

4. The electricity arrears in relation to these premises had fallen due since they had neglected to pay.

5. By exercise of power under Section 24 of the Electricity Act the electricity was disconnected.

6. For recovery of the loans the mortgaged/hypothecated properties were brought to sale under Section 28 of the Corporation Act.

The Supreme Court referred to the important provision of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948, and held that the law relating to electricity is principally contained in these two Acts. The Supreme Court referred to the various provisions of the aforesaid Acts. Regarding the requirements, for getting electricity supply, for premises, the Supreme Court referred to Shiv Gopal's law, relating to electricity and held that the auction purchaser came to purchase the property after disconnection and cannot be a consumer or occupier within the meaning of the provision of law. The Supreme Court also held as under :

"Electricity is public property. Law, in its majesty, behighly protects public property and behoves every one to respect public

property. But, the law, as it stands is inadequate to enforce the liability of the previous contracting party against the auction purchaser who is a third party and is in no way connected with the previous owners/occupier."

The Supreme Court affirmed the decision in *Sauryar Luka v. Kerala Electricity Board* (AIR 1959 Ker 199) on which reliance was placed by the counsel for M/s. Isha Marbles.

However, the Court cautioned that dishonest consumer cannot be allowed to play truant with the public property but inadequacy of the law can hardly be substituted for over zealousness.

The above is a land-mark judgment not only with respect to consumers of the supply of electricity in the State of Bihar but also for general consumers in the rest of the country. It has become a normal feature that wrong bills are being sent to purchasers of property and or to persons in occupation of the same; in respect of electricity consumed over for which they could not be held responsible in any way. The supply of electricity being essential commodity in the present times, it is all the more important that consumers be not penalised for electricity not consumed by

"CORPORATE DEMOCRACY"

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them and for which they are in no way responsible, and it is high time that the electricity departments wake up to this reality.

Democracy has become well-established in political institutions all over the world. With the increasing importance of economic institutions, which are coming more and more within the ambit of private sector with liberalisation of national economies, it is equally significant to introduce democracy in such institutions as well. It is in this context that democratisation of company administration becomes essential, in order to ensure that the affairs of a company are conducted in accordance with the wishes of the majority of its members. The Companies Act, 1956, specifically contains provisions to this effect.

In fact, for certain matters relating to the administration of a company, which are of special or vital significance, there are provisions requiring passing of special resolutions, wherein a resolution is treated to have been passed only when the votes cast in favour of the resolution are not less than three times the number of the votes cast against the resolution.

However, the experience of company law administration shows that due to certain lacunae in the provisions of the Companies Act, 1956, the principle of rule by majority has not been effectively accomplished. The object of this article is to identify some of such lacunae and suggest corrective measures to democratise the company administration in this country in the true sense of the term, so as to ensure that the administration of com-

panies is conducted as per the wishes of the actual majority of the members of the company and not as per the wishes of an illusory majority.

There are two primary organs of a company between whom the company's powers are divided, namely the Board of Directors and the General Body of members, i.e., the members in the general meeting (Gower, *Principles of Modern Company Law*, 4th Edition, 1979, p. 152). However, according to the legal theory, the members or the shareholders are the ultimate and the final authority within the corporate enterprise (JAC Hetherington, *Corporate Responsibility*, (1969) *Stam LR* 248, 251). The inherent, residual and ultimate powers of a company lie with the general meeting of the shareholders (MA Pickering, *Share Holders Voting Rights and Company Control*, (1965) 81 *LQR* 248). The general meeting of members retains ultimate control, but only through its powers to amend the Articles and to remove the Directors and to substitute others more to its taste. However, until it takes one or other of these steps, the Board of Directors shall be entitled to exercise all powers of the company, subject to certain restrictions (See Section 291).

First, we shall see the manner in which the General Body of members can exercise the said powers of a company.

Sub-section 2(48) of the said Act defines the total voting power in respect of a body corporate, to mean the total number of votes which may be cast in regard to a matter on poll at a meeting of such body, if all the members thereof and all other persons, if any, having a right to vote on that matter are present at the meeting, and cast their votes. The voting rights of individual members of a company are to be exercised as per the provisions of Sec. 87 of the said Act. It is provided therein that every member of a company limited by shares and holding any equity share capital (with which we are mainly concerned here) shall have the right to vote, and his voting right on a poll shall be in proportion to his share of the paid-up equity capital of the company. It may be noted that

every such member holding equity shares has a right to vote on every resolution placed before the company (Clause (a) of sub-section 87(1)).

The General Body of members of a company exercises its powers by way of adopting resolutions at a general meeting of the members. Section 189 of the Act defines two types of resolutions, namely ordinary and special resolutions. Stated briefly, an ordinary resolution is one in which the votes cast in favour of the resolution by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, exceed the votes cast against the resolution by members so entitled and voting (sub-section 189(1)). Thus, an ordinary resolution is passed by a simple majority of the votes cast by members entitled and voting in person, either themselves or through proxy. On the other hand, a special resolution is one, wherein the votes cast in favour of the resolution by members who, being entitled so to do, vote in person or by proxy, are not less than three times the number of the votes cast against the resolution by members so entitled and voting. Put briefly, special resolution means a three-fourth majority of the votes cast by members of the company, voting in person or through proxy.

Thus, it is important to note that the simple majority or the three-fourth majority in the general meeting of members, as the case may be, is required to be judged from the votes cast by members who are entitled and who vote in person or through proxy. It is also pertinent to note that wherever an entitled member votes by proxy, the proxy is required to remain present in person in the general meeting of the members where the vote is to be cast. Thus, again the emphasis is on personal presence in the general meeting. As we shall see in the following paras, the requirement of personal presence of the member himself or his proxy in the general meeting is one of the biggest impediments in the way of rule by majority in a company, which is an established norm of democracy.

Next, we shall see the manner of appointment of the Board of Directors of a company,

which is the other organ for the management and administration of a company. The success of a company depends, to a very large extent, upon the competence and integrity of its directors. It is therefore necessary that management of a company should be in proper hands (See *Indian States Bank Ltd. v. Sardar Singh*, AIR 1934 All 855). Once a Board has been properly constituted, it has the authority to exercise all powers of the company as are authorised under the Act, Memorandum or the Articles and even the General Body of members do not have any control over such powers of the Board, other than by way of amending the Articles (so as to take away, for the future, certain powers from the Directors) or to remove the Directors as also to substitute others who are more amenable to it. Such being the extent and scope of the powers of the Board of Directors of a company, it is of paramount importance to ensure that the Board is constituted and it acts as per the wishes of the General Body of members of the company. This implies that the constitution of the Board should be through a democratic process capable of properly reflecting the wishes of the members of the company. In the absence of the same, a Board supported only by a minority of the members can corner the management and administration of the company to the detriment of the majority of the members.

It is laid down that subject to other provisions of the Act, in respect of a public company, or of a private company which is a subsidiary of a public company, not less than two-thirds of the total number of Directors of the company (unless the Articles of the company provide for retirement of all Directors at every annual general meeting) shall be persons whose period of office is liable to determination by retirement of Directors by rotation and such Directors shall be appointed by the company in the general meeting (Sub-section 255(1)). The remaining Directors in the case of such a company and all the Directors in the case of a private company which is not a subsidiary of a public company, can be appointed in accordance with the regulations contained in the Articles of the company, and in default of and subject

to the same, such Directors can be appointed by the company in its general meeting.

Thus, it can be seen that one-third of the Directors of a public company (with which companies we are mainly concerned here) can be appointed in a manner prescribed in its Articles. For instance, they may be appointed for life, or for 25 years' period, subject, of course, to the other provisions of the Act. Full liberty has been given in respect of the appointment of such Directors, numbering not more than one-third of the total number of Directors, subject to certain provisions of the Act. Obviously, the method of appointment of such Directors may not necessarily be through a democratic process and a lot depends upon the Articles of the company, as framed by the original subscribers of the company or as amended from time to time.

As regards the appointment of remaining Directors numbering not less than two-thirds of the total number of Directors also, it may immediately be seen that they are required to be appointed by the General Body of members in the general meeting on rotation basis by way of adopting ordinary resolution in the general meeting in accordance with the provisions of Sec. 263 of the Act. Such ordinary resolution for appointment of such a Director has to be adopted by a simple majority of the votes cast by members entitled and voting in person or by proxy (Section 189(1)). As we shall see in the following paras, this method of appointment of Directors of a company also is generally not in accordance with the principles of rule by majority, which is an established norm of democracy.

The other methods of appointment of Directors on the Board under the provisions of Sec. 260 (i.e. appointment of additional Directors by the Board of Directors itself if authorised by the Articles) and Sec. 262 (i.e., filling of casual vacancies among Directors by the Board of Directors), can in no way be termed as democratic methods of appointment of Directors by the General Body of members.

Thus, the only so-called democratic

method of appointment of Directors, is regarding the appointment of not less than two-thirds Directors in a public company by the general meeting of the company (the other methods of appointment of Directors not necessarily being democratic, as explained in para 7 supra). This is the only method by which the General Body of members can exercise any control over the appointment of Directors, who in turn exercise most of the powers of a company as explained above. This has to be done by passing an ordinary resolution in the general meeting. Likewise, as noted in para 4 supra, the powers of management and administration of a company which are entrusted to the General Body of members are also required to be exercised by passing ordinary or special resolutions, as the case may be. In both of such circumstances, the resolutions are required to be passed by a simple majority or a three-fourth majority, as the case may be, of the votes cast by the members voting in person or by proxy.

However, unfortunately, voting in person or by proxy is not a practicable proposition for most of the members of a company and thus, this single provision in the said Act becomes the biggest impediment in the process of democratisation of the company administration. Considering the fact that India is a big country, with many inaccessible remote places where a large number of members of a company, albeit with small holdings, may be spread all over the country (Members with small shareholdings residing outside India is also not uncommon now-a-days), it is normally not practicable for the common members of a company to attend the general meetings of a company for exercising their voting rights and thereby controlling the management and administration of the company. Added to this are the time and the cost factors which to a large extent dissuade even the most alert and enthusiastic members of a company from attending its general meetings for exercising their voting rights. As it happens, even those members of a company who reside at the place where the general meeting of the company is to be held, normally are not able to attend such a meeting due to the time and the cost factors and also

due to their small holdings. Moreover, general meetings of many of the companies are conducted at far-flung and remotely located small places, making it inconvenient and impossible for most members to attend such meetings.

In view of these practical difficulties, the provision of voting in person or by proxy unfortunately ensures that members holding only a fraction of the equity of a company may be in a position to attend the general meeting of a company and exercise their voting rights.

With the latest SEBI guidelines, even a new company can make a public issue of capital with only 25% or only 20% of the equity contribution coming from the promoters (depending on the size of the issue). This means that the promoters may hold as little as only 25% or 20% of the equity of a company, the remaining equity being held by a large number of investors in small lots. As many of such large number of investors with small holdings, spread all over the country, may not be in a position to attend the general meetings of a company, the promoters with as little as 25% or 20% of the total voting power may dominate the general meetings of the company and may get a Board of Directors of their own choice appointed, may get passed such ordinary and special resolutions as they like, and may also amend the provisions contained in the Memorandum or Articles of the company in the manner they like with least possible difficulties. In fact, as the experience shows, in certain well known companies, the promoters/management hold as little as 10% of the total equity of the company and yet they are able to dominate the management and the general meetings of the company.

Instances of unscrupulous promoters with minority or minuscule holding in the equity, monopolising the management and the general meetings of the company and thereby obtaining unfair benefits at the cost of the common members, are not uncommon. The recent spate of preferential issues made by various companies to their promoters/others at very small fractions of the existing market

prices of the shares of the concerned companies, is a live illustration of such practices. Examples in which the promoters or the management of a company, though holding minority or a very small fraction of the equity of the company, have used the companies as their own private properties at the cost of the common members, may be endless.

This exposes the myth of the introduction of the democratic process in the management and administration of a company. What may appear to be a majority of the members of a company may actually be an illusory majority and in fact a minority only, because it may represent only the majority of the actual votes cast by members voting in person or by proxy and not the majority of the total voting power of the company. For illustration, if members holding only 40% of the total voting power of the company are only able to attend the general meeting of the company, this means that an ordinary resolution and a special resolution adopted by them may have support of as little as 20% (i.e., 50% of the 40%) and 30% (i.e., 75% of the 40%) of the total voting power of the company respectively, exposing the myth of the rule by majority.

As detailed in the foregoing paras, the biggest impediment in the process of democratisation of company administration is the provision of voting in person or by proxy. Therefore, there is an urgent need for suitable amendments in the Companies Act, 1956 to overcome the difficulties caused by this provision. With the latest developments in information and communication technology, it may not be that challenging to overcome this difficulty.

As a simple measure, it is suggested that the difficulties caused by the provisions of voting in person or by proxy can be overcome to a great extent by introducing the system of voting by postal ballot in the general meetings of a company by way of making specific provisions to that effect in the Companies Act. It may be germane to note that it has been held in the case of *Kunwar Brij Bhushan v. Dehradun Tea Co. Ltd.*, 1980 Tax LR 2023 (All), that it is possible for the Chairman in the exercise of the power conferred on him by

sub-section 185(1) of the Act for regulating the manner of poll, to permit casting of votes by post. However, it is held in *MacMillan v. Le Roi Mining Co. Ltd.*, (1906) 1 Ch 331, that unless there is a provision to that effect in a company's Articles, ballot papers cannot be allowed to be sent to the members by post and to be returned by them under their signatures to the office of the company. In fact, in view of the specific provisions contained in Sec. 189 regarding the requirement of voting in person or by proxy, the validity of permitting voting by postal ballot as per the existing law is doubtful, even if the Articles of a company authorise the same. It is a well established principle of Company Law that Articles of a company cannot contravene the specific provisions of the Companies Act. Therefore, the Articles of a company permitting voting by post may not be valid in view of the specific provisions of Sec. 189 of the Act, unless there is a provision for some sort of ratification of the result of such voting by post by a general meeting of the company. It may be mentioned here that a similar view appears to have been expressed in the Guide to the Companies Act by A. Ramaiya (12th Edition 1992, p. 1223), to the effect that a company may adopt regulations providing for any preliminary mode of elections for the appointment of Directors, such as choosing the candidates by postal voting, or ballot or otherwise and then submitting those chosen for approval by the Annual General Meeting, provided that such procedure does not contravene any provision of the Act.

This view is further supported by the judgment in the case of *Mica Export Promotion Council v. GCL Joneja & Sons*, (1968) 1 Comp LJ 301 : (1968) 38 Com Cas 371 (Cal), wherein it was held that where, as is usual in the case of companies limited by guarantee, such as a Chamber of Commerce or other association or club, the rules of the company prescribe mode of election of committee members by ballot or in any other manner, such rules cannot override the provisions of Sec. 256 or Sec. 263 of the Act (which provide for the appointment of Directors in the general meeting). The proper procedure in such case will be to submit the results in such

election for approval by the Annual General Meeting. Without such approval, there will be no valid appointment of the persons so elected or chosen.

In view of these difficulties, presently even if the Articles of a company provide for the process of voting by post, the results of such voting will not be valid unless the same is approved in the form of a resolution in the general meeting, as required by Sec. 189 of the Act. As the approval of the result of such a voting by post will again have to be approved by the members voting in person or by proxy in a general meeting, this will mean the same thing as if there had been no voting by post because those members who vote in person or by proxy over such result may very well reject the same and have their own ultimate say.

Therefore, in order to ensure that the management and administration of a company is conducted in accordance with the principles of democracy and all members of the company are able to exercise their voting rights (which is a statutory right in view of the provisions of sub-sec. 87(1) of the Act), it is essential that suitable amendments are made in the Companies Act, 1956 by including the facility of voting by postal ballot. The finer details and procedure of the process of voting by postal ballot can be worked out in order to ensure that the same does not become a farce. This can be ensured by making provisions for some independent authority or agency for supervising the exercise of voting rights by post.

Arguments may be raised by interested parties against the proposal for introduction of provisions relating to voting by postal ballot saying that it may be expensive or cumbersome, or that it may lead to delays or also that it may be misused or that there may be fraudulent exercise of such voting. However, considering the benefits which may accrue by introduction of voting by postal ballots, such as

(i) democratisation of the administration of the company,

(ii) protection of small investors/minority investors,

(iii) prevention of centralisation of powers and misuse of the same by promoters holding minority stakes in the equity,

(iv) more transparency in administration of the company,

the aforesaid arguments against the introduction of voting by postal ballot do not hold water. Sufficient procedural safeguards may be provided to prevent any misuse or fraud in the process of voting by postal ballot by promoters or other interested persons.

It is suggested that it may be worthwhile to introduce voting by postal ballot at least in respect of appointment of Directors who are to be appointed on rotation basis in general meeting and also in respect of special resolutions in general meetings which are meant for more important functions of the company.

It may further be suggested that in view of the latest revolutionary advancements in the field of communication such as E-mail, voting by this method may also deserve consideration with necessary procedural safeguards, if not today then may be in the not-too-distant future.

In case, introduction of voting by postal ballot is not found feasible, certain other measures as mentioned below may be suggested as alternative methods for democratising the management and administration of companies :

(i) Sec. 174 of the Act provides for quorum for meetings of a company to be 5 members personally present in the case of a public company (other than a deemed public company by virtue of Sec. 43-A of the Act), and ~~2 members personally present in the case of~~ any other company. This provision may be amended in respect of a public company (with which we are concerned here) to provide for a quorum of such minimum number of members personally present who represent at least 50% of the total voting power of the company as defined in sub-section 2(48) of the Act.

Such enhanced quorum may be provided at least in respect of and for the purposes of important matters such as appointment of Directors or passing of a special resolution.

(ii) At least in respect of big companies, e.g., say for companies with paid up equity capital of Rs. 10 crores or more, it may be made necessary by introducing necessary amendments in the Act, to provide that facility of voting in person or by proxy shall be made available by the company in all or some specific metropolitan cities simultaneously (with or without the assistance of the video conferencing technology). Thereafter the total votes cast for a resolution at different places may be compiled and collated. This will enable members residing in different corners of the country to exercise their voting rights with less efforts and less inconvenience and will ensure that a large number of members are in a position to exercise their voting rights.

(iii) Necessary amendments may be made in the Act to provide that in respect of a special resolution at the general meeting of a company, in addition to the requirement of three-fourth majority of the votes actually cast by members voting in person or by proxy (as required by Clause (c) of sub-sec. 189(2)), the total votes cast in favour of the resolution shall not be less than 50% of the total voting power of the company as defined under sub-section 2(48) of the Act. This will ensure that

members holding at least 50% of the total voting power of the company have consented to the special resolutions at the general meetings of the company, thereby democratising the company administration at least in important matters. Similar provisions, albeit may be with a lesser percentage of the total voting power of the company, may be made by amending the Act in respect of resolutions for appointment of Directors on rotation basis in the general meetings.

(iv) In respect of the public companies, it may be provided by amendment of the Act that all Directors of the company shall be appointed on rotation basis in the general meeting.

It may be pointed out that in these alternative measures suggested in sub-paras (i) to (iv) supra need to be introduced in the Act if the possibility of introduction of voting by postal ballot is not found feasible. However, the suggestions made in sub-paras (iii) and (iv) supra may be considered in addition to the requirement of voting by postal ballot, as it will further fulfil the cause of democracy in the company administration.

The suggestions made in the foregoing paras deserve consideration in order to ensure that the administration of a company is conducted in accordance with the wishes of the actual majority of the members of the company and not of an illusory majority of the same.

"RIGHT TO CONCEIVE VIS-A-VIS RIGHT TO BIRTH"

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Woman by nature possess a right to have a child. She should not be deprived of such a natural right just by a statute. A woman having become pregnant, it is her fundamental right to have a child. She cannot be forced to abort the child. The Constitution of India under Article 21 guaranteed personal liberty which may include the liberty of conceiving a child and giving birth to it. At the same time under various provisions of other laws woman is given ample liberty and

discretion in matters like procreation, abortion and sterilisation. This paper is an attempt to study the legal provisions which affect the right of a woman to conceive and to give birth to a child and the right of an unborn child to birth.

Right to Conceive :

In the month of December, 1993 a father of a minor girl of 16 years age filed a writ petition before the Madras High Court under Medical Termination of Pregnancy Act, 1971 for a