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THE POWER OF SHAREHOLDERS - ANALYSING THE IMPACT OF SHAREHOLDER ACTIVISM AND CORPORATE GOVERNANCE DECISION MAKING

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CHAPTER 1
INTRODUCTION

1.1 ABSTRACT

Corporations be it the mammoth size are critical to the creation of finance, i.e., money in the contemporary societies. It is these which not only create economic value rather these entities generate employment. The way in which they are founded and erected as well as governed through is very much of value to a nation's economic development. Corporate governance not only means the utilization of resources with efficiency rather it also means greater access to capital, creation of more and more employment opportunity ensuring high quality and at the same time a better way of developing the domestic as well as the regional capital markets. Corporate governance is not only vital to the governance of private institutions rather they are critical to the development of public institutions. Thus, it can be said that corporate governance is a condition precedent for attracting equity capital which will further go on to contribute for the sustainable growth at the domestic level. For achieving the same, the important elements are the ones like credible transparency followed by accountability and at last but not the least the protection mechanism of shareholders.

With the introduction of the LPG, i.e., liberalization, privatization and globalization, the financial deregulation and at the same time liberalization both in the field of trade and capital markets took place. As a result, many barriers both within and across the country have been removed, further giving the chance to the firms to prosper the opportunities in the business world having the support of accessible priced capital. In the consequence the market trend in the globe is an ever-flourishing reality of commerce and trade in this era of the twenty first

century. With the development of financial market, the role of an investor has intensified many folds. Thus, with the trend of time the demand for a better and high standard of corporate governance is increasing day by day so that the capital is used efficiently and in an effective manner which will ultimately result into good returns. Nowadays, the investors expect the board to make such decisions which are free from the conflict of interests. They put force on the matter that enforcement of any decision has the force of necessary authority, availability of resources and at the same time the same should be credible enough so as to ensure that the act is done expeditiously and in an effective manner. Thus, it can be said that these are only the rules and practices of better corporate governance which shall ultimately go on to create the trust of the investors ultimately leading to the robust economic development of the country. It is also worthy to be noted that for proper corporate governance blind faith should never be a medium rather reliance should be placed on verifiable reporting by firms, finally articulated by the board of directors.

The adoption of the principles on corporate governance which were signed to and ratified by the member countries of the Organization of Economic Operation and Development (hereinafter OECD) was the result of the reaction towards the principles on the same lines of OECD. These principles were adopted in the month of June of the year 1999. These principles are mainly concentrated on five areas like the one is concerned with the rights of the shareholders and the others were concerned with equitable treatment of the stakeholders and their roles therein, the other being related to transparency and discloser and the respective duties of boards. To bring all these principles in action and at the same time to bring in private sector representative and the policy makers stand at one point in order to create atmosphere for the policy dialog, both OECD and the World Bank have come together to create cooperation at the global level. The same shall be comprised of corporate governance round tables at reasonable level. The aim of the same principle for the developing economies is to create institutions in function for the purpose of sustainable development of the private sector. This work is put into action through a focused cooperation with the World Bank and other donors. Corporate governance is concerned with ethical conduct in business. Ethics is concerned with the code of values and principles which motivates a person to choose between the good and the bad.[1] When the clash in the interest of the parties occurs then at that point of time the Company's managers take decision with keeping in view of the set of the principles influenced by ethical values and culture of that company. If in a company's management ethical values are prevailing, it means the business of company will always do better as the company is seen to conduct its business commensurate with the expectations of all investors. Corporate governance has never been confined to the sphere of law alone. It breaths from the culture and mind set of management and may not be regulated by the law alone.[2]Corporate Governance deals with the functioning of the company in such a way that fairness is maintained in the company for all the stakeholders and at the same time its way of working could be beneficial to all. It is about fairness, accountability and integrity. The company needs to recognize that its development is possible only with the cooperation of all stakeholders and the company can expand such cooperation by following the good corporate governance practices. In this context, the management must work as a trustee of

[1] N.R .Narayan Murthy Committee report on corporate governance .page no 1

[2] Shri Kumar Mangalam Birla Committee report on corporate governance

the shareholders and stop disproportionate benefit among different section of shareholders. It is almost a blossom that the quality and adequacy

in the Corporate Governance of any country determines the capital market's future of that country. The company receives capital from a large investor's base which comes from both, the domestic as well as the foreign capital markets. In this respect, investment is a belief that the investor has on the management of that company. When a shareholder invests money in the stock market, he expects the board and management of the company to act like a trustee and determine not only the security of their invested money but also the percentage of return on that money. In this context, it is always expected from the management of the company to work in the best interest of investors and implement the practices of good corporate governance.

We are living in this age when the flow of capital is so fast across the world just like information. Companies that are not promoting a strong culture and independent oversight, their future health and stability are at risk.[3]As a result, the link between the company's directors, management and its financial reporting system has never been so important before. As the boards lead companies, they play a key role in their efficient functioning. Research suggests that investors in both the domestic and foreign market pay attention to the company which is well managed and as a reward, it positively attracts the investors with high valuation. Such company has a common feature ,i.e., it has a system which permits the management and the board to take innovative decisions keeping themselves within the framework of accountability for the betterment of the company. In other words, company has a system of good corporate governance.

Corporate governance is a very important element of increasing the financial efficacy of a company. Good corporate governance also promotes that the corporation should take into consideration the interest of a large constituency as well as the community where it works. Apart from this, it also ensures that its board is accountable to the shareholders and this in turn helps to ensure that the corporates work not only for themselves but for the welfare and benefit of the entire society. In the short term, the company can earn more profit by taking advantage of the discord between the stakeholders [3], however, long term stability and profit in the company can be ensured only through balancing the interests of all stakeholders. This contains, for example, taking into consideration the worry of the society for environment and labor. Failure to implement good corporate governance has many far-reaching consequences that are not limited to just the regulatory problem. There is a lot of evidence that suggests that companies which did not implement the process of good corporate governance had to pay a significant risk premium when faced with the problem of lack of capital in the public markets.

India is the fifth fastest growing economy in the world with a nominal GDP of 2.94 trillion in total and India surpassed United Kingdom and France in 2019. According to purchasing power parity, India comes in third with 11.33 trillion. As our economy is growing, the chances of frauds and scams in it are also increasing due to which

[3] India Is Fifth-Largest Economy In 2019, Overtakes France, UK: Report https://www.ndtv.com/india-news/india-is-fifth-largest-economy-in-2019-overtakes-franceuk-report-2181652

many Committees have given suggestions from time to time so that such frauds and scams do not happen and can be stopped. There have been many scams in our country and due to those scams many major changes have been made in the company law, but in spite of those changes, why is such a thing not being stopped at such a gap is a matter of concern. In order for a company to run well, it is very important that the company strictly follows the rules of corporate governance.[4] Shareholders' Activism is the use of a part in ownership to influence the decisions taken by the management of a company be it either in a reactive way or in a proactive way. In US corporations, the life events of Ben Graham, Rose Perrot, Karlas kerror are fine examples of proactive ways of shareholders' Activism. While in India up till now, the ways in most of the cases have been as reactive barring few exceptions. For bringing in the shareholders' Activism, the aim can be either financial or non-financial. The financial one may include the increase in the wealth of a shareholder through change in strategy of the corporation or structure of capital and also cost reduction. On the other hand, the non-financial one may include the sustainability in the performance a company in the different aspects like the socio-economic and environmental ones. Shareholders' Activism can have several forms of manifestations like selling of the shares, time to time dialog with the management of the company, bringing forward the proposals of the shareholders, litigations as well as bid making for the purpose of acquisition of controlling interest in the company. Shareholders' Activism has taken the form of emerging global trend particularly after the giant scandals like World Com and Enron. Though in India also after the Satyam scandal the shareholders' Activism has taken pace but still it's in the nascent stage. The pioneering efforts of shareholders' Activism in India can be related to early 2010 when Security Exchange Board of India brought forth a mandatory requirement for the domestic mutual funds. This requirement included discloser of voting policies at companies wherein investment has been made and that to on a yearly basis. The same was seen as an opportunity by research services private limited which further gave rise to the establishment of the first proxy advisory services company in the year 2010. These firms provide advice for the purpose of investing in mutual funds to the institutional investors. The same is not restricted to mutual funds rather extends to insurance companies as well as foreign institutional investors. The result of such disclosures was very useful to find and engage into the routine business of the company.

Though as discussed earlier, shareholders' Activism is still in a nascent stage but a numerous attempts showing increase in contribution and participation of shareholders for their right are worthy to be at least noticed, since many times the collective activism of the shareholders has caused the management to reconsider its decision on major policy matters. Even now, the corporate proposals of even giant corporations are at least scrutinized by the shareholders collectively. One of the key factors behind such trend of change is the introduction of a number of legal as well as regulatory measures be it either through the enactment, i.e., direct legislation in the form of provisions in the company's act or through regulations by the Security Exchange Board of India. The implementation of the vote casting right through electronic postal ballot being made mandatory and along with the same, the recently introduced live annual general body meeting through web cast (particularly for the mammoth corporations) have paved the way for increased participation of the shareholders further causing increase in the engagements in the proceedings. Not only this, in the case of institutional investors express task have been given so as to engage in more active participation as well as to ensure greater penetration of internet which shall ultimately go on to cause increase in the participation of the shareholders at the ground level, i.e., retail shareholders. This effort of the SEBI by regulatory measures has significantly caused improvement in the quality and extent of the valuable information received by the shareholders and much credit of the same goes to the 2013 amendment of the Companies Act, 2013[4].To be more specific the amendments in regulatory measures by the SEBI has meant that the majority of minority approval has the meaning that the decisions of the promoters and management are subject to approval of the public shareholders to such related party transactions.

Apart from the direct and delegated legislations, another factor which has contributed to the shareholders' Activism in contemporary times is the role of governance intermediaries and to be more specific the proxy advisory firms, as discussed earlier. Another factor which is influencing the culture of shareholders' activism in India is the increasing penetration of the foreign investors in the Indian companies through foreign direct investment (hereinafter FDI). FDI not only brings with itself the wealth critical to the functioning of a corporation rather it also brings with itself the culture of shareholders' activism hitherto unknown to Indian corporate arena. This culture of shareholders' activism trickles down into Indian corporate system consequentially giving rise to shareholders' activism which ultimately benefits the stakeholders meaning the shareholders of a company.

The contribution of shareholders' activism can be understood by the following step by step procedure. For example, when any corporate investment style is being considered, shareholders are mainly inclined to get absolute returns of their investment as opposed to the relative performance. In generality, the annual report when reviewed by the shareholders and also voting takes place so as to examine that shareholder are in favor or against the proposals of the management. In case of questions or if any red flags are raised then formal discussions are invited with the board of directors and the executive management. In such case, the same can be used as opportunity to explain their own actions. Particularly, in the cases wherein the companies are on a regular basis yielding under-performance with no signs of improvement such activism is bound to loom. The shareholders who are unsatisfied may react by voting against the decision of the management at the annual general meeting. This satisfaction is not limited to the extent of casting vote against the decision of the management rather it extends to the extent of follow up with the vote by regular letter to the company continuously explaining as to how they do not support the decisions of the company and at the same time, it is accompanied with the proposal of recommendations for alteration in the decisions. The response to the same is also followed up as to how much the board is willing to bring up the suggested changes in the force.

Shareholders' Activism can fructify only when such environment is made where the regulators are inclined towards the protection of the interest of the minority shareholders. The Companies Act, 2013, just after the revisions to clause 49, in terms of bringing reforms in respect of listing agreements and along with it the other regulatory changes by SEBI have paved the way to bring many changes which shall ultimately go on to enhance the landscape of corporate governance in India. The mandatory requirement for ensuring discloser in greater degree by companies has finally gone on to help shareholders to examine and particularize the actions of the company and thus make them more well versed with the decisions of the company. Another revolutionary effort

[4] The companies act 2013.

so as to ensure greater participation of the investors in the voting process was the introduction of mandatory e-voting in the year 2013.This effort went on to make voting process painless and at the same time liberated the voters from the pain of approaching the same from any independent location. Even greater transparency in board meetings got ensured by the provision of independent director. The provisions like class action suit against the decision of the company or its board gave wings to the confidence of minority shareholders. They can now at least raise their voice against the company whenever the time comes. The events fought and won over by the shareholders through their collective efforts can be taken a glance of in the following events:-

The first event which attracted the attention of the corporate arena was the Akzo Novel and Sesa Sterlite merger case wherein the decision of the Board for making a proposal to merge the three promoter held entities (which were unlisted) with Akzo Novel at prima facie high valuation was challenged by domestic institutions but such shareholders' activism could not bear fruit and the same got defeated by getting sufficient votes by majority shareholdings but left the mark in the corporate arena for further shareholders' activism in Indian corporate system.

The aforesaid event could not defeat the decision of the management but the ideas of the same fructified in the year 2014 wherein the top brass like Tata Motors United Spirits and Siemens were forced to re-propose their resolutions with enhanced discloser for payment of remuneration to the top office bearers of the company. This was an instance of victory of the shareholders against the management of the company in its routine affairs.

In the line of events, another case is of Maruti Suzuki India Ltd. wherein Japanese Suzuki Motor corp. had declared that it will invest in its factory in Gujarat and shall thereafter sell the car produced therein to Maruti Suzuki India Ltd. This was a clear case of alteration in earlier plan wherein the Maruti company was supposed to build a plant. Surely, such announcement had its own ramifications in the form of raising of concerns by the shareholders of Maruti company as this event will go on to delegate Suzuki to sale the cars at higher cost to what Maruti company could produce itself in terms of money. Some shareholders went on to criticize to the extent that such declaration was nothing but a tactic to shift the finance from the domestic partner Maruti to the offshore partner Suzuki. Ultimately this effort was successful and the company was forced to alter its proposal.

Another fine example of shareholders' activism was seen recently in the case of sale of Fortis Healthcare to Manipal Hospitals by majority stakeholders Mr. Malvinder Singh and Mr. Sivender Singh. It was slammed by minority shareholders time and again through different media which finally went on to cause a major loss to the majority players like the Singh brothers as the share prices plummeted to thirteen percent and the Ranbaxy Daichievent (orchestrated again by the same brothers) was not left from attracting the attention of the Hon'ble Supreme

Court. Finally, this majority stakeholder's giant had to face the wrath of Hon'ble Supreme Court in the form of contempt action which could even extend to putting them behind bars.

1.2 SIGNIFICANCE OF THE STUDY

The present study is very relevant in the fast-moving corporate world in general and in India specifically, the shareholding pattern is changing rapidly in country with the flow of foreign investment the foreign ownership is also increasing. Foreign investors are coming with their own tool kit due to that cases related to shareholders' activism in country are increasing. It is clear from the discussion hereinabove; the increase of shareholders' activism cases in corporation like Fortis Healthcare or in big giant like Tata Motors is a sign of changing trend and better participation of shareholders in company's affairs.

An inadequate legal framework with less provision to safeguard minority shareholders and weak provision of discloser caused the Satyam fraud, in which millions of shareholders lost their wealth but the shareholders in USA got compensations by class action suit. In India for a long-time demand come to an end when the Companies Act, 2013 brings the concept of class action suit and the concept of majority of minority in related party transaction. The SEBI brings many provisions like proxy advisory firm and discloser of voting pattern by mutual fund and other institutional investor make the minority shareholders more powerful but they are not doing that much of activism as shareholders do in USA.

The country became the fifth largest economy in 2019 in the world the reason behind it was the increase in foreign direct investment in India and the same time foreign culture is also coming to India which can be seen in the cases of shareholders' activism in big companies like Tata Motors or Maruti Suzuki and in recently in Fortis so the researcher wanted to know that what is the reason behind the increase in the cases of shareholders' activism in India especially in proxy season 2017 and also why the cases of shareholders' activism is not that much as in USA. Now with the provisions like e voting and class action suit still the cases are not that much.

In the background of the facts and the resultant problems discussed above, the researcher is prompted to undertake the study on Corporate Governance and Shareholders' Activism in India. An effort has been made to do in-depth contemporary relevant study and to address some of the important legal issues that surfaced in the present-day corporate governance and shareholders' activism in the wake of globalization.

1.3. STATEMENT OF RESEARCH PROBLEMS AND RESEARCH QUESTIONS

Good corporate governance is essential for the economic development of a country because it is essential for the growth of a company and the active participation by the shareholder in company's affairs will change in positive way the whole working environment of the company. The United States of America is the biggest economy in the world and India is the fifth biggest economy (2019) so it is to be seen that in USA shareholders' activism is acknowledged as a tool for better corporate governance but what will be the effect of the same concept in India, since the economic development in India attracting more foreign investment with foreign ownership. The foreign ownership also bringing their own tool kit so the country could not be untouched with the effect of shareholders' activism and the same thing is being seen in proxy season 2017 where a large number of cases of shareholders' activism reported. The recent case of Cyrus Mistry in which the giant company Tata and Sons has to face the flare of shareholders' activism. A number of legal changes took place to empower minority shareholders and in last five year the number of cases of shareholders' activism increased.

In the light of the context given above, the researcher is impelled to seek answers to the basic research questions, such as

1. What is the concept of shareholders' activism?
2. How legal framework related to shareholders' activism evolved in India?

3. What is the contribution of Companies Act, 2013 and SEBI regulation in favour of shareholders' activism in India?
4. How the Satyam scam contributed to regulatory changes in support of minority shareholders?
5. What is the main difference between the shareholders' activism in USA and India?
6. How does the Indian Judiciary respond to matters relating to shareholders' activism in India?

1.4 HYPOTHESES

The present study titled Corporate Governance and Shareholders' activism in India is proceeded with the following hypotheses:

- Shareholders' activism will have negative effect on director's powers and duties and will affect overall functioning of the company.
- Following shareholders' activism as in U.S without studying Indian scenario properly may have detrimental effect on corporate governance.

1.5 OBJECTIVES OF THE STUDY

The objectives of the present thesis work are given as below: -

- To study the concept of shareholders' activism, its history, causes and influence. The study will also look at the types of shareholders in a company and their role in shareholders' activism
- To study the nature, extent, incidence and impact of shareholders' activism in India so far and what will be its effect in future on Indian companies.
- To examine the effects of shareholders' activism upon the rights and duties of shareholders and directors in a company.
- To examine the impact of shareholders' activism on work environment in a company.
- To examine the sufficiency or otherwise of the existing laws to provide safely and protection to the rights of shareholders as well as directors in a company.

1.6 SCOPE AND LIMITATIONS

The present thesis titled "the power of shareholders- analysing the impact of shareholder activism and corporate governance decision making" in India is a comprehensive study on the working style of the companies in USA and in India which also include the legal framework related to shareholders' activism in both the country. The scope of the study focuses on the effect of the concept of shareholders' activism in Indian companies because the foreign investment are increasing in Indian markets which also bringing foreign legal concept like class action suit etc. the study will cover major laws such as the Companies Act 1956 and 2013, the Securities Exchange Board of India, the clause 49 and Listing Obligations and Discloser Requirements, Regulation 2015. The study will also cover the various reports given by the various committees in India related to minority shareholders rights and better participation of minority shareholder in company. Like the Rajinder Sachar

Committee, the Irani Committee and the Kotak Committee. The study will also cover the main important events of shareholders' activism in USA and in India with the latest cases of shareholders activism in India. The study will not cover in detail the Securities Act 1933 and the Security and Exchange Commission 1934 and Sarbanes Oxley Act 2002. other sectoral laws like Telecom Regulatory Authority of India Act, with these limitations, the researcher has taken proper care not to deviate from the present topic and confine the study to corporate governance and shareholders' activism in India.

1.7 RESEARCH METHODOLOGY

The title of the thesis "the power of shareholders- analysing the impact of shareholder activism and corporate governance decision making "in India distinctly states on examining and evaluating shareholders activism. In order to meet the objectives of the study, to test the veracity of the hypotheses, to find answers to the research question and to arrive at fair conclusion, the researcher has adopted doctrinal methodology for the research work. The study has not resorted to empirical methodology as the subject matter does not involve selection of sample size and collection of data.

Doctrinal research essentially deals with what the law is on a particular issue. Its basic aim is to analyse the existing legal framework and how it has evolved and is being enforced. The study is mainly related to critical analysis of the effect of development of legal framework and its effect on minority shareholders in India.

In the present doctrinal approach, the researcher also relied upon historical, analytical and evaluative methods. The evolution of legal regime is traced through historical events, wherein the study covered three phases of emergence of laws pertaining to corporate governance and consequential rise of shareholders' activism in India. The study is partly analytical in nature wherein the researcher explored the existing law and the foreign laws and the substantial events on the area of research. The relevant judgments and events are also analysed for understanding the approach of the judiciary in the area of research.

The effectiveness of new legislations is evaluated through critical assessment and the findings are arrived by researcher's study and logic.

The researcher mainly relied on the primary source like statutes, regulations, committee reports and secondary sources like books, articles, newspapers, dictionaries and websites. Throughout my study, the researcher has followed a uniform mode of citation

The information acquired from different sources is duly acknowledged in the footnotes and bibliography. Due acknowledgements are made to the authors for using their extracts for the purpose of research. As a supplement to the existing literary sources, the researcher has also consulted government officials, advocates and academicians.

The pattern of footnotes followed throughout the study is based on the footnoting rules formulated by the Indian Law Institute (ILI), New Delhi.

1.8 LITERATURE REVIEW

For the purpose of current study, a lot of literature has been referred in order to get an insight of the problems faced by minority shareholders and the reasons for their being more vocal by using rights given under various provisions of company law and other laws. Shareholders' Activism cases are increasing day by day in India and in turn compelling the management to change its decision which is not suited to the interest of minority shareholders. For these various provisions of several Acts and articles of the company law and SEBI LODR have been consulted. In addition, several judgments of the Hon'ble High Courts, Hon'ble Supreme Court and NCLT relating to protection of minority shareholders have been relied upon. The current study has also examined various reports of the Law Commission, several reports of the Committees constituted by the government and opinion of experts on tribunals to get an idea about the current issue.

There is a lot of literature available on corporate governance but there is a shortage of literature available directly on the shareholders' activism in India. Therefore, the researcher has to refer to several books and articles in several journals to gain knowledge about the shareholders' activism in India. Following are some of the important literatures referred by the researcher for his research: -

Books & Encyclopaedia

Francis J Aquila, The Shareholder Rights and Activism Review, Law Business Research ltd, London,4th Edition (2019)

This book deals in detail with the state of shareholders' activism worldwide. It contains fifteen chapters covering almost all the developed economy. The book in its chapter five talks about the shareholders' activism in India in which it states in detail the law related to shareholders' activism in India which means all those laws which empower the shareholder to use its right in order to change company's behaviour. The main part of this book is that it denotes the major shareholders events or cases in India with selected provisions. So far whatever I found in any book or article regarding shareholders' activism in India, it talks about the power of activist but does not give relevant provisions. This book also talks about the present situation of shareholders' activism in our country and what we need to do in future for better shareholders' activism. It also talks about how SEBI and the new company law contributed for the shareholders right and especially the minority shareholders right after the big scam like Satyam took place in India. Chapter 15th of the book talks about the shareholders' activism in United States of America. It talks about the central law as well as the state law since America is a federal country so they follow both the law. It was the US where the birth of shareholders' activism took place so it talks about the history and development as well as the present scenario of the activism. One shortcoming which I noticed in this book was that it talks less about shareholders' activism in US compared to other countries.

Jeff Gramm, Dear Chairman the Board Room Battles and the Rise of Shareholders' Activism, US, Harper Collins books, 1st Edition (2017).

This book deals with the cases and events of shareholders' activism in the United States of America. The author says in detail about the first case of shareholders' activism at the time when there was no such disclosure law as available in US now and all the shareholders benefited due to the struggle and effort of the first activist shareholder. The book in its first chapter says how the shareholders' activism took place in US Corporation and what were the challenges which were faced by the activist shareholders in order to get benefited. The book in its second chapter denotes a successful case story of Robert Young and how that shareholder activist compelled the CEO of the General Motors to change his working style and give more attention to the shareholders of the company and its employee rather than to the technology. In this chapter, the author shows the continuous endeavour made by the shareholders to change the company working style.

This book also says that how the shareholders' activism evolved and took its speed to reach the level where it is right now. The author tried to showcase the whole journey of shareholders' activism in US from the period of 1920 till today.

Author also put some original letters of the active shareholders which was written by the shareholder to the head of the company at the time of his or her activism. This book denotes not only the important events of shareholders' activism but also the crux of the cases written in this book which ultimately give practical knowledge of the activism.

CM Madtha, Shareholders' Activism an Emerging Paradigm, the ICFAI University Press, 1st Edition (2008)

This book contains fourteen articles written by different writers in which the 1st chapter is written by author CM Madthain. In this chapter he talks about the global trend of shareholders' activism, especially the institutional shareholders' activism like pension fund, mutual fund and hedge fund investor's activism. After the World Com and Enron scam a new turn of shareholders' activism is gaining more popularity in all over the world. Through recent changes in India, the shareholders are affecting corporate behaviour in the corporation. The second article of this book has the title-"the activist investing an approach to growth" in which the author denotes about the changes in the US law in 2003 when it introduced the proxy rules in 2003. Activist investing becomes prevalent in the corporation making it easy to achieve representation in company's board.

The third chapter having title "shareholder voting and corporate governance; economic prospective," in this article the author says that how the shareholders in US through their voting power changed the corporate decision making to enhance corporate governance in the company and how the shareholders are addressing the objective of the firm as value maximizing. In next article of the book titled "the case of powerful shareholders" the author discusses in this chapter about the effective participation of shareholders in the corporate governance. The management and board have vast power with reference to decision making in the company so they are also accountable to the shareholders of the company and where the institutional shareholders are united then management of the company will be accountable. The book also talks about the merit and demerit of the shareholders' activism meaning when shareholders are angry, they will interfere in more management work and ultimately hamper the working style of the company which is not better for the stakeholders as well as for the company.

S.K Sahary, Company Law, Universal Law Publication, Fifth Edition (2008)

This book deals with the various aspect of corporate law from the history of company to the latest trend of company law is written in the book, the book talks about the modern trend of company law not only in India but also the world. But one thing which I did not find in this book was the managing agent system, it was earlier in the same book but in old edition unfortunately the book deleted managing agent system. The book is very helpful in searching any topic the main thing that attract in this book was the arrangement of table given section wise and topic wise the commentaries also, earlier it was chapter wise which was not much helpful. Topic wise commentaries at the same updated case low give eminence help to the reader to study and understand the judicial thought. The book shows the practical aspect of the company law which was untouched so far, one more thing in this book was for writing history of company law the book contains the table wise 1993 Bill and proposed change in the Bill in 1956 act. The most attractive thing in this book was the comparative analysis of case law at world level, means different countries which show what is exactly happening in other countries as well.

Kailash Rai, Company Law, Allahabad, Allahabad Law Publication, Eleventh Edition (2009), reprint in 2011. This book denotes the fundamental of corporate law, like the formation of the company the power and liability of directors as well as the auditors, the management etc. the book on the other hand also discuss in detail about the shareholders how they are owner of the company what are their rights and how they use all those rights as well. The book also discussed the kind of share like preferential and equity at the same time their sub kind as well, voting rights of the shareholders and increase of authorized share capital as well as increase of subscribed share capital, alteration in reduction of share capital, the rights and liabilities of creditors also given in detail. How a shareholder becomes a member, his duties and liability and loss of limited liability as well. The book also contains the company law amendment 20006 new provisions and the recent case law with the comment of the author; author used his own thought somewhere which was good. After the amendment of 2006 the new condition for the appointment of director was introduced the book covered all those condition as given under new section of 266 A to C, which talks about the directorate identification number is required for the appointment and reappointment of the director as well. Book also inserted new provision of 253 of the company law. Overall, the book gives satisfactory information of the all part of company law till the date it was written, since the publication of the book is a decade ago so at that point of time it was good and now it is useful.

Dr. G.K Kapoor and Dr. Sanjay Dhamija, Company Law, a comparative text book on Companies Act, 2013, Taxmann Publications (P) Ltd. New Delhi, Twenty first Edition (2018). This book talks about in very depth the latest trend of company law and effect of various amendments in company law including the latest amendment of 2017. The book in detail denotes about the power function and liabilities of independent director, how he will get selected what are the motive of bringing the concept etc. the book also discusses about the Committee of Board of directors including their liabilities, powers and duties. The book also discusses few important things like share held in trust, discloser of beneficial interest of the members and how the members will get register as well. The author of this book also denotes rectification of members the interested directors, what is his liability towards company and its shareholders as well. The book discusses about the private placement and its mode that how this takes place in the company. The book in its 23rd chapter discussed in details about amalgamation of the company how it takes place and compromise as well as the arrangement, reconstruction etc.

The most interesting and important thig I found in this book was the new concept of class action suit given in detail, the book talks about the application of the class action suit as well as the condition in which can be filed by the plaintiff. Since, it is the new concept so very less material valuable on it but the author written much on this in the book which was very useful. Since the class action suit can be filed in tribunal so what are the power of tribunal how the tribunal work and who can go to the tribunal also discussed in the book. While discussing about the NCLT the author also discusses about the company law board. The book also discusses under section

242 the power of the tribunal in new company law. The book also discusses in its 27th chapter corporate governance in which the author discusses all important aspect of corporate governance, like the transparency, efficacy, fairness, and the accountability of the management of the company. how the corporate governance evolves and how it is right now, the effect of new amendments of corporate governance and the importance of the SEBI as well.

Avtar Singh, Company Law, Estern Book Company publication, Sixteenth Edition (2015).

This book is very useful because the language of the book is very simple and the way its author explained the term it is quite easy to understand. The book discusses in detail the formation of the company, how the company comes into existence and then how it evolves. From the history of the company to the till date it talks about the all-important aspect of corporation like the role of the management, the duty and liability of the auditors and the power and duty of the shareholders as well. The book contains all the new provision of the 2013 act, like the concept of independent directors, women director and at the same time their duty which was more legal this time. The new company act fixed the duty of the directors as well; the book also discussed the provisions related to class action suit and the national law appellate tribunal.

On the other hand, the book also discussed the new act especially the checks and balances brought by the legislature in auditing will make the concept of corporate stronger and provide to the public a more secure corporation. The book also discusses about the amalgamation, how it takes place the concept of merger and winding up of the company. The book also talks about the increasing voting power of the shareholders for better checks and balances in the company. Overall, the book covers all the important aspect pf the corporate law and new act of 2013.

Dr. N.V Paranjape, Company Law, Central Law Publication, Allahabad, Seventh Edition (2015).

In this book the author denotes the major as well as the minute changes in company law 1956 and what the new companies Act 2013 brings. The book talks about much on the role of board of director and the shareholders protection through new act. The author also says that the effect of e governance in the corporation of India, the concept of company's social responsibility which was brought by the new act, what will its effect on company's management and in case of fail to obey this what will be the effect. The book compares also the changes from old law, and try to explain in detail the benefit expected from the new act, the book also discussed the effective shareholders protection mechanism brought by the new act and the need of rapid change to follow the global standards of corporate governance in India. The book also critically analysed the changes which are major at the same time the changes which are minor also been analysed. How the new act is more responsive toward its stakeholders and corporation as well. It also contains the concept of independent director, woman directors and how they will get selected what are their rights and liabilities. The board of audit Committee was also discussed in the book in detail with the expected effect.

This book covered all the new concept brings by the new Companies Act, 2013, with relevant case law. In 15th chapter the author has discussed in detail about the meeting of companies, how it takes place, who will join it and what are the rights of the members of the company, like voting right, appointing proxies and right to speck by proxy. In next chapter, i.e., chapter 16 of this book the author discussed in detail about the accounts and audit of the company, along with the duties and rights of auditors. It also talks about the constitution of national financial reporting authority.

Jayanti and Subrata Sarkar, Corporate Governance in India, New Delhi, Sage Publications India Pvt. Ltd., 1st Edition (2012).

The book deals with the major crucial issues of corporate governance such as the role of large shareholders, the board of directors, agency problems in Indian corporations, auditors and audit Committee in corporate governance, disclosure, and enforcement norms that Indian corporations must adhere to, etc.

This book provides a summary of the many reforms that have taken place in India founded on the recommendations of numerous Committee reports that have changed the norms of corporate governance in India.

Here the author has also talked about several big scams and frauds in India and other countries which compelled the government to change the norms of corporate governance in India to keep away from the repetition of such incidents in our country. Together with it, the book also discusses several amendments, which have been made in the Companies Act, 1956, which have brought about major changes in the norms of corporate governance in our country.

The book also talks about in detail the role of the Securities and Exchange Board of India to safeguard corporate governance in our country as it is a major regulatory authority, which operates the stock exchange in India and secure corporate governance in India by enacting many rules and regulations for it like SEBI's clause 49 of the listing agreement.

The book also brings the data analysis and research work of many experts in this field, showing how corporate governance is safeguarded by a corporation in India and in line with the current scenario of corporate governance in our country Improve the issues involved and what can be done.

Subhash Chandra Das, Corporate Governance in India, New Delhi, PHI Learning Private Limited, 3rd Edition (2012).

This book, basically, denotes about the corporate governance norms which we are following in our country considering global practices and what measures can be taken to improve it. In its 1st chapter, the author denotes about the history of corporate governance as well as the three basic models of corporate governance, which is being followed in the country for years, which are Managing Agency System which existed before independence, Promoter System which was followed after independence, and Anglo-American System which is presently being followed in India. Together with it, the author also talks about many reforms through alteration have been brought by the legislature in these models. In the 2nd chapter, the book denotes about the corporate governance's concept and the various ways by which corporate governance norms are being followed in a corporations like through the board of directors, the audit Committees, director's report, the annual general meetings etc. In the 3rd chapter, the book denotes about many Committee reports worldwide which covers all over the world famous Committee reports, for example the famous Cadbury Committee report of UK, this Committee had introduced first time in the world the 'Code of Best Practices' a group or bunch of norms which has to be followed by all the listed companies in United Kingdom and after the UK the almost all the country has begun to obey its norm and legislatures have enacted their law according to the Committee reports.

Next report that the book deals with is the Greenbury Committee Report, Hampel Committee Report etc. were discussed in depth which formed the corporate governance norms globally comprising the ''Organization for Economic Co-operation and Development (OECD)" principles on corporate governance norms. Together with it, the book also contains a comparative study of the many famous Committee reports. In the next chapter, i.e., 4rth chapter the book discussed about the many Committees reports on corporate governance in India Birla Committee reports, Irani Committee reports etc. and recommends much improvement for good corporate governance norms in India. In the 5th chapter, the book deals with a case study on some famous companies in the financial year 2004-05 to check out the shortcomings which have been misused by the companies in the Companies Act, 1956 as well as in the SEBI regulations and what measures can be taken to wipe out such misuse, so situation may improve. Lastly, the book has suggested so many important suggestions for the policy makers and corporation which if obeyed would improve a well culture of a good corporate governance in India.

M.C. Kuchhal, Modern Indian Company Law, (Shree Mahavir book depot, Delhi, 27thEdn, 2012).

This author of this book analyzes in depth all the provisions of the Companies Act 1956, the act is the largest one legislated by the legislature of the country, which discussed the various aspect of the corporation in India so it is also quite complex. Therefore, through book the author tries to explain the all-complicated aspects in a very simple term so that the student could understand it easily. This book at the same time tries to explain all the important provisions of the company law 1956. Since the act went into various amendments what new came was also explained. The book contains both the case law Indian as well as of English cases and mentioned at appropriate places to assure the required clarity and authenticity of the subject. Kamal Gupta, C.R. Dutta on Company Law, (Lexis Nexis ButtertsworthWadwa, Nagpur, 6thEdn, 2008).

This book gives an insight of the Companies Act, 1956 as amended from time to time which had augmented the authority of the Union Government to form rules thereby reducing the scope of agitation before the court or the tribunal. The author has attempted to make the most exhaustive coverage of the legislative history and background of the Companies Act and has tried to interpret every section of Companies Act in a best possible manner. Under each section, notes on clauses of the original Bill and associated amendment have been given to explain the original section. This book also deals with relevant extracts of the Sachar Committee and DaphtaryShastri Committee and other Committee recommendations, which led to the passing of significant amendments in the Companies Act. The author explains the original sections and then the subsequent amendment in a lucid and simple way for the readers.

Dr. N.V. Paranjape, The New Company Law, (Central Law Agency, Allahabad, 6thEdn, 2014). This book makes an effort to summarize the major modifications that have been introduced in the new Companies Act, 2013 taking lessons from the working of the old Companies Act, 1956, which now provides a better framework for an effective enforcement of law relating to Companies in India. The legal implications of the various changes and the new concept that has been introduced in the Act have been examined critically and analysed in minute details along with relevant judicial pronouncement so as to make the subject material more readable and captivating. This book talks about how the Companies Act, 2013 embraces significant changes by introducing new concepts. The author pointed out that the old Companies Act, 1956 needed a major overhaul for a very long time in order to make the provisions of the Company Law more up-to-date, germane and receptive not only to the companies but also to the shareholders and the regulators. The new Companies Act, 2013 seeks to ensure this by maintaining greater accountability, effective investor protection mechanism, e-governance, and stringent enforcement of corporate social responsibility norms to meet the challenges of intensely competitive global and domestic business environment, which has put enormous pressure on the business organization to be responsive to the rapidly changing corporate culture. The author of this book has endeavoured to incorporate all the significant changes that have been introduced in the realm of company law and management lately to ensure that it serves as a useful reference book for the practicing lawyers, professional managers, policymakers, dynamic entrepreneurs, teachers and students of law and management.

Dr. Madan Pal Singh, Company Law as an instrument for the protection of public interest, (Allahabad Law Agency, Faridabad, 2010)

The present book undertakes to examine the real intent of bulk of regulations under company law and tries to answer the question as to whether is it capable of protecting and promoting public interest also the author tries to find out whether these regulations and rules under company law are able to achieve social justice. This book discusses the concept of welfare, public interest and protective aspects under company law in terms of the preamble of the constitution of India which strives to attain social justice. It reveals the element of socioeconomic justice and public interest within the ambit of Company Law. The author of this book also tries to deal with those segments of the society which are characterized as corporate constituencies and which are in the need of protection. The author examines the structures, powers and function of different authorities constituted under the Companies Act 1956 such as the Company Law Board, Registrar of Companies and Regional Directors etc. The book also makes an endeavour to discuss the ambit of judicial review of the orders of Company Law Board, Board for Industrial and Financial Reconstruction etc. under the Companies Act, 1956. The book makes the findings in concrete terms so as to expose the areas of success and failures of the Act and the regulations in terms of protection. The book also suggests measures to attain the socio-economic objectives under the Companies Act 1956.

K.D. Raju, Company Directors fiduciary duties and liabilities under the Indian Company Law, (Eastern Law House, Kolkata, 2013).

This book discusses the role of directors as key managerial personnel in a company and the manner in which they utilize such vast powers and discretion in the discharge of their function. As regards the nature of their powers, almost all powers held by them are in nature of trust and are exercised by them in a fiduciary capacity. The impact of Companies Bill, 2012 in the light of economic reforms and the new role of company directors in the 21st century are examined. The efficacy of the techniques for enforcing the fiduciary duties and the shortcomings thereof are discussed and suggestions are being made in the light of Indian as well as international experience. The book also analyses the jurisprudence of fiduciary duties of company directors from the common law practice based on the decision of various Indian courts. This book answers almost each and every aspect of fiduciary duties and liabilities of directors, and it substantiates its claims with case laws. Here the author has tried to demystify and explain some of the complex legal issues relating to the role of company directors as trustees, employees and the officers of the company. This book does not undertake to discuss all the provisions of Companies Act 1956, but it covers those portions, which dealt with company directors along with new concepts introduced in the Companies Bill, 2012.

1.9 CHAPTERISATION

Chapter 1: Introduction

In this chapter, a brief background and significance of the topic are introduced to the readers in order to make them understand the importance of the topic at hand. After that various research steps have been mentioned in this chapter in order to give to the readers a brief idea about what the research is all about. For instance methods and methodology used by the researcher to come to particular conclusions, object and scope of research to give an idea about the areas where the research will be focused and the overall aim it tries to achieve, literature review in detail have been discussed to give to the readers an insight about the literature which the researcher has read during his research period and the void or gap he has found out in the available literature relating to his topic. And finally, Chaptalization has been discussed to give to the readers a brief idea about the overall thesis and its content.

Chapter 2: Historical evolution of corporate governance and consequential rise of Shareholders' Activism in U.S and India.

In this chapter I have discussed in detail development of corporate governance in USA and in India and at the same time how the shareholders' activism evolved in USA and India. All the major reports and laws are written in sequence in this chapter.

Chapter 3: Tracing the growth of Shareholders' Activism in USA and India in light of judicial pronouncements and events

In this chapter I have discussed in detail about the pioneer of shareholders' activism in USA and how they done activism and at the same time I have also written the cases of shareholders' activism in India as well. This chapter also includes the events of shareholders' activism.

Chapter 4: An analysis of the changes that have occurred in Shareholders' Activism in India after the Satyam Scam

I have discussed in this chapter about the Satyam scam and how the legislature of India enacted and amended various provisions and introduction of companies Act 2013, all these provisions related to minority shareholders right is written here.

Chapter 5: Committee Reports

In this chapter I have discussed three Committee reports in which I have taken the recommendations of these three Committees related to the rights of minority shareholder and their activism and how they can be more powerful in the company to participate properly.

Chapter 6: Conclusion

This chapter summarizes the entire work of the researcher. It deals with conclusions derived from all the chapters. Along with it this chapter, also discuss various possible solutions to the issues or challenges pointed out in this study which the policy framers could adapt to make the National Company Law Tribunal an efficient and effective forum as envisaged by the government.

CHAPTER 2

HISTORICAL EVOLUTION OF CORPORATE GOVERNANCE AND CONSEQUENTIAL RISE OF SHAREHOLDERS' ACTIVISM IN U.S AND INDIA

2.1 INTRODUCTION

The birth of the East India Company is also considered to be the birth of the company affairs in the Anglo-American corporate world. The Industrial revolution had already commenced business at large scale in an organized form. Several East India Company like the British East India Company, French East India Company, Dutch East India Company came up into origin. But the use of the word company in these entities does not in itself make these bodies a company ensuring corporate governance. These entities were more of the nature of a partnership firm. In the ancient India, the term "Shreni" is said to coincide with that of a company. But more or less Shreni was like a partnership firm only since a group of business men uniting for a common benefit were more like a partnership firm.

The modern origin of ensuring the corporate governance by the state actions came up firstly and mainly in the United States of America (hereinafter referred as USA) by time to time bringing in a number of acts to ensure corporate governance and thus, to protect the interest of the ultimate beneficiaries, the shareholders of a company. These provisions of the US statutes have been the building blocks even in the Indian corporate affairs. The great Depression of the year 1928 is considered as a watermark for giving way to reforms in the governance of a company right from that time till few years back. The cases like the World Com crises, Enron crises have sown the seeds of a number of reforms be it through the constitution of the Committees by the government themselves or through the individual efforts of the shareholders through shareholders' activism. These reforms in the affairs of the management, auditing in bold therein also known as corporate governance in the Anglo American system of corporate affairs has percolated into Indian system of company's affairs. Though the provisions like e- voting, independent director, protection of the interest of a minority shareholders through a class action suit, greater say of the shareholders in the merger and amalgamation or decision in the major affairs of the company were already there in the company affairs in European companies and in USA but most of these provisions could only be brought into statute only after the Companies Act,2013 which was just a consequence of the Satyam crisis.

In USA after the great depression of the year 1929,change in the Security Act of 1933 followed by the Security Exchange Commission Act of 1934, a number of reforms had already been brought into the statute culminating into the Sarbanes Oxley Act of the year 2002 but in India most of these provisions to ensure corporate governance came in the form of legal provisions only after the Harshad Mehta scam followed by the constitution of the Security and Exchange Board of India(called hereinafter as SEBI) and thereafter followed a number of reforms. Even though from time to time a number of Committees were constituted which submitted their reports but it could not fructify into legal provisions in black and white. Needless to say that these Committees were asked to submit report and when the reports were submitted, it was red tapped and thus could never see the sun again as these were never incorporated in the statutes. Incorporation of these major provisions could only take place after the Harshad Mehta scam in

90's and after the Satyam crises in the first decade of the twenty first century.

Some of the federal Acts of USA and the Committee reports in India to ensure corporate governance have been dealt in brief herein and in detail in the chapter.

Security Act of 1933: It was the immediate consequence of the stock market crash in the year 1929.This Act derives its validity from the interstate commerce clause of the US constitution. It is worthy to note here that it was the first time that any federal law had been enacted to regulate the offer and sale of the security. This Act made it mandatory for the offer and sale of security to be registered in the case it uses the means and instrumentalities of commerce of interstate nature. The use of the term "means and instrumentalities of interstate commerce" had made the ambit of the Act so broad that it became virtually impossible to forgo or avoid the provisions of the Act. Before the enactment of this statute, the regulation for the offer or sale of the securities was mainly regulated by the clause made by the State legislatures. The philosophy behind such enactment was disclosure of material facts.

Security Exchange Commission Act 1934: This Act was brought in so as to regulate secondary trading of security which mainly consisted of stocks, bonds and debentures. It formed the basis of regulation in respect of the financial market. This Act also had its significance in respect of the establishment of a forum in the name of SEC primarily for the purpose of enforcement of federal security law of the United States.

When a comparison is made between the Act of 1933 and 1934 then it comes out that on one hand the 1933 Act regulates the original issues and on the other hand the 1934 act regulates the secondary trading of those securities.

Maloney Act 1938, an amendment to the Securities Exchange Act 1934 that assigned oversight responsibility for over-the-counter market to a self-regulatory organization registered with the SEC.

The Foreign Corrupt Practices Act of the year 1977 is again a federal law. It prohibits not only the US citizens but even the entities from giving illegal gratification, i.e., bribe to foreign government officials mainly for the purpose of getting benefit in respect of their business interest. This Act was aimed at bringing an amendment to the federal Act of 1934. The appreciable feature of this Act is that it required all companies with securities listed in the US to fulfil certain accounting provisions like ensuring accurate and transparent financial records and also at the same time maintenance of internal accounting controls.

Sarbanes Oxley Act 2002: This Act is also known as public company accounting reform and investor protection Act and corporate and auditing accountability, responsibility, and transparency Act. It is again a federal law. The provisions of this Act apply not only to the public company board but even to the public accounting firm. Many of the provisions of this Act even apply to the privately held companies. The main aim of this Act is to protect the investors by bringing reform in the disclosure provisions in pursuance of the Securities law. The Kumar Mangalam Birla Committee: The recommendations of the Birla Committee largely focuses on improving the structure of the board of directors of a company and their functions. The Committee also stressed on putting a focused lens on increasing the transparency and discloser of information to the shareholders.

Clause 49 was the result of a meeting of SEBI on 25th of January 2000, primarily on the issue of corporate governance. This meeting was for the purpose of bringing some amendment to the listing agreement. Clause 49 came into light for touching upon a large number of issues like dealing with audit Committee, procedure of the board and the ways in which the meetings of the board are held. Another good aspect of this report is that it required an interval wise report on the management of a company and report on the compliance of the norms of corporate governance. But these provisions were already provided for by the amendment Act of the Company's Act of 1956 in the year 2000. But overall, it can be said that clause 49 asserted a new phase in the field of corporate governance in India.

Naresh Chandra Committee Report is also known as report on corporate audit and governance. This Committee recommended the formation of audit Committee consisting of all independent directors. Furthermore, it also recommended that half of the directors within the board of directors should be independent directors.

N.R Narayan Murthy Committee Report on corporate governance- This report is criticized on the fact that many of the recommendation of the Committee overlapped with the recommendation made by its predecessor Naresh Chandra Committee. The SEBI formed this Committee so as to evaluate and bring reform in clause 49 and at the same time to suggest some measures so as to ensure transparency in the Indian stock market and also to suggest provisions to ensure compliance of the corporate governance code.

As it was suggested by the Birla Committee, the Murthy Committee also acknowledged that India should take lesson from international experience because during that time the World Com and Enron crises had already occurred. The appreciable feature of this report was that for the first time it recommended for looking about small and retail investors.

J.J. Irani Committee: One of the most important features of this Report is that it put focus on bringing a law for uniform code for all companies, i.e., an umbrella code for all companies so as to bring in the best approach on corporate governance in India. But it is worthy to be noted that this report was not in favour of putting the regulation of all public companies within the hands of SEBI. This report has been dealt in detail within chapter 5 of this thesis. Uday Kotak Committee: This Committee proposed that there should be a wall like separation between the roles of a chairman and a managing director. The report also focused on ensuring minimum board strength. Similarly, the Naresh Chandra Committee had also recommended that half of the number of directors in a board of directors of a company should be independent director.

Historical Evolution of Corporate Governance and consequential rise of Shareholders' Activism in India in light of U.S experience

One of the most crucial aspects of research and policy discourse in the corporate forum can be said to be the Corporate Governance which has a long history and diverse theories of origin. There are plethora of accounts regarding the genesis of governance problems, for instance, some scholars trace it to the creation of the "mother of the modern corporation" in 1602, i.e.

United East India Co. while others trace it to as early as 1800 BC when "shreni" was an entity structured to conduct business in India. However, there is an altogether different belief regarding the use of the term Corporate Governance. It is believed to have been coined recently. Corporate Governance as a policy [5]matter can be understood differently in developing and developed countries. There is no doubt that corporate governance in developed countries has gained importance after the poor performance of entities in US and UK while in the developing states like India and China, it became the pathway to a developed, globalized market-oriented economies. Further, the corporate failures in the more developed nations and the economic failure in many nations during the East Asian crisis provided impetus to the growth and importance of corporate governance.

Thus, it can be rightly said that corporate governance plays an important role in both developing as well as developed countries.

The modern corporate governance owes its origin to the recent period of extreme economic liberation. India too followed the footsteps of USA and UK which under Ronald Reagan and

Margaret Thatcher respectively became the global centres of economic liberalization after the

1991 fiscal crisis. This marked a complete change in the corporate governance system. Further, the Anglo-American System which deals with strong foothold over capital markets and the single tier structure wherein the directors elected by shareholders represent the system also came to be associated with the reform.

The 1929 Great Depression in US formed the backdrop for development of corporate governance however the modern corporate governance developed much later in 1962 as providing a sense of security to the shareholders against the mismanagement and abuse of their invested capital. Corporate governance[6], as we see it today, has undergone several changes which was triggered by events such as Stock Market crash of 1929 wherein the stock market played a devastating role ruining multiple entities and severely affecting the American banking and economic system.

These events further justified the need for reforms in the corporate governance and greater control over markets. Corporate governance in the 20th century[7] can be attributed to the Stock market crash of 1929. The Securities Act of 1933 and Securities Exchange Act of 1934 which till date serves as cornerstone of Securities Law were the result of this catastrophic event.

[5] Jayanti Sarkar" Corporate governance in India

[6] Subhash Chandra Das "Corporate governance in India An evaluation "19(PHI, New Delhi, Third edn2012)

[7] CM Madtha "Shareholders' activism: An Emerging Paradigm "181(IUP, Tripura,firstedn 2008)

Shareholders' Activism originated in USA around 1930 as sourced from the Investor Responsibility Research Centre of USA. It gradually gained momentum with the development of regulations by SEC and participation of shareholders.

The American fiscal entities actively participated in corporate governance. However their role and power was limited due to the securities laws enactment. All this resulted in widening of the divide between title and control in public sector companies in USA. Further in 1942, the advent of new SEC rules which allowed proposals to be submitted for corporate ballots changed the approach of the shareholder activists for putting pressure on the corporate management.[8] The introduction of the Public Pension fund activism with the participation of institutional shareholders intensified the growth of shareholders' activism in US.

However this concept is still in the initial stages in India. Shareholders' Activism in India is more about receiving gifts and refreshment rather than raising serious issues of concern or seeking information and response from the management. Such agitation cannot be equated to shareholders' activism in true sense as it helps the management to ignore the true situation and to not deal with the just rights of the shareholders.

Chairman of Tata group, Mr Ratan Tata accepted in a speech that absence of considerate [8]treatment to the shareholders:

"I fear today that in many of our companies, we are not treating our customers well, and we are not showing our shareholders approximate courtesy. This may not be happening at senior management levels, but it is certainly happening at interface[8] levels."

Further Mr. Tata[9] suggested his colleagues for creating[10] value for shareholders and customers.

"You don't have to face the shareholders when you make a loss I do. May be you should stand up one day and face the shareholders for what you have deprived them of. Selectively involving people in shareholder meets, investor conferences and dealer meets will help in exposing them to different situations that they may face".

However, the new market reforms and Companies Act of 2013 has changed the scenario completely. They have enhanced the shareholder participation in India with the advent of concepts like e-voting, class action suits under Sec 245 and Sec 188 of the Companies Act, 2013 dealing with interest of minority shareholders. Further, it has widened the role and participation of minority shareholders by empowering them with rights such as active defenses of their interests.

The knowledge of the concept of corporate governance and shareholders' Activism is crucial before understanding its genesis.

2.2. Meaning and Concept of Corporate Governance

According to Murthy Committee Report, 2003

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[8] Stuart Gillan and Laura Starks," The Evolution of Shareholders' activism in the United States"

[9] AMSP ,55(2007)

[10] CM Madtha "Shareholders' activism: An Emerging Paradigm "183(IUP,Tripura,firstedn 2008)

"Corporate Governance is the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between personal and corporate funds in the management of a company." Corporate Governance can be defined as a scheme of rules, processes and practices which help in controlling and directing a company. It primarily involves balancing out the varied interests of management, shareholders, financers, customers, government and the public.The Corporate Governance among other things also provides the outline for company's objects.It embraces within itself every sphere of management including internal controls and action plans ensuring corporate disclosure and performance capacity.

The primary direct stakeholder who influences[11] the corporate governance is the Board of Directors. They are appointed by the other board members or elected by the shareholders of the company. The board of Directors represents the shareholders of the company. The functions which have been assigned to the board of directors include making vital decisions such as dividend policy, corporate officer appointments and executive compensation. In some cases, the obligations of board of directors expand beyond financial optimization while the resolution of shareholders require some environmental or social issues to be prioritized. The Board of Directors constitutes of independent as well as inside members. The insiders can include executives, founders and major shareholders. The reason for choosing the independent directors is their prior experience directing or managing other similar large companies. The independent directors are different from inside members as they do not share the ties of the insiders. The usefulness of the independent directors can be highlighted because of the fact that they dilute the concentration of power and helps in balancing the interests of the insiders with those of the shareholders.

The ill-effects of the bad corporate governance can affect a company's integrity, trustworthiness and the obligation to shareholders which can have wide-ranging implications on the financial health of the firm. Any attempt to support or tolerate illegal activities can create outrages, for example, Volkswagen scandal in 2015- where it came to light that Volkswagen had rigged emission tests in Europe and America. The consequent result was that the stocks of Volkswagen dropped by nearly half in its value and the global sales of Volkswagen in its full first month following the scandal fell 4.5%.

Cooperation with auditors is very vital for the companies as not selecting auditors with the appropriate scale can result in publication of non-conforming or false financial results. Bad executive compensation packages are not an incentive enough for the corporate officers. Furthermore, the difficulty in ousting ineffective incumbents is grave because of the poorly structured boards. Following the 2002 Sarbanes-Oxley Act in the US, corporate governance became a burning issue.The Act was passed to restore public confidence in companies and markets after accounting fraud bankrupted prominent companies such as WorldCom and Enron.

The result of good governance is that a clear set of controls and rules are created where directors, shareholders and officers have allied incentives. Generally, most of the companies endeavor for attaining a high level of

[11] https://blog.ipleaders.in/shareholders-activism-india/

corporate governance. Not all the shareholders have profitability as the sole criteria.They require much more than that and they also require that the company demonstrate good corporate governance citizenship by way of sound corporate governance practices, environmental awareness and ethical behavior.

Corporate governance includes both institutional as well as social aspects. This implies that corporate governance has a very broad scope. Corporate governance helps in encouraging a moral, ethical as well as trustworthy environment.[14]

2.3 . Meaning and Concept of Shareholders' Activism

Reaching to a straight-jacket definition of shareholders' activism is not possible. An activist shareholder can be described as a shareholder who uses an equity stake in a company to put pressure on the management.[15] The varied goals of activist shareholders vary from financial as well as non-financial which includes financial structure, corporate policy, cost-cutting, adoption of environmental friendly policies as well as disinvestment from particular nations. Shareholders elect a board of directors to supervise the corporation as per mechanism adopted by internal bylaws. When the shareholders wield their influence as owners by relying on the board to make certain changes, they are the activists. Accordingly, it can be aptly summarized that shareholders' activism is one of the various aspects of corporate governance which is in itself a quite broad concept.[12]Sometimes, agitation helps in shareholders' activism but to consider agitation as activism would be very far-fetched as mere agitations do not constitute activism. Opposed to agitation, activism is an informed movement. Activism encompasses claiming the legitimate and legal rights in the interests of the company and the shareholders.

Shareholders activists and shareholders' activism has been defined in various ways by many shareholder associations and researchers. Among these, the most striking definition has been given by the US Shareholder action network, which has defined it in the following way:-

"Uniting investors for corporate responsibility".

Shareholders' Activism definition:-

"A way that shareholders can claim their power as company owners to influence corporation's behaviour".

Apart from this, the most commonly accepted definition of a shareholders' activism is:- "An investor who tries to change the status quo through voice, without a change in control of the firm"

Activism can involve raising the voice by way of lawsuits, direct negotiation with the management, voting and public criticism. In the ordinary course, a shareholder may not have the intent to complain or to participate or oppose any activism. Ideally, he may also not like to read about the corporate laws or make an attempt to understand what are various rights and responsibilities which he has under the law. After all, the fact that the money which has been invested is hard-earned money and therefore any common investor wants a good return on the investment. In his desire of receiving good returns, the investor may also desire that all the information regarding management, accounting and deployment of the investments are known to him. The objectives of the shareholder's investments and investment decision have an impact on the mode of voice of the shareholders' activism.

[13] [12] Corporate Governance - Definition, Scope and Benefits available at https://www.managementstudyguide.com/corporate-governance.htm visited on 20 april 2024

The classification of the goals of activist shareholders can be made into financial and nonfinancial goals. The ambit of financial goals encompasses increasing shareholders wealth through cost reduction, corporate strategy and capital structure etc. On the other hand, the nonfinancial goals include investor's demand for sustainable performance by companies in varied areas of economic, environment and social aspects. The Shareholders' Activism is displayed by institutional investors as well as individual investors.[12] Institutional investors include in its scope mutual funds, labor unions, pension funds and hedge funds that use their shareholder rights to sway the company's decisions either in collaboration with other shareholder groups or individually.

Globally, the shareholders' activism is an emerging trend, especially after the huge business scandals like WORLDCOM and ENRON that occurred at the beginning of this millennium. The aspects which help in greater activism are social and environmental performance measures, greater transparency in the business performance reporting, new communication channels, reforms in provisions regulating litigation and shareholder proposals and more sophisticated social, environmental and financial performance measures. Although certain regulatory and legal changes have been incorporated in India with an aim to enable a more participatory role to shareholders in monitoring the company's management, the shareholders' activism in India is still in a blossoming stage which we will deal later in this paper.

It is pertinent here to discuss the evolution of the concept of shareholders' activism and corporate governance in the United States of America and this will help us in reaching to a better idea regarding the background in which the concept of shareholders' activism and corporate governance evolved and gained significance in the United States of America for the first time.

2.4 HISTORICAL EVOLUTION OF CORPORATE GOVERNANCE IN THE UNITED STATES OF AMERICA

The corporate governance[13] has been indirectly on the agenda in USA since the incorporation of companies began seriously in the 1790s. Some examples of USA specific corporate governance reform and corporate governance scandals can be traced to around 1826 when a large number of companies based in New York collapsed in the middle of rumors of fraud by

powerful directors which prompted[15] the NY legislature to introduce reform packages with a design to safeguard the stockholders interests and interests of the creditors in that enterprise. In the beginning of the early 20th century, the idea of corporate governance rose to prominence, especially after the 1929 stock market crash and

[12] An institutional investor is a nonbank person or organization that trades securities in large enough share quantities or dollar amounts that it qualifies for preferential treatment and lower commissions. Institutional investors face fewer protective regulations because it is assumed they are more knowledgeable and better able to protect themselves. Examples of institutional investors include pension funds and life insurance companies

[13] CM Madtha "Shareholders' activism: An Emerging Paradigm "32(IUP,Tripura,firstedn 2008)

as a remedy, the Securities Act of 1933 was passed by USA government. The USA government also passed several other legislations to remedy this. At this point, it becomes important to discuss various significant statutory bodies and important legislations administrating corporate governance in USA.

2.5 SECURITIES ACT, 1933

The Securities Act of 1933 was the first significant piece of federal legislation upon the subject of sale of securities. Before this legislation was enacted, the blue sky laws (state laws) governed the sale of securities.

The goals behind passing the Securities Act of 1933 were as following:-

- To ensure that more transparency is present in financial statements enabling the investors to make informed choices about investments;
- To establish laws against the fraudulent activities and misrepresentation in the securities sector.

It is by large a disclosure law mandating the issuers of securities to reveal information that supposedly allows the investors to make informed and vigilant investment choices. The 1933 Act in addition to the disclosure provisions, also provided prohibition for fraudulent sale of registered securities. Another significant feature of the 1933 Act was that it was the first federal legislation which was used to regulate the stock market. The 1933 Act diverted the power from the hands of state towards the federal government. Another landmark feature of the Act was that it ensured a uniform set of rules to safeguard the investors against possible fraud. This act is popularly called the "Trust in Securities Act or law". President Franklin Roosevelt signed the Securities Act of 1933 into law and it is presently considered as a part of the famous New Deal which was passed by the Roosevelt.

The Act of 1933 mandated that investors receive financial information from such securities which are offered for public sale. This implied that the companies had to mandatorily make information readily available to the investors prior to the company going public. SEC's website has this prospectus available on the website. The information which has to be provided includes:-

a. Financial statements certified by the independent accountants;
b. Description of the securities which is being offered;
c. Information about the management which is running the company; and
d. Description of the company's business and properties.

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[15] ibid

The other significant feature of the 1933 Securities Act was the attempt to prohibit misrepresentations and deceit. The 1933 Act envisaged eliminating fraud that happens during the securities sale.

The SEC was created in 1934 under the Securities Act of 1933. The Securities Act of 1933 has undergone a lot of Amendments since its creation.[14] The Securities Act of 1933 and the consequent creation of SEC are

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[14] Security act of 1933 available athttps://www.investopedia.com/terms/s/securitiesact1933.asp(lastUpdated 12 april 2024) [17] Report of Pujo Committee, Money Trust Investigation-Hearings before the House Committee on Banking and Currency on H. R. No. 429 and No. 504, 62d Cong. 3d Sess. (1913). See H. R. REP. No. 1593. Mr. Samuel Untermeyer was counsel for the Pujo Committee. See also Hearings before the Senate Committee on Banking and Currency on

considered as the most significant changes to USA financial institution in the past century.Before SEC was created, the federal securities market regulation was basically lacking in the United States of America.

A comparison between the corporate governance in India and the corporate governance in USA will indicate that the corporate governance in USA is intrinsically complex as there are no single set of regulations or laws which governs the realm of corporate matters. Traditionally speaking, corporate governance came under the purview of state law as the legislations of each state determined the corporate governance laws. The corporate state laws of Delaware are considered prominent as compared to other state's corporate laws in the USA since most of the large public companies are incorporated in Delaware[17], regardless of their jurisdictions of operations. This is because of the significant doctrine of corporate law which is called as the "internal affairs doctrine". As per this doctrine, the corporations which functions in more than one state are amenable only to the laws of their state of incorporation with regard to regulation of the internal affairs of the corporation. Corporate governance in USA is also governed by the federal law.

Recently in 2002, the Sarbanes Oxley Act was enacted which is an all-inclusive federal corporate law after the 1934 Securities Exchange Act. United States of America is a common law system, independent of written regulations and statutes and accordingly, a significant part of the law on corporate governance has taken shape through various judicial decisions. There

are varied rules and standards of Securities Exchange which are based on the SEC's guidelines.

2.6. Securities Exchange Act, 1934 and Maloney Act, 1938

After all the depressions in the recent past, an investigation in the commodity exchanges and stock exchanges was undertaken. USA as a whole knew very little about the commodity speculation or about securities in 1907. The panic in 1907 resulted into a New-York

investigation. Governor Charles Hughes in 1909 appointed the White Commission which made an enlightening report about commodity and security speculation.

The White Commission Report concluded that no attempt towards state regulation of exchanges should be made. The public accepted the White Commission's Report as prosperity had appeared around the corner during that time. A mild depression followed in 1913 after which the stock exchange was investigated by the Congress.[18] Subsequent to this, prosperity returned again and nothing was done. Depression again returned in 1920 after which another Constitutional inquiry was undertaken in this regard. The end result of this was federal regulation of the grain exchanges. This law was declared unconstitutional by the Court. The farm prices remained low and more investigation followed and thereafter, a new regulatory law was passed. Subsequently, we had a major

S. No. 3895, 63d Cong. 2d Sess. (1914). The Hughes report is also printed in this volume. The Senate Committee had no counsel.

depression which began in 1929 after which the stock exchange was investigated by the Congress. Considering that the prosperity did not return sharply, it led to the federal regulation of the stock exchanges.[27]

The finding of the Senate Committee on Banking and Currency summarized the following:- I. Immediately before 1929, a large amount of credit was absorbed in security speculation; II. Manipulation as well as other forms of unfair practices frequently made the market prices of securities extremely artificial; and III. Insiders of various sorts had all kinds of unfair advantages in respect of others interested in corporate securities.

To a little extent, these maladies were outside the jurisdiction of stock exchanges and also indifferent and impotent. An attack on all these evils was ensured by the Securities Exchange Act. The administration of the Act is divided between the SEC and the Federal Reserve Board. On one hand, the Commission ensures the regulation of the practices of exchanges as well as their members whereas on the other hand, the Board has most of the credit control.

If we look at some of the original drafts of Securities Exchange Act, we will find that they propose to ban brokers and in particular, the specialists to trade on their own account. An exception in this regard [19] was made for the odd lot dealers. The intention behind these proposals was the disclosure of some instances where brokers had taken part in pools at the cost of their customers and some instances in which the specialist had a vigorous role in the

[18] Addresses AIN papers of C.E Houses Governor of new yorkx,1906-1908(1908)Van Anrwmp,The stock exchange rom WiT=I" (1913) 415 et seq.; Meyer, The New York Stock Exchange and the Panic of 1907 (1909) 18 YALE REV. 34; White, The Hughes Investigation (1909) 17 J, PoL. ECON. 528.

[19] See, generally, Hearings Before Committee on Banking and Currency, U.S. Senate, 72d Cong. 2d Sess. (1932-1933) and 73d Cong. 1st and 2d Sess. (1933-1934). See also MEYER, TE SEctnus ExcmANGEAcr or 1934, ANALYZED AND ExPrLmNED (1934); TwENnTC'mm--y FuND, INC., STOCK MARKEr CONTROL (1934); Tracy and MacChesney, The Securities Exchange Act (1934) 32 MIcH. L. REv. 1025; Roper Report, New York Times, Jan. 23, 1934, at 3

direction of the pool in a stock in which he specialized. The down side of these proposals was that these proposals had a harsh effect upon many honest members of the stock exchange or on the probable repercussions to the market aimed at eradicating from trading privileges, the floor specialists and traders.

An analysis of the Securities Act of 1933 indicates that it focuses majorly on primary markets and ensuring the proper disclosure of requisite information pertaining to publicly offered securities. The Securities Exchange Act of 1934 focuses majorly on the secondary markets and thereby ensuring that the parties who take part in trade of securities (i.e. dealers, brokers and the exchanges) act in such a way that safeguards the best interests of the investors. It is pertinent to note here that certain securities were exempted from the purview of both the Acts such as Municipal debt and US Treasury.

The requirements set forth in the 1934 Securities Act have to be complied by all the companies which are listed on stock exchanges. Major requirements include registration of any securities listed on stock exchanges, proxy solicitations and disclosure, audit and margin requirements. The SEC was created from this Act of 1934. The responsibility of SEC is to enforce the securities laws. The SEC is an independent federal agency having authority over all the aspects of securities market and industry.

The intention of the Congress behind creation of SEC was that it would be a regulator which would establish national policy over the country's securities market. The SEC adopts rules to implement the provisions of the federal securities laws. Furthermore, the SEC cooperates with the USA Department of Justice which has the role of criminal enforcement of federal securities laws.

An Act was passed by the Congress in 1938 to amend the Securities Exchange Act, 1934 by adding a new section. The object of this amendment, the Maloney Act, was to boost over-thecounter dealers to regulate and organize their activities under the purview of governmental supervision.[30]As per the Maloney Act, more than one association of broker or dealers were eligible to apply for recognition, yet only one applied for recognition - the NASD- National Association of Securities Dealers Inc. Today the NASD includes within its ambit all the broker & dealers in USA.

At the time of passing of the Maloney Act, very little was known about the over-the-counter markets. Therefore, while the Act has a fundamental philosophy of regulating the organization and functioning of over-the-counter broker dealers, the SEC was given the power to work out the descriptive details.

The following things were envisaged under the Maloney Act:

I. Creation of a few organizations, which would be democratic in character (in which the membership would be voluntary)

II. Guardianship by the government against tyranny of the organization towards its members and against carelessness of standards in the public interest

III. Regulation of relationship between the members and the public IV. Education of members

V. Promotion of ethical standards

VI. Decrease in government expenses and

VII. Provision of incentives for organizing and being organized

The Maloney Act didn't provide for mandatory membership of the broker-dealer in the future organizations. It just made the membership appealing[15], prestige and profit were the positive inducements to become a member and continue to remain so. The Maloney Act further granted partial exemptions to organizations from the anti-trust laws by allowing a provision that only members may be provided price concessions and discounts by other members.

Accordingly, the principle which was established[16] by the Maloney Act was that any honest person may become a broker dealer. Among the purposes of Maloney Act, one purpose was the creation of an organization of broker dealers which would promulgate and would have the power to enforce the rules ensuring the maintenance of higher standards of conduct than those promulgated by the government. It has been proclaimed by the industry that it imposes rules of ethical conduct on the members, which is expected by the SEC also. The full capability of assuming the complete burden of self-regulation may be assumed by NASD, if it develops as per the peculiar functions and needs and if it splits into unified groups.

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[15] Tamar Hed-Hofmann"The Maloney Act Experiment"6 B.C.L.R 187(1965)

[16] Mr. Justice William O. Douglas said in 1 Conference News, Investment Banking Conference, Inc. No. 11 A: "The pattern is simply that provided by Congress for the Exchange."

To sum up, the Maloney Act of 1938 extended the SEC's jurisdiction covering the over-thecounter market. The SEC had regulatory authority over the securities firms (including nonbanks as well as the investment banks). The Maloney Act made a provision for self-regulating organizations to provide direct oversight of securities firms under perview of the SEC. The creation of Securities Commission by way of Securities Act of 1933, the Securities Exchange Act, 1934 and the creation of NASD helped in creating a composite system of supervision and regulation over dealers, over-the-counter markets and brokers.

2.7 CONCLUSION

As it has already been discussed right from the introduction to the elaborate explanation of the same in the chapter, the corporate governance and consequentially the shareholders' activism has been in vogue in the US corporate system. Right from the enactment of the Securities Act of 1933 which was a consequence of the great depression of 1929 due to the stock market crash to the Sarbanes Oxley Act of year 2002, the journey has been quite fruitful in terms of corporate

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governance as well as the shareholders' activism. The number of enactments were the result of either some sudden market crash or corporate scams or the individual shareholders' activism. After the Securities Act of 1933, the government in the year 1934 came up the security exchange commission Act of 1934. Thereafter, an amendment to the same Act of 1934 came up the Maloney Act. Thereafter another blow to the corporate frauds and to the corruption in corporations was given by this foreign corrupt practices Act 1977. But all these Acts were not enough to prevent the corporate scams like the one of World Com and Enron and finally the government of USA had to come up with the Sarbanes Oxley Act of 2002. These were all federal enactments and were the result of the public efforts but at the same time many examples of shareholders' activism at individual level are also manifest. The individual shareholders' activism by eminent personality of corporate arena like Ben Graham Rose Perrot, Karla's keror are singing examples of shareholders' activism at own level.

On the other hand in India, the enactments were not up to the mark so as to ensure corporate governance as well as to give rise to shareholders' activism at own peril. The basic minimum elements to ensure corporate governance like proxy voting, e voting, independent director, class action suit, proper mechanism for ensuring the rights of the minority shareholders, etc were also very much later introduced in black and white in the statutes though many Committee reports had time to time recommended for the same. These Committee reports were either red tapped and thrown into isolation for eternity. If at all some recommendations saw the light of the day then these were not the result of activist attitude of the government at the Centre nor these were the results of shareholders' activism at personal level but rather these were the consequence of the efforts to fill up the vent in the corporate governance which had become manifest after big corporate or securities frauds like the Harshad Mehta scam or the Satyam scam. Even the SEBI was a culmination of damage control after the Harshad Mehta scam. Not only this, the famous provisions to ensure corporate governance (as named before) were the results of the Satyam scam of the year 2009. So in India we see that the government in power has time and again shown reactionary approach for ensuring corporate governance while the federal government of USA has many a times shown proactive approach so as to protect the rights of the shareholders and at the same time to ensure corporate governance. At the same time, the positive sign is also visible in many of the Indian companies wherein the shareholders have caused the management to lean in favor of their legitimate voice like Maruti Suzuki and Raymonds. Inspite of all these, the Indian corporate have still miles to go before they sleep.

CHAPTER 3

TRACING THE GROWTH OF SHAREHOLDERS' ACTIVISM IN USA AND INDIA IN LIGHT OF JUDICIAL PRONOUNCEMENTS AND EVENTS

3.1 INTRODUCTION

The overall health condition ,i.e., all round development of an institution, group or association can be deciphered from the fact that how much right and privilege is enjoyed by the person at the hind side, ,i.e., how much enjoyment of the right is available or remediable to the person who is weakest, since the main purpose of law is to protect the weaker section as the well versed ones as they themselves are capable of insuring the enforcement of their rights. In the corporate world also the corporate governance shall remain incomplete without ensuring the rights of the minority shareholders. If the minorities shareholders have say in most of the significant decisions of the company, it's very much a manifestation of good health of the company and if the minority shareholders themselves peruse for the enforcement of their rights, it adds value to the feature of corporate governance.

Not only in the past or present rather in the coming[17] days also shareholders' activism seems to be a promising feature of the corporate arena in the United States. This continued significance of the same has been due to a past famous serious of scandals during the early period of 2000s and the most memorable among them all was of Enron Corporation. It followed war level efforts in the field of U.S corporate governance. Famous among the reforms particularly the later introduced federal regulations primarily focusing on corporate governance have significantly altered the features of the board of directors in U.S. corporations. Not only this, the engagement of the shareholders has become a ray of hope for companies. It has also significantly influenced some other legal and cultural alteration and amendments further increasing the power of shareholders.

In today's time it is also decipherable that shareholders also have desire to make hand in hand cooperation with the management and board of directors, so that reforms can be brought in the governance of the company further touching other aspects also. This role of present day shareholders activity has in a way melted the thaw between a traditional shareholder activist and other shareholders of a corporation. This is due the fact that, now days an increased expectation; seeking to impose more influence upon the governance and the decisions which may have a substantial effect upon the company; can be seen to have been well discharged by a shareholder.

Though the term activist has seen itself effectively getting diluted due to the fact of a number of kinds of shareholders emanating the solution, then also the always increasing acceptability of activism in the

field of corporate arena has continued to increase the frequency of the same. This is manifest from the fact that a number of giant U.S. Corporations, i.e., U.S. Public Companies, which time and again face the public activist demand, are day by

[17] The Shareholder rights and activism review edition 4, UNITED STATES available on https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition4/1197515/united-states visited on 21st 2020.

day getting more and more pronounced then the time which has ever happened in the past and it is also worthy to be noted that the same has increased in terms of publicly announced campaigns.

Shareholders' activism in U.S. was pioneered by Benjamin Graham in the case of Benjamin Graham versus Northern Pipeline. From this case it is assumed as if it was the birth of modern shareholders' activism. It was all due to sheer and continuous efforts of Graham that the management of the Northern Pipeline (dominated by the Rockefeller Foundation) had to lean before the demands and the ultimate benefit went to the shareholders. For the same, not only research work had been done by Graham rather he was the person who is considered as a trend setter in making use of the proxy voting so as to finally secure the rights of the shareholders. Now the ground had been set and the battle for the shareholders right was time and again fought through different means but with the same ends, the sharing of benefit with the shareholders. The case of Robert Young versus New York Central is a fine example of securing the famous New York Central with a flair for the dramatic, turning shareholder communiques from formal legal documents into entertaining and irreverent missives.

The case of Carl Icahn versus Philipps Petroleum is an appreciable example of corporate raid. Through the threat of buying out the company and in case of refusal, the sanctions in the form of initiation of proxy voting as well as the denigration of the recapitalization plan, was within the agenda of Carl Icahn so that finally the benefit reaches the shareholders.

As we know that stream of water which keeps on flowing does not go bad that early but once it has started to remain settled, fungal bacterial action accordingly commences. The case of Rose Perot versus General Motors is all about the docile state of affairs at the General Motors under the Chairmanship of Roger Smith. Ross Perot; right from his entry into the company, both within and outside the board of the company; tried to bring reforms in the said affairs of the management and the complicated state of bureaucracy within the company. He was not restricted only to this stage rather he had even personal communication with the Chairman so as to bring reforms in the management.

The next case in line is of Karla Scherer versus R.P.Scherer. Herein the wife of the CEO of the Company raises her voice against the mismanagement of the company at the hands of her husband and few of his loyalists. But finally she was successful in conveying her message that the sale of the company was in the best interest of shareholders and as a result she won the battle.

William Shlensky case of the year 1966 was about the fact as to non-installation of the lights in the Wrigley Field due to the belief of the president that such organizing of night games was not in the interest of the neighborhood, was not considered an act of negligence and mismanagement of the corporation.

Moving on to the Indian cases, the first case in the line is of Rajahmundry Electric Supply Corpn. V. A. Nageswara Rao [23] wherein the Chairman of a Government Corporation in the state of Andhra Pradesh had committed so many cases of corruptions, as a result the winding up of the Company was sought. After finding the allegations as true by the court, the winding up of the Company was accordingly ordered by the Apex Court without interfering with the decision of the Andhra Pradesh Hon'ble High Court.

S.P. Jain versus Kalinga Tubes Ltd. is such a case wherein the Hon'ble Supreme Court decided to side with the best interest of the shareholders and rebutted the allegation that any oppression or mismanagement had been committed by calling for a resolution of the Board of Directors in haste. The appellant in the case had helped the Company when the same was in dire need of capital and when its condition improved it appeared as if he had been sidelined. The court did not find any material in the allegation of oppression and mismanagement.

The issue of the Indianization of Indian Companies was very much a topic of discussion in the case of Needle Industries (India) Ltd. due to the newly introduced provisions of the Foreign Exchange Regulation Act. It was the allegation of the appellant in the case that the respondent had committed oppression and mismanagement in the Company by the act of allotting fresh equity shares to their own puppets, who were not existing shareholders but the court held that oppression and mismanagement was not made out as the allotment of the newly allotted shares to the non–existing shareholders was with the aim of extending the reach of the Company and the court also held that the new shareholders were not the puppets of the majority shareholders.

The last Indian case in our tally is of the Cyrus P. Mystry which was by way of an appeal to the National Company Law Appellate Tribunal from the decision[18] of the Mumbai Bench of the Company Law Tribunal. In this case the appellant had been suddenly removed from the post of Executive Chairman of the Tata Sons Ltd. Company on the allegation of oppression and mismanagement. But the Appellate Tribunal was of the view that the appellant was not liable rather it was the undue interference of Ratan N. Tata and other Tata family members which were creating hurdles in the impartial discharge of duty of the Executive Chairman by the appellant. So finally it was the Tata family which was more to be blamed rather than the appellant himself who was running the company with the best of his conscience. The Appellate Tribunal also ordered to expunge the disparaging remarks made against the appellant by the Company Law Tribunal. This case is a leading example of a case wherein the minority shareholders persuade the case against the giant majority shareholders like Tata Sons.

Particularly in the year 2018 the same has seen an increase of approximately 5% in comparison with the year 2017. But the fact which must be kept in mind is that the before said figures do not tell the entire story because for every public activity for a demand may have been a result of a campaign which may have never

[23] 1965 AIR 1535, 1965 SCR (2) 720

appeared in the public domain. For example consequently the board of directors of the U.S. Corporations and their management teams have continuously kept their sharp inclination on getting to know shareholders' activism and at the same time also working to not only prevent but also in preparing with the efforts so that activist campaigns can be responded to. For better understanding the effect of shareholders' activism in the arena of U.S. Corporate world, it shall be better here to understand first the structure of statutory set up for Company's affairs in U.S., the same is not only confined in the corporate laws of the federal government rather the same is also influenced by the respective law of a constituent state of United States of America. A fine example of the same is the fact that nearly half of the U.S. Companies are incorporated in the state of Delaware because the state laws of a constituent state of a federation exercise a great influence in the corporate governance within a Company. For the same, we shall deal with the structure of state law and federal law in U.S. one by one.

[18] Company Appeal (AT) Nos. 254 & 268 of 2018

3.2 STATE LAW

Each company gets its incorporation in the state of its choice. In the U.S. the law within the realms of states established the fiduciaries duties of Directors. Also the powers and authority of the same is also governed by the states laws. This duty, power and authority of the before said at the instance of the state legislature holds good not only to privately held companies but also to publicly traded companies. As already discussed more than half of the Public Companies in the United States of America are formed in a single state by the name Delaware. Delaware is a small state but since it has got specialized in the field of business law and also together developed a sophisticate judiciary, as a result it has given a body of good number of case laws.

3.3. FEDERAL LAW

For the purpose our research, the federal laws are to be more focused on because the same are related to shareholders' activism and engagements. The one governing securities trading like the Securities Act of 1933, the Security Exchange Act of 1934, the Sarbanes Oxley Act 2002, and the Dodd Frank Act of 2010 are the example of federal laws which have given rise to shareholders' activism. The federal laws particularly the one relating to the protection of competition also has a significant impact on activism.

3.4 CASES OF SHAREHOLDERS' ACTIVISM IN UNITED STATES

The present wave of shareholders' activism which is seen now a days, has not been constituted in a day. It's a common saying that "Rome was not built in a day", it took not only years but decades to reach this level of shareholders' activism of the date. The foundation of the same dated back to the year 1942 with the introduction of SEC. Later on the events were followed by an appreciable number of land mark cases which paved the way for shareholders' activism and consequent corporate governance in U.S.

These cases have been dealt with hereinafter.

3.5 BEN GRAHAM VERSUS NORTHERN PIPELINE (1928)

This case marked as a pioneer in modern shareholders' activism[25], as it introduced a very novel concept of new era shareholders' activism. At the first time when Benjamin Graham came face to face with the management of Northern Pipelines in the year 1926, it was a path which was till date very much less headed to, because at that time[26] the intervention of shareholders in normal course involved the disputes between minority owners or at most it could be the case of a strategic buyers who desired of taking control.

Now the question may arise as to why shareholders' activism was so rare in the early period of twentieth century. So the answer is obvious that the ownership at Public Companies was mainly centered into a few hands, be it the ones who founded the company, their family members or at the most the entrepreneurial financiers. As a result it was tough for any outside shareholders to exert any sort of influence. It was Graham who at the first time noticed both of these forces in action at Northern Pipeline. It was also not surprising that none of the others shareholders were aware about the fact that the company was hoarding a large amount of capital and at the same time the Rockefeller Foundation was in effective control of the management of Northern Pipeline and the same was through a 23% equity stake.

Now coming to the other part of the story which concerns Standard Oil which was an American oil producing Company and its business was not limited to oil production rather it also extended to the transportation, refining and even the marketing of oil. Here also John Rockefeller was the Founder, Chairman and majority shareholder, as a result Rockefeller Foundation here also was in effective control. Viewing the same ,i.e., the standard oil as a monopoly, the U.S. Government under the provisions of Shaerman Anty Trust Act, split standard oil into smaller functioning parts. The same was not paid that much heeds to buy the Wall Street. The thing which needed to be paid attention to was that a very little was within the cognizance about the finances of the Company in the public domain, reason being the fact that they did not provide the balance sheets in detailed form. Frankly, it could be said that no one in reality cared to give a damn to this fact. But there was an exception also and this exception was Benjamin Graham. Time and again he used to look through the data provided by the commission for inter states commerce. Interstates Commerce Commission was a regulatory body that used to over sea the rail roads. Benjamin Graham came across some data which was made available by the pipeline companies. The same was accompanied by a note which read "taken from their annual report to the commission". Mr Graham wanted to know more about the same so he left for Washington with the sole aim of examining the filings of the company in full length at the record room of the commission. He came across the fact that most of the pipeline companies owned a large amount of money in the form of finest rail road bounds. He also noted that these companies in comparison were doing small gross business but the same was coupled with a large profit margin. But even

6/jurisdiction/23/shareholder[26] Dear Chairman, Board room battles and the rise of Shareholders' activism, JEFF GRAMM[25] Shareholders' activism & Engagement available on https://gettingthedealthrough.com/area/84 -activism-engagement-2019-united-states/ visited on 26 april 2024.

then also they did not carry any inventory. As a result they had no need for these investments in bonds. Benjamin Graham focused more on northern pipeline because it has huge amount of securities in ratio to the share to its market price.

The company which was responsible for the transportation of the crude oil to the refineries of standard oil, was at that time trading at the rate of 65 dollars per shares. In the meantime the same company held 95 dollars per share but the same was in rail road bonds and other related liquid assets. Out of this nearly all could be easily distributed to stock holders of the company. And this action in no way was going to cause even a slight inconvenience to the oppressions of the company. In the beginning Graham started to pick up the stock when he reached the extent of acquiring a 5% stack in the shares of the Northern Pipeline Company, the first step which he took was to meet with the President and General Counsel of the Company. The intention of the meeting was clear that he would meet to request them so that he could persuade them to distribute the access cash lying with the company. But the same was declined reason being the fact that the par value of the stock was very much high. To this problem also, Graham had a solution that the par value be reduced and the same be treated as a distribution as a return of capital. Graham also inquired as to when they shall replace the pipeline, to which they could not say anything. Not only this, they denigrated Graham and sent him packing. The next confrontation of them was at the occasion of annual shareholders meeting. Here Graham read his report which was in respect of company's financial [27]position but he was on the occasion asked to put the same through proper channel ,i.e., in the form of a motion, to which Graham assented but no one seconded the motion. As a result after the adjournment of the meeting Graham, who was already embarrassed, was sent packing again. But Graham was not to stop here. He chose to mount an extra pressure an attack via proxies. A provision in respect of shareholders not attending the annual meeting of the Company was already there, wherein they could choose to cast their vote by proxy ,i.e., allowing some other person to cast vote in absentia but on their behalf. For the same Graham had a law firm through which he could work soliciting proxies.

It was natural that Graham paid his first visit to the Rockefeller Foundation. This time he intimated the Financial Adviser of the foundation with his intention that he had no interest in the operations of Northern Pipeline but in its surplus as he believed that the proper use of these assets was within the realms of the concern of the shareholders and not in that of the management. This time again, he failed and was thus sent packing. On the occasion of Northern Pipelines annual meeting Graham and his counsels ,i.e., in January 1928, met with the other side reason being the fact that opposing groups assented to counting the proxies the last night. It was the sheer result of Graham's hard work that his group had received proxies amounting to roughly 37.5% of the shares of the Company. As the event followed Northern Pipeline was left with no options but to distribute 50 dollars in cash followed by a promise of 20 dollars more. But this was not the end of the battle. The management of the Northern Pipeline was not of the intention to lose their active control on the excess treasure.in reality the management fought of thwarting Graham's request which was

[27] ibid

to distributes 90 dollars of the Company's surplus liquid assets per share even after the fact that the Company itself was generating a mammoth some of 300,000 dollars of annual revenue while with the same carrying 3.6 million dollars in the form of rail road bonds. This some lying in the form of rail road bonds were not related to the normal course of the business of the Company. As a result had these assets been distributed to the shareholders, it could make an eminent sense. Graham took this war directly to non-other than shareholders on the occasion of annual shareholder meeting. Since earlier he had failed to make someone second his motion so this time he was well prepared to deal with the situation and took the recourse to proxies. Within a period of one year he had the power of siding with himself the proxies extending to 40% of the shares of the Company. This time there was no one to stop Graham's election to the board. Within a short span of time 70 dollars per shares of the surplus liquid assets were distributed to the shareholders. This event marked the first victory for shareholders' activism and the victor was none other than Benjamin Graham himself and finally the shareholders, the ultimate beneficiaries.

3.6 ROBERT YOUNG VERSUS NEW YORK CENTRAL (1954)

The story of the case dates back to the year 1938 when Robert R. Young, and inhabitant of Texas who was always of the conscious effort to rail against the bankers of the Wall Street. The bankers have been referred in the case with a specific term "God Damn Bankers". The use of the specific term "God Damn Bankers" is obvious of the fact that the bankers were worthy to be damned by the God. Mr. Young found himself in a bitter feud for the control over the Chesapake and Ohio Railways. His opponent on the other side was guarantee trust. It was a "God Damn Bankers" acting in trust of $80 million of debt which was secured by Young's stock. As a result of the declaration by the Guaranty about the value of Young's collateral having been fallen below desired level, the bank started action to impound the stock and at the same time by the use of its voting power it initiated the removal of Young from the C&O Board. Though Young had been in active control of the C&O only for a brief period of 1 year but during that short span he was able to alienate both rail-road community as well as primary lenders thereof. He was convinced with the fact that GuarantyTrust was in a conspiracy with some "God Damn Banker" like J.P. Morgan[19], so that he could be pushed out of the industry.

It is also worthy to be mentioned here that a few weeks before the C&O meeting of the shareholders, an order by the Federal Court had been issued which temporarily restrained both the GuarantyTrust and also Young from casting vote for the contested share. When the fact became clear that the issued order is going to remain in effect for long, both the sides, i.e., GuarantyTrust and Young were forced to initiate the campaign so as to secure their side through proxies of the

C&O's shareholders. Initially it was within the expectation of both Guaranty and Young that a legal battle will ensue over securing voting control of a block of shares. But as the time would have it they had to compete but for the exercise of loyalty of 60,000 shareholders of C&O over a smaller shareholdings. In the beginning Young fought his bankers adroitly and the same was his first ever

proxy fight. Due to his sheer populist charm, he won over the news media due to the fact that he appealed to the public's prevailing resentment of the Bank of Wall Street. In the line of his strategy, Young released a series of letters which were vicious, to the Guaranty Trust and this all had been done publically. It was also the part of the strategy to address these open letters to the opponents of Young but it was written more for the purpose of influencing the smaller shareholders of C&O and as it was anticipated, in reality also it proved to be a powerful weapon in the course of the campaign. Young won for a land sliding percentage of 41 of common stock C&O. This in effect was representing far more than 70% of the constituent share which had not been restrained by the injunctive order of the court.

This fight for the proxy in C&O railway was successful in sending a clear warning and that too through the board rooms of the Public Company. Not only this the daring gesture of young man by the name Young had also been recognized by the Saturday Evening Post. In its words the man had bested both Guaranty Trust[29] and also allegedly J.P. Morgan. And this feat was not achieved with the mere supplies of capital but by merely lobbying the ultimate beneficiaries i.e. the public shareholders.

This mark of events was also not far from catching the attention of an appreciable no. of young men who were desirous of beginning to establish their own empires of business and that too during the great depression. The campaigns of Young for the C&O were successful in teaching them a strategy to win in the war of seeking control of the corporations, i.e., Public Companies with the help of proxy votes. Not only this when the World War II ended the U.S. economy started to expand and it is not surprising that they walked and took the help from Young's playbook for the purpose of targeting the underperforming of Public Companies. The list not only included major rail roads but it also included other well-known household names namely Montgomery Ward, M.G.M.

Loews and the likes of 20th century Fox and also Decca Records.

Encouraged by his success in the year 1954 at the C&O, the next target of Young was the New York Central.

The same was 2nd largest rail-road in the country. This time the strategy of Young was to debate with his opponent and the result was very much reflected in daily newspapers which were field with ads for the purpose of soliciting votes. The control of the New York Central was not new as before Young's effort to control the New York Central, Commodore Vander Bilt had also made a successful effort in the year 1867 but the same was done through behind the scenes share purchases. But this time the same was done with the spice mixture of drama, turning the communiques of shareholders from a mere formal legal document, into an entertaining and irreverent missive. For understanding on of his provocative letters to the New York Central, it shall be relevant here to produce the cutting into the very words: "Warning: if any banker, lawyer, shipper, supplier or other person

[19] Young v. New York City Transit Authority, 903 F.2d 146 (2d Cir. 1990)

solicits your proxy for the present Board, ask him what his special interests are, or what yours Company is paying for his services. Like the bankers now on your Board, he, too, may be hoping to receive special favors from you railroad or from the bankers."

29 ibid

3.7 WILLIAM SHLENSKY, ON BEHALF OF AND AS A REPRESENTATIVE OF CHICAGO NATIONAL LEAGUEBALL CLUB (INC.), PLAINTIFF-APPELLANT V. PHILIP K. WRIGLEY, ET AL., AND CHICAGO NATIONAL LEAGUE BALL CLUB (INC.), DEFENDANTS-APPELLEES. (1966)

The case in this court was preferred by way of an appeal. The appeal was from the dismissal of plaintiff's complaint (which was amended) at the behest of the defendants. The case was concerned with the negligence and mismanagement by the directors of the company[30] as a result the corporation was also made the defendant in the case. The plaintiff prayed for damages and also sought an order for causing the installation of lights as well as for the purpose of organizing baseball games in Wrigley Field.

Plaintiff in the case was a minority shareholder in the corporation (defendant in the case) by the name Chicago National League Ball Club the same was a corporation registered in Delaware but its principal place of business was in Chicago Illinois. The story of the defendant corporation was that it owned and operated the major part of the professional baseball team playing leagues with the name of Chicago Cubs. Along with the same the corporation was also engaged in the operational works of the Wrigley Field which was also the Cubs; Home Park, the sales which used to happen during the cubs home games as well as the television and radio etc. broad cast of the home games. The corporation also used to deal in the business of giving the field on lease for the organising football games and in return it received its share.

The individual defendants in the case were the Directors of the Cubs who had served for varying period's years. One of the individual defendants Philip K.Wrigley was also the President of the Corporation as well as the owner of shares extending to 80% of the shareholdings. It was the allegation of the plaintiff that right from the inception of the night baseball in 1935 nineteen of the total twenty major league teams have time and again scheduled night games. For example in the year 1966 out of a total no. of 1620 games in the major leagues, 932 were played at night time. It was the allegation of the plaintiff that every member of the league except the Cubs used to schedule substantially most of its home games in the same year at night. Though the exclusion was provided for the opening days, Saturdays, Sundays, holidays etc., and all this had been done only for the specific purpose of more and more maximizing attendance and thereby increasing revenue and income many a folds. It was also unknown fact that the Cubs in the years ranging from 1961 to 1965 have to face operating losses from its operations[31] of direct Baseballs. The plaintiff related those losses as a direct consequence of the inadequate attendance of the game lovers. He directly connected this non-attendance with the noninstallation of lights at Wrigley Field due to the continued refusal of the Directors. The plaintiff also contended that if the situation is allowed to continue as it is then it is not far fact that it would sustain comparable losses, thereby deteriorating the financial condition of the company.

The plaintiff also alleged that except for the financial year of 1963, attendance far or less at Cub's home games had been substantially far below that as had been at their road games and many out of which

30 237 N.E.2d 776, 95 Ill. App. 2d 173

31 ibid

were played at night time. It was the allegation of the plaintiff that the defendant in the case, i.e., Wrigley had refused to install lights. The refusal was not because of the fact that Wrigley was concerned about the interest in the welfare of the Corporation rather he was more concerned about his personal opinions like baseball is a day time sport and if lights are installed, then in that case the night baseball games will have a negative effect ,i.e., a deteriorating effect upon the surroundings.

It was also an allegation that the defendant had admittedly showed his disinterest in financial benefits which Cubs will get from such action due to his personal concern for the neighborhood and if at all he agrees or the night games then it should have been played at the new stadium to be built somewhere in Chicago along with the president of the corporation as alleged by the plaintiff, other defendant Directors had acquiesced in the policy framework which were laid down by the President of the Corporation himself. It was them who had permitted him to rein the Board of Directors particularly in the matters of the installation of the lights as well as the scheduling of night games.

So finally the charge was made out that the directors were in action or inaction for reasons which were contrary as well as unrelated to the interest of the business of the Corporation and thus were arbitrary and capricious and hence constituting mismanagement and waste of the assets of the Corporation. Also the Directors are equally to be held liable for the negligence as they failed to exercise reasonable care and prudence, which are necessary in the management of the affairs of the Corporation. Now coming to the question in the appeal, which was as to whether plaintiff amended complaint stated a cause of action. On the contrary, the defendants in the case argued that the courts cannot step in and thus interfere with the business judgements, which were honest unless it could be shown that it was a result of fraud, illegality or the conflict of interest.

Now coming to the decision of the appellate court, as far as the argument of the plaintiff in respect of action of the Directors was concerned, the honorable court held that it was not satisfied with the fact that the motives assigned to the President of the Corporation and through him to others, were contrary to the best interest of the Corporation and resultantly to the stockholders. For instance, the effect on the surrounding neighborhood, as it appeared to the court, of course might well be considered upon by a Director. As his role was to consider as to who would attend or who would not attend the games had the park been in a poor neighborhood. In addition, the visionary interest of the Corporation might demand all attempts to keep the neighborhood from getting deteriorated. By expression of his opinions, they made it clear that in no way they mean to say that they had decided about the correctness of the decision of the Directors. They were merely stating the fact that the alleged motive in the complaint (amended) showed no fraud, illegality or conflict of interest in their making of the decision.

Coming to the next claim of the plaintiff the court held that taken as a whole, the factors other than attendance also affect the net earnings or the losses. The court for instance, took the reference of the year 1962, wherein attendance both at home and road games depreciated significantly as compared with the year 1961, and then also the loss from baseball operation was appreciably less. Even then also the plaintiff in the case was only concerned with the installation of lights. Furthermore in the instant case the allegation of the plaintiff that the interest of the minority stockholders and also the Corporations have been compromised with both seriously and irreparably by the wrongful conduct both of the president and the defendant Directors, is not sustainable.

3.8 ROSS PEROT VERSUS GENERAL MOTORS (1985) GROBOW V. PEROT, 539 A.2D 180 (DEL. 1988) HON'BLE SUPREME COURT OF DELAWARE

It is not unknown that General Motors exercise[32] mastery in auto mobile making. General Motors were the largest car maker in the world, but it was losing the battle to its competitors like Toyota and Honda and thus losing the market share. It is also worthy to be discussed here that General Motors when was in the control of a consumer goods company later moved into the hands of financial managers, the decline was inevitable this was due to the fact that the accountants had started preferring short term profits over and above quality products.

In the year 1981 Roger Smith became Chairman and also the CEO of General Motors. For the purpose of modernizing operations he focused on massive acquisition. It was in the year 1984 that the deals were signed by setting the sites on EDS and as a result Rose Perot became the largest shareholders and thus made his way to the Board of Directors. The inclusion of Rose Perot into the Board had ignited a fresh flame of enthusiasm in the mind of the investors and accordingly Smith elaborated that the style of Mr. Perot rightly fitted with what the Board was busy in trying to achieve at the General Motors.

But this wave of enthusiasm was short lived reason being the more he started becoming aware of about the auto mobile business, the more he started thinking as well as making presumption that smith's enthrallment with the newly introduced technology was missing the agenda. Though General Motors went on to lavishly spend millions of dollars, not only on robotics but also on automated manufacturing but these were the Japanese auto makers which were reining the market share as they were building better cars and that to on old equipment. The reason of this obvious failure was that General Motors was not successful in taping the real potential of its employees.

The biggest hurdle in the way was the company's huge bureaucracy incapable of getting out of its created ways. The prevailing condition at the General Motors is obvious from a statement of Perot to the Fortune magazine wherein he through an example tried to explain the condition therein. The example was in the very words of Mr. Perot as follows:-

"I come from an environment[33] where if you see a snake, you kill it. At GM if you see a snake the first thing you do is go hire a consultant on snakes. Than you get a Committee on snakes,

32 ibid

33 539 A.2d 180 (Del. 1988)

and then you discussed it for a couple of years. The most likely course of action is –nothing. You figure, the snake has not beaten anybody yet, so you just let him crawl around on the factory floor. We need to build an environment where the first guy who sees the snake kills it." Ross Perot's contribution to the company so as to start shareholders' activism runs into a number of efforts so as to get right to work at the GM. He considered labor as a resource in his effort to exploit better to say utilize the capacity of the labor force, he once invited the top ranking two hundred executives for dinners at his house, each in the group of eight not only this he met with nearly a thousand of computer workers of the General Motors in the groups of fifty each. It had become a part of his routine to visit dealerships of the general motors in street clothes on weekends. This weekend visit was for the purpose of not only to taste there ,i.e., of dealership's customer service and also to check on the field the Company's product. All these efforts were part and partials of a shareholders' activism for the sole purpose of understanding the non-competency of the world's richest car company against Japanese automakers which were flourishing on shoe string budgets.

Perot considered labor as a resource but on the contrary Roger Smith had not initiated any conscious effort for the purpose of establishing any positive relationship with the labor force of the General Motors. General Motor was not only hostile to its workers but it was also hostile to its dealers. This was due to the fact that Smith was obsessed with technology and this obsession had arisen from his negative view or better to say non optimistic view about the Company's labor relations. In the mind of Smith the idea of operating the factory by the robots perhaps may have been hovering above his head, left with the presence of only a handful of employees ,i.e., human employees. But this technology based idea of running the factory by the then CEO Roger Smith could in no way be fruitful to the latest most advance auto plants of today's era in the world for example the Tesla Motors factory situated in Fremont, California, touted as the most advanced auto mobile maker in the world owes more to Toyota's manufacturing the cars then to the Roger Smith's ill-informed, ill structured and thus non visionary automated future. The factory at Fremont though uses versatile high ended German robots, but it's also a true fact that reliance on human component has not been left of. Perot not only remained restricted to the extent of having meetings with the workers or inspecting the products at the field rather he also even not hesitated from writing letters to Mr. Smith even sometimes criticizing him but all this was done reverently ,i.e., by keeping the affairs private through individual communication. For example on October the 23rd, 1985, letter to Smith on the page number 222, a full briefing about the acquisition of Hugh was demanded and at the same time principal reasons had also been demanded. In the same letter he also deals about his working relationship with the CEO. He writes, "I will tell you candidly when I think you are wrong. If you continue your present autocratic style, I will be your adversary on critical issues….I

don't expect that all of my ideas will be accepted. I do insist that they be heard and thoughtfully considered." Perot's free admonishment in the recent meeting even went to the extent of saying that he got bored and thus therewith he also listed the effects of the management's style Smith in the very words, "your style intimidates people…. You need to be aware that people are

afraid of you. This stifles candid, upward communication in GM. You need to know that GM'ers at all levels use terms like ruthless and bully in describing you."

Perot delivered a number of speeches both in and out of the board meetings. On November the 4th 1985,
Roger Smith did not remain confined to argue against the acquisition of the Hughes aircraft, rather he went on to indict and question the modernization strategy of Roger Smith and at the same time threw challenge to the Directors of the Board. He was also critical about the ways in which the board meetings used to be held. Instead of being a passive session with less or even no to way communications, the format of the meeting of the Board should be such as to make an environment of participatory sessions so that the same could be made a two way communication ,i.e., active session. The same must allow the discussion about the real issues further leading to the resolution of the real problems therein.

3.9 CARL ICAHN VERSUS PHILLIPS PETROLUIM (1985)

Carl Icahn famous for his corporate [34]raiding work within a brief period of seven years had become a symbol of corporate raid. On February 4th 1985, he penned down and sends for a letter to the management of the Phillips Petroleum with the offer to buy the Company. In the same letter he had blown his first salvo in the form of a threatening that if the bid was not accepted he shall be compelled to initiate a round of hostile tender proposal for securing the control. This gesture of confidence shown by Icahn was not ill informed (as Icahn was not a novice in this field) rather Philipps was the fifteenth target as a raider. Now the question arose before the management of Philips as to whether the threats in case of non-acceptance of the bid, should be ignored or should it be seriously considered. The tender offer of Icahn was of a whopping some of 8.1 Billion dollars for the acquisition of Philips and at the same time this threat attracted the attention of a few people and that to seriously also. And the reason of such heed being paid to was not surprising too as

CarlIcahn's career during the decade of 1980s had set an example and it was more than that of any of the other raiders.

The fight of control which was started Carl Icahn was not a consequence of any short of misinformation rather it was based on his firm belief that whenever a fight for control is initiated, it generally leads to wind fall profits for the shareholders. ,i.e., why in the year 1980, wherein he wrote a memo for the purpose of making the prospective investors who were outlining the opportunity, he said "it is our contention that sizable profits can be earned by taking large positions in undervalued stocks and then attempting to control the destinies of the companies in question by :(a) trying to convince management to liquidate or sale the company to a white knight, (b) waging a proxy contest, (c) making a tender offer and/or,(d) selling

backour position to the company."

34 ibid

With the growth of his fortune day[20] by day Icahn had himself developed a philosophy about corporate governance. At public spaces time and again he used to talk about the situation of the lake of accountability which was prevalent in the Public Companies and the same was ultimately growing as a threat to the prosperity of the American economy.

The turning of events for controlling the Phillip Petroleum by Icahn started stemming in the late 1984. It was rip time for doing so as the management was not at all concerned about as to what was happening at its back and thus it appeared as if it had back against the wall. ,i.e., why Icahn was certain about the fact that Phillips if pressured would sweeten the recapitalization in favor of the shareholders. ,i.e., why it was the need of the hour to start a hostile raid. Though Icahn had already threatened the management of the Phillips with the threat to take action to start a proxy fight but before making the offer he had perhaps not enough of money to buy the entire Company. In order to remain prepared with the funds in case of acceptance of proposal to buy the Phillips petroleum, Icahn met with a number of people be it Michael Milken, Drecsell etc. before the Phillips episode, drecsell had ben handy in lining of capital for two earlier hostile raids the first being Pickens versus Gulf and the second being Steinberg versus Disney.

After the round of negotiation between Icahn and other for raising the capital after the prospective acquisition of Philips now it was time for Carl Icahn to fire his opening shot on Philips petroleum and the same was indeed fired also in the evening of February 4th 1985.He sent an invitation to the company in the form of package. He sent a letter to the Company's investment bankers the same content his communication with the Chairman of the Company, Mr. William Douce. The same was accompanied with Drexel's letter. The letter by Icahn begins with the words that Icahn

[20] Lessons from a famous shareholder activist battle available on https://www. firstlinks.com.au/lessons-shareholder-activism-battles last updated on 27 august 1917.

himself owned 7.5 million shares of the Company. Running with the utterance, he now steps in his hands with the criticism of the recapitalization plan and said that the same was grossly inadequate. Moving further he suggests an alternative also. The alternative was in the form of an offer to buy the Company with 55 dollars per share offering. The same offering was in the form of cash and kind ,i.e., composing of 27.5 dollars in cash and further 27.5 dollars in subordinated notes. With the same quotation of price, Icahn also went on to rage faith and confidence in the mind of investment bankers about the availability of necessary cash in case of buy out of the company by saying that Drexel is highly confident about raising the cash by the deadline of February 21.

The exchange of letter between Icahn and Investment Banker was followed by the offer of Icahn to the Chairman and CEO of the Phillips, Mr. William Douce. In the very word of Icahn the offer ran like this "if you raise your offer so that you acquire all the outstanding Philips share for a package worth $55 per share, I will gladly step aside." But in case of rejection of the offer Douce was also warned of remaining prepared to face a proxy fight aimed at defeating the recapitalization and at the same time also to be beware of a hostile tender for 51% of the share. The management was given a period of 2 days to say 'yes' or 'no' to his buyout offer.

This offer of buyout and in case of a rejection the warning took face the defeat the recapitalization was responded in the form of a suit by Philips against Icahn in the US District Court on February 6. The same was for violating proxy solicitation as well as against the breach of anti-manipulation roles. The Company's response was not only restricted to filing the suit rather it also extended to making two slide changes in the recapitalization plan. These changes had in a way sweetened the recapitalization plan. The same was coupled with a clarificatory statement that the value of the recap had been increased by 3 dollars per shares. But still the rights plan to preserve long term value was slipped, which was an unwelcome morsel by Phillips. The Company after such changes in the recapitalization plan, went on to fire another salvo from its bunch of arrows. This was in the form of a poison pill. The first poison pill was created by Martin Lipton in the year 1982 with the aim to defend Elpaso Natural Gas against any attempt of hostile takeover by Burlington. The use of poison pill is that it does not in reality prevent any hostile takeovers but it blocks any further raids for securing an effective control on the open market. The poison pill also gives the shareholders of the company some special rights aimed at countering any triggered threshold by a buyer by crossing a certain ownership.so the moment shareholders exercise the rights that may be usually for preferred or common shares, the Company [21]dilutes the ownership stacks. As a result the buyer would be left with owning over leveraged Company with a stock pile of short term debt.

But to everyone surprise and particularly to of Douce, Icahn came up with a plan to activate the rights of the stock holders by initiating a tender offer which was approximately 25% of the common stock of Phillips. This in a way was a threatening to use Phillips own pill as a medium to buy out the company, ,i.e., why with the success of his reply against the poison pill the quotation of Icahn reflected his strategy in the words, "I responded by offering, in effect, to swallow the poison pill. "During the exchange of these allegation and counter allegation Icahn had got benefitted by extra media attention which Icahn received by Phillips poison pill. In addition to this benefit the other factor which was in favor of Icahn was that Company's institutional shareholders had already become frustrated about the plan of recapitalization. Shareholders viewed the pill not as a pill but as a punch surely in the gut.

[21] 36 Ibid

In the next chain of events on February 13th Icahn started a tender offer of 60 dollars for the control of Phillips. The success of the offer was dependent on the voting down of the recapitalization plan at the meeting of the shareholders on 22nd of February. In case of tender offer not being accepted

Icahn wrote that he would not sit idle rather would run another proxy fight on the next meeting of the shareholders. He also went on to say that in case of victory in proxy fight he would go on to liquidate the company. Through these serious of massages Icahn had made his intention clear that he was not going to run away.

On February 22nd the shareholders meeting started and one by one people started to pore in the meeting and also began to oust their anger against the recapitalization plan. Thereafter the meeting was adjourned. The next day the meeting was reconvened on all of these days voting was open. On March3rd, the announcement came from the house of Philips that the recapitalization had lost and this lose was not normal but by a whopping votes of 9 million. In this way it was first time in the history of corporate world that a corporation of the size of Philips Petroleum had lost a fight by proxy.

At last Phillips had to give up the plan for recapitalization and Carl Icahn was successful in winning a richer pay out for the shareholders of Phillips. Furthermore Phillips also agreed to pay Carl Icahn's 25 million dollars for his expenses. This time the market was in favor of Carl Icahn which was of the view that the recap was really worth around 55 dollar per share. At last but not the least the best expression of the story can be reflected in the words of Carl Icahn himself, "I am happy the shareholders benefited. But I am no Robin Hood. I enjoy making the money."

3.10 KARLA SCHERER VERSUS R.P.SCHERER (1988)

The beginning of the case hovers around the invention of a machine capable of producing in mass number the soft gelatin capsules. It was invented by Robert Pauli Scherer in the year 1933. This invention further led to the establishment of R.P.Scherer Corporation which around fifty years after the invention, had become the world's largest manufacturer dealing in soft gels. Other remarkable incident happened in the year 1984 when Robert Scherer's daughter, Karla joined as a Director in the Board of Directors in the Corporation. After joining the same she was disillusioned after coming across the fact as to how such a cash generating business was being run for the past two decades. For the last few years the Corporation was managed by none other than Karla's husband, Mr. Peter Finkas the CEO. It was the belief of Karla after assessing most of the facts that her husband was busy in perusing and continuing with an aggressive strategy for growth but the said anger of this fact was that the said strategy was not adopted keeping in mind the interest of the shareholders.

Karla Scherer was not far from realizing the fact that the venture which was pioneered by her father could have been more valuable, had it been separated from respective management team which was under peril. Even she was well aware of the fact as to what happened in the Northern Pipeline case. The same also had the lacking of the accountability to the ultimate beneficiaries ,i.e., shareholders. Even in the Scherer Corporation Boards were not in a direct way controlled by management, rather Directors were handpicked by her husband, the CEO. And whole case in question is the story of a proxy fight fought by Karla against her husband and the same is a lesion in such cases of entrenchment.

Now coming to the some of the background story of the Corporation, we find that the Company which had initially been started by Robert Scherer was diversified by his successor, his son Robert junior. After so many acquisitions and attempts of diversifications, Robert junior finally left the Company in the year 1979 and was later replaced by Karla's husband, Mr. Peter Fink, he had already been there in the Board since 1966. Right at the time of departure Robert junior kept his focus on the business of the acquisitions which he had made. On the other hand Peter Fink the new CEO focused more in remaining intact to the core business of the corporation. But this intactment to the core business ,i.e., of manufacturing capsules did not last long. Within a year of Fink becoming the CEO the company got engaged in seals and closers for injectable solution, a recently bought German Company by the name Franz Pohl.

The way in which Robert junior used to deal, had also become a way of running the business of the company by Fink. Fink had made way to a number of acquisition reneging from disposable dental supplies, tasting laboratory for animals and even to the production of eye glasses, contact lenses etc. Till date the company's largest acquisition was that of Paco Pharmaceutical Services. Out of all these ventures the worst performing was Paco, soon after it was acquired it ran into serious troubles. This was due to the lack of research before acquisition. For example the Company lost a large number of customers in the city of Puerto Rico, as a result of the fact that the customers decided for taking packaging production in house. Not only this, the Company's production units turned unprofitable but they could not be closed due to non-visionary labor agreements which compelled penalties in case of closer of production unit.

For Karla, Paco was the last sucking pipe as ,i.e., the last straw sucking the capital out of the core business. She said "Paco was one more example of extending into businesses which I felt were not appropriate."

Initially even Karla's entry into the Board was reluctantly assented to by her husband but his reluctance was of no avail to Karla's persistence as she had grown up with the business. And finally she was on the Board. Right from her entrance into the Board in the year 1984, she had already witnessed the hard shell business collapse in the year 1985, and also the later negative earnings in the year 1985and 1986 and the last dent was in the month of February 1988 when the acquisition of Paco took place. As a result of the acquisition of Paco, the signs of trouble had started signaling. Within a few years, long term date had more than doubled, though the soft gel business still continued to perform well.

Though, there was clear signs of mismanagement of the company's affairs at the hands of Peter Fink, Karla thought of selling the business. But her decision could not be put into effect as majority of the Directors in the Board ,i.e., six in numbers were backing Peter Fink while only three of the Directors were only of the view that Karla was right. On April 26th 1988 and also on June 8th Fink and his supporters passed a resolution of the effect that the Board will not consider at all any offer for buying the Company, not only this the resolution went on to declaring the fact that it was in the best interest of the company and also the shareholders to reject any such offer of sale. The Board of Directors was sceptic of the fact that any legitimate bid for company would compel them to make a choice between their friend, the CEO Mr. Peter Fink and the shareholders.

The main signs of shareholders' activism started to appear by the year 1988 instead of running here and there and starting a campaign elsewhere. It was the decision of Karla Scherer to take the case directly to the real stakeholders in the affairs of the Company. On May 28th ,i.e., just after a brief period of nine days from her divorce from Peter fink, Karla with her brother John Scherer decided to file a 13D with Security and Exchange Commission. It disclosed their desire in selling the Company so that the benefit of shareholders could be secured. In the month of June both of them requested the list of shareholders from the R. P. Scherer Company and at the same time they made it clear that they were going to start a proxy fight so as to bring a change in the make-up of the Directors in the Board. This announcement by Karla and John was taken seriously by Peter Fink whom Fink considered a formidable threat, reason being the fact that they controlled 38% of the votes; this was in extra to 9% of the votes which were held in trust formed by their father for their benefit.

For fighting back the Company led by Peter Fink responded with hiring Mr. Martin Lipton who was a corporate defense lawyer of eminence and also famous for his invention of the poison pill. As a result the Company refused to assent to provide the list of the stock holder to Karla and John. Peter Fink rather even started to lobby to secure the vote shares which had been held in trust for both Karla and John. The board also went on to aid a new member by the name Joerg Siebrt. He was the Chairman of Deutsche Gelatine, a German Company which had sold gelatin of a worth of 12 million dollars to R. P. Scherer Company in the previous year.

Against the non-discloser of the list of shareholders, a suit was filed in the Chancery Court of Delaware. On July ,i.e., one day before the hearing the shareholder list of the Company had finally been handed over.

But the final battle was to happen on august the 17th when the voting had to take place both the sides started the campaign through bombarding shareholders with proxy mailings. The initial salvo ,i.e., the first attack was made by the Company through a letter which was signed by both Peter Fink and also Wilber Mack. It argued that both Karla and John had nothing to do with the welfare of the shareholders of the Company rather they were concerned with their own financial interest. On the other hand Karla wanted to make the attack but it was not through any criticism of the other side. On the contrary she tried to make the shareholders familiar with the positive aspect of the sale as a sale of the company to one bidding the highest would go on to give maximum return to the stock. Thus she urged the shareholders to vote for her and against the newly introduced stock option plan. Karla and John give a new name to their group, Karla Scherer Fink Stock Holder Committee.

In line with the two sided campaign, first one led by Fink through the R.P. Scherer Company for the purpose of demining Karla and John's newly constituted Committee and the other side led by the new Committee for the purpose of defending the decision of selling out the Company, the battle between the two was day by day increasing in terms of intensity. For example on July the 28th Fink, and Mack sent for a shortly penned letter to the shareholders of the Company which mocked the newly constituted Committee and also went on to reveal the fact (the correctness of the same not been proved, neither brought on record) that Karla once had also expressly asked to be made the CEO of R.P. Scherer Company. There after a serious of letters had been made public to the shareholders at the instance of Fink and Mack. One such other letter went on to highlight that Karla herself shortly before going on to announce for the selling of the Company, had filed for divorce. Furthermore even her motivation in favor of desire to sell the Company was questioned. Even Mr.Fink and his loyalist went on to make personal attack through words in the terms

that Karla Scherer is panted as a fickle queen that of the night for Fink's calm and not only this she collected Sarastro. On the other hand instead of making any personal comment or accusation Karla preferred to expose the collective effort of Fink and his men's act of mismanagement of the Company and also their continued effort to create hurdles in the way of selling of Company so that they could continue with their personal benefit.

All was going well with the positive campaign by Karla rather going for personal attack and focusing more on exposing the mismanagement of the Company, a wave of support started spiraling in favor of Karla and as a result she started feeling positive about her chances of victory. The same was even reflected by the presence of a large number of shareholders who had rallied for her cause and they even bought sizable stacks. In the meantime an unwelcome news was received that the National Bank (the trusty of the shares for the benefit of Karla and John) had decided to go against Karla at the voting. National Bank was going to exercise 9% of voting stack against Karla, so the result could be counterproductive to her. Accordingly Karla's group approached the court against the National Bank decision. The decision of the National Bank was quite obvious as it had been receiving so many benefits in terms of finance from the R.P. Scherer Company (led by Fink) for quite some time. The grant of remedy by the court went in favor of Karla and accordingly the National Bank was ordered to abstain from the voting. Karla was at last able to secure her victory after the casting of votes. At last through her tiresome struggle the fruits of success had been reaped. It was all due to her shareholders' activism that the Company not only got rid of the management which had been mismanaging the affairs of the Company for last so many years.

Shareholders' Activism was heralded during the initial decades of the twentieth century. The first case on shareholders' activism in U.S.A. dates back to the third decades of the twentieth century ,i.e., in the year 1928, with the case of Benjamin Graham versus Northern Pipeline and at the present time it has reached its zenith (though much is still to be done). But shareholders' activism in India is still in transition stage both in term of statutory protection for the interest of shareholder and the case law of the Apex Court are also not that much abundant so as to deal with the problem of exploitation of the shareholders at the hands of the ones exercising effective control due to being in control of majority of the shareholdings of the company. Even then also we must admit the appreciable role of our courts in ensuring the enforcement of the rights of the real beneficiaries, the shareholders. A few of the notable Apex Court decisions have been dealt with as follows:-

3.11. CONCLUSION

The concept of shareholders' activism in USA has been well established and now in maximum cases in which a problem occurs between the shareholders and management be sort out through proper dialog. The numbers of cases are very few in which they need to go to the court for the relief because the Board and management are ready to indulge in dialog. The question arise here how it is possible? the answer is the struggle done by the activist shareholders in past realized the board that they have to be more cautious for the overall functioning of the company because the shareholders are keeping eye on your activities and in case of any wrong move will take place they will react proactively. It was the Benjamin Graham who had shown the power of shareholders that how a single person without the much protection and right of statute can makes the difference. He was the person who is considered that as a trend setter in making use of the proxy voting so as to finally secure the rights of the shareholders. He just shown in his activism to the all shareholders community that if you are active enough no one can cheat you in the company and your money will be secured. The case of Robert Young versus New York Central is a fine example of securing the famous New York Central with a flair for the dramatic, turning shareholder communiques from formal legal documents into entertaining and irreverent missives. The case of Carl Icahn versus Philipps Petroleum is an appreciable example of corporate raid. Through the threat of buying out the company and in case of refusal the sanctions in the form of initiation of proxy voting as well as the denigration of the recapitalization plan, was within the agenda of Carl Icahn so as to finally the benefit reaches the shareholders.

On the other hand in India the cases of shareholders' activism are very less and only few cases are related to oppression and mismanagement in which minority has shown activism by going to the court. First case in the line is of Rajahmundry

Electric Supply Corpn. V. A. Nageswara Rao in which the the minority went to the court for winding up order and the court passed the order and through this the first

41 the case of

shareholders' activism succeeded. In the case of S.P. Jain versus Kalinga Tubes Ltd minority again went to the court for alleging oppression which court did not find but through this shareholders shown activism. In the Cyrus P. Mistry case which was by way of an appeal to the National Company Law Appellate Tribunal from the decision of the Mumbai Bench of the company law tribunal. Here in the case the appellant had been suddenly removed from the post of executive chairman of the Tata Sons Ltd. Company on the allegation of oppression and mismanagement. The tribunal passed an order that the this is case of oppression on minority shareholders so Mr Cyrus Mistry should be reappointed as the CEO of the company.

The case of Cyrus Mistry was the latest case of activism done by minority shareholders against a big elephant ,i.e., Tata and sons the biggest company in India so the cases of shareholders' activism in India also catching its speed as we have seen in the proxy season of 2017 a large number of cases of shareholders' activism occurred in India but the basic difference between the shareholders' activism in India and USA is that the shareholders in USA are doing activism at their personal level too like in the case of Graham and Rose Perrot on the other hand in India shareholders are going to the court or institutions are voting because they want to save themselves and are not concerned about the whole group of minority shareholders as in the case of Cyrus Mistry he went to the court because of his own interest was being violated not for the whole shareholders as done by Graham[37] and Rose Perrot. One more thing that in USA the shareholders are being vocal and not fully dependent upon the rights given to them by statutes rather they are using their own efforts like Graham went to the office of record studied the whole report and went for activism but in India shareholders are being vocal only by using their right given by statutes like operation and

[37] 1965 AIR 1535, 1965 SCR (2) 720

mismanagement or by voting through different mode. So shareholders' activism has a good future in India and agency like proxy advisory firm will play a vital role in development of shareholders' activism in India. One more thing that in India we need to develop a culture where the board or management sit together with the shareholders and talk about each other concern instead of thinking that the shareholders are needlessly interfering in the company's affairs, management has to give respect to the minority through which a culture will develop which will ultimately make the corporate governance more efficient and good.

CHAPTER 4

AN ANALYSIS OF THE CHANGES THAT HAVE OCCURRED IN SHAREHOLDERS' ACTIVISM IN INDIA AFTER THE SATYAM SCAM

4.1 INTRODUCTION

Only change is permanent in this world and for this reason we should accept the same with time else we may lag behind others. The corporate sector in India is growing rapidly day by day, which means that the responsibility of managing the company is now increasing more and more to strictly adhere to corporate governance and especially it is taking pace more for protecting the interests of the minority's shareholders. The business in corporate sector is growing with noticeable speed due to the same different means of doing it and thus carving the methods of the same is growing rapidly. Due to the same reason, now even the management or directors of a company focus mainly on making profits and thus pay less attention to the minority shareholders who also own the company according to the proportion of money levied.

Thus it's the binding duty of the ones running the company to protect their interests from the forefront.

Satyam scam made the law maker in India realize that our company law has a lot of shortcomings in it which need to be rectified as soon as possible so that the possibility of such scams happening in the future can be minimized. So it is not only the responsibility of the government to enact strict law but also the responsibility of the shareholders to use their rights in a big way so that they can protect their own interests.

The fact that the shareholders are the owners of the company should not only remain lying in the books, but the same should also take the shape in ground reality. For achieving the same, the shareholders will have to enjoy their statutory rights more and more and will have to participate in the affairs of the company in a proper way. Now it is not only in USA but also in India that the shareholders are actively participating in the affairs of the company and through this participation changing the day to day discharge of duties of the top brass of a company which will go on ultimately increase the profit of the company.

Satyam scam did what so many committee reports could not result into doing. This scam forced the Legislature to come up with a number of amendments for removing the shortcomings in the company law, especially the ones related to shareholders' activism. In the case in question, shareholders in USA succeeded in getting compensation through class action suit. At that point of time in India, there was no such concept of class action suit. so the shareholders in India did not have such variety of reliefs in this eventuality.

SEBI has framed rules in 2012, with reference to e-voting and as per the new rule now the top five hundred companies of the stock exchange can use e-voting facility and later on the compliance of the same has been made mandatory for all of the companies. The same provision was later on given statutory force through the newly enacted provisions of Companies Act, 2013. With the introduction of the provision of e-voting in 2013 Act, the participation of the shareholders in affairs of a company has enhanced appreciably which is a positive sign.

Then the next important provision related to shareholders' activism was brought in the provisions of oppression and mismanagement. Earlier in order to approach the tribunal against the majority shareholders in case of oppression and mismanagement, the minimum strength of a minority shareholders required[22] in terms of stake was 10% of the shareholdings. The new Act 2013 added a new clause in this topic which allows the tribunal to give permission to a person to bring an application against the act of management amounting to oppression in spite of having less than 10% of shareholdings.

Under section 245, the provision of class action suit was inserted in the new Companies Act 2013, which allows a shareholder to bring a suit to represent a class against the same defendant. It was a long sought after demand of a number of committees which came into existence through the said act. The said act empowered the shareholders a lot to fight for their interest and right as well.

The concept of independent director also empowers the shareholders for the same, because as per the provision of Company Act there is no other interest of the independent director of the company except the remuneration given to him or her. So a neutral director always goes in the interest of a company and its shareholders since he will not indulge in unfair activities with the management of the company. Now even a small group of shareholders can appoint a director and since he is the appointee of such group he or she with his best shall endeavor to protect the interest of the small shareholders.

Now in the issues of remuneration to the directors of a company the greater say is of the shareholders. The same requires to be approved in the general meeting through the exercise of the right to vote by all the shareholders of the company. Even in some cases, special resolution is required. So in such case the hegemony of majority will not prevail and even a small group of shareholders can go against the wrong decision of the company through its activism. Not only the SEBI's LODR or company law strengthens the shareholders' activism in India but also through many amendments like the Company law Amendment Act 2017, which provides in many section like section 185, 186 that now the need of Central Government not required in many stage instead of that now it is sufficient to pass it through special resolution, have also increased the ambit of play field.

The role of proxy advisory firm become vital in present time because they study properly the move of the company and also try to find out that what will be the effect of that move. As per their expectation they suggest the shareholders to vote in favor or against the proposal. Since a large number of shareholders do not know much about the expected consequence of the decision of the company that how the said decision will affect their interest, the role of proxy advisory firm become very much important. The proxy advisory firm and all other provisions which were made to protect the interest of the minority shareholders are doing well. as a result of the same that in the financial year 2017-18, the largest number of cases of shareholders' activism were brought to the respective tribunals. The current trend shows that shareholders' activism has a better future in India and slowly it is expanding in the corporate arena and becoming an important ingredient of corporate governance in India.

An analysis of the changes that have occurred in Shareholders' Activism in India after the Satyam Scam

"Business is all green, only philosophy is grey".

Karl Marx[2]

[22] Satyam Episode Compels Enterprises To Revisit Governance available on https://www.firstpost. com/business/biztech/satyam-episode-compels-enterprises-to-revisit-governance-1870245.html visited on 2 feb ,2024

"It was riding a tiger not knowing how to get off without being eaten." Ramalinga Raju Financial criminal wrongs are still a threat to Companies[39] in India with around 35 % of the entities reported to have witnessed in the last few years as per Price Waterhouse Cooper. The survey took 152 companies in India reported in its conclusion that there seems a drastic decrease in the strength of entities which reported as the victim[40] of fraud in "2005 survey", where 54 percent of respondent said that they were a witness to financial misdoings. However in maximum cases of fraud, the respondent insight of fraud was significantly higher than the real incident reported. This disparity may imply that cases of fraud do not make it to the news.[3] Satyam scam has been so far the biggest scam in the corporate history of India. The Satyam fraud case which relates to serious inconsistencies in financial records is called "India's Enron" by media. Assessing and understanding the harshness of Satyam fraud and its effect on shareholders of the company and the corporate sector on India as well requires understanding of the causes that resulted in the 'unethical' choices taken by the executives of the company. So it is needed to examine in detail the growth of Satyam as a contender within the international IT service market. Furthermore we need to assess the driving-forces behind the decisions of Satyam under the Chairmanship of Mr. Ramalinga Raju. At last we can draw some broad results and learn some 'lessons' from fraud in the Satyam case and its effect on the shareholders of the company as well. [41]Will begin from its name, according to Sanskrit language "Satyam" means "truth[4]

[39] https://taxguru.in/company-law/reminiscences-corporate-governance-satyam-fraud.html

3 [40] CORPORATE ACCOUNTING SCANDAL AT SATYAM: A CASE STUDY OF INDIA'S ENRON available on https://www.researchgate.net/publication/271133751_CORPORATE_ ACCOUNTING_SCANDAL_AT_SATYAM_A_CASE_STUDY_OF_INDIA%27S_ENRON

[41]Issue 2, 2012 available at http://web.nacva.com/JFIA/Issues/JFIA Asia's Enron: Satyam (Sanskrit Word for Truth) Journal of Forensic & Investigative Accounting Vol. 4, -2012-2_5.pdf

4.2 ORIGIN AND RISE OF SATYAM

"Satyam Computer Service Limited" was the new ace of the Tech service industry for outsourcing in India. The company was established by Mr. Ramalinga Raju in the year of 1987 in (Hyderabad), India. It performed wonderfully and achieved so many milestones very soon from its formation and became rising star of outsourcing company in India. The company started its business with only twenty employees and rise tremendously in Indian as well as in Global market.

It provided IT and business process outsourcing (BPO) services bridging a number of sectors. Satyam became an example of growing success of India in IT sector. The company became a public sector company from a private sector company in the year of 1991 when it got enlisted in the Bombay Stock Exchange. It accomplished a lot in corporate accountability, governance and innovation. "Ernst & Young rewarded Mr. Raju with the 'Entrepreneur of the Year' award. On April 14, 2008, Satyam won awards from MZ Consult's for being a 'leader in India in CG and accountability". Satyam computer service limited promoted four subsidiaries company in 1996 comprising:-

1) Satyam Computer Services Ltd,

2) Satyam Enterprise Solutions Pvt. Ltd 3) Satyam Renaissance Consulting Ltd and

4) Satyam Infoway Pvt. Ltd.

Satyam was selected as one of the most rapidly growing and most remarkable entrepreneurial companies in India in 1997, by World Link Magazine and World Economic Forum both are Switzerland-based. Satyam Infoway (Sify), was listed in NASDAQ in the year of 1999 and at that point of time it was the first Indian internet company which listed in NASDAQ, Satyam Infoway (Sify), was a wholly owned subsidiary of Satyam Computer Services Ltd. Mr. B.

Ramalinga Raju(Chairman of the Satyam computer service limited) was selected by Dataquest[23] for the award of IT Man of the Year 2000. Satyam again touched the milestone in the year of 2001 after getting acknowledged for being the world's first ISO 9001:2000 company to be given certificate 2 by BVQI. The World Bank began to take IT services from Satyam and also signed a deal with the Satyam. In the year of 2003, the company achieved 3rd rank in the survey by Investors and Institutions of world repute on corporate governance. Again , the company was rewarded with the title of being best governed in 2007 and 2009.The award name was the "Golden Peacock Award". Satyam secured another laurels from MZ Consult's for being a leader in India in CG and accountability.

Satyam's entities in technology till 2003 comprised around 13,120 technical associates who were serving more than 300 clients in the world. At that point of time the IT sector market at

globally was as per the estimate was around 400 billion US dollars, with an estimated yearly compound growth rate of 6.4%. The main drivers of the market at that time were the impact of the Internet on e-Business, greater importance of IT services to businesses world-wide; the rising need of IT services suppliers who could make available a range of services. In order to compete effectively with competitors in India as well as global competitors, the company undertook up a vivid multi business growth plans. In business terms, Satyam displayed, in its reported statements – "spectacular results in all key operating parameters."

From 2003-2008, in almost all fiscal metrics of interest to investors, Satyam developed significantly. The company in its total sales in 2003-04 generated Rs. 25,415.4 million. The company sales proceeds had increased by more than three times till March 2008. The company exhibited "a yearly compound growing rate ,i.e., growth of 38% over that period." Net profit averaged 33,Operating profits averaged [43] 28 and operating cash flows averaged 35% respectively. Per share earnings also increased in a same way, from dollar 0.12 to dollar 0.62, at a compound yearly, growing rate of ,i.e., growth rate of 40%.During the same period (2003 to 2009), Satyam was trading at an average trailing EBITDA multiple of 15.36. As a final point, starting at a share price of 138.08, in January 2003, stock of the company increased to at 526.25 –a growth of 300% in share price after nearly five years.

Satyam noticeably registered a significant growth in this sector and immense increase in the value of shares. The company had established itself in global market as a pioneer of IT sector. The outward environment in which Satyam operated was definitely beneficial to the growth of the company. Being Indian Tech "Crown Jewel" and the "fourth largest" company with high profile clients, it turned out to be involved in the largest corporate scam in Indian history. Satyam Computer Services pioneer B. Ramalinga Raju dropped a letter bomb

[23] Satyam Computer Services Ltd. available at https://www.encyclopedia.com/reference/dictionariesthesauruses-pictures-and-press-releases/satyam-computer-services-ltd

on innocent employees, investors, and the Government admitting that he had committed a fraud of dollar 1.57 billion (Rs. 7,136 crore), After confession of fraud he was arrested by the police. At the same time he also admitted that in this fraud his close circle of relatives and employees are also involved. He explained his situation in such term that "It was like riding a tiger, not knowing how to get rid of," in his resignation letter, which was written to the Board of Directors of the company Raju said that now he is ready to face the law of the land and also expected consequences.

This scam was such a big that media started calling it India's Enron. In order to understand the gravity of the Satyam scam we need to understand the factors that involve in the unethical choices taken by the executive and management of the company.

6 [43] CORPORATE ACCOUNTING SCANDAL AT SATYAM: A CASE STUDY OF INDIA'S ENRON available on https://www.researchgate.net/publication/271133751_CORPORATE_ACCOUNTING_SCANDAL_AT_SATYAM_A_CASE_STUDY_OF_INDIA%27S_ENRON

Mr. Raju revealed in his letter, to Satyam Computers Limited Board of Directors that "the company's balance sheet and accounting numbers had been manipulated by him in last few years." He again claimed that he exaggerated the assets of Satyam in the balance sheet by $1.47 billion. Nearly dollar, 1.04 billion in bank loans and cash that the company claimed to own did not exist. Company also had shown wrong entries of its liabilities on the balance sheet. In order to meet upon the expectations of analyst, Satyam exaggerated its income nearly in every quarter over the course of several years. For instance, the results which had been declared on 17th of October 2009, exaggerated quarterly revenues around 75, percent and profits around 97, percent. Mr. Raju and the global head of the internal audit of Satyam used so many different methods to commit the fraud. He was in habit of "Using his personal computer, to create so many bank statements to advance the fraud. Mr. Raju fabricated the bank accounts to blown up the balance sheet with amounts that did not exist. He had blown up the income of the company claiming by interest income from false bank accounts. Mr. Raju also disclosed that around six thousand false salary accounts were created by him in last few years and arrogated money after the company deposited it.

The Global head of internal audit of the company made forged identities of its customers and generated false invoices in their names to enhance income. He also counterfeit board resolutions and by illegal means obtained loans from the company's accounts." It also appeared that the cash that the company generated by American Depository Receipts in the United States, never made it to the balance sheets.

avarice for wealth, power, money and achievement and prestige forced Mr. Raju to "ride the tiger," which led to abuse of all ethical obligations imposed on them as fiduciaries, the duty of proper corporate governance, care, loyalty, the duty of disclosure towards the stakeholders that includes shareholders. Satyam scam is a perfect example of negligence of fiduciary duties, significant failure of ethical standards, and missing of corporate social responsibility. It is human being's avarice and wants that led to fraud. Such a behavior may be traced to avarice overshadowing the liability to perform fiduciary duties aggressive competition and the necessity to influence investors and all stakeholders which include shareholders, employees, creditors, government,[24] customer etc. top managements; think less about ethical and moral standards their lean is on short-term performance."[8] According to the Central Bureau of Investigation that in short[25] CBI, (the Indian crime investigation agency), the fraud activity had been begun by the Satyam's management dates back from April 1999, when the company began on a road to double-digit yearly growth. Satyam had an entire market capitalization of

$3.2 billion till December 2008. Ramalinga Raju chairman of Satyam intended to buy two

Maytas companies the first one was Maytas Infrastructure Limited, a leading infrastructure development company and other one was Maytas Properties, another real-estate investment firm. Satyam was willing to acquire 51% stack in Maytas Infrastructure Limited for around three hundred million, in this company 37% stack's owner was Mr. Ramalinga Raju and entire turnover of the company was three hundred fifty million with net profit of 20 million. In second company that was Maytas Properties which 35% shares were in the name of again Ramalinga Raju. In the year of 2006 the revenue of Satyam was more than dollar one billion. After two years in 2008 the company became the first company in India which publishes IFRS audited financial.

On 16th of December 2008, the board of directors had allowed the proposal of its chairman with the consent of all five independent directors to purchase shares (stacks) in the Maytas Infrastructure Limited and Maytas Properties. Both the companies were owned by the family of chairman of Satyam, they went on buying the company without the prior consent of Satyam's shareholders which was required as per the company act 1956; directors started executing the decision of Satyam management. After the move taken by management and directors of the company shareholders got angry and sold the shares of Satyam at the same time warned for further action against the management, In furtherance of this law a suit was also filed in United State of America against Maytas deal. The value of share price falls[26] by 55 percent on apprehensions regarding corporate governance practices of Satyam. Shocking news came for Satyam, the World Bank declared on 23rd of December, 2008 that Satyam is being barred from operating business with World Bank. The bar was for eight years, and the allegations were, the charges of data theft and bribing the employee and also for providing Bank employee with "inappropriate benefits". Share prices plunge again 14% and reach to its lowest in over the years. US academician Mangalam Srinivasan resigned from the post of independent director of the company. He was the sole independent director since 199. In furtherance of his resignation three more independent directors had resigned on 28th of December they were Mr. Rammohan Rao (Dean of the renowned institution, Indian School of

Business)Mr. Krishna Palepu (Harvard Business School's professor) and the last one was Mr. Vinod K Dham (who is known as father of the Pentium).

[24] S. Ramachadran, "Raju Brings Down Satyam, Shakes India," Asia Times Online Ltd., 2009. www.a.times.com

[25] Damodaran, M. (2009), "Listed firms to get new conduct code," Financial Chronicle, available at http://wrd.mydigitalfc.com

[26] WHAT WENT WRONG WITH SATYAM? availble at file:///C:/Users/USER/Desktop/ Prof%20J%20P%20Sharma-What%20Went%20Wrong%20With%20Satyam.pdf

Finally, B. Ramalinga Raju (Chairman of Satyam) admitted his guilt through a letter written to the board of directors admitting the financial fraud over Rs. 7800 crore and resigned from the post of Chairman. He disclosed in his letter that his attempt to buy Maytas companies was his last attempt to "fill fictitious assets with real ones". He admitted in his letter, "It was like riding a tiger without knowing how to get off without being eaten". " Satyam's Founder, Chairman and CEO, Mr. Raju's Letter to his Board of Directors[11]

To The Board of Directors,

Satyam Computer Services Ltd.

From: B. Ramalinga Raju

Chairman, Satyam Computer Services Ltd.

January 7, 2009

Dear Board Members,

1. It is with deep regret, and tremendous burden[27] that I am carrying on my conscience, that I would like to bring the following facts to your notice: 1. The Balance Sheet carries as of September 30, 2008: (a) Inflated (non-existent) cash and bank balances of Rs.5,040 crore (as against Rs. 5,361 crore reflected in the books); (b) An accrued interest of Rs. 376 crore which is non-existent; (c) An understated liability of Rs. 1,230 crore on account of funds arranged by me; and

(d) An over stated debtors position of Rs. 490 crore (as against Rs. 2,651 reflected in the books).

2. For the September quarter (Q2), we reported[28] a revenue of Rs.2,700 crore and an operating margin of Rs. 649 crore (24% of revenues) as against the actual revenues of Rs. 2,112 crore and an actual operating margin of Rs. 61 Crore (3% of revenues). This has resulted in artificial cash and bank balances going up by Rs. 588 crore in Q2 alone. The gap in the Balance Sheet has arisen purely on account of inflated profits over a period of last several years (limited only to Satyam standalone, books of subsidiaries reflecting true performance). What started as a marginal gap between actual operating profit and the one reflected in the books of accounts continued to grow over the years. It has attained unmanageable proportions as the size of company operations grew significantly (annualized revenue run rate of Rs. 11,276 crore in the September quarter, 2008 and official reserves of Rs. 8,392 crore). The differential in the real profits and the one reflected in the books was further accentuated by the fact that the company had to carry additional resources and assets to justify higher level of operations —thereby significantly increasing the costs. Every attempt made to eliminate the gap failed. As the promoters held a small percentage of equity, the concern was that poor performance would result in a take-over, thereby exposing the gap. It was like riding a tiger, not knowing how to get off without being eaten. The aborted Maytas acquisition deal was the last attempt to fill the fictitious assets with real ones. Maytas' investors were convinced that this is a good divestment opportunity and a strategic fit. Once Satyam's problem was solved, it

[27] Satyam Satyam Raju's Letter to Board on Jan 6, 2009availble at https://www.scribd.com/doc/261328584/ -Raju-s-Letter-to-Board-on-Jan-6-2009

[28] Volume 36, No. 3, July Shirur, S. (2011) "Tunneling vs Agency Effect: A Case Study of Enron and Satyam," Vikalpa, -September, page 11)

was hoped that Maytas' payments can be delayed. But that was not to be. What followed in the last several days is common knowledge.

I would like the Board to know:

(1) That neither myself, nor the Managing Director[29] (including our spouses) sold any shares in the last eight years excepting for a small proportion declared and sold for philanthropic purposes.

(2). That in the last two years a net amount of Rs. 1,230 crore was arranged to Satyam (not reflected in the books of Satyam) to keep the operations going by resorting to pledging all the promoter shares and raising funds from known sources by giving all kinds of assurances (Statement enclosed, only to the members of the board). Significant dividend payments, acquisitions, capital expenditure to provide for growth did not help matters. Every attempt was made to keep the wheel moving and to ensure prompt payment of salaries to the associates. The last straw was the selling of most of the pledged share by the lenders on account of margin triggers.

(1) That neither me, nor the Managing Director took even one rupee/dollar from the company and have not benefitted in financial terms on account of the inflated results. 4. None of the board members, past or present, had any knowledge of the situation in which the company is placed. Even business leaders and senior executives in the company, such as, Ram Mynampati, Subu D, T.R. Anand, Keshab Panda, Virender Agarwal, A.S. Murthy, Hari T, SV Krishnan, Vijay Prasad, Manish Mehta, Murali V, SriramPapani, Kiran Kavale, Joe Lagioia, Ravindra Penumetsa, Jayaraman and Prabhakar Gupta are unaware of the real situation as against the books of accounts. None of my or Managing Director's immediate or extended family members has any idea about these issues. Having put these facts before you, I leave it to the wisdom of the board to take the matters forward. However, I am also taking the liberty to recommend the following steps:

1. A Task Force has been formed in the last few days to address the situation arising out of the failed Maytas acquisition attempt. This consists of some of the most accomplished leaders of Satyam: Subu D, T.R. Anand, Keshab Panda and Virender Agarwal, representing business functions, and A.S. Murthy, Hari T and Murali V representing support functions. I suggest that Ram Mynampati be made the Chairman of this Task Force to immediately address some of the operational matters on hand. Ram can also act as an interim CEO reporting to the board. 2. Merrill Lynch can be entrusted with the task of quickly exploring some Merger opportunities.

3. You may have a 'restatement of accounts' prepared by the auditors in light of the facts that I have placed before you. I have promoted and have been associated with Satyam for well over twenty years now. I have seen it grow from few people to 53,000 people, with 185 Fortune
500 companies as customers and operations in 66 countries. Satyam has established an

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excellent leadership and competency base at all levels. I sincerely apologize to all Satyamites and stakeholders, who have made Satyam a special organization, for the current situation. I am confident they will stand by the company in this hour of crisis. In light of the above, I fervently appeal to the board to hold together to take some important steps. Mr. T.R. Prasad is well placed to mobilize support from the government at this crucial time.

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[29] Full text of Raju's resignation letter to the Board available at https://timesofindia.indiatimes. com/business/india-business/Full-text-of-Rajus-resignation-letter-to-the-Board/articleshow/ 3946538.cms

With the hope that members of the Task Force and the financial advisor, Merrill Lynch (now Bank of America) will stand by the company at this crucial hour, I am marking copies of this statement to them as well.

4. Under the circumstances, I am tendering my resignation as the chairman of Satyam and shall continue in this position only till such time the current board is expanded. My continuance is just to ensure enhancement of the board over the next several days or as early as possible. I am now prepared to subject myself to the laws of the land and face consequences thereof."

Signature (B. Ramalinga Raju)

B Ramalinga Raju and B Rama Raju, the two brothers were arrested[30] by the (State of Andhra Pradesh) police and therefore, the Government of India took control of the Satyam computer service limited. The charges imposed against the two brothers were criminal breach of trust, cheating, criminal conspiracy and forgery under the Indian Penal Code 1860.

The Government of India had taken an active role to reconstitute the board of Satyam, that comprised three renowned members, SEBI member C Achuthan (former), Deepak Parekh (HDFC Chairman), Kiran Karnik (IT expert & Ex Nasscom chairman). The Government also appointed three more directors-:

1) LIC's S Balakrishnan
2) TN Manoharan (ICAI former president)
3) Tarun[31] Das (CII mentor & chief)

There was a Global auditing firm, PricewaterhouseCoopers which was auditing Satyam's books from 2000 till the date of discloser of Satyam fraud. The firm failed to detect the fraud of Satyam so it was brutally criticized by the so many commentators, auditors Price of Satyam Waterhouse indeed accepted that the audit report, which was made by him, was wrong as it was made on the basis of manipulated financial accounts given by the management of Satyam.

Finally the company signed the Satyam's account and was liable for the numbers under Indian law, a particularly disturbing item envisaged $ 1.4 billion, which Satyam stated to be on its balance sheet in "non-interest bearing deposits". In line with accounting experts, any sensible company would have capitalized the money either in an account where it could earn interest, or give back surplus to the shareholders. The large amount of cash thus should have been a

'red-flag' for the auditors that further verification and testing was necessary. Furthermore, it appears that the auditors did not independently verify with the banks in which Satyam claimed to have deposits". Hence a huge quantity of cash ought to be red-flag for auditors which required additional proof and testing. Further, it seems that the auditors did not self-reliantly verify the banks in which money was deposited according to declaration of Satyam. On 22nd of January, 2009, Srinivas Vadlamani[32] (CFO of Satyam) also admitted to have exaggerated the employee's numbers by ten thousand. In his interrogation he revealed to CID that this assisted them in

[30] https://trak.in/tags/business/2009/01/06/satyam Satyam Letter From Mr. Ramalinga Raju To Its Board Directors Admitting Fraud ! available at -head-raju-admits-fraud-letter-board-directors/

[31] Govt sacks Satyam Board, to appoint 10 new directors available at https://www.hindustantimes. com/delhi/govt-sacks-satyam-board-to-appoint-10-new-directors/storyEBjpmt3sRae8GAkYiea92N.html last updated jan 9, 2009.

[32] Winkler, D. India's Satyam Accounting Scandal, February 1, 2010, The University of Iowa Center for International Finance and Development. Available online at http://blogs.law.uiowa.edu

drawing of Rs 20 crore in each month from fictitious salary accounts. CB-CID of Andhra Pradesh State through its raid in the house of Suryanarayana Raju,(who owned 4.3% Maytas Infra) seized more than one hundred sale deed of lands and different agreements. Senior partners S Gopalakrishnan and Srinivas Talluri of the auditing firm PricewaterhouseCoopers (PwC) were arrested for their alleged role in the Satyam scandal. The State's[33] CID police booked them, on charges of fraud (Section 420 of the IPC) and criminal conspiracy (120B). Furthermore, Satyam fraud lasted for many years and involved both the manipulation of the balance sheet and income statement. Whenever Satyam desires more revenue to meet analyst estimates, it simply created imaginary sources' and did so many times, without auditors ever discovering fraud. The company's books were audited by PricewaterhouseCoopers (PwC)for approximately nine years and could not discover the fraud, whereas Merrill Lynch discovered the fraud in ten days due to its great effort and conscientiousness. Missing these wake up calls entails only two story that either the auditors were clearly incompetent or in conspiracy with the company in committing the fraud. PWC primarily proclaimed that it carried out every audit per the applicable auditing standards. One more point was also raised regarding the rise of audit fees. A period from 2004-05 to 200708, surge in audit fees was 5.7 times in comparison with the fact that the entire income enhanced by only 2.47 times through the same period. However, it is tough to draw any assumption as to whether the surge in audit fee was reasonable or not. Dubiously, the company also remunerated PwC double what other companies would charge for the audit, which increases suspicions about whether PwC was involved in the fraud.

4.2.1 Aftermath of Satyam Scandal

Straightaway in furtherance of the news of the Satyam[34] fraud, Merrill Lynch ended its relations with Satyam, Credit Suisse put off its coverage of Satyam, and Price

WaterhouseCoopers (PWC) was banned to work and its license was also cancelled. Craved awards secured by Satyam and its executive management were cleared from the company. [35] The shares of Satyam dropped to Rs 11.50 on 10th of January 2009, it was company's lowest price since 1998, March, when we compare it from 2008, and it was a high of Rs 544. Its share price in the New York Stock Exchange, reached in 2008, at the level of US dollar 29.10 and till 2009, March, it was they trading a lower level around US dollar 1.80. Consequently, shareholders and all other investors lost around US dollar 2.82 billion in Satyam (BBC News, 2009).

Woefully, Satyam remarkably exaggerated its incomes and properties for years and unfasten the Indian stock markets and pushed the industry into chaos. Mr. Raju was booked under criminal charges comprising: breach of trust, criminal conspiracy and forgery.

After the Satyam debacle investors started scaring from those companies which had been auditing by PriceWaterhouseCoopers (PWC) investors community turned out to be more cautious from those companies

[33] Kahn, J. (2009). The Crisis exposes all the flaws. Newsweek.Available at https://www.researchgate .net/publication/271134027_India's_Satyam_Accounting_Scandal_How_the_Story_Unfolded last updated jan2012.
[34] DSP Merrill Lynch disengages from Satyam available at https://www.businessstandard.com/article/companies/dsp-merrill-lynch-disengages-from-satyam109010700016_1.htmlLast Updated at January 20, 2013
[35] Agrawal, S. and Sharma, R. (2009), "Beat this: Satyam won awards for corporate governance, internal audit." VCCircle. Available at www.vccircle.com/news

which are clients of PWC[19], which gave rise to in drop in share's value of around 100 companies, the downfall were from 5% to15%. The news of the scandal (quickly compared with the collapse of Enron) brought apprehension into the Indian stock market, and consequently the benchmark Sensex index Bombay stock exchange and national stock exchange both fell flat around 5%. Satyam's shares collapsed and reached to a record low level, the company registered a fall in share price of 70%. Immediately after Raju's revelation about the accounting fraud, 'new' board members were appointed and they started working towards a solution that would prevent the total collapse of the firm. Indian officials acted quickly to try to save Satyam from the same fate that met Enron and WorldCom, when they experienced large accounting scandals. The Indian government "immediately started an investigation, while at the same time limiting its direct participation, with Satyam because it did not want to appear like it was responsible for the fraud, or attempting[36] to cover up the fraud." The government appointed a 'new' board of directors for Satyam to try to save the company. The Board's goal was "to sell the company within 100 days." To devise a plan of sale, the board met with bankers, accountants, lawyers, and government officials immediately. It worked diligently to bring stability and confidence back to the company to ensure the sale of the company within the 100-day time frame. To accomplish the sale, the board hired Goldman Sachs and Avendus Capital and charged them with selling the company in the shortest time possible.

4.2.2 The Securities and Exchange Board of India (SEBI)

In April 2014, SEBI amended the Listing Agreement to include provisions relating to establishment of a vigil mechanism, role of Audit Committee in cases of suspected fraud or

irregularity, and the role of the Chief Executive Officer and the Chief Financial Officer pertaining to financial reporting and disclosure to the Audit Committee. In 2015, SEBI framed the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR"), applicable to all listed companies, and provided for stringent guidelines relating to reporting / disclosure of material events and actual and suspected fraud.

4.2.3 The positive fallout: Better laws to govern corporates

The Satyam scandal may have shocked India Inc. and regulatory authorities by its sheer scale and gravity, but over the years it has led to major changes in the country's corporate law framework towards the protection of minority shareholders rights, greater transparency in decision-making and statutory independence. Earlier we used to think that our corporate laws are too protective and proper to tackle the changing situation in India and all over the world, since due to globalization no country is safe from any big scams, like Satyam scam also affected the U.S shareholders. In spite of many committees' reports our law maker does not change our company law to the level it was needed and due to that, big scams took place which ultimately compelled our law make to enact stringent laws to tackle current scenario. It was the Harshad Mehta scam due to which SEBI came into existence and later on the Satyam scam which makes the way on many changes in act which we shall discuss as follows-:

[36] Blakely, R. (2009). "Investors raise questions over PWC Satyam audit," Times Online

4.3 The Companies Act, 2013

4.3.1 E. Voting

The companies Act 2013 contains too many provisions with respect to shareholders' activism which may give rise to a more number of people coming forward to fight for their genuine right as well as to discharge their duties. The companies Act 2013 brings up a new section 108, which arms the shareholders of a company with the right to vote both in a general as well as special meeting through electronic means. Through this new section the law maker has secured more and more participation of shareholders in the affairs of a company. Since shareholders are the real owner of the company but due to less participation they sometime are not aware with the major decision making by the management and the Board of directors of the company and some time it costs the major losses be it through either scams or frauds. Voting through electronic means benefits shareholders with in terms of time and money. India is a big potential market for the purpose of corporate growth the reason being the fact that the major part of the population has access to internet and thus resultantly the participation of the shareholders by electronic means has also the chances of growing rapidly. In that way this population dividend shall ultimately be in cashed through the participation of the shareholders in the affairs of the company through electronic means. The latest data boom caused by Gio and in compulsion accompanied by the other telcos has contributed more to the participation of the shareholders in the affairs of a company. Furthermore the provision of demat account has made the people self-reliant for the purpose of trading in stocks and shares. This all has further strengthened and set the ramp for shareholders' activism in the Indian company's affairs. Even in India the shareholders have started challenging the management and the board of directors in the major decision making of a company.

A new research revealed that the average consumption of internet by an Indian in more than the internet used by person in USA, India is only behind the China. So due to the rapid growth in internet user the shareholder are keeping eyes on the latest happenings in the company's affairs and developing skill to judge its effect of their interest. Therefore the active participation by shareholders in the company's affairs increased and due to that the cases of shareholders' activism also increased. In recent year we have noticed lots of cases related to shareholders' activism are coming and the reason behind this increase is more and more information with reference to the activities of the company are reaching to the shareholders.

The earlier trend of shareholders behavior was more and more passive, they used to buy shares of reputed companies and wait for a long term, if the value of shares fall they exist and in case the value increase they buy but they never take much interest in affairs of the company. But now with the passage of time shareholder's behavior is changing now they are more active than earlier. The reason behind their becoming more active is advancement in technology. Now shareholders can buy and sell their share quite easily only by pushing a finger on their smart phones by using apps in mobile phones. The buying and selling of the shares also become very easy just with the use of smart phone now one can buy and sell shares through installing one app like Zerodha, Sbi, ICICI and many more. Even in our portfolio we can read what major events are going on in the company whose shares we are having and also what will be the expected effect of these happening on the company's health.

4.3.2 Oppression and Mismanagement (Sections 241-244)

The word oppression in common parlance refers to a situation or an act or instance of oppressing or subjecting to cruel or unjust impositions or restraints.

According to Lord Keith," Oppression means, lack of morality and fair dealings in the affairs of the company which may be prejudicial to some members of the company, the term mismanagement refers to the process or practice of managing ineptly, incompetently, or dishonestly. However it is to be noted that the terms are not defined under the Companies Act and is left to the discretion of the court to decide on the facts of the case whether there is oppression or mismanagement of minority or not.

Sections 241-244, of the Companies Act 2013 deals with the cases of oppression and mismanagement. As per Section 241, which talks about the person who can apply for the relief in the case of oppression and mismanagement, as per the section if a shareholder believes that the affairs of the company is taking place in such a way which is prejudicial to the interest of the company or the interest of the shareholders of the company or prejudicial to the public interest; or the substantial change is taking place in the management of the company or in the control of the company, the change is taking place through alteration in the ownership of the shares of the company or in the Board of director or manager, or if it has no share capital than change in its membership or in any other manner. The change which is taking place is such which is not a change for the benefit of the shareholders of any class or creditors or debenture holders of the company at the same time it is expected that the affairs of the company be conducted in a manner which will be prejudicial to the interest of the company or its members or shareholders., may apply to the National Company Law Tribunal (NCLT) but the condition applied to this that the shareholder who is going to the NCLT must fulfill the requirement of section 244.

Section 242, deals with the power of the tribunal ,i.e., NCLT, if an application made before the NCLT and the tribunal is of opinion that-

(a) That the affairs of the company are being conducted in a manner which is prejudicial or oppressive to the interest of either the company or its members like shareholders or against the public interest and

(b) Winding up of the company will affect prejudicially to the members or shareholders but otherwise wind up order is justified as per the grounds given by the company then the tribunal will take decision in order to conclude the matter as it thinks fit.

Without prejudice to the general power given under sub section (1) an order under sub section may provide-

a) That how the regulation of the company will be in future;

b) Buying of the interest or shares of any member by other member;

c) In case of buying of the company's shares as above said resultant reduction of its share capital;

d) Allotment or transfer of the share of the company may be restricted;

e) The tribunal may pass an order, upon such condition and circumstances as its consider just and proper or equitable in the case, of setting aside, termination or modification of any agreement between the company and its managing directors or manager and other directors. f) Above said setting aside order or termination order will be passed only when the consent of the party concern has been received and after notice;

g) Removal of manager, managing director or any of the directors of the company; (i) Order to recovery of undue gain made by the directors, managing directors or managers of the company which he gains during his tenure and also how it will be used when the gain is recovered, whether it will be given to the victim or transfer to the IEPF.

(j) In case of removal of managing directors or managers then how they will be selected; (k) What number of director will be appointed, who will tell this to the tribunal this will be decided by the tribunal itself;

(l) The tribunal may imposed cost as it thinks fit

(m) Any order on any matter for which tribunal think that it is just and equitable to provision should be made;

Registrar of the company will file a certified copy of the order of the tribunal under the 30 days from the order of the tribunal.

If any party applies to the tribunal through his application, the tribunal may pass an interim order on such condition and terms as the tribunal thinks fit for controlling the conduct of the affairs of the company ;

If the tribunal pass an order under sub section (1) which is against the memorandum or article of the company then the company does not have power to make any changes which is not consistent with the order of the case, here the word notwithstanding is written which means the company does not have power to alter anything which is inconsistent with the order passed by the court in spite of the fact that any other law supporting that alteration.

Subject to the provision given under sub section (1) the changes made in the article or memorandum of the company will be considered that it was made by the company with the provision of this act and such provision will be applied as per the memorandum or article so changed.

The registrar of the company shall file a certified copy of this order altering or allowing altering less than 30 days of the order passed to the tribunal;

In case of a company violates the provisions of sub section (5) then the company will be fined by minimum of one lakh and a maximum of twenty five lakhs of rupees, and the officer who defaults so will be liable for imprisonment of a term which will be extend to 6 months and with fine too. Section 243 denotes the consequences of termination or modification of certain agreements.

When an order to set aside or terminate an agreement between its director or managing directors and company is passed this will not give any right to the parties to file a case against the company either upon the agreement or on anything else for compensation or damages. When such setting aside or termination order is passed by the tribunal the director or managing director or manager is not entitled to re-appoint as director or manager in company without the leave of the court.

Any party who with knowledge of the above said order works as managing director or manager of director of the company will get punished with imprisonment of a term which will extend to 6 months and with fine too.

Section 244, talks about the condition of filing the case to the tribunal- it says that if the company having share capital then case is filed by the at least 100 members of the company or not less than $1/10^{th}$ of entire number of its member whichever is less or any member who holds not less than $1/10^{th}$ of issued share capital of the company condition with that the applicant/ applicants have/has no due.

And in case where the company does not have share capital then not less than $1/5^{th}$ of the total numbers of its members.

Provided that the tribunal may dispense with the requirement of sub section (a) and

(b) of the section 244 if it is asked through an application and allows the member to apply under section 241. The same permission granted in the case of Tata and sons and Cyrus Mistry case.

4.3.3 Class action

The new concept of Class action suit has been incorporated in the Section 245 of Companies Act, 2013. It was not in the act of 1956, when the Satyam scam occurred the shareholders in

USA gets their part of relief through the class action suit and been compensated by the Mahindra Satyam but in India at that point of time there was no such provision like class action suit so a large number of shareholders did not get relief and find themselves cheated.

The ground for filing the suit under section 245, is that certain number of depositors or members are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner which is prejudicial to the interest of the company, then they have right to bring an application against those management to the National Company Law Tribunal (NCLT) for a relief order given as follows -:

•To prevent the company from committing such an act which violates the articles or the memorandum of the company, such violation is ultra vires.

•To prevent the company from committing anything resulted to breach of the article or memorandum of company.

•To declare a resolution void which change the article or memorandum of the company, if the resolution passed by obtaining misstatement to the depositor or member or by suppressing the substantial fact.

•To prevent the directors as well as the company from acting on such resolution,

•To prevent the company from doing an act which contradictory to the provision of this act or any act for the time being in force,

•To prevent the company from taking action contradictory to the resolution passed by the members,

•to claim damages or compensation or demand any other suitable action from or against— (i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part; (ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or (iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part; (h) to seek any other remedy as the Tribunal may deem fit.

Where the depositors or members demand any damages or compensation or any other relief against or from an audit firm the liability shall be of the partners of the firm who has participated in the making of the misleading or improper statement of particulars in the audit report or who acted in a wrongful, fraudulent or unlawful manner. Such suit can be filed by the required numbers of members as follows-:

J.K. in case of company having a share capital, at least one hundred members of the company or not less than such percentage of members as prescribed whichever is less or any member/members having not less than such percentage of the issued share capital of the company as may be prescribed with the condition precedent that the applicant /applicants has or have paid all sums due on his or their and all calls is also paid.

J.L. In case of a company not having share capital at least $1/5^{th}$ of the entire its member, The required number of depositors given under section (1) will not be less than 100 or not less than such percentage as may be prescribed, which one is less or any depositor/ depositors to whom the company be indebted[37] such percentage of entire depositor as may be prescribed.

When the application under sub section (4) is filed the tribunal shall consider, particularly-

a. The members or depositor who have filed the application and praying from the tribunal to pass an order for relief, whether they are acting in good faith or not,

b. In order to the prove involvement of any person other than director or officer of the company, by putting evidence with reference to matter given under sub section (1) clause (a) to (f),

9 Whether the cause of action is such the depositor or members may pursue in his own right rather than an order this section,

9 Any evidence produced before it related to the views of the members or depositors of the company who does not have personal interest either direct or indirect, in the matter being proceeded under this section,

9 When the cause of action is an act or omission which is yet to be occurred, whether the act or omission could be and, in the circumstances, would be likely to be-

(i) authorized by the company before it occurs; or

(ii) ratified by the company after it occurs;

(5) If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely: —

(a) Public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;

13 all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant‘s side;

14 Two class action applications for the same cause of action shall not be allowed; 15 The cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.

(6) Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

[37] Company act 2013 available at file:///C:/Users/USER/Desktop/CompaniesAct2013.pdf

(7) Any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(8) Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.

(9) Nothing contained in this section shall apply to a banking company.

• Subject to the compliance of this section, an application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in sub-section (1).

4.4. CONCLUSION

The law related to corporate governance has gone [38]through major changes in India since Satyam scam. Satyam scam had proved that so many shortcomings are available in our law and regulation and there is an urgent need to improve it. Since from Satyam scandal a serious of changes took place in Indian company law as well as in SEBI regulation. So the legislature has started implementing all the relevant recommendation given by the earlier committee's reports.

Consequently e voting was introduced in company law so that shareholders can participate more in company's affairs, the proxy advisory firm or the concept of independent directors to take care of the interest of the minority as well as of the company. The 2013 act brought so many new provisions which are very necessary to compete with the international market. Since the whole business depends upon the capital which company invest in the business and that comes from the investors from all over the world. The investor invest to increase his wealth so they invest only in those companies who follow the corporate governance norms properly so in order to attract international investment Indian companies have to follow international standards. The recent increase in the shareholders' activism especially in the proxy season 2017 was due to the changes that took place in last decade. After introduction of the Companies Act, 2013, now shareholders have teeth to bite if their interest is being hampered by the management. ,i.e., why we have seen in case of Vedanta in 2012 when the shareholders had shown activism which did not converted into successful event but later on in Tata case or in the famous Maruti Suzuki case or in latest case of Fortis where shareholders got success in compelling the management and the board of the company to change its decision. The latest trend shows that the shareholders' activism in India is taking its speed and in coming days it has a better future in India

[38] Raising their voice, editorial of The Hindu news paper published on august 9, 2018.

CHAPTER 5

SHAREHOLDER ACTIVISM IN INDIA IN LIGHT OF VARIOUS COMMITTEE REPORTS

5.1 INTRODUCTION

In order to protect the interest of the ultimate beneficiary of a company that is the shareholders, shareholders' activism has a significant role. Shareholders' activism can come up through either by and an individual action of a person thereby setting a standard of action for a particular function or actions or decisions of a company or through a legislative action preparing ramp where from the shoots of individual actions may germinate from. These legislative actions in respect of company affairs before coming into being are preceded by committee reports. In Anglo American corporate world individual actions for promoting shareholder activism, are quite much in abundance along with the legislative actions by the legislative bodies. On the other hand, in India the stage for shareholders' activism has mostly been set up by legislative actions. So for the evaluation of the room for shareholders' activism the rule of different committee reports becomes quite significant in India. That's why different committee reports have hereinafter been discussed in the light of shareholders' activism. In earlier of the committee reports the emphasis was mainly upon corporate governance and a less number of suggestions only were in respect of shareholders' activism. But one of the last committee reports after the Satyam crises have started mentioning the term shareholders' activism expressly. For example, after the Satyam crisis there was absence of any express provision for shareholders' activism like class action suit. That's why in India no such remedy was available with the shareholders collectively while in the same crises that is the Satyam crises class action suits were filed in USA and apt compensation had accordingly been granted by the US judicial establishment.

Now coming back to the reports

The Rajindar Sacher committee has put emphasis on the suggestion that there should be a meaningful and active participation by minority shareholders be it either in a general body meeting or in an extra ordinary meeting.[1]

In case of oppression and mismanagement of the company by the ones having majority stake in the shareholding of the company remedy should be fast and better. This is a formal type of suggestion but one such suggestion which is important to be discussed here is in respect of the coordination of the shareholders. The committee suggested that steps should be taken to promote the coordination between the shareholders.

As it was suggested even by the Bhaba committee, that voting by proxy should be allowed. Though the common law does not allow such thing but many of the articles of association of a company do provide voting by proxy. As per the provisions of the 1956 act the voting through proxies allowed but such person on proxy even though having the right to vote in absentia but does not have the right to speak at the meeting, on the contrary the committee has recommended that such proxy should be allowed to speak on behalf of someone.

In case of clash between shareholders and director, the sovereignty finally lies with the shareholders. The same has even been supported by the dicta in Foss V. Harbottle. In respect of a public company one noticeable feature is in respect of the discloser procedure. In all public companies whose shares are registered in any stock exchange, the company [39] has recommended the same to publish the abstract and that to within every six-month period. Such discloser should be of their own audited account and the same should be accompanied by a brief report. Finally, to recognize the right of a shareholders and that's why to promote shareholders' activism the committee has recommended that in line with the recognition of stock exchanges, shareholders associations should also be recognized.

In J.J.Irani committee report for example it has recommended that the ultimate duty to remove and appoint the director of the company should lie with the shareholders. Along with the same even in the corporation instead of the interference of the government in the cases of appointment or removal of director the last say should of course be that of the shareholders. Other thing noticeable in the report is that to increase the level playing field of the shareholders in the cases where profit of the company either is not adequate or in the case the company does not earn profit then for the purpose of grant permission by the remuneration committee the approval should be of the board as well as the shareholders of the company.

The next thing worthy to be mentioned as discussed in the report is the restriction on the power of the board in respect of some important strategic matters of the company wherein decide the decision of the board, the approval of the shareholders through a general body meeting has been recommended to be maid mandatory. For example, in the cases of sale of the substantial part of the assets of the undertaking the approval of the shareholders has been suggested to be made. Not only this putting the company affairs at par with the need of the hour and also to increase the role of the shareholders in the annual general body meeting from nearly accepting gifts to voting through electronic means that is e voting, has been recommended by the committee.

Further for the purpose of protecting the interest of the minority shareholders, the ones having more than 10% of the shareholdings should have right to approach the NCLT in case of oppression and mismanagement is also a provision on for inspiring shareholders' activism. Before evaluating as to what level the Uday Kotak Committee has played in respect of shareholders' activism, it can be seen that some issues have aptly been dealt

[39] Government of India, "Rajindar Sacher committee report on the High- powered expert committee on Companies and MRTP Acts" , page48(Ministry of Law, Justice and Company Affairs,1978

with by the committee. To bring in more and more transparency in the affairs of the company it has been recommended that emphasis should be on auditing and accounting practices in the listed companies. As some stress has been given in the Irani committee also on the restriction of the power of the board of directors, even the Kotak committee has suggested regular assessment of the efficacy of the board.

To increase the participation of the shareholders in the affairs of the company and to enhance as well as to encourage them to take more and more participation in the democratic process within the company, the problems felt by the shareholders while voting and attending the general body meetings, should seriously be address further more to safeguard the interest of the shareholder from the whims and fancies of the board, the committee recommended that the independence of the independent director should be ensured and also the participation of the independent director in the strategic and diplomatic affairs of the company should be ensured.

5.2 RAJINDER SACHER COMMITTEE REPORT ON COMPANIES AND MRTP ACT

High powered expert committee on Companies Act and MRTP Act was constituted on 23rd June 1977 under the chairmanship of Justice Rajindar Sacher. He was an Indian lawyer and a former Chief Justice of the Delhi High Court. He was a member of United Nations Sub Commission on the Promotion and Protection of Human Rights. He served as a counsel for the People's Union for Civil Liberties. He chaired the Sachar Committee, constituted by the Government of India which submitted a report on the social, economic and educational status of Muslims in India before being the chairman of the committee constituted in 1977 which we are going to discuss here.

The object for which the committee was constituted is provided as follows: -

"To consider and report on what changes are necessary in the Companies Act 1956, and the Monopolies and Restrictive Trade Practices Act, 1969, with particular reference to the modifications which are required to be made in the form and structure of the Companies Act, 1956,[40] and the Monopolies and Restrictive Trade Practices Act, 1969, so as to simplify them and to make them more effective whenever necessary."

The Committee was constituted to study the provisions of company law 1956 and the provisions of the Monopolies Act and the Restrictive Trade Practices Act, 1969 on-:

Classification and formation of companies and the constitution of Board of directors with special reference to protection of the interests of minority shareholders; (ii) exercise of managerial powers and protection of shareholders' and creditors' interests and their relations, inter se; (iii) measures by which workers' participation in the share capital and management of companies could be brought about;

5.2.1 Shareholders Association

Chapter VII, which dealt with the topic of "Shareholders Protection and Prevention of Mismanagement." The Committee advised the Government that it should recognize precise

[40] Rajinder sacher ,available at https://en,wikipedia.org/wiki/Rajinder_Sacher visited on 4th april 2024

shareholders' association which should be empowered to take decisions on behalf of the shareholders. So, we advise the following definition of a “recognized shareholders” association-:

“Recognized shareholder’s association means with reference of any provision of this act in which this takes place, a shareholders' association which is notified by the Central Government in Official Gazette as a recognized shareholders' association for the purposes of that provision."

5.2.2 Certain companies to have managerial personnel

The Act today states that three types of managers can be appointed by a company, i.e., a fulltime director, a managing director and a manager. There is no obligation on any public company to recommend or designate a person as managing director or manager etc. The purpose of obtaining government approval for the appointment of managerial personnel has sometimes been passed by companies. In this case, we are suggesting that all appointments[41] of managerial personnel should be approved by a special resolution passed by shareholders. We are anxious to see that this proposed requirement has not been passed equally by companies in the future. Therefore, we would recommend that as far as large public limited companies are concerned, i.e. Companies having capital up to Rs. 50 lakhs and above, the above requirement should be made compulsory for at least managing or full-time director. Of course, the company may have more than one managing or full-time director. This suggestion is based on the committee's belief that large firms with a diverse-sized nature and operational complexity cannot be successfully managed without an individual having adequate management rights.

5.2.3 Special resolution regarding certain matters

Some powers may be used by the Board without any reference by the shareholders (Section 292). The powers of the Board in respect of the matters mentioned in clauses

• to (e) under Section 293 of the Act can be exercised by the Board only with the consent of the company in the general meeting. A general resolution is sufficient for this purpose, particularly, with regard to sale, lease or disposal. If appropriate, these powers are exercised by the general meeting by passing a special resolution instead of a simple resolution. We shall accordingly recommend a suitable amendment to Section 292.

Due to insufficient remuneration outcomes in the country, persons on the post of manager have left the country in larger numbers mostly to European and Middle-East countries thereby reducing the scarce resource when the country is going to make rapid progress in its economic activities. One more unwanted increase of such artificial limit which is in particular to fix

remuneration at a certain level which that has already been reached by a large numbers of managers in their forties and there is no incentive for further efforts. One might link to a great extent under-performance of the public sector undertakings to the reason that the remuneration to the top level managers in that sector has been

[41] Government of India, “Rajindar Sacher Committee Report on the High- powered expert committee on Companies and MRTP Acts” , page 19(Ministry of Law, Justice and Company Affairs,1978)

insufficient and does not match with the liability carried by them. This has given rise to a group of managers doing a job which could otherwise have been done by a single manager if salaried and motivated appropriately. Having told this, one must realize the fact that if salary is grounded on the wealth of a company, like it is so grounded in large number of companies then one should reasonably share the wealth with all those who have contributed through their hard work resulting in that wealth. Thus, there must be a bonding in a company between the highest paid employees and the lowest paid employees. Apparently, such bonding ought to be established[42] with reference to 'take home' salary, i.e., salary having been deducted of all taxes except provident fund. This should be immediately implemented in a country which not only talks about the ideology of parity in income but also be done within a fixed time. As an alternative of fixing a maximum salary, which regrettably the current guidelines do, if the maximum salary in a company is related to the lowest, the following required consequences will follow-:

A prosperous company will have no stagnation at any stage. There will be a lot more egalitarian environment within one organization In the midst of all those who are collectively working to achieve the objectives of a company and also there will be a sense of belonging.

It is desirable, therefore, that the current Section 198 should contain only one over-all ceiling of total managerial remuneration.[5] There should be a special process, like a special Resolution, if someone is very interested in seeking to withdraw it or belonging to those who have a substantial interest in the company; There should be a relation between the highest and lowest remuneration paid within the company, it being calculated after taking into account perquisites but after deducting tax, if any, which is payable and the final decision in such cases should rest only with the shareholders of the company.

Another view is that some limitations may be desirable in the public interest. The present limitations that already function today are completely inadequate to attract competent individuals / professional managers acting with the consent of the shareholders of the company or wants to engage it. It inhibits the development of the corporate sector. Managers in India get lowest salary when we compare it with the rest of the world.

The protagonist of this approach believes that if there is a ceiling then it should be raised and not lowered and the development of the corporate sector requires that incentives are provided for better performance[43] even among managerial personnel.

Any ceiling that can be provided should be such that Indian managers are not tempted by the high salaries they are liable to receive abroad. India has lost many capable managers in the last three years. To determine the remuneration that full-time directors should be paid, it should be highlighted that these are the ones who contribute greatly to the development of the corporate sector. Sophisticated equipment and technology only makes sense when men are able to make the best use of these resources to serve the community at large to achieve maximum results. Employment and economic development are interconnected and interlinked. The need for greater employment in a country which is striving to live a better life for its citizens cannot be easily

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[42] Id.,p.no. 32

[43] The Company Act, 1956,s. 198.

overcome. These are the people who bring development into a joint venture and they are to be rewarded for their skills for this effort. With greater professionalism of management, the entire approach to managerial remuneration should be seen in the current situation and in the times when the industry will be run entirely by professional managers. In this context, the following suggestions are made:

The relevance of Section 198 no longer exists. This was introduced as a hangover of the managing agency system. This should be deleted. With the professionalization of management more and more professional persons would be appointed as Managing Directors or whole time Directors. The number of such persons depends on the size of the company and, therefore, the above suggestion has been made.

Section 198 is not relevant anymore so it must not continue. It was introduced as a hangover of the managing agency system. It should be removed. With the expertness of management, incrementally professionals will be employed as full-time directors or managing directors. The number of such individuals depends on the size of the company.

The current system of remunerations, commissions and perks causes confusion and does not always provide correct impressions. It is advised that this may be substituted by the following. c. Remunerations not more than ten thousand per month,

d. Perks equal to half the remunerations calculable on a cash basis, - : These Perks may be taken in any form whatsoever;

e. In the general course, no commission excluding as advised under clause (3) below;. 9 All other conditions of service at par with those relevant to the senior executives in the company;

The Committee has carefully considered this question and realized that every public company needs to approach the Central Government for approval of all proposals for appointment and re-employment of its managing personnel which is in itself an appropriate statutory. Both the department and the companies and their personnel have to go through stress and therefore they can be regulated by guidelines. By waiving with the need of approval in majority cases, we will not only put an end to avoidable paperwork, but also impose a greater sense of obligation on the shareholders and the board of directors.

By his contract with the company (and other members), a shareholder undertakes to accept as binding on him decisions arrived at by a majority of shareholders if they are arrived at in accordance with the law and the articles of association. These membership rights are referred to as "corporate membership rights".

In order for a company to function smoothly, it is necessary to maintain a proper balance between the rights of majority and minority shareholders. This balance has been upheld by the court by drawing a distinction between the rights of individual membership and the rights of corporate membership. By his agreement with the company and its other members, a shareholder guarantees to accept them as these rights are binding on him if the majority of shareholders reach to a decision according to article of association or law. These membership rights are called "corporate membership rights".

Shareholders cannot be deprived of some rights unless he or she consents or any law explicitly permits of doing so. These category of rights are called "individual membership rights. "The Companies Act 1956 comprises many provisions which recognizes both the rights, i.e., corporate membership rights and individual rights. For instance, as per Section 38, a shareholder cannot be constrained to take or subscribe for more shares or to increase his liability without his consent in writing. On the default of the company for holding annual general meeting (AGM), shareholders can approach the Government for calling of AGM (sec.167).As per Section 263,shareholders can through a single resolution object appointment of two or more directors. Also there exists Right of shareholders to vote differently on poll under sec.183,right to object if procedure not been followed for a general meeting that before the meeting a notice of 21 days not been served (sec.171), The right to file a petition for winding up of a company (sec.439) etc.

Where the will of the majority is being communicated in the meetings of the company by general or special resolution (as the law requires), the shareholder should submit to the decision of the majority. These are cases related to the membership of the company and hereby referred to as "corporate membership rights". But the law is so passionate about shareholders' rights that even with regard to corporate membership rights, where the principle of majority supremacy applies, attempts have been made to apply exceptions such as an act which is ultravirus of the company or illegal, an act which establishes a fraud against the majority where the wrongdoers themselves are under the control of the company, an act approved by a resolution which requires a qualified majority but is passed by a simple majority: All of these are considered sufficient to justify interfering with an individual shareholder's application. They create exceptions to the century old RULE in Foss v. Harbottle:

The rule is for the majority to decide what is in the company's interest. A more general relic exception has also been incorporated[44] by judicial dictators over the years. Matters in which

justice requires that the court must interfere to help the helpless minority shareholder, the courts will not deny to set right the wrong even though the majority has expressed a desire otherwise. The object of each committee whether in India or in England constituted to modify or simplify company law is to devise means to make it at ease for shareholders to have more effective general control on the company's management? This was what enthused the constitution of the Committee in 1950 on Company Law (the Bhabha Committee), whose duty was to study and report on the crucial amendments to the Indian Companies Act, 1913, having due regard to the desire to safeguard the investor's interest and that of the public. Committee also needs to study the provisions of the 1956 Act and give report on protection of Shareholders' and Creditors' interest.

It is infamous that a large number of minority shareholders are uninterested and that they do not have the experience of exercising their rights and that they are too numerous and widely scattered to be effective in taking control of management. We do not subscribe to the desperate opinion that it is impractical to make available additional protection to shareholders which they will not use. Previous attempt has shown that arms kept in the armory of minority shareholders have often been used, for example, by the 1956 Act on the recommendations of the Bhabha Committee. We rely on the point that they have not been used to often because a large number of shareholders have not filed lawsuits to enforce their rights given under Section 397 or Section 398 of the Act and also because these provisions are hedged with unnecessary precedent conditions.

We believe that a public company should be free to deal with and regulate its own internal affairs with minimal external control. But it must be done effectively so that there is more effective and meaningful participation by

[44] The Company Act, 1956,s. 263.

its own shareholders. With this end in mind, we will provide a broader pattern of investor control with provisions ensuring better management[45] at the board level. Our recommendations are under various heads as follows:

(6) Meaningful & active participation by minority shareholders in general meeting as well as in extra ordinary general meetings of the company,

(7) It is to ensure that management be better at Board level;

(8) In case of oppression and mismanagement remedy be fast and better.

(9) Coordinated activities of shareholders should be promoted,

(10) Miscellaneous.

Proxy voting though unrecognized in the Common Law is now a standard practice owing to the Articles of Association of Company in order to ensure members living far off too can have a role in the meetings of the company without accruing hardships. As provided under [Section 176 (1)] "In every public company, a member who is entitled to attend and vote at a meeting is entitled to appoint another person (whether member or not) as his proxy to attend and vote

instead of himself." Proxies in England have similar rights as that of the member with regard to vote and speak at the meeting [Section 136(1) of the English Companies Act, '1948].[9] Bhabha Committee had also made similar points which were not incorporated in its spirit in the 1956 Act as a proxy appointed by any member of a company whether public or private does not have any right to speak at the meeting.[10] A body corporate which is a member of company is entitled to be represented at meetings of that company by a person authorized by resolution having similar rights as that of such body corporate would have had it been an individual member(Section 187). The representative of a body corporate thus has a right to speak at meetings of the company of which the body corporate is a member. Therefore, on similar lines, we recommend that proxies appointed by individual members too should have a right to speak at the meeting in order to ensure better and effective representation and participation. With the same object in view, we would also recommend the two-way proxy form as a mandatory requirement. A proxy should not be effective in forming a quorum in our opinion and, therefore, no change is suggested in Section[46] 174. Our proposals under this head accordingly are:

Voting by proxy is not recognized by common law but it is conferred by article of association of a company. It cannot be expected from a person who lives far away to attend a meeting in person by travelling long distance. The law now ensures this right. A member in all public company, if he is empowered to vote and attend a meeting can appoint a person (whether a member or not) as his proxy to vote and attend on his behalf, (sec.167). In Britain a proxy can be appointed in a private company and has the same right as the member to vote and speak, sec.136(1) of English Companies Act.1948.

In India, the Bhabha Committee had also recommended the same in its report in para 77.[11] In Indian Companies Act 1956, a proxy does not have right to speak in a company's meeting irrespective of whether the company is private or public. A corporate body which is a member can authorize by the resolution that it be empowered to represented at the meeting of that company by a person. The person who is representing the corporate body has

[45] The Company Act, 1956,s. 397

[46] The English company Act, 1948,s.136(1).

the same power and right as the corporate body would have if it were an individual member, sec.187. So where the body of a corporate is a member that person has right to speak in the meeting of the company.

The committee does not think that there is any reason to deprive a person from appointing proxy who is not able to attend all the company meetings due to reason of residing far from the place where meetings were held. They will not be represented properly if they are not allowed to appoint proxy on their behalf. In order to ensure more efficient participation by the members, it is very much necessary to allow them to attend, vote and speak through proxy. With the same aim and understanding, the committee recommends the two ways proxy as a compulsory

requirement. But committee thinks that proxy should not be taken [47]to make quorum so no change in Section 174. The committee's proposals are as follows-:

- In Section 176(1) the words "but a proxy so appointed shall not have any right to speak at the meeting", shall be substituted by the following, namely "and a proxy so appointed shall also have a right to speak at the meeting".
- In Section 176(2) the weirds of the articles of which provide for voting by proxy at the meeting' should be deleted.
- In the proviso to sub-Section (1) of Section 176, clause (c) should be deleted.
- For sub-Section (6) of Section 176, the following shall be substituted: "An instrument appointing a proxy shall be in Form II set out in Schedule IX and it shall be the duty of the Board of Directors to circulate proxy forms to all members entitled to attend and vote at the meeting along with the notice convening the meeting."

We also recommend change in The Form II of the form of proxy in Schedule IX sin order to make sure there is effective utilization of the form by the member in cases of voting. These two ways proxy form is somewhat similar to postal ballot though not identical. Postal vote would be anti-ethical to the basic principle of Company Law that which mandates resolutions must be passed "at a meeting" meaning thereby that the member or his proxy must attend and vote.

e. We also recommend changes in Section 172(3) to cover accidental omissions in distributing proxy form along with notice.

In order to have a more effective participation by the minority shareholders in a company's meeting, it is necessary to look again on Section 291 of this act, which talks about the general powers of the board of directors. As per this Section, the board of directors will be empowered to use all the powers & do all such things which a company is authorized to use and do. The second proviso of Sec.291 reads -:

Provided further that while using any such power or doing any such act or thing, the Board shall follow all the provisions given in that behalf in this or any other Act, or in the articles of the company, or memorandum or in any regulations not inconsistent therewith and accordingly made thereunder, comprising regulations made by the company in general meeting.

[47] supra note 6 at 49

It is quite clear that the textual content, "regulations" by shareholders at the general meeting may govern the acts[48] of directors but the textual meaning is not always the accepted judicial meaning.

Section 291 follows its English colleague (Article 80 in Table A of the English Companies Act, 1948).[12] It is now well-known by a number of judgments of the English Courts that the

language used in Article 80 of Table 'A' does not empower shareholders by passing resolution at a general meeting without varying the Articles to give instructions as to how the company will manage its affairs nor to over-ride any decision reached at by the directors in the conduct of its business, even as respects matters not specifically delegated to the directors by the Articles.[13]The word "regulations" are confined to procedural matters. In a recent English case (John Shaw & Sons Ltd. Vs. Shaw) the Court even said that the "sovereignty of the directors" power is subject to the limitation conferred on them by the Articles overlooking the rule set long time ago in Foss Vs. Harbottle that if a clash occurs between shareholders and directors then it is shareholder who are sovereign. An imaginable purpose for such interpretation is that the English Companies Act, 1948 contains no provisions corresponding to Section 90 of the English Companies Clauses Act, 1845 which had allowed that the power can be used by the board would be subject to the general meeting arranged for the purpose. The Indian Companies Act does not include such legal provision.

But the belief that directors are "sovereign" in matters assigned to them by the Articles runs counter to a long line of authority (both in England and in India) that director is company's agent and position in a fiduciary relationship with shareholders of the company. To escape future controversy as well future litigation, we would recommend an alteration in the second proviso of Section 291(1) hence, it will be read after amendment as follows:

"Provided further that while using such power or doing any such act or thing, the Board shall follow and be subject to the provisions comprised in this behalf in this act or any other Act or the Articles of the company or Memorandum or in any regulations consistent therewith, comprising all the matters passed by the company through resolution at general meeting especially arranged for the purpose".

Section 291 after amendments as suggested by the committee will provide a legal right to shareholders to give direction to the board as well as exercise control over it. At the same time, it will not disturb the management of the board of directors and will not be hurdle in day to day routine management.

5.3.CONCLUSION

Good corporate governance is essential for any company because it is the corporate governance norm which attracts the investors to invest in the company. Without investment a company cannot survive. Now the question arises what are the factors which a corporate governance system should adopt and how the legislature will come to know about those factors which makes a company run properly. In India whenever the legislature tries to fill the loopholes in any company they make a committee and ask for recommendation on required law. In India various committee have been formed to give suggestion for a good corporate governance and as per the

[48] The English Companies Act, 1948,art. 80.

requirement of the legislature committees have recommended very well suggestions but very less been enacted. The Rajinder Sacher committee also recommended a numbers of suggestions in which few were implemented like the power given to the proxy to speak in the meetings of the company, in case of appointment of the director of any kind no need of the assent of the Central Government only assent of shareholders is sufficient in special resolution. Also the recommendation regarding the remuneration of the managers should be increase so that it may reach to the international level so that they could not leave the company etc. the committees always recommended the good suggestions in time but due lethargy in government they did not implemented it on time and when Satyam type of scam occurs only then they go for either to amend the law or bring new law which includes maximum number of suggestions. So the government should take prompt action when any committee gives it report and try to implement it in time so that we could reach to the standard of international level in every way. Only through this we could avoid fraud and scams in the company. After the new companies act 2013, now minority shareholders have teeth to bite in case of its interest being hampered by using various rights given by the company law and SEBI LODR. The SEBI also contributed a lot to make regulation for the shareholders' activism which could be either the allowing of proxy advisory firm to recommend regarding voting by shareholders or the regulation which compel institutions to vote on every proposals of the companies. The voting right through electronic means or right to speak in the meeting by proxy or shareholder's say in third party transaction etc. like rights makes shareholder more active for activism and because of that the number of cases related to shareholder activism is being increased day by day it was unexpected increased in the proxy season 2017. So the future of shareholders' activism in India seems to be very good. With the time there is a need of making a culture where minority shareholders should be respected and not considered as opponent by the board or management only through this a proper balance will be made which will ultimately enhance the gain of the company as well as the shareholders.

CHAPTER 6

CONCLUSION AND SUGGESTIONS

Conclusion

My thesis contains in total six chapters. In Chapter one, I have written the background of my topic,i.e., the concept of shareholders' activism and literature review in brief with hypothesis as well as objective.

In my second Chapter, I have discussed in detail history, origin, concept and evolution of corporate governance and shareholders' activism in India as well as in USA. In USA after the great depression of the year 1929 followed by Security Act of 1933 and later the Security Exchange Commission 1934, a number of reforms had already been brought into the statute culminating into the Sarbanes Oxley Act of the year 2002.

Security Act of 1933-It was the immediate consequence of the stock market crash in the year 1929.This Act derives its validity from the interstate commerce clause of the US constitution. It is worthy to be noted here that it was the first time that any federal law had been enacted to regulate the offer and sale of the security. This Act made it mandatory that the offer and sale of security be registered in case it uses the means and instrumentalities of commerce of interstate nature. The use of the term means and instrumentalities of interstate commerce had made the ambit of the Act so broad that it became virtually impossible to forgo or avoid the provisions of the Act. Before the enactment of this statute, the offer or sale of the securities was mainly regulated by the clause made by the state legislatures. The philosophy behind such enactment was discloser of material facts.

Then the new commission came into existence called the Security and Exchange Commission 1934.This Act was brought in so as to regulate secondary trading of security which mainly consisted of stocks, bonds and debentures. It formed the basis of regulation in respect of the financial market. This Act has also its significance in respect of the establishment of a forum in the name of SEC primarily for the purpose of enforcement of federal security law of the United States.

When a comparison is made between the Act of 1933 and 1934, it comes out that while the 1933 Act regulates the original issues the 1934 Act regulates the secondary trading of those securities. Subsequently, the Maloney Act 1938 came into existence which was an amendment to the Securities Exchange Act 1934 that assigned oversight responsibility for over the counter market to a self-regulatory organization registered with the SEC .(business dictionary for foot noting)

After that the Foreign Corrupt Practices Act of the year 1977 came which is again a federal law. It prohibits not only the US citizens but even the entities from giving illegal gratification ,i.e., bribe to foreign government officials mainly for the purpose of getting benefited in respect of their business interest. This Act was passed for the purpose of bringing an amendment to the federal Act of 1934. The appreciable feature of this Act is that it required all companies with securities listed in the US to fulfill certain accounting provisions including the one like ensuring accurate and transparent financial records and also at the same time maintenance of internal accounting controls.

After the FCPA, USA signed two important conventions which was the Organization of American state inter American convention against corruption. This treaty was at that point of time first such treaty to curtail corruption and was signed by twenty three nations and ratified by twenty nine nations. The above convention adheres its members to make criminally liable those who indulge in bribery practices and tackle such practices through effective cooperation. It makes provision for the expedite extradition of members violating laws of other countries.

The U.N Convention against Corruption, the members of United Nations are the members of this convention which have one hundred forty signatories and one hundred eighty six parties. This convention was universally accepted and became legally binding. Many provision of this convention is mandatory and its far reaching effect makes it more effective in fighting global problem.

In spite of so many law, the biggest scam like Enron and World Come paved the way for Sarbanes Oxley Act 2002. This Act is also known as public company accounting reform and investor protection Act and corporate and auditing accountability, responsibility and transparency Act .It is again a federal law. The provisions of this Act applies not only to the public company board but even to the public accounting firm and many of the provisions of this Act even applies to the privately held companies. The main aim of this Act is to protect the investors and that to by bringing reform in the discloser provisions in pursuance of the securities law. This law did what no law had done before; it proved to be a milestone in controlling fraud and scam in USA.

On the other hand, in India the history of corporate governance started through managing Agency System(1805-1955). The first managing system came into existence in 1809 and further the system developed and changed into legal enactment as 1st Companies Act 1850 followed by amendment in 1857 as well. British merchants were the first managing agent in India. They in order to gain much profit brought both the financial as well as managerial resources together. They were following few basic steps for business and the first one to start new company when it began to produce profit then they sold its shareholdings. Next, they were excellent in running the company so they got appointed to manage the company according to contract and in the last, they got key monetary function because of their capability to allure investors. Post independent, the top managing agents started promoting new trade by funding some amount and rest will be managed through public offering. The concept of corporate governance arises from promoter system. USA and UK brought various program for economic liberalization and due to economic crises of 1990s and consequently the need of IMF compelled India for liberalization.

The controller of capital issue was extinguished and the new organization was constituted which was Security and Exchange Board of India (SEBI). It was similar to SEC 1934 of USA but it has not much of power as given to SEC in USA. The SEBI began to regulate the listed company as well as the capital market of India.

Further development of corporate governance in India takes place through the recommendation of various Committee reports.

In our country, the corporate governance took actual momentum from the enactment of the code of desirable corporate governance 1998. The CII formed it to control the listing companies in India. The audit Committee record of information and keeping accounts were the outcome of CII. Kumar Mangalam Birla Committee: The recommendations of the Birla Committee largely focus on improving the structure of the board of directors of a company and also their functions. The Committee also stressed on putting a focused lens on increasing the transparency and disclosure of information to the shareholders.

Companies Amendment Act, 2000 came with few new provisions and amendment with reference to buyback of shares, responsibility of directors and representation of small shareholder and formation of audit Committee.

Clause 49 was the result of a meeting of SEBI on 25th of January 2000, primarily on the issue of corporate governance. This meeting was for the purpose of bringing some amendment to the listing agreement. Clause 49 was brought into light for touching upon a large number of issues like for dealing with audit Committee, procedure of the board and the ways in which the meetings of the board are held. Another good aspect of this report is that it required an interval wise report on the management of a company and also a report on the compliance of the norms of corporate governance. But these provisions were already provided for by the amendment

Act of the Company's Act of 1956 in the year 2000. But overall it can be said that clause 49 in many ways asserted a new phase in the field of corporate governance in India.

Naresh Chandra Committee Report is also known as a report on corporate audit and governance. This Committee recommended the formation of audit Committee consisting of all independent directors. Furthermore, it also recommended that half of the directors within the board of directors should be independent directors.

N.R Narayan Murthy Committee report on corporate governance: This report is criticized on the fact that many of the recommendations of the Committee overlapped with the recommendation made by its predecessor Naresh Chandra Committee. The SEBI formed this Committee so as to evaluate and bring reform in clause 49 and at the same time to suggest some measures so as to ensure transparency in the Indian stock market and to suggest provisions to ensure compliance of the corporate governance code. As it was suggested by Birla Committee, Murthy Committee also has acknowledged that India should take lession from the international experience because during that time the Worldcom and Enron crises had already occurred. The appreciable feature of this report was that it for the first time recommended for looking about small and retail investors.

Company Amendment Bill 2003: This amendment Bill suggested alteration in the previous Act like liability for non-discloser, nothing in addition to dividend, consolidated accounts, disqualification as well as plenty for non-obeying the norms by auditor, putting restriction on the directors of the company after reaching to a certain age, meeting of board etc.

J.J.Irani Committee : One of the most important features of this Act is that it put focused on bringing a law for uniform code for all companies ,i.e., an umbrella code for all companies so as to bring in a best approach on corporate governance in India. But it's worthy to be noted that this report was not in favor of putting the regulation of all public companies within the hands of SEBI. This report has been dealt in detail within chapter 5 of the thesis.

The new Companies Act 2013 brings so many new provisions like class action suit, companies social responsibility, concept of independent directors, e-voting and many more.

SEBI LODR also brings new regulation for the listing companies.

Uday Kotak Committee, this Committee proposed that there should be a wall type separation between the roles of a chairman and a managing director. The report also focused on ensuring minimum board strength. Same as the Naresh Chandra Committee also recommended that half of the number of directors in a board of directors of a company should be independent director. As it has already been discussed right in the introduction to the elaborate explanation of the same in the chapter, the corporate governance and consequentially the shareholders' activism vis-a-vis has been in vogue in the US corporate system. Right from the enactment of the Securities Act of 1933 which was a consequence of the great depression of 1929 due to the stock market crash to the Sarbanes Oxley Act of year 2002 the journey has been quite fruitful in terms of corporate governance as well as the shareholders' activism. These enactments were the result of either some sudden market crash or corporate scams or the individual shareholders' activism. After the Securities Act of 1933, in the year 1934 came up the SEC Act of 1934. Thereafter, an amendment to the same Act of 1934 came up the Maloney Act. Thereafter another blow to the corporate frauds and to the corruption in corporations was given by this foreign corrupt practices Act 1977. But all these Acts were not enough to prevent the corporate scams like the world com and Enron, so finally the government of USA had to come up with the Sarbanes Oxley Act of 2002. These were all federal enactments and were the result of the public efforts but at the same time many examples of shareholders' activism at individual level are also manifest. The individual shareholders' activism by eminent personality of corporate arena like Ben Graham, Rose Perrot, Karla's Keror are singing examples of shareholders' activism at own level. On the other hand in India, the enactments were not in themselves up to the mark so as to ensure corporate governance as well as to give rise to shareholders' activism at own peril. The basic minimum elements to ensure corporate governance like proxy voting, e voting, independent director, class action suit, proper mechanism for ensuring the rights of the minority shareholders etc were also were later introduced in black and white in the statutes though in respect of the same many Committee reports had time to time recommended for. These Committee reports were either red tapped and thrown into isolation for eternity. If at all some recommendations saw the light of the day, then these were not the result of activist attitude of the government at the Centre nor these were the results of shareholders' activism at personal level rather these were the consequence of the efforts to fill up the vent in the corporate governance which had become manifest after big corporate or securities frauds like the Harshad

Mehta scam or the Satyam scam. Even the SEBI was a culmination of damage control after the Harshad Mehta scam. Not only this, the famous provisions to ensure corporate governance (as named before) were the results of the Satyam scam of the year 2009. So in India, we see that the government in power has time and again shown reactionary approach for ensuring corporate governance in India while the federal government of USA has many a times shown proactive approach so as to protect the rights of the shareholders and at the same time to ensure corporate governance. At the same time, the positive sign is also visible in many of the Indian companies wherein the shareholders have caused the management to lean in favor of their legitimate voice like Maruti Suzuki and Raymond. However, the Indian corporate have still miles to go for they sleep.

Shareholders' Activism in USA is more successful and has been frequently used to change the corporate behavior since the US economy is biggest in the world and their citizens are more educated when compared to India. The speed of shareholders' activism taking place in India is satisfactory and its effects on the corporate behavior in India will be seen in coming days. The law related to corporation was more efficient in USA especially with reference to the protection of minority shareholders whether it was Security Exchange Commission 1934 or Sarbanes Oxley Act of 2002. The scams like World Com and Enron has been the biggest reason of enacting such strict law to protect the interest of minority shareholders and because of that the cases of shareholders' Activism in USA is more successful. But in India, it was the Companies Act, 1956 which gave protection and rights to shareholders especially the minority shareholders but with time it was not so much effective, so the new Act of 2013 came into existence.

The SEBI also contributed to strengthening minority shareholders either through enacting clause 49 or through enacting listing obligation and discloser regulation ,i.e., LODR. In India the new Act has given more rights to minority for activism but it will be seen in coming days that how shareholders are using those rights to change the corporate behavior in positive manner and whether they will be able to increase the companies wealth as well as their own wealth.

In chapter 3, I have written the cases and events of shareholders' activism in India and USA. Shareholders' Activism in U.S.A was pioneered by Benjamin Graham in the case of Benjamin Graham versus Northern Pipeline.[46] This case is assumed as the birth of modern shareholders' activism. It was all due to sheer and continuous efforts of Graham that the management of the Northern pipeline (dominated by the Rockefeller Foundation) had to lean before the demands and the ultimate benefit went to the shareholders. For the same not only research work had been done by Graham but he was also the person who is considered as a trend setter in making use of the proxy voting so as to finally secure the rights of the shareholders. Now the ground had been set and the battle for the shareholders right was time and again fought though through different means but with the same ends which is the sharing of benefit with the shareholders. The case of Robert Young versus New York Central is a fine example of securing the famous New York Central with a flair for the dramatic turning shareholder communiqués from formal legal documents into entertaining and irreverent missives. The case of Carl Icahn versus Philips Petroleum is an appreciable example of corporate raid. The threat of buying out the company and in case of refusal, sanctions in the form of initiation of proxy voting as well as the denigration of the recapitalization plan was within the agenda of Carl Icahn so as to finally the benefit reaches the shareholders. As we know that stream of water which keeps on flowing does not go bad that early but once it has started to remain settled, fungal bacterial action accordingly commences. The case of Rose Perot versus General Motors is all about the docile state of affairs at the general motors under the chairmanship of Roger Smith. Ross Perot right from his entry into the company both within and outside the board of the company tried to bring reforms in the said affairs of the management and the complicated state of bureaucracy within the company. He was not restricted only to this stage rather he had even personal communication with the chairman so as to bring reforms in the management.

The next case in line is of Karla Scherer versus R. P. Scherer. Herein, the wife of the CEO of the company raised her voice against the mismanagement of the company at the hands of her husband and few of his loyalists. Finally, she was successful in conveying her message that the sale of the company was in the best interest of shareholders and as a result she won the battle. William Shlensky case of the year 1966 was about the fact as to non-installation of the lights in the Wrigley Field due to the belief of the president that such organizing of night games was not in the interest of the neighborhood was not considered an act of negligence and mismanagement of the corporation.

Moving on to the Indian cases, the first case in the line is of Rajahmundry Electric Supply Corpn. v A. Nageswara Rao[47] wherein the chairman of a government corporation in the state of Andhra Pradesh had committed many cases of corruption and as a result, the winding of the company was sought. After finding the allegations true by the court, the winding up of the company was accordingly ordered by the apex court without interfering with the decision of the Hon'ble Andhra Pradesh High Court.

S.P. Jain versus Kalinga Tubes Ltd[48] is such a case wherein the Hon'ble Supreme Court decided to side with the best interest of the shareholders and rebutted the allegation that any oppression or mismanagement had been committed by calling for a resolution of the board of directors in haste. The appellant in the case had helped the company when the same was in dire need of capital and when its condition improved it appeared as if he had been sidelined. The court did not find any material in the allegation of oppression and mismanagement.

The issue of the Indianization of Indian companies was very much a topic of discussion in the case of Needle Industries (India) ltd. due to the newly introduced provisions of the foreign exchange regulation Act. It was the allegation of the appellant in the case that the respondent had committed oppression and mismanagement [69]in the company by the act of allotting fresh equity shares to their own puppets who were not existing shareholders but the court held that oppression and mismanagement was not made out as the allotment of the newly allotted shares to the non–existing shareholders[70] was with the aim of extending the reach of the company and the court also held that the new shareholders were not the puppets of the majority shareholders. The last Indian case in our tally is of the Cyrus P. Mistry which was by way of an appeal to the National Company Law Appellate Tribunal from the decision of the Mumbai Bench of the company law tribunal. Here in the case, the appellant had been suddenly removed from the post of executive chairman of the Tata Sons Ltd. Company on the allegation of oppression and mismanagement. The appellate tribunal was of the view that the appellant was not liable rather it was the undue interference of Ratan N. Tata and other Tata family members which were creating hurdles in the impartial discharge of duty of the executive chairman by the appellant. So finally it was the Tata family which was more to be blamed rather than the appellant himself who was running the company with the best of his conscience. The appellate tribunal also ordered to expunge the disparaging remarks made against the appellant by the company law tribunal. This case is a leading example of a case wherein the minority shareholders persuade the case against the giant majority shareholders like Tata Sons.

The Shareholders' Activism cases in India is very less when compared to USA, reason being the provision were not so much supportive as it was in USA and at the same time the shareholders were also not much active as in USA. When we see the struggle and fight of Graham and Rose Perrot, we will find that they were not very much dependent on the protection

[69] AIR 1956 SC 213

[70] 1965 AIR 1535, 1965 SCR (2) 720

given by the laws of the land but they used their own efforts to fight the management and through their great effort the management was compelled to change its working style and become more shareholders friendly. The case related to shareholders' activism are very less in India and only a few cases are with reference to oppression and mismanagement in which the recent case was the Cyrus Mistry case in which Mistry tries to fight with the management of the company and also got success in appellate tribunal but after that the Hon'ble Supreme Court of India[49] put a stay on his reappointment as CEO in the Tata sons and after getting vexed, he decided to sell his shares and leave the company. The result of this case was at the end similar to the case of TCI V. Coal India. So in coming days, the cases related to shareholders' activism will come to the court only then it will be seen that how the court will react to this.

In my 4th chapter, I have written on how Satyam was considered to a be cause for change in corporate law. Satyam computer service was India's top IT service provider company which reached to the highest level in very few time. In the year 1987, it was established in Hyderabad, India, by Mr. Ramalinga Raju and enlisted in Bombay stock exchange in 1991 and got tremendous success and in 1999 enlisted to New York stock exchange. It won many prizes in corporate governance and in 2007, Ernst & Young awarded them the 'Entrepreneur of the Year' award. On April 14' 2008, Satyam won awards from MZ Consult's for being a leader in India in corporate governance and accountability. Everything was good but Raju started investing in real estate with the expectation of earning more and the amount which has been invested was the wealth of Satyam. Raju thought that when he will earn profit from real estate, he will put Satyam's wealth in Satyam's account but due to recession he suffers loss and has no option except to confess that he was showing forge balance sheet for last few years. After the news came out, the Central Government played an active role and changed the board of the company. The scam has damaged the image of India in international market. Indian investors suffered grave loss but investors of USA covered their loss by filling class action suit in USA which was compromised and a handsome amount given to US shareholders.

The legislature in India from that point of time made many changes in Indian company law to prevent Satyam like scam in future. The legislature understood one thing that they have to make such law which may protect minority shareholders because this is the community who suffers a lot in fraud and scams. The introduction of e voting proved to be milestone in attracting shareholders for participating in company's affairs. The proxy advisory firm came into existence in the year 2010 and they started giving suggestions to the shareholders to vote against or in favor of any proposal. Then the concept of independent directors came which also strengthens the minority shareholders by taking their care because the independent director is non-executive director who has no interest in the company except the remuneration that he takes from the company. The remuneration of the managers and directors of the company will not be more than a limit fixed by the company law and if it needs more than that then the approval of shareholders is required in special resolution and as special resolution required 75 % of the vote of shareholders so it is quite tough to get it passed without the consent of the minority.

[49] Company Appeal (AT) Nos. 254 & 268 of 2018

On the other hand, SEBI also enacted many regulations to empower minority shareholders to do activism by using their rights. It allows proxy advisory firm to suggest the shareholders to vote. It was a tremendous move by SEBI.

Due to continuous changes in the corporate law in India, the minority shareholders became more powerful because the introduction of company law in 2013 has provided them teeth to bite in case if their interest in the company is being hampered. From 2014 the cases of shareholders' activism in India increased rapidly and it witnessed more than expectation in the 2017 proxy season where a large numbers of cases came where minority shareholders went against the decision of the company's management. For example in the case of Sesa industry in 2012, where the shareholders voted against the company's decision and shown their displeasure by casting around 20% of vote against the decision of the company. The journey starts from there and now cases came like Tata motors case where shareholders compelled management to take back the decision to give remuneration to the executive beyond fixed level. Shareholders had casted voted against the decision in special resolution. In the other case, where the Maruti Suzuki a company of Japan tried to shift its plant to Gujarat , the proxy advisory firms criticized it and shareholders casted vote against the decision. The case of Cadbury India ltd where the minority shareholder approached the Bombay High Court to increase the rate of buyback of the shares is also a fine example. In this case, the Court increased the rate of share around fifty percent from the price fixed earlier. The case of Fortis health care is also a good example of shareholders' activism where the minority shareholders registered a victory by removal order supported by 88% of the shareholders and they removed an executive from the Board. Such increase in the cases of shareholders' activism in India clearly shows that the minority shareholders who were weak earlier had now started using their right to compel the management and the board to change its decision. Now the new law ,i.e., the Companies Act 2013 has provided them teeth and they are participating in the company's affairs actively and on find anything wrong, they become vocal and with the help of the given provisions succeed tremendously.

In my fifth chapter, I have written about the recommendation given by the three Committees. The Rajinder Sachar Committee has put emphasis on the point that there should be a meaningful and active participation by minority shareholders be it either in a general body meeting or in an extra ordinary meeting.

In case of oppression and mismanagement of the company by the ones having majority stake in the shareholding of the company, remedy should be fast and better. This is a formal type of suggestion but one such suggestion which is important to be discussed here is in respect of the coordination of the shareholders. The Committee suggested that steps should be taken to promote the coordination between the shareholders.

As it was suggested even by the Bhaba Committee, that voting by proxy should be allowed. Though the common law does not allow such thing but many of the articles of association of a company do provide voting by proxy. As per the provisions of the 1956 act the voting through proxies allowed but such person on proxy even though having the right to vote in absentia but does not have the right to speak at the meeting, on the contrary the Committee has recommended that such proxy should be allowed to speak on behalf of someone.

In case of clash between shareholders and the director, the sovereignty finally lies with the shareholders. The same has even been supported by the dicta in Foss V. Harbottle. In respect of a public company, one noticeable feature is in respect of the disclosure procedure. In all public companies whose shares are registered in any stock exchange, it is recommended to publish the abstract and that to within six month period. Such disclosure should be of their own audited account and the same should be accompanied by a brief report. Finally to recognize the right of a shareholders and to promote shareholders' activism, the Committee has recommended that shareholders associations should also be recognized in line with the recognition of stock exchanges. In J.J. Irani Committee report for example, it is recommended that the ultimate duty to remove and appoint the director of the company should lie with the shareholders. The last say should be of course that of the shareholders in the corporation instead of the interference of the government in the cases of appointment or removal of director.

The next worthy thing to be mentioned as discussed in the report is the restriction on the power of the board in respect of some important strategic matters of the company. The approval of the shareholders through a general body meeting has been recommended to be made mandatory. For example in the cases of sale of the substantial part of the assets of the undertaking, the approval of the shareholders has been suggested. To increase the role of the shareholders in the annual general body meeting from nearly accepting gifts to voting through electronic means ,i.e., e voting has also been recommended by the Committee.

Further for the purpose of protecting the interest of the minority shareholders, the ones having more than 10% of the shareholdings should have right to approach the NCLT in case of oppression and mismanagement. Before evaluating the role of Uday Kotak Committee in respect of shareholders' activism, it can be seen that some issues have aptly been dealt with by the Committee. To bring in more and more transparency in the affairs of the company, it has been recommended that emphasis should be on auditing and accounting practices in the listed companies. The Irani Committee also stressed on the restriction of the power of the board of directors and even the Kotak Committee has suggested regular assessment of the efficacy of the board.

To increase the participation of the shareholders in the affairs of the company and to enhance and encourage them to take more and more participation in the democratic process within the company, the problems felt by the shareholders while voting and attending the general body meetings should seriously be addressed further. To safeguard the interest of the shareholder from the whims and fancies of the board, the Committee also recommended that the independence of the independent director should be ensured and the participation of the independent director in the strategic and diplomatic affairs of the company should be ensured. The Committee constituted either by the SEBI or the MCA have always given important recommendations so that by implementing those recommendation, Indian corporate governance practices reach to the level of international standards but unfortunately the government did not implement it in time and as a result big scams and frauds like Harshad Mehta, Ketan Parekh or Satyam were reported. International investment will come to the company which is following a good corporate governance norm like during COVID, the reliance industry succeeded to attract investment from foreign countries. When the company follows good corporate governance norm, it will treat its minority shareholders as the owner of the company and will give proper respect. Unfortunately in India, there was a culture that minority shareholders were not getting respect and if they went for activism, the board or management will start treating them as an opponent. It was the minority shareholders who always suffered a great loss in the case of scams and fraud but due to the Committee's recommendations which were included in the company law and the coming of the new Companies Act, now the minority shareholders have teeth. In last one decade, a numbers of the law related to shareholders' activism comes into existence and due to that the cases of shareholders' activism increased drastically which shows that the shareholders' activism has a good future in India and it will increase in coming days like in USA.

Shareholders' Activism evolved and gained prominence in India in last decade because it was being supported by the legislature. In last one decade, legislature has enacted many laws and regulations which resulted in an increase in shareholders' activism cases in India. The shareholders now understand that the share one holds not only has economic gain but also a part in the ownership of the company. They are trying to apply pressure on Board and management of the company to make changes and such pressure comes from shareholders, other investors, stakeholders and unions too. Now the minority shareholders became more vocal and are applying pressure. The classic case of shareholders' activism is the Fortis Health care case in 2018.

The watershed moment in shareholders' activism was the introduction of the Companies Act 2013. It gave teeth to the minority shareholders and as a result, a large number of cases have been reported in last few years especially in the proxy season 2017. We can consider that this is the tipping point of shareholders' activism because the legal and regulatory tool kit significantly expanded in last decade. The journey started from the year 2009 when the SEBI talked about Stewardship code which ultimately promoted the shareholder democracy by holding the company more accountable with its policy decision. The next big move by the SEBI was the proxy advisory firm which was incorporated into SEBI regulation in 2010.The proxy advisory firm started suggesting shareholders regarding their vote and what will be the effect of any decision taken by the company on its interest and accordingly vote in favor or against the resolution. Since the major decision of the company requires special resolution which can only be passed by the company if it has 75 % of votes, therefore the suggestion of the proxy advisory firm becomes vital. Again the SEBI in 2010 made it mandatory on the part of the assets management company to public their voting policies with regard to shares held by them in companies. The regulators also directed fund houses to participate in the voting process more judiciously.

Indian market is changing rapidly. India is the fifth largest economy in the world and the shareholders pattern in Indian market has also been changed. In India around fifty percent of the shareholdings are foreign shareholdings which mean more than fifty percent markets are owned by foreign investors so they come with their own kit. Thus new ownership reality and foreign culture is coming to India and because of that the laws like class action came in 2013 Act. The class action suit was filed in USA in Satyam case and because of that the shareholders benefited.

The concept of independent directors and the shareholder's say in related party transactions are a big move in 2013 Act. Independent directors have no interest in the company except the remuneration they get so they are fair to minority shareholders. In India, there are many get keepers which are protecting the minority shareholders because they are in the system. It is well said that the get keeper comes first to protect minority and regulation comes later Like auditors or the independent directors are important constituent in the company. In digital age, the social media is also a get keeper. India has brought new slew of get keeper, i.e., tipping point and the newest thing is the class action suit.

The single largest tipping point of shareholders' activism in India is the concept of majority of minority in related party transaction brought by Companies Act 2013. It is the biggest conceptual change in the company law. The concept of majority of minority and the normal notion of conflict of interest applies to the Board when they are in fiduciary roles and in the traditional company law, they are free to be as selfish as they want. Earlier minority have no say in sale of business and company was selling business to parent at very low cost meaning at the cost of minority.

Since shareholders' activism is gaining space in India, the basic difference in the shareholders cases in India and in USA is that the shareholders in USA are using their own efforts along with the power given to them by the law and getting success like in the case of Ben Graham who used his effort to distribute the dividend to all shareholders and in order to compel the company ,i.e., Northern Pipeline he went to the main office of the company and when denied to give information regarding the profit of the company, he went to the interstate commerce office in Washington from where he got the required document and after thorough reading of that he came to know about the corruption in the company. I mean to say that the level of activism he shows in this case is missing in India. In another case, Mr. Rose Perrot in order to change the working style of the General Motors went to meet all the employee of the company whether it was executive or common employee and at the same time he met with the retailer of the company and threw parties as well as invited them to convince them regarding what was happening in company and at the same time, he has written letters to the ones related to company. Such type of activism is still missing in India. In India, the most famous case of shareholders' activism is the case of Mr. Cyrus Mistry when Mr. Mistry was removed from the chairmanship of the Tata and sons, he went to the NCLT in appeal against that decision and succeeded in getting an order in his favor. The NCLT ordered that he must be reappointed as a chairman of Tata and sons. Though the Hon'ble Supreme Court of India stayed the order of reappointment later in appeal. In this case Mr. Cyrus Mistry fought well and when he did not get relief in the tribunal, he went to the appellate tribunal and alleged that Tata and sons removed him from the post which was oppressive since he was minority shareholder in the company.

The next thing missing in Indian activism is that in India whenever a shareholder goes to the court or tribunal, he does so because of himself and not for the whole minority whereas in USA the activism was much active because the shareholders were thinking about the whole minority community as explained in the case of Ben Graham or Ross Perrot.

In India, there is a concept of shareholders' activism on social, climate and environmental issue but real challenge is the capital shareholders' activism. The big hurdle in the way of shareholders' activism is the "Big Elephants" which means that in many big companies promoter's ownership is so high that minority has no say. They are running their companies as per their will without the participation of minority. Many events of shareholders' activism took place in past where a large number of minorities voted against the proposal of the company but still company got the proposal passed because of their large shareholdings in the company like in

DLF scheme for directors in which around 99% of the vote of institutional investor went against the proposal of the company but still it was passed in the special resolution because the DLF has large shareholding in the company. Initially, the insurance and pension regulator took their time but now they are also working together which will be enhancing shareholders' activism in the country. This was not always the case and there are also many cases in which company is not promoter led but still there is less transparency. So, it is basically an agency conflict where the management has moved away from their role.

On the other hand, nexus created by the minority shareholders may misuse the power given to them. They may sometimes cast their vote not for the minority class but also for their own ulterior motive and because of which the long-term vision of the management gets defeated. There is one more thing developing where both the side is now preparing for the battle. The need of the hour is use of effective communications tool which helps in talking to the management. The shareholders relationship Committee is acting proactively now and more importance is given to the meetings; presentations input being received from the SRC meeting. In Indian company, there is a requirement of the balancing of act which means activist shareholders should not be considered as adversary to the management and they should be given legitimate place. So finally, the shareholders' activism affecting the power of directors so the first hypothesis is proved. On the other hand, the second hypothesis is partially proved because in India the shareholders' activism is gaining place but only activism by institutional shareholders and retail shareholders are not sowing activism. One more reason of shareholders'' activism not much expanding in the country because they are less interested in changing the working style of the company by active participation, there concern is the profit on their capital.

A large number of cases of shareholders activism came in last few years but the rate of success achieved by the shareholders is very low. Although a number of cases caught the attention of media and led to a dialogue between the management and the shareholders, activist shareholders are yet to achieve significant success in India. The shareholder advisory firm In

Govern Services in a report published in the year 2017 by the name " The India proxy Season 2017" outlined that 45 companies from the 100 companies that made up the Nifty 100 index witnessed minimum 20% votes against at least one proposal in the annual general meeting. Given the concentrated shareholding in India, dissenting shareholders did not receive any success as all these resolutions were ultimately approved with requisite majority. The state of activist investors in USA and UK is quite different when compared to its Indian counterpart as is evident from the report of Activist Annual Review in the last few years. The former is more successful than the latter and therefore, we can conclude that the developed countries are enjoying a better position.

Thus, we can conclude from the above that though Shareholder Activism is still in initial stage but there is a scope for a lot of development in this field. The last decade has witnessed regulatory reforms in this field and therefore, shareholders' activism has a lot of potential to grow in the Indian corporate sector like in USA. We need to sit patiently and watch as the true scope and benefit of shareholders' activism is revealed as it evolves with time.

Suggestions

- In India as is manifest from many of the cases that individual shareholders' activism is not even in nascent stage though collective shareholders' activism is in its beginning stage but many a times the efforts of such collective shareholders activism has got defeated by majority shareholders. So the need is that both the government in power and the corporate field expert must endeavour to promote both individual shareholders activism as well as collective shareholders activism.
- As it is decipherable from many a cases in India that the minority shareholders approach this and that court for example in Cyrus Mistry case, Cyrus Mistry had approached the NCLAT for the reason that he had been shacked from the post of executive chairman. Like this case in other cases also the minority shareholders have approached the different courts for enforcing their own rights but not the rights of other minority shareholders collectively at individual level. For example, Ben Graham had initiated the movement so that the benefit of the dividend may reach to the shareholders at even the ground level. Such example of protection of the common interest by individual lakes in India. So the ramp should be repaired both by the governmental as well as corporate actions to promote such activism.
- As is very much manifest from the aftermath legislations in the company law that the reports of many of the committees had been red tapped after the presentation and never saw the light of the day until some big scams like Satyam and Harshad Mehta throttled the neck of corporate governance in India. So the suggestion is that apt recommendations of such committee should be brought time to time in black and white in the cat enactment.

- In current scenario, Technology too can play a major role in increasing shareholders' Activism. It can be used for the benefit of Shareholders and to make the system more transparent and accountable. Such steps can also help to tackle fraud in the company.
- Shareholders, i.e, person holding shares of the company are basically the owners of the company and therefore, they should be allowed to participate in the decision making or at-least the important information must be communicated to them. The cost of shares depend on the decision making of the company and since shareholders have a right to property so they should also be allowed access to the basic information which has a tendency to affect the value of their property.
- The role of Minority Shareholders should be strengthened by providing them greater role and participation in the decision making of the company. There should be an active forum where the minority shareholders can genuinely express their views and such views should be studied before making of any key decision in the company. In simple words, the views of the minority shareholders too should be given certain binding force in the decision-making process.
- There should be more accountability and liability fixed on the majority shareholders. Most of the fraud as is evident is committed by the consensus of majority shareholders and auditor therefore, it is very important to bring certain stringent provisions to fix accountability on the majority shareholders. The

minority shareholders should be given more powers in the general meeting and in the decision-making process. All the important decisions by the company should be mandatorily informed to the minority shareholders.

- Most of the dispute resolution mechanisms such as NCLT or courts come into picture after the actual dispute has arisen. This scenario needs to be changed. Proper and effective communication should be developed between the management of the company so that most of the problems can be tackled in their initial stages itself.

- Alternate dispute Resolution called ADR should be promoted. ADR is the new trend and in this, both the parties can sit and discuss their issues and arrive at a mutual decision. This is like a win-win situation for both the parties and neither of them feels cheated or deprived. Also, the dispute resolution through ADR is much cheaper and faster as compared to tribunals and ordinary courts.
- In the recent era of globalization, companies have become multinational and are engaging in business in all over the world in different countries. This creates a hindrance as to the place of suing in case of dispute against the company .The principles of Private International Law must be incorporated in the corporate sector. Parties should be independent to decide the actual place of suing depending on the convenience and reasonable grounds. Legal remedy should not be denied merely on the grounds of distance.
- In view of the recent trend in corporate sector where huge companies are merging with each other for the conduct of business such as the Facebook acquiring stake in Jio, the bargaining power of minority shareholders is being compromised. Minorities must be provided an effective forum to express their views such as a union or an organization which could represent the collective right of the minorities and they can have an equal power of bargain. Minority shareholders are also the owners of the company and therefore, their rights must be protected.
- Minority shareholders currently do not play an effective say in the winding up of the company compared to the creditors. They should be allowed to give their views and there should be a meeting with the minority shareholders before winding up of the company.
- The restriction on shareholder to approach NCLT as imposed by Section 241 and 244 should be relaxed and any shareholder should be allowed to approach NCLT seeking appropriate remedy.
- Last but not the least NCLT should hear the cases of minority shareholders on priority basis and in a time bound manner as we have seen in most cases that the remedy required by them would be useless if there is a delay in dispensation of justice on part of tribunals. So, The Tribunals must decide such matters within reasonable time to meet the ends of justice.
- Scope for Future Research: shareholders' activism is still in initial stages and there is a scope for a lot of future research in this field. Researchers can collect empirical data on this topic.