



The existence of shareholder activism in India: A factual occurrence or a deceptive perception?

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Abstract

The traditional governance of companies globally has revolved around majority rule, wherein the power to make binding decisions for the entire company rests with the majority shareholders. This principle gained legal validation through the English case of *Foss v. Harbottle*, establishing a norm of judicial non-interference in corporate affairs if the majority's decision prevails. This norm prevailed for decades and shaped corporate governance practices. In India, the concentration of ownership and control in companies has posed significant challenges for activist shareholders. The dominance of business families in controlled companies or government entities in public sector undertakings has hindered the ability of minority shareholders to challenge or influence the functioning of these entities. However, the regulatory developments such as the Companies Act, 2013, and regulations introduced by the Securities and Exchange Board of India have provided momentum to empower minority shareholders. Implementation of the Kotak Committee's recommendations and the regulation of Proxy Advisory firms reflect ongoing government interventions aimed at promoting shareholder activism in India. This paper aims to analyze the legal framework of shareholders' rights in India, its impact on shareholder activism, and the necessary statutory and regulatory measures to strengthen it. The paper also delves into emerging trends in shareholder activism in India and prospects for further advancement in this movement. It includes analysis of three key cases related to shareholder rights and corporate governance to assess the potential avenues for activism. In conclusion, the paper presents recommendations to enhance shareholder activism in India, considering the evolving legal landscape and regulatory environment.

Keywords: Shareholder activism, corporate governance, proxy advisory firms, minority shareholders, companies act, 2013

Introduction

In recent decades, the global corporate sector has seen remarkable expansion fueled by technological progress and the growth of international trade. This evolution has prompted a shift in corporate objectives, moving beyond mere shareholder value maximization to prioritize sustainability and contributions to societal progress, underscoring the community-oriented role of modern corporations. Simultaneously, there has been a need to restructure and adapt the operations of contemporary companies. Traditionally, companies worldwide have adhered to the principle of majority rule, where decisions made by the majority shareholders bind the entire company, and the option favored by the larger group is typically chosen. Consequently, minority shareholders have often been passive and disengaged from the broader company objectives. The legal foundation for this majority rule principle was established in 1843 through the influential ruling in the English case of *Foss v. Harbottle*, which advocated for judicial non-interference in corporate matters when decisions are made by the majority. This precedent persisted for years and hindered the growth of shareholder activism—a movement driven by shareholders seeking to influence company affairs to safeguard their interests. Shareholder activism involves actively engaged shareholders considering their share investment not just as a financial decision but as a strategic one. Although the principle of majority rule initially aligned with democratic principles, subsequent developments revealed that majority decisions are not always optimal. The dominance of majority shareholders in directing company affairs according to their preferences has led to the

acknowledgment that the majority may not always act in the company's best interests.

During the 1980s, shareholder activism began to emerge in both the UK and the US, fueled by shifts in legal and cultural landscapes. Influential factors included active pension and hedge funds, widespread share ownership, and a wave of takeovers, particularly notable in the US, which empowered these economies to shape the trajectory of shareholder activism.

While shareholder activism is well-established in the UK, Continental Europe, and the US, its growth in India is still in its nascent stages. Despite India's historical ties to English company law from its time as a British colony during the industrial revolution, the country's corporate environment and realities differ significantly from global norms. The predominant ownership and control structures in Indian firms, often concentrated in business families or government entities in the public sector, pose significant barriers to activist shareholders.

This activism has brought to light shortcomings in the governance of some well-managed listed companies, exposing both promoters and professional management. Furthermore, India has experienced a series of corporate frauds over the past two decades, including the Satyam Scam and the collapse of Kingfisher Airlines, among others. In many of these instances, the actions of company boards were called into question. Therefore, a strong shareholder movement is not only necessary to address declining corporate governance standards in India but also crucial to positioning the country as an attractive investment destination.

Although shareholder activism in India has faced challenges due to systemic and institutional weaknesses for many

years, recent developments have shown promising signs of progress. Institutional investors such as mutual funds and other long-term investors have started engaging more actively with company promoters, indicating a growing level of involvement.

Moreover, over the past two decades, significant legal and regulatory measures have been implemented to enhance shareholder protection. These include the Companies Act, 2013, and its subsequent amendments, guidelines issued by the Securities and Exchange Board of India (SEBI) under the SEBI Act, 1992, including the SEBI (Issue of Capital and Disclosure Requirements), 2018, and SEBI (Listing Obligations and Disclosure Requirements), 2015, along with circulars for listed companies. The recommendations of the Kotak Committee and their implementation, as well as guidelines from the Insurance Regulatory and Development Authority of India regarding stewardship and the expansion of proxy advisory firms, have also played a crucial role in advancing shareholder activism in India.

Trends in Shareholder Activism in India: A Recent Overview

Shareholder activism is gradually making its mark in the Indian corporate realm. Legally, recent reforms have brought clarity to previously ambiguous issues and established a more robust framework for disclosure, reporting, and transparency, all aimed at enhancing corporate governance. The amendments to the relevant laws and the implementation of key recommendations, such as those from the Kotak Committee, have been positive steps toward safeguarding shareholder rights. Additionally, SEBI's enhanced regulatory measures, through the lens of SEBI (ICDR) AND (LODR) Regulations 2015 which have elevated corporate governance standards among Indian listed companies. The emergence of proxy advisory firms, regulated by SEBI under the SEBI (Research Analysts) Regulations, 2014, had also been a significant development. Shareholders can now rely on the expert guidance provided by these firms, enabling them to make more informed and reasoned decisions. While their impact may not be as pronounced as in the US, they play a vital role as a key market participant in India. Regarding shareholder grievance redressal, the current mechanism allows for personal suits, class actions, and derivative actions, providing avenues for addressing shareholder concerns, as discussed earlier. The patterns observed in shareholder activism within the Indian context show promise, yet the actual achievements of the shareholder movement remain limited. Despite this, concentrated share ownership continues to be widespread, and activist shareholders have primarily achieved success in situations where corporations have openly flouted corporate governance standards.

The report "The India Proxy Season 2017," prepared by In Govern Research Services, offers an intriguing insight into shareholder activism. The report reveals that 45 out of 100 companies included in the Nifty 100 index experienced at least one instance where a resolution presented at the Annual General Meeting (AGM) was opposed by at least 20% of shareholders. Despite the diverse shareholding patterns seen across Indian companies, these actions, although likely unsuccessful in the end, made significant points. Another positive trend noted in the shareholder movement is the increasing number of activist campaigns, particularly among large and medium-sized companies,

despite less-than-stellar outcomes. This could be attributed to the legal framework provided by the Companies Act and SEBI regulations. Unlike in developed economies where shareholder activism has often succeeded in reversing companies' downward trends, India has substantial ground to cover in this regard. When examining the directions in which the Indian shareholder movement has shown advancement, there has been a consistent rise in formal activism, such as voicing concerns at Annual General Meetings (AGMs) or other company platforms. On the other hand, informal activism, which typically occurs behind closed doors and stays out of the media spotlight, remains relatively underdeveloped. Let's delve into significant instances where activist shareholders' interventions have influenced the trajectory of a company's decisions.

Appointments or Reappointments

In July 2018, the reappointment of Mr. Deepak Parekh as a director faced opposition from 22.64% of HDFC Ltd.'s shareholders. Similarly, in October 2018, Mr. Kumar Mangalam Birla's reappointment to the board encountered dissent from 18.63% of Hindalco Industries' shareholders. Although both reappointments were ultimately approved, the substantial dissent involving prominent figures in corporate India was remarkable and unprecedented. Previously, the control exerted by promoters posed obstacles for investors aiming to instigate changes at the board level. However, this dynamic is transforming. Investors managed to oust a director from Fortis Healthcare in May 2018 in response to concerns about how the board evaluated specific company bids. Likewise, in 2019, CG Power and Industrial Solutions' board took steps to replace its promoter as chair amidst allegations of irregularities, although this did not involve removing a directorship. A significant milestone occurred in March 2022 when Invesco secured a landmark judgment affirming its right to convene an Extraordinary General Meeting (EGM) to revamp Zee's board. Although Invesco later withdrew its request, this legal precedent paves the way for similar actions in the future. In a related ruling, the Bombay High Court declined to intervene in preventing Yes Bank (a share pledge enforcer) from voting to dismiss Dish TV's chair, a company previously connected to Zee's promoters. Consequently, at Dish TV's EGM in June 2022, shareholders rejected the reappointment of the current managing director and certain other directors, marking significant developments in shareholder activism in India amidst challenges from promoters.

Related Party Transactions

In recent years, there have been instances where shareholders have raised concerns and obstructed related party transactions that were perceived to be detrimental to shareholders' interests. For example, in 2018, shareholders opposed a board resolution regarding a related party transaction at Tata Sponge Iron Ltd., which initially failed to gain approval. It was only after a second ballot that the resolution was finally approved. Similarly, in June 2017, the board of Raymond Ltd. proposed a related party transaction involving the sale of a company-owned apartment, reportedly at a price significantly below market value. This proposal was rejected by 70.6% of voting shareholders, comprising solely non-promoters.

Proxy Advisory Firms

Proxy advisory firms have played a crucial role in mobilizing opposition against company actions or resolutions that are perceived to be against shareholders' interests. For instance, they recommended voting against Tata Motors' executive remuneration resolution in 2014 and took a stand on the leave absence issue of the former CEO of ICICI Bank. In 2019, these firms challenged the management of Sterling Wilson, highlighting the failure to use IPO proceeds for debt repayment. These actions by advisory firms have significantly influenced shareholder activism and engagement.

Action against fundraising or proposed investment

Shareholders of Suzlon Energy, a renewable energy solutions provider, rejected a proposal by the board to raise INR 2900 crore through the issuance of equity shares and debentures in July 2018. The resolution received only 65.12% of votes, falling short of the 75% required for a special resolution. Similarly, Sun Pharma, India's largest pharmaceutical company, encountered strong opposition from shareholders in November 2015 regarding a proposed \$225 million investment plan in the wind energy sector in the United States. As a result, the company had to abandon its plans. The shareholder movement in India has achieved distinctive milestones beyond traditional activism. In the late 2016 and 2017 period, Infosys, a major player in the Indian IT sector known for its robust corporate governance, faced challenges from its founder shareholders regarding alleged impropriety in severance payments to departing executives. Although an international law firm's investigation later vindicated the management team, the resulting discord led to the CEO's departure, exposing significant internal divisions.

Moreover, there have been noteworthy occurrences indicating promising prospects for shareholder activism. For instance, external investors making substantial investments in Jio, a subsidiary of Reliance Industries Limited (India's largest listed company), represents a positive trend. Since Jio is presently unlisted, heightened engagement from these investors over time could empower 'outside' shareholders to influence corporate strategy, signaling a new phase in shareholder activism.

Key episodes of shareholder activism observed in the Indian landscape

Given the dynamic evolution of shareholder activism in India over recent years, it is crucial to delve into pivotal cases that have reverberated throughout the Indian corporate sphere, leaving lasting impressions that may chart the future trajectory of shareholder movements in the country.

HDFC Life- Max Life merger case

In August 2017, HDFC Standard Life Insurance Co. Ltd. and Max Life Insurance Co. Ltd., two major players in India's life insurance sector, announced the cessation of their proposed merger after months of deliberations. This potential merger, had it materialized, would have created an insurance behemoth with assets totaling INR 1.1 trillion, positioning it as the second-largest player in the market, trailing only behind the formidable Life Insurance Corporation of India. Though primarily, the merger failed to garner approval from the pertinent authorities due to its structure being deemed violative of §35 of the Insurance Act, 1938, there was an additional aspect related to

shareholder concerns that added a peculiar twist to the case. The agreement also included an INR 850 crore compensation to the Max Life group as non-compete fees. While these types of payments are common in mergers and acquisitions involving private firms, they have sparked debate in the realm of public companies due to concerns about safeguarding the interests of minority shareholders. Proxy advisory firms and the mutual fund body strongly opposed this payment, arguing that it should have been included in the open-offer price for shareholders. They contended that there should be consistent protection standards for minority shareholders in both takeover and merger scenarios, as observed in this particular case.

The McDonald Case

The widely-known Vikram Bakshi v. Connaught Plaza Restaurants Limited case, celebrated as a victory for Indian entrepreneurs against powerful investors, garnered significant attention due to the strong brand presence of McDonald's among millennials. Mr. Vikram Bakshi approached the National Company Law Tribunal (NCLT) alleging oppression by McDonald's. His petition was based on §§ 397-402 of the Companies Act, 1956, but the case also marked the transition to the Companies Act, 2013, bringing into play §§ 241-245 of the new Act and the NCLT replacing the Company Law Board.

In a meeting on 5th August 2013, Mr. Vikram Bakshi was removed through a resolution passed by McDonald's India, with their nominee directors' votes. Allegations were made that Mr. Bakshi had not fulfilled his duties competently and had violated key terms of the joint venture agreement with McDonald's India. The NCLT, in a groundbreaking ruling, deemed Mr. Bakshi's removal unlawful. The tribunal acknowledged Mr. Bakshi's sincere efforts in developing the joint venture business in India over 16 years, during which McDonald's India had not previously raised any significant grievances against him. In fact, there were instances where Mr. Bakshi received appreciation for his contributions. Furthermore, the NCLT noted that McDonald's India had previously attempted to buy Mr. Bakshi's shares, an offer he declined. The tribunal viewed Mr. Bakshi's ousting as an act of oppression aimed at pressuring him to sell his shares to McDonald's India at an undervalued price.

Tata- Mistry Case

The key lesson from this case is that the NCLT expanded the interpretation of oppression provisions in joint venture contracts in two significant ways:

- a. It allowed individuals to seek relief based on oppression grounds beyond just being shareholders or members, provided they can demonstrate that their shareholding or membership has been impacted. In Mr. Bakshi's case, his claim that not being elected as MD amounted to oppression, even though it did not directly affect his shareholder status, was accepted by the NCLT, marking a novel stance.
- b. The NCLT's ruling provided a framework for petitioners to base their oppression claims on provisions within independent contracts. This paved the way for future petitioners to cite the breach of agreement conditions within the Articles of Association as sufficient grounds for alleging oppression.

The SP Group, under the leadership of Mr. Mistry with a controlling interest, strongly contested the board's decision and escalated the matter to the NCLT through Cyrus Investments Private Limited and Sterling Investment Corporation Private Limited. Their petition alleged egregious treatment, systematic oppression, and managerial malpractice under pertinent sections of the Companies Act. However, the NCLT ruled decisively against the SP Group in March 2017, decisively favoring the Tata Group on all fronts, both substantively and legally.

Subsequently, the SP Group pursued recourse at the NCLAT, which in a momentous ruling in December 2019, unequivocally sided with the SP Group on all contentious issues. This verdict was later subjected to rigorous scrutiny in the hallowed halls of the Supreme Court, culminating in a comprehensive and resolute judgment on 26th March 2021. The Supreme Court emphasized the stringent criteria requisite for invoking the just and equitable clause as a basis for winding up a company, highlighting the glaring absence of substantive evidence supporting a functional deadlock or a corrosive breakdown in trust within a purported corporate quasi-partnership in the instant case.

The court astutely observed the conspicuous dearth of instances where the SP Group effectively substantiated claims of a stalemate within the company's operational framework. It also unequivocally dispelled any notion of a formalized corporate quasi-partnership despite the historical camaraderie between the SP Group and the Tata Group. The court adamantly asserted that Mr. Mistry's ascension within Tata Sons did not confer entrenched entitlements to representation and management, and his subsequent removal was deemed a judicious course of action for the company's holistic welfare, devoid of any semblance of oppressive intent.

Furthermore, the court acutely noted the philanthropic stature of the company's promoters, cautioning against the deleterious repercussions of a winding-up scenario on their benevolent endeavors. Consequently, the Supreme Court unflinchingly repudiated the NCLAT's ruling, affirming that the company's operations were not marred by prejudice or oppression, and Mr. Mistry's ousting was warranted due to his professional lapses rather than any orchestrated act of oppression.

Infosys and Vishal Sikka's Resignation

The case involving Infosys and Vishal Sikka's resignation is a notable example of shareholder activism in India's corporate landscape. Vishal Sikka was appointed as the CEO and Managing Director of Infosys in 2014, with a vision to transform the company's business model and technology offerings. During his tenure, Sikka implemented several strategic initiatives aimed at accelerating Infosys' growth in areas such as artificial intelligence, digital services, and automation. Shareholder activism at Infosys gained momentum in 2017 when co-founder Narayana Murthy publicly raised concerns about corporate governance practices and alleged lapses in transparency and board oversight. Murthy's criticisms included issues related to executive compensation, severance packages for former executives, and the company's acquisition strategy. In February 2017, Infosys announced a buyback of shares worth \$2 billion, which was seen as a move to placate shareholders and boost investor confidence amid the ongoing controversies. Despite these efforts, shareholder

discontent continued, leading to a series of public statements and interviews by Narayana Murthy and other prominent stakeholders highlighting governance concerns. In August 2017, Vishal Sikka resigned as CEO and Managing Director of Infosys, citing "personal attacks" and distractions that hindered his ability to lead the company effectively.

Sikka's resignation and the preceding shareholder activism had a significant impact on Infosys, leading to a period of uncertainty and volatility in the company's stock price. The episode raised questions about the balance between founder influence and professional management in Indian corporations, as well as the role of shareholder activism in shaping corporate governance norms. Following Sikka's resignation, Infosys appointed a new CEO and embarked on initiatives to address governance concerns and rebuild investor trust. The company implemented changes in board composition, executive compensation policies, and disclosure practices to enhance transparency and accountability.

The Infosys case highlighted the growing significance of shareholder activism in India, with investors asserting their rights to demand transparency, accountability, and ethical conduct from corporate boards and management teams. It underscored the need for companies to proactively engage with shareholders, address governance issues, and maintain open communication channels to avoid potential conflicts and disruptions. Overall, the Infosys and Vishal Sikka's resignation episode serves as a prominent case study illustrating the dynamics and impact of shareholder activism on corporate governance and management decisions in India's corporate landscape.

Fortis Healthcare

Shareholder activism played a role in the Fortis Healthcare saga, where investors raised concerns about alleged financial irregularities and governance lapses. The case involved multiple stakeholders, including institutional investors and minority shareholders, advocating for transparency and accountability within the company.

Coal India Limited: In 2019

Coal India Limited faced shareholder activism related to issues such as executive compensation, dividend distribution, and corporate governance practices. Shareholders, particularly institutional investors, voiced their concerns at the company's annual general meetings and through public statements, highlighting the importance of active shareholder engagement.

Empowering Shareholder Activism

Empowering shareholder activism within the Indian company law context requires a multi-faceted approach aimed at enhancing transparency, accountability, and shareholder rights. Here are some recommendations

1. Enhanced Disclosure Requirements: Implement stricter disclosure norms, particularly regarding executive compensation, related party transactions, and corporate governance practices. This will enable shareholders to make more informed decisions and identify potential areas of concern.
2. Strengthening Shareholder Rights: Grant shareholders greater voting rights and participation in key corporate decisions, such as mergers, acquisitions, and executive appointments. Introduce mechanisms for shareholders

to propose resolutions and nominate directors, enhancing their influence within the company.

3. **Facilitating Proxy Voting:** Simplify and streamline the proxy voting process to encourage greater shareholder participation in general meetings. Provide electronic voting options and ensure transparency in the proxy voting system.
4. **Protection Against Oppressive Actions:** Strengthen legal provisions to protect minority shareholders against oppressive actions by majority shareholders or management. Enhance the remedies available to minority shareholders, such as class action suits and derivative actions, to address instances of corporate mismanagement or malfeasance.
5. **Engagement and Dialogue:** Promote constructive engagement between shareholders, management, and the board of directors. Encourage regular dialogue through investor meetings, forums, and disclosures to address concerns and foster a culture of transparency and accountability.
6. **Institutional Investor Participation:** Encourage active participation by institutional investors in corporate governance matters. Develop guidelines and incentives for institutional investors to engage with companies on governance issues and exercise their voting rights responsibly.
7. **Regulatory Support:** Provide regulatory support and guidance to shareholders, including clear frameworks for filing complaints, accessing information, and seeking redressal. Strengthen regulatory oversight to ensure compliance with corporate governance standards and protect shareholder interests.
8. **Educational Initiatives:** Conduct educational programs and awareness campaigns to educate shareholders about their rights, responsibilities, and avenues for activism. Empower shareholders with knowledge and tools to effectively engage with companies and hold them accountable.

Conclusion

In the Indian context, the surge of shareholder activism is unmistakable, with investors assuming a progressively proactive stance. Over the past two decades, this activism has etched its indelible mark on India's corporate governance framework, ushering in a heightened premium on global governance paradigms. The aura surrounding shareholder activism is poised for an upward trajectory in India's burgeoning economy, with activists positioned as trailblazers, echoing Ben Horowitz's timeless adage that "Shareholder activism thrives when activists discern business nuances evading the board."

Nonetheless, navigating India's legal labyrinth and institutional landscape presents formidable hurdles for shareholders opting for litigation as a weapon against managerial malfeasance. Historical precedent reveals the limited efficacy of legal maneuvers in this realm. Hence, while strides are being made to refine legal and corporate standards, a pragmatic roadmap necessitates fostering robust shareholder-promoter interfaces, underpinned by fortified institutional investor backing and bolstered regulatory frameworks, serving as formidable force multipliers for positive change.

The phenomenal surge of shareholder activism in Australia serves as a poignant exemplar, accentuating its potency in

catalyzing organizational metamorphosis. Recent Australian AGMs have borne witness to fervent activism, notably centering on climate risk disclosures and the mainstreaming of Environmental, Social, and Governance (ESG) imperatives. This proactive stewardship by activist shareholders underscores their pivotal role as value enablers, poised to expand their sphere of influence, enriching the global corporate governance paradigm exponentially. As history has shown, shareholder activism, when applied judiciously, has the potential to unlock considerable value for all shareholders. One notable area where activist shareholders have wielded significant influence is in driving cost-cutting measures. In a developing market like India, the role of shareholder activism extends beyond mere demands; it aims to cultivate a robust corporate governance framework and ensure structural stability within companies. With ongoing legislative and systemic enhancements, India is steadily positioning itself to claim a prominent position within the global corporate community.

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