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SHAREHOLDER ACTIVISM IN INDIA

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ABSTRACT

An activist shareholder is one utilizing a value stake as a part of an enterprise to put public pressure on its management. The objectives of activist shareholders range from financial (increment of shareholder quality through changes in corporate arrangement, financing structure, cost cutting, and so on.) to non-financial (disinvestment from specific nations, appropriation of ecologically inviting strategies, etc.). The fascination of shareholder activism lies in its comparative cheapness; a genuinely little stake (under 10% of extraordinary shares) might be sufficient to launch a fruitful battle. In comparison, a full takeover offer is a significantly more immoderate and troublesome undertaking.

The researcher has harnessed doctrinal method of research carrying out qualitative as well as quantitative data analysis, triangulating on major empirical sources. The paper is divided into five broad heads. Firstly, "Introduction", where the researcher will introduce that what is shareholders activism and how it has emerged. Secondly "What is Aided Investor Activism", here the researcher will go into the depths of Aided Investors Activism. Thirdly, "Government's Initiative: 2013 Act", here the researcher will focus on the Governments Role and the recognition of the Act. Fourthly, "Shareholder Activism: Peroration", here the researcher will discuss shareholders activism basically in a positive sense. Lastly, "Conclusion and Suggestion", here the researcher will summarize the research findings giving a basic way on how to make the market efficient for shareholders.

KEYWORDS: Activism, Corporate, Government, Investor, Shareholder

INTRODUCTION

Corporations act as major players in an economy ever since the industrial modes of production became prime mover of an economy. Professors Adolf Berle & Gardiner Means, in their seminal work on corporate governance and law, *The Modern Corporation and Private Property* outlined the fundamental problems plaguing the structure of corporate ownership.[1] In modern corporations, there exists a separation of ownership and control; shareholders own the company and management of the company is left in the hands of board of directors. This separation is based on the presumption that the management of the company will always work in its interest and will aim to maximize profit for the corporation and the shareholders however; this may not always be the case. Examples of such conduct which resulted in corporate governance related failures such as in Enron, WorldCom & Parmalat. This is essentially the agency cost involving delegating responsibilities to the board as an agent of the shareholders. Therefore the shareholders, in order to safeguard the interest of the company, need actively participate in the operations and administration of the company. Therein lays the importance of shareholder activism and a vigorous corporate governance structure.

Most of the Indian corporate houses are run by families, especially the big corporate houses, and majority of the

[1]Adolf Berle& Gardiner Means, *The Modern Corporation & Private Property*, 125 (Transaction Publishers, 1932).

decisions are taken by promoters of the company unlike corporations in UK and USA where the task of running the company rests solely with the management of the company who are answerable to the shareholders.[2] This makes the tasks of activists fairly easy as they are capable of running aggressive activist campaign against any decision of the management, not in the interest of shareholder, and force the management to comply with the wishes of the shareholders. This task would become difficult for activists in a developing country like India where the majority of the stakes in the company is owned by the promoters of the company who also run most of the operation of the company.[3] Any attempt to influence the decisions of the management would require an arsenal of sufficient amount of shares. The democratic setup of the corporations in India makes the administration of company a mere number game where any decision will be taken by the side having majority of the shares. Since the majority of the shares is owned by the promoters and financial institutions of the company, even congealed shares of minority shareholders and activists will not suffice to form a block vote. Thus the role of institutional investors becomes more central as any staunch stance against the management would require the backing of the theses institutions holding major shares in the corporations.

The existing standards are said to be far from the desirable, and governance crises such as that witnessed in the Satyam accounting scandal have underscored this line of criticism.[4] As a result of the scandal, Indian regulators and industry groups have advocated for a number of corporate governance reforms to address some of the concerns raised by the Satyam scandal. Some of these responses have moved forward, primarily through introduction of voluntary guidelines by both public and private institutions.[5]

WHAT AIDED INVESTOR ACTIVISM IN INDIA?

Shareholder activism is considered to be a set of "proactive efforts [on the part of shareholders] to change firm behaviour or governance rules."[6] It signifies the pursuit of shareholders of a public corporation to bring about a material change in the operations of the company in myriad ways and numerous forms. Shareholder activists are "often viewed as investors who, dissatisfied with some aspect of a company's management or operations, try to bring about change within the company without a change in control."[7] In the wake of investors acting as mere spectators, rarely participating in the decision making process of the corporation, activist investors take centre stage in the process of keeping checks at the corporation's whimsical decisions. Passive investors are often reluctant in taking part in the management of the company and prefer to exit the company, by selling their shares, if a decision is not favourable. This practice of passive investors, fancifully referred to as "Wall Street Walk"[8], has given way to the corporations enjoying unqualified control in the

[2]J.Sarkar&SubrataSarkar, *Large Shareholder Activism in Corporate Governance in Developing Countries: Evidence from India*, International Review of Finance, 161-194 (2000).
[3]*Id.*
[4]UmakanthVarottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21(1) NAT. L. SCH. IND. REV.1 (2009).
[5] See *Satyam Fraud: Raju Sent to Central Prison; CFO Vadlamani Arrested*, The Economic Times, Jan. 10, 2009; *Satyam's Raju Brothers Arrested by AP Police*, The Economic Times, Jan. 9, 2009; Jackie Range, *Pricewaterhouse Partners Arrested in Satyam Probe*, The Wall Street Journal Asia, Jan. 25, 2009; MukeshJagota&RomitGuha, *India Names New Satyam Board*, The Wall Street Journal, Jan. 12, 2009.
[6] Bernard Black, *Shareholder Activism and Corporate Governance in the United States*, The New Palgrave Dictionary of Economics and The Law(1998).
[7] Stuart Gillan& Laura T. Starks, *The Evolution of Shareholder Activism in the United States* (2007).
[8] Jayne Elizabeth Zanglein, *From Wall Street Walk to Wall Street Talk: The Changing Face of Corporate Governance*, 11 DEPAUL BUS. L.J. 43 (1998).

management of the company. However this could also transform into a shareholder activism if the shareholders decide to put their foot down in chunks as a disciplinary action against the firm, though this form of activism has limited effect on the corporation and seldom yield any results.

Activist shareholders indulge in a range of activities to bring about a desired change in the operations of the company. The activism gamut ranges from simple dialogue, where activists seek to let their views known to the management, to a more combative stance that seeks a material change to the corporation's strategies, policies, and management. This involves efforts to overthrow incumbent management through processes such as proxy fights or hostile takeovers that result in a change in control of the company.[9] A more aggressive form involves the initiation of litigation against the company, its board and management. Certain types of investors, such as pension funds and hedge funds, have utilized this strategy more recently in certain jurisdictions like the US to achieve their goals.[10] However in India, where shareholder activism is still in cradle, using such aggressive tactics by activists might still be a distant dream.

The disparity of power prevailing between the dominant and minority shareholders and institutional investors reluctant in playing an active role in the management of the company are the major reasons to keep aggressive shareholder activism at bay. Equity ownership by institutional investors like mutual funds has limited impact of performance in India.[11] The nature of developing economies, such as India, is that they rely heavily on financial institutions and equity market for long term projects while corporations of developed world such as U.K and U.S, rely mostly on internal sources of finance and move to financial institutions and capital market only as a last resort.[12] Thus if shareholder activism is to prevail in India, it is imperative for mutual funds and financial institutions to play a more active part in the operations of the company.

However, what seems to be laudable is the budding stride towards creating a favourable set up for the cultivation and nourishment of this concept, which will soon enable us to reap maximum benefits.

Pre-Existing Shareholder Norms

Shareholder passivity was one of the crucial problems faced by the Indian corporate scenario post-independence. The equity markets were considerably shallow, and retail investment in Indian listed companies was negligible.[13] The legal regime governing corporate decision-making did not come to the aid of retail shareholders either. Company meetings had to be convened at specified physical locations.[14] On the other hand, certain institutional shareholders such as banks, development financial institutions (DFIs) and the then largest mutual fund, the Unit Trust of India (UTI), held larger stakes in companies in comparison to retail shareholders.[15] The strong nexus that existed between government and industry

[9] Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 J. CORP. L. 681 (2007).
[10] Marcel Kahan& Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007); *See also*, Randall S. Thomas, *The Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation*, 61 VAND. L. REV. 299 (2008); Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315 (2008).
[11] *Supra* note 4.
[12] AjitSingh, *Corporate Financial Patterns and Industrializing Economies: A Comparative International Study*, Technical Paper, International Finance Corporation (1995).
[13] John Armour &PriyaLele, *Law, Finance, and Politics: The Case of India*, 43 LAW & SOC'Y REV. 491, 496.
[14] Section 166(2) Companies Act, 1956.
[15] *Supra* note 4.

ensured that the management always enjoyed the support of these institutional shareholders.[16]This resulted in extreme shareholder passivity, of retail and institutional shareholders, post liberalization.

Another existent norm is widespread suppression of minority shareholder rights. The basic principle relating to the administration of the affairs of a company is that "the courts will not, in general, intervene at the instance of shareholders in matters of internal administration; and will not interfere with the powers conferred on them under the articles of the company"[17]

This is mainly the underlying principle governing the rule of majority. The rule of company governing by majority and 'supremacy of majority' has been settled in the very old landmark common law judgment of Foss v. Harbottle.[18] This principle has been widely prevalent in the Indian jurisdiction and has been reiterated several times. In furtherance of this rule, the court held "it is difficult to see how a few shareholders who represent a minority are entitled to maintain the suit and ask the Court to interfere on the question as to who should be the managing agents of the company."[19] Such decisions hindered the participation of minority shareholders in the management of the company and hence led to an unfair and iniquitous state of affairs within the system. Due to this, there arose a need for change, which was to be seen in the form of shareholder or investors' activism.

GOVERNMENT'S INITIATIVE: THE 2013 ACT

Indian corporate arena has witnessed several honest efforts in the recent past to enhance shareholder participation in the governance of the company.

In 2001, the facility of voting by postal ballot was introduced.[20] A set of rules promulgated by the Central Government listed certain resolutions that are to be mandatorily put to vote by postal ballot. In other cases, the company has the option to offer the postal ballot facility. The postal ballot system sought to bring about a difference by enabling retail shareholders to cast their votes and hence increase their participation. However one report states that the response of shareholders through postal ballot has been abysmally low at only about 3% on average.[21] Given the inadequate functioning of the postal ballot system, more recent regulatory developments have sought to utilize technological advancements to enhance shareholder participation and voting. In July 2012,

SEBI amended the listing agreement requiring large companies to provide electronic voting (e-voting) facilities in respect of matters requiring postal ballot.[22] Although it is too early to gauge the effectiveness of e-voting, it is expected to generate greater participation by shareholders thus in turn induce shareholder activism in the company. For example, the e-voting process is less costly compared to the postal ballot, and involves less time and effort on the part of the shareholders

[16]Omkar Goswami, *The Tide Rises, Gradually: Corporate Governance in India* (2000), available at http://www.oecd.org/corporate/corporateaffairs/corporategovernanceprinciples/1931364.pdf, at 8. (Last accessed on 27th April, 2016).
[17]*Rajahmundry Electric Supply Corpn. Ltd v. A NageshwaraRao*, AIR 1956 SC 213,217: (1956) 26 Comp Cas 91.
[18]*Foss v Harbottle*, (1843) 2 Hare 461: 67 ER 189.
[19]*V N Bhajekar v. K M Shinkar*, AIR 1934 Bom 243. See also, *Jhajharia Bros ltd v.SholapoorSpg.&Wvg. Co. Ltd*., AIR 1941 Cal 174 : (1940) 72 Cal LJ 458 : 195 SC 36 and *Heyting v.Dupont*, (1964) 1 WLR 843.
[20] §192A Companies Act, 1956.
[21] V. Kothari, *Welcome to the World of E-Voting*, The Firm: Corporate Law in India, July 2012.
[22]S.E.B.I. Amendment to the Equity Listing Agreement – *Platform for E-Voting by Shareholders of Listed Companies*, Circular CIR/CFD/DIL/6/2012 (Jul. 13, 2012).

as well as the company.[23]

These were the efforts to prevent hindrance in shareholder participation due to the lack of time and communication; as far as statutory rights and remedies are concerned, sections 397 to 409 of Indian Companies Act, 1956 lay down provisions for the protection of minority shareholders. In spite of the provisions, the majority rule continued to prevail as evident by the judicial pronouncements and there was no significant increment in the participation of minority shareholders in the company's governance. Companies Act 2013 has sought to invariably provide for protection of minority shareholders rights and can be regarded as a game changer in the tussle between the majority and minority shareholders. Various provisions have been introduced in Act of 2013 to essentially bridge the gap towards protection and welfare of the minority shareholders under the Act of 1956.[24]

The requirement of establishing existence of 'just and equitable' circumstances to waive any and all requirements of the section pertaining to meeting the minimum minority limits and providing 'security' while allowing such an application are excluded from the Companies Act, 2013.[25]Further, by way of Section 245, the Act of 2013 has introduced the concept of class action which was non-existent in in the Act of 1956.[26] This act enables minority shareholders to file a class action suit against decisions of the board which might be contrary to the Articles or Memorandum of the Company or which seems to be violating the provisions of the Companies Act. Moreover section 188 of the new Companies Act requires all related party transactions to be approved by shareholders through special resolution.[27]

An instance of success of these amendments was seen in the transaction between Siemens India and its German parent company. The proposal was a related party transaction and required approval of minority shareholders by means of a special resolution. The minority shareholders rejected the offer price as insufficient, as a consequence of which Siemens Germany revised the offer price from Rs 857.2 Cr. to Rs 1,023.27 Cr. Further, In the case of United Spirits, as many as 9 related party transactions with Vijay Mallya entities were rejected by minority shareholders.

A significant change in this regard has also been made to clause 49 of the listings agreement by SEBI, to inculcate the essence of the new companies act for greater participation of minority shareholders in crucial decisions of the company. One such regulation requires all related party transactions to be approved by 75% of the minority shareholders.[28]In July 2014, for instance, minority shareholders voted against a Tata Motors (TTMT IN) resolution that allowed, among other things, a couple of the firm's executive directors to be paid a minimum remuneration in the future if the firm's profits were inadequate. 70% of the shareholders voted for the resolution, while a 75% approval was needed for it to be passed.[29]

These legal modifications have resulted in providing impetus to shareholders. Very recently; CLSA wrote an open letter to Mr S. D. Shibulal, Infosys CEO and MD, questioning the sustainability of its business model, after getting

[23] Vinod Kothari, *E-voting becomes mandatory for all listed companies*, MoneyLife, July 16, 2012; Tania Kishore, *E-voting will make life easier for investors*, Business Standard, July 4, 2012.
[24] A. Sulalit, *Companies Act, 2013: Rise of the Minority Shareholder*, 6 I.L.J. 4 (2013).
[25] Section 241 & 244(1) Companies Act, 2013.
[26] Section 245 Companies Act, 2013.
[27] Section 188 Companies Act, 2013.
[28] S.E.B.I.Amendments, Circular No. CIR/CFD/POLICY CELL/7/2014, 15th September, 2014. - See more at: http://taxguru.in/sebi/sebi-amendments-clause-49-equity-listing-agreement.html#sthash.iyxbbGn5.dpuf. (last accessed on 25th Apr. 2016)
[29] M. Raychaudhuri, *Corporate Governance and Shareholder Activism highestin Asia*, Business Standard, September 23,2014.

feedback from various small investors.[30]

The incidence of shareholder activism in India is more than that in other Asian countries, according to a BNP Paribas Asia Strategy report. Among the instances of shareholder activism mentioned in the report were those involving Satyam Computer Services (now Mahindra Satyam), Coal India, and Ambuja Cements. [31]Maruti Suzuki and Alstom India have witnessed activism more recently in their governance.

With activism taking firm ground in the country, shareholder/investor activists have successfully obtained a say in the management of the company, however there are several turfs yet to cover in order to lucratively clout the mergers and acquisitions among the companies.

SHAREHOLDER ACTIVISM: PERORATION

Having addressed the various facets of the shareholder activism in India, the strategies they use to administer the operations of company and the relevant provisions affecting the shareholder's protection in India, which is essential for shareholder activism to sustain, we now deliberately arc over the challenges faced by activism in Indian corporate environment and the upshot of activism in the mergers and acquisition mechanism in India.

The Satyam fiasco in 2009 revealed various loops existing in the Indian corporate framework and underlined the importance of shareholder activism in India.[32] This Satyam scam, often compared to the Enron scam in US, was an eye opener for many and spurred various reforms in the corporate legal framework.[33] However, what is little known about the Satyam scam is that investor's activism, against an acquisition deal pursued by the Satyam promotors, is what lead to the revelation of a billion dollar scam undergoing in the boardrooms of Satyam Computers.[34] The success-run of the company was halted rather abruptly in early January 2009, when Satyam promoters resolved to invest the company's funds in buying stakes for an amount equivalent to $ 1.6 billion against their book worth of only $ 225 million, in two firms, Maytas Properties and Maytas Infra founded by Satyam's Chairman, Ramalingam Raju's sons.[35] The investors in the company dissented the move and forced the management to retreat from its earlier decision. Investors publicly condemned the move when the promoters of the company asserted that the move did not require approval of the stockholders. The thumbs down given by investors and the market experts forced him to retreat within 12 hours. This was a remarkable feat achieved by shareholder activists and also paved way to a more conducive environment for shareholder activism India.

A glaring example of an unrewarding merger deal for shareholders, where the dominant shareholders acted in their own interest neglecting the concerns raised by large investors, leading brokerages and minority shareholders is the Vedanta Cairn merger.[36] Cairn India's major shareholders are the promoters of the company having 60% stake in the

[30] K.S. B. Narayanan, *Rise of Shareholder Activism*, The Hindu: Business Line, April 25, 2012.
[31] *Supra* note 38.
[32] U.Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21 National Law School of India Review 4-5, (2009).
[33] *Supra* note8.
[34] *Supra* note 8.
[35] A.C. Fernando, *Satyam- Anything but Satyam*, Loyola Institute of Business Administration, http://www.publishingindia.com/uploads/samplearticles/mm-sample-article.pdf (last accessed 23rd March, 2016).
[36] B.Baruah, *Vedanta-Cairn Merger Makes Investors Glum, Company Says It's A Win-Win Deal*, (2015), http://economictimes.indiatimes.com/articleshow/47682883.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst(last accessed 23rd March, 2016)

company, Cairn UK holding Limited and LIC each own 10% (approx.) of the stock and other major stockholders are Foreign Institutional Investors.[37] This is a classic big merger with a lot of expectations. On one hand, management of the company is working with high profile market experts and on the other hand, few minority shareholders questioning the reason for such a move. Cairn investors fear that the firm's cash would be used to pay off Vedanta's debt and that it would inherit the problems of a large mining conglomerate, which is fighting environmental activists over an aluminium project in Odisha.[38] A day after Vedanta Ltd and Cairn India Ltd announced their merger, most analysts gave the thumbs-down to the deal for Cairn India shareholders, but called it a good opportunity for the shareholders of Vedanta.[39] Cairn India is a debt-free firm. As a result of this merger, public shareholders of Cairn will become shareholders of the heavily levered Vedanta Ltd, as the merger will socialize the debt of Vedanta Ltd. across the minority shareholders of both Vedanta and Cairn India.[40] Basically, the shareholders of Cairn India will be paying off debts of Vedanta Ltd. The minority shareholders of Vedanta will benefit at the detriment of the minority shareholders of Cairn India.

Any move against the Vedanta-Cairn merger will be fruitful only if the institutional investors are roped in, which is highly improbable as institutional investors are often reluctant in voting against the propositions promotors or taking an aggressive stance against unbeneficial decisions of promotors due to the prevailing conflict of interest among them. One day after Vedanta announced the move, institutional investors panned the deal but a negative vote against the merger is unlikely because of close business links between many funds and Vedanta group companies.[41] The Vedanta Cairn merger manifests the helplessness faced by the minority shareholders and institutional investors in India.

Although approval from government due to court cases by minority shareholders on the grounds of unattractive valuations may prove a hurdle for this merger but chances of rejection of the merger is very slim. It is possible to get away with such mergers in India because of one reason essentially, lack of shareholder activism.

India has witnessed a very mild level of activism, still, there is a huge potential for aggressive expansion.

CONCLUSIONS AND SUGGESTIONS

The way to solve the problem of lack of shareholder activism in India would be to create a more flexible capital market. The past few years have witnessed an initial level of activism in the corporate structure of our nation where promoters have experienced the power of activist shareholders.

Thus it can be safely concluded that Indian problem of substandard M&A can be easily solved by activist institutional investors and proxy advisory firms and deliberately adopting the U.S. model of shareholder activism. Reforms in transparency laws and more stringent measures that promote shareholder activism would create an effective threat to the dominant shareholders of the company. A viable option at this juncture would be concentrate on the greater role of institutional investors.

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[37] *Shareholding Pattern*, Cairn India, https://www.cairnindia.com/investors/shareholding-pattern, (2015)(last accessed 23rd March, 2016.
[38] *Supra*note 7.
[39] *Id*.
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