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Case Comment: Zee vs Invesco

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INTRODUCTION

When we talk about the elements that are imperative to a company, the relationship between promoters and shareholders has always been fundamental. The promoters and shareholders can highly influence the business of a company, be it a start-up or a corporate giant. The current times have seen a significant increase in the shareholder's interest in the company's activities and decisions. This active engagement of the shareholders by casting votes, engaging in discussions, and opining on resolutions proposes their significance, also gives rise to a number of disputes. Though shareholder litigation and shareholder activism were not actively seen in India, the past decade has seen some positive legislation and regulatory compliances, which contributes to improving corporate governance and enhancing shareholder rights. Briefly, the Companies Act, 2013 deals with shareholder activism which are followed by the regulations provided by the Securities and Exchange Board of India (SEBI), acknowledging the shareholder's rights and remedies. There have been precedents connoting the role of shareholders in protecting the interest of the company, and one such observation is, "Where the wrong is being done to the company by the directors in control, the company obviously cannot take action on its own behalf. It is in these circumstances that the derivative action by

some shareholders (even if they are in the minority) becomes necessary to protect the interest of the company."¹ The present case deals with the issue of shareholder activism, answering various questions relating to the jurisdiction, rights, and legalities.

FACTS OF THE CASE

The legal strife began on 11.09.2021 when Invesco Developing Market Fund and OFI Global China Fund LLC (Invesco), holder of 17.88% equity in Zee Entertainment Enterprises Ltd (Zee), issued a requisition notice under Section 100(4)², calling an Extraordinary General Meeting (EGM) to, among other things, remove Mr. PunitGoenka, the MD and CEO of Zee, and appoint six new individuals as independent directors of Zee. The contention to hold the EGM by issuing a requisition notice was declined by the Board of Directors of Zee. Thereafter, Invesco filed a petition before the National Company Law Tribunal (NCLT) for calling the meeting whilst also asserting the violation of corporate governance measures. Consequently, a suit was filed in the Bombay High Court requesting an injunction restraining Invesco from acting in furtherance of the requisition notice, declaring the requisition notice illegal and validating their decision of not acting upon the same. On 26.10.2021, a single-judge bench of Justice Gautam Patel granted an injunction in favor of Zee restricting Invesco from acting on its requisition to call an EGM. It was held that Section 430³ of the Act does **not** place an absolute bar on the High Court's jurisdiction to adjudicate matters arising under the Act, and Section 430 would **not** bar the High Court from adjudicating on the validity of the requisition notice issued by Invesco to call for an Extraordinary General Meeting.

Aggrieved by the order, Invesco filed an appeal before the Division Bench challenging the same.

LEGAL ISSUES

- Does the Bombay High Court have the jurisdiction to pass an order on the issue?

¹ *Starlite Real Estate (ASCOT) Mauritius Ltd. &Ors. v Jagrati Trade Services Pvt. Ltd.* (2015) CS No. 284/2014

² Companies Act, 2013, s 100(4)

³ Companies Act, 2013, s 430

- Is the calling of the EGM under Section 100⁴ of the Companies Act, 2013, via a requisition notice valid?
- Is the suit demanding injunction in the Bombay High Court barred by Section 430 of the Companies Act, 2013?
- Do the shareholders have an unconditional right to call an EGM even with the board's disagreement?
- Is the right of the shareholders to remove directors at an EGM affected by the prior approval of the Ministry of Information and Broadcasting?
- Is the prior approval of the Nomination and Remuneration Committee needed for the appointment and removal of independent directors?

OBSERVATIONS OF THE DIVISION BENCH

The Division Bench comprising Justice SJ Kathawalla and Justice Milind Jadhav observed that Invesco's proposed resolutions are not illegal and are legally enforceable and, therefore, dismissed the single-judge order 'on all counts.

Who has the jurisdiction: NCLT or Bombay High Court?

The Division Bench was of the opinion that the High Courts have an absolute bar in the matters which come under the jurisdiction of NCLT. It observed that "...the injunction granted by the impugned [single bench] judgment is squarely hit by Section 430 of the [Companies] Act." Section 430 of the Act bars civil courts from entertaining any suit or proceeding which comes under the jurisdiction of the NCLT/NCLAT. The intention of the legislature behind the introduction of Section 430 can be traced back to the Justice Eradi Committee Report, which mentioned the formation of a single specialized forum instead of numerous forums and multiple jurisdictions for company-related matters.

⁴ Companies Act, 2013, s 100

Is the requisition notice illegal?

It was also observed that the term "valid requisition" means nothing but numerical and procedural compliance, and since the requirement of 10% shareholders was fulfilled, the requisition notice stands valid. It was also noted that the word 'valid' had no reference to the 'object' of the requisition but rather to the requirements in the section itself and that the reasons that are provided are not subject to judicial review.

Is the suit demanding injunction in the Bombay High Court barred by Section 430?

It is imperative to recognize the scope of civil courts under Section 9 of the CPC⁵. According to Section 9 of the CPC, the courts have jurisdiction to try all civil matters, with the exception of those for which cognizance is expressly or impliedly barred. As a result, when an issue falls under the authority of a special act or provision, the civil court cannot intervene unless there has been a violation of legislative procedure or the tribunal has behaved inconsistently with the rules of judicial procedure. Hence, it was observed that the order of injunction was not within the purview of the Bombay High Court as it had no jurisdiction to adjudicate upon the matter.

Do the shareholders have an unconditional right to call an EGM?

The Division Bench emphasized the intent of the legislature while framing the law. It was observed that "Section 100(4), in fact, equips shareholders with an additional right to call and hold an EGM despite an unwilling board. The legislature's intent, therefore, cannot be ignored while construing the relevant provisions." The prominent role of corporate governance was adopted in Section 100 in enabling the shareholders to exercise the democratic rights of speech and vote, and as a result, the Division Bench observed, "If we were to open this flood gate, corporate democracy, as we understand it, would be rendered nugatory. Shareholders will be repeatedly restrained and enjoined from exercising their statutory rights. Civil Courts will grant injunctions at the ad-interim stage and thereafter embark on an analysis as to whether or

⁵ Code of Civil Procedure, 1908, s 9

not the resolutions proposed are illegal or legal and only thereafter, vacate the injunction, if at all.”

Is the right of the shareholders to remove directors at an EGM affected by the prior approval of the Ministry of Information and Broadcasting?

The Division Bench was of the opinion that the prior approval of the Ministry of Information and Broadcasting is required only in the case of appointments and not for the removal/resignation of a director. Hence, the right of the shareholders to remove the directors would not be affected by the prior approval.

Is the prior approval of the Nomination and Remuneration Committee needed for the appointment and removal of independent directors?

The Division Bench concurred, saying there is no bar on a shareholder to appoint an independent director, nor any prior approval is required from the Nomination and Remuneration Committee. The Division Bench also examined Section 160⁶ of the Companies Act, which deals with people who aren't retiring directors being able to run for directorships. It was observed, “On a plain reading of Section 160, a company shareholder clearly has the right to propose the appointment of an independent director.”

DECISION

The Division Bench of the Bombay High Court set aside the order passed by the Single Bench, which stated that the requisition notice was illegal, the Act of not acting on the notice by the Zee's board was valid, and which granted an injunction order for calling an EGM for removing Punit Goenka as the Director as well as appointing six other independent directors, amongst other matters. It was observed that the requisition notice was not invalid as the shareholders had an absolute right to call for an EGM under Section 100 even if the directors refused to call for the same. It was also observed that the injunction order passed by the Bombay High Court was beyond its jurisdiction as the decision was barred by Section 430 of the Act, which affirms

⁶ Companies Act, 2013, s 160

exclusive jurisdiction of the NCLT/NCLAT on all companies law matters. The contention of Zee that removing Punit Goenka would leave a 'managerial void' was also addressed with Section 160, which states that any individual other than the retiring directors has the right to stand for a directorship at any general meeting of the company if he or another member intending to propose him as a director meets the requisites as provided under the applicable Act. It was recognized that the legislative intent behind making the laws was to protect the rights of the shareholders along with preserving corporate democracy. This was observed keeping in mind the Supreme Court's ruling in *LIC v Escorts*.⁷ Expressing that the judgment would be rendered meaningless, and the very fundamental footing of corporate democracy in India would be wrecked. The Division Bench, therefore, decided that they could not establish a precedent that would have far-reaching effects, such as sidetracking the democratic functioning of enterprises across India, attributable to the board of directors' non-cooperative and obstructive behavior.

ANALYSIS AND CONCLUSION

The Division Bench's judgment has emphasized the long-lasting legal position on corporate democracy and shareholder activism in India. The stand of the court on the rights of the shareholders is supported by understanding the intent of the legislature while framing the law. The recent legislation and regulations are made with a view to not letting the upper management engage in malafide practices under the corporate veil. This judgment also throws light on NCLT/NCLAT's jurisdiction on all matters relating to corporate disputes. By stating Section 430, the court also mentioned that no parallel proceedings should be entertained along with examining the rationale behind having a single specialized forum for company disputes. An essential conclusion of this judgment would be its indisputable acknowledgment of corporate democracy principles.

⁷ *LIC v Escorts Ltd.* (1986), AIR 1370