they have to prove a justifiable lack of confidence in the conduct and management of the company’s affairs which springs from a lack of probity¹⁹ in the conduct of the company’s affairs.²⁰ The Courts are also reluctant in passing winding-up orders because winding up is equivalent to killing the company²¹ and the same is not desirable as it makes the concept of a corporation fragile²², forces shareholders to sell their assets at the break-up value²³ which is comparatively small²⁴, entails unemployment, et cetera. Furthermore, now

¹⁴ *Id.* at § 241(b).

¹⁵ Devika Bansal and Naina Bora, *Analysing the Oppression Remedy in India: Is it “Just and Equitable”?*, INDIACORPLAW (July 1, 2021, 9:00 PM), <https://indiacorplaw.in/2021/05/analysing-the-oppression-remedy-in-india-is-it-just-and-equitable.html>.

¹⁶ Companies Act, *supra* note 4, at § 242 (1) (b).

¹⁷ *Shanti Prasad*, *supra* note 7.

¹⁸ Varghese George Thekkel, *Tata v. Mistry: A Case for Greater Protection of Minority Shareholders’ Rights*, SCC ONLINE, (July 1, 2021, 9:15 PM), <https://www.scconline.com/blog/post/2021/05/15/tata-v-mistry-a-case-for-greater-protection-of-minority-shareholders-rights/>.

¹⁹ *Needle Industries (India) Limited v. Needle Industries Newey* (1981) 3 SCR 69.

²⁰ *Loch v. John Blackwood* (1924) AC 783, *Rajahmundry Electric Supply Corporation Ltd. v. A. Nageswara Rao*, (1956) 26 Comp. Cas. 91 (SC).

²¹ *Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton* (1964) 0 GLR 804.

²² *Kirthana Singh Khurana*, *II/L-CT-0036/Spring2021/BALLB2018/Sem-5/Sec-B* <https://web.microsoftstream.com/video/5989755b-6a1e-4e36-bd8f-3f56672e7949> (Last visited July 1, 2021).

²³ *Mohanlal Ganpatram*, *supra* note 21.

²⁴ Report of the Committee on Company Law Amendment (Cohen Report 1945).



the Courts have also begun taking into account various factors like the nature of the company²⁵ while deciding whether they can be wound be up.

All these factors along with the structure of the law make it fundamentally difficult for minority shareholders (even the powerful ones like Mr. Mistry) to prove their oppression and mismanagement claims, which is against the legislative intent of protecting minority rights. Thus, although many believed that removal and the manner of removal of Mr. Mistry from the chairmanship was oppressive or prejudicial to his interest, the same could not be seen as a ground for winding up²⁶ the Tata Sons Company due to which Mr. Mistry's claim of oppression and mismanagement could not succeed.

III. LEGISLATIVE HISTORY OF THE CONDITIONAL LIMB

Archaically, where unresolvable disputes emerged amongst the shareholders or amongst them and the company, the sole remedy available was that of winding up the company. Under the English legislative history, 'oppression of minorities' was first dealt with by the Cohen Committee Report²⁷, which suggested giving Courts the powers to make alternative orders in cases where the minority shareholders were being oppressed and winding-up orders did more harm than good. Subsequently, this resulted in the enactment of the Companies Act, 1948. Section 210 of this statute allowed the Courts

to give alternate remedies in cases of oppression where the requirement of both, the substantive and the conditional limb were met.

In the case of *Cooperative Wholesale Society v. Meyer*²⁸, however, the Lords held that the requirement imposed by the conditional limb was itself 'harsh'. Thus, the Jenkins Committee of 1962 suggested the use of the term 'unfairly prejudicial'. This was adopted by the Parliament under Section 75 of the Companies Act, 1980,²⁹ which went on to become Section 495 of the Companies Act, 1985. The only requirement to claim a remedy under this Act was to prove unfair prejudice. All the Acts and Amendments that followed, reproduced this Section with the only requirement of proving an 'unfair prejudice'. Thus, the requirement for proving that the facts justified winding up on the grounds of it being a 'just and equitable remedy' was deleted from the English law forever.

Indian Legislature, on the other hand, in 1951 via an amendment in the Companies Act, 1913³⁰ borrowed the requirement of the conditional limb from the English Law of 1948 (which was later deleted on the grounds of being 'harsh'). The conditional limb was also incorporated in the Companies Act, 1956 because the 1956 Act was based on the Bhabha Committee Report of 1952, which derived most of its contents from the Cohen Committee Report of 1945. Thus, the conditional limb did not only manage to exist

²⁵ *Tata Consultancy Services Limited*, *supra* note 5.

²⁶ *Bagree Cereals Private Limited and Ors. v. Hanuman Prasad Bagri and Ors.* (2001) 2 Comp LJ 397 Cal.

²⁷ Cohen Report, *supra* note 25, at para. 60.

²⁸ Board of Trade, Report of the Company Law Committee (June 1962), (hereinafter the "Jenkin Report").

²⁹ *Tata Consultancy Services Limited*, *supra* note 5, at pg. 90.

³⁰ The Indian Companies (Amendment) Act, 1951.

in the Indian statutes but its scope, too, had been continuously expanding i.e., in the Companies Act, 1956³¹ proving mismanagement did not require proving the conditional limb but the Companies Act, 2013³² requires proving of the conditional limb for giving Courts the jurisdiction to grant remedies in matters of oppression and mismanagement.

IV. DISREGARD TO THE HIGH-POWERED EXPERT COMMITTEE REPORT

In 1978, the High-Powered Expert Committee on Companies and MRTP Acts believed that the requirement under Section 397 (2) (b), i.e., the conditional limb requirement in the Companies Act, 1956, was difficult to establish³³ and since they saw no 'sufficient reason for making out a case of oppression to also justify the making of a winding-up order', they recommended deleting the same. However, the Doctor J. J. Irani Committee Report of 2005³⁴ that formed the framework of the Companies Act suggested that 'adequate provisions existed in the 1956 Act for the prevention of oppression and mismanagement'.³⁵

V. COMPARATIVE ANALYSIS

Under the U.K. Companies Act, 2006, Part 30 deals with the protection of members

against unfair prejudice.³⁶ Section 994 of this Act gives company members the right to file a petition in matters where they have faced 'unfair prejudice' due to the company's affairs,³⁷ and where the Court feels that the petition was well-founded, they can give remedies to end the matters complained of.³⁸ Similarly, while the Canada Business Corporations Act, 1985³⁹ allows the petition to be filed on the grounds of 'oppression', 'unfair prejudice', or 'unfair disregard'⁴⁰, this Act, too, simply requires the Court to be satisfied with such conduct to give remedies. In Australia, Part 2F.1. of the Corporations Act, 2001 deals with 'oppressive conduct of affairs'.⁴¹ Section 232 of this Act provides members with remedies such as 'oppression', 'unfair prejudice', or 'unfair discrimination' and the Courts have been provided with a non-exhaustive list of remedies that they can provide as they deem appropriate.⁴² Likewise, the Companies Act, 1967⁴³ of Singapore that has been amended time and again, currently under Section 216 provides for 'oppression', 'unfair discrimination', and 'prejudice', where the Court is of the view that such grounds have been established, they have the power to make orders that would remedy or bring an end to the matters complained of.⁴⁴

³¹ Companies Act, 1956, § 398, No. 1. Acts of Parliament, 1956 (India).

³² Companies Act, *supra* note 4, at § 242.

³³ Ministry of Law, Justice & Company Affairs, Government of India, Report of the High-Powered Expert Committee in Companies and MRTP Acts (August 1978), para. 7.11.

³⁴ Expert Committee on Company Law, *Report on Company Law* (31 May 2005).

³⁵ *Id.*

³⁶ Companies Act, 2006, Part 30, No. 46, Acts of Parliament, 2006 (United Kingdom).

³⁷ *Id.* at § 994.

³⁸ *Id.* at § 996.

³⁹ Canada Business Corporations Act, 1985, R. S. C. c. C-44, Acts of Parliament, 1985 (Canada).

⁴⁰ *Id.* at § 241.

⁴¹ Corporations Act, 2001, (Cth) s 3, Acts of Parliament, 2001 (Australia).

⁴² *Id.* at § 242.

⁴³ Companies Act, 1967, Acts of Parliament, 1967 (Singapore).

⁴⁴ *Id.* at § 216.



Thus, when compared to the laws of some developed jurisdictions it is seen that the only requirement on the petitioning member is that to prove the matters that they complain of or Indian counterparts of the substantial limb i.e., oppression, unfair prejudice, unfair discrimination, et cetera (based on the law of the country). The excessively 'harsh' burden on the member of the company for proving the conditional limb i.e., proving that the facts justify winding up on the grounds of it being a 'just and equitable remedy' was only found to exist in the jurisdiction of India.

VI. SUGGESTIONS

After a reading of the aforementioned exegesis, one can come to the conclusion that there is no 'sufficient reason' for the existence of the conditional limb in Section 242 (b) of the Companies Act, 2013. The 'harsh' requirement of the conditional limb was introduced in the Indian law on account of the English law. However, despite a deletion of the same from the English Act owing to its harshness, no such change was made in its Indian counterpart. While the Indian legislators continued to make other changes in the law to tailor it to India's needs, they failed to take into account the recommendation of the 1978 Report⁴⁵, in relevance to the deletion of the requirement of the conditional limb.

Through this paper, I suggest that the real legislative intent should be upheld i.e., protecting the interest of the minorities. In furtherance of the same, an amendment should be made to Section 242 (1) of the Companies Act, 2013 that would delete the word 'and' from Section 242 (1) (a) and delete Section 242 (1) (b) of the Companies

Act, 2013 in its entirety. Consequentially, after the amendment, only the requirement of satisfying the substantive limb should remain.

VII. CONCLUSION

In India, to succeed under an oppression and mismanagement claim, one is met with the obligation of satisfying the dual requirement i.e., the substantial limb and the conditional limb. Through this paper, we understood the problem posed by the existence of the conditional limb, a real-life example of which we all witnessed in the Supreme Court Judgment of the Tata-Mistry Dispute. In the case of most of the shareholders, despite having legitimate oppression, prejudice, or mismanagement claims they cannot proceed with the same due to the 'harsh' requirement posed by the conditional limb which requires them to justify winding up of a company for an oppression and mismanagement claim.

After having analyzed the legislative history of the conditional limb, read various committee reports on the same, and compared the oppression and mismanagement laws of various developed jurisdictions, I have suggested the deletion of the requirement of the conditional limb. With this deletion, I believe that the minority shareholders will actually be able to get their cases of oppression and mismanagement fairly tried and the legislative intent of protecting the minority rights, in its true sense, will be upheld.

⁴⁵ Report of the High-Powered Expert Committee, *supra* note 33.