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INDEPENDENT DIRECTORS AND THEIR ROLE IN CORPORATE GOVERNANCE

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ABSTRACT

Independent directors play a crucial role in enhancing corporate governance by ensuring objectivity, transparency, and accountability in decision-making processes within organizations. Their primary function is to provide an unbiased perspective, free from conflicts of interest, particularly in the areas of financial oversight, executive compensation, and strategic direction. Independent directors contribute to mitigating agency problems between management and shareholders, thereby protecting the interests of minority investors. They also serve as a key safeguard against potential corporate fraud and unethical practices. While their influence is often defined by legal frameworks and corporate governance codes, the effectiveness of independent directors largely depends on their experience, expertise, and commitment to the company's long-term success. This paper examines the evolving role of independent directors, their legal and ethical responsibilities, and the challenges they face in fulfilling their duties within dynamic corporate environments.

• INTRODUCTION

Being real owners the shareholders appoint the directors through a simple majority resolution passed at the general meetings. Therefore the directors are accountable to the owners. Directors are having fiduciary duty to the shareholders, not to the management. That doesn't mean an adverse or an uncooperative Board. However, the plan and ideas of management may be different from that of shareholders. If any act of the management affects the shareholders' interest, the non- executive directors of the company should raise objections and speak in the interest of the shareholders. This is

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precisely the reason why 'independence' has become such a significant issue to determining the composition of company's Board. With such notion, the security market regulator, the SEBI insisted to constitute the Boards of listed companies with the combination of executive and independent non-executive directors.

An active, knowledgeable and independent Board only can achieve the highest standards of corporate governance. Company's Board should be constituted with such an objective. This objective can be achieved through appointment of independent directors. They can bring all elements of objectivity to Board process and such neutrality will protect general interests of the company and that will be beneficial to minority and smaller shareholders. The very purpose behind the appointment of independent directors is to scrutiny each and every activities of Board and to ensure independence and neutrality in the Board.

In India, the term independent director was coined first time by the CII's "Desirable Corporate Governance Code 1998" and this Code recommended constituting the Board of listed companies with professionally competent, independent non-executive directors. In 1999, the Birla Committee defined the term 'independent director' first time in the Indian corporate regime and enlightened the importance of those directors in the improvement of corporate governance standards. In accordance with the recommendations of above said both Committees' reports, the SEBI inserted Clause 49 in its Listing Agreement in 2000. After that, the independent director concept has been strengthened by the Reports of Naresh Chandra Committee 2002, Narayana Moorty Committee 2003, JJ Irani Committee 2004, Corporate Governance Voluntary Guidelines 2009, Kotak Mahindra Committee on Corporate Governance 2017. However the Companies Act 1956 was silent in respect of appointment, role, functions, duty and liability of independent directors.

- **Requirement of the Independent Directors under Regulations of the SEBI**

Before the 2013 Act, the security market regulator SEBI mandated the appointment of independent directors through its Listing Agreement. But the agreement binds only the listed public companies. The requirement under Listing Agreement is stricter than the 2013 Act. The Listing Agreement requires that if an executive director is the chairperson of the Board fifty percentage of the Board or if a non-executive director is the chairperson one third of the Board should be with the combination of independent directors. The SEBI enacted SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 on 2nd September 2015. This regulation has inducted most of all aspects relating to corporate governance mentioned in the Listing Agreements of SEBI.

- **Requirement of the Independent Directors under the 2013 Act**

The high profile corporate governance failure of India's fourth largest software company the Satyam Computers Ltd, urged the policy makers to strengthen the corporate governance standards. As a result of that failure and its experiences, the Companies Act, 2013 gives more importance to develop the standards of corporate governance. Especially, it mandates to include the independent directors and explains their role, power, functions, duties and liabilities under various provisions of the Act. It provides a code of conduct to independent directors in the Schedule IV of 2013 Act. The Act compels all listed companies to appoint minimum 1/3 of the total numbers of Board as independent members and minimum two members of Board as independent members in other unlisted companies which have 10 or more than 10 crore rupees as paid-up share capital, or 1 crore or more than 1 crore rupees as turnover in a financial year, or aggregate of debt capital such as debentures and loans or borrowings of more than 50 crore rupees[2]. The prescribed requirement ratio of independent director under Listing Agreement applies only to listed public companies. The Board ratio given in the 2013 Act applies to unlisted public and all listed companies.

- **Selection and Appointment procedure of Independent Directors**

An eligible person may be selected as an independent director from a data base / bank containing important particulars such as name, address, education and other details of candidates who are capable to be appointed and have willingness to act as such. The data base may be maintained by any institution, association or body which are recognized by the Central Government and have experience in formation and maintenance of such data base. Now, the data base / bank is being prepared by the Independent Directors Repository. After such selection of eligible person from the repository, the selected person will be appointed as independent director by the shareholders having voting rights in the general meeting of the company like the appointment of an ordinary director. Besides, the basic requirements and qualifications to the appointment of an ordinary director, the selected person must also possess suitable balance of skillfulness, understanding and familiarity in the fields of finance, law, corporate administration and dealings, promotion of marketing, supervision, research, ability in the technical operations, corporate governance and other allied activities related to the company's business to be appointed as independent director. Such appointment should be formalized through a letter authorized by the concerned authorities. The letter shall contain the tenure of office of the appointed independent member, expectancy of the Board and its Committees from the member, primary duties, responsibility, Ethics Code for the office, list of actions which are restricted to do in the functioning

[2] Sec.149(4)oftheActof2013,andthisessentialaspectshavebeenclearlylaiddowninRule4of2014 CompaniesRulesrelated toappointmentanddisqualifications

period of the office and remuneration for the office and reimbursement of expenses for participation of Board meetings and its Committees' meetings. After such appointment, the company's Board has duty to furnish a statement in its report regarding the skills, experience and knowledge of the appointed independent director.

- **Limits on Directorship**

As per the 2013 Act, a person cannot hold office as Board member in more than twenty companies simultaneously. If the person holds his office in public companies, the maximum number of directorship is ten.[181] The Act does not specifically prescribe any limit on directorship of independent directors. But the SEBI in its Listing Agreement limits the number of directorships of independent directors. The Clause 49 (II) (B) stipulates that the maximum number of independent directorship for an individual in public listed company is seven and if such individual hold whole-time directorship in any public listed company he cannot hold more than three independent directorships in listed public entities.

- **Tenure of Office**

An independent member of Board may hold office for two consecutive terms. A term has five consecutive years. He may be appointed in the same Board where he had held his office, only after completion of three years period from the last day of the previous ten years tenure. For such appointment, the person should not be connected with that company in any way either directly or indirectly for above said three years duration.

- **Duties of Independent Directors**

Independent directors have all duties which an ordinary director holds. Apart from that, they have some additional duties in the Board and its committees. Independent directors shall keep themselves well informed and get updating of all information about the company in which he serve, seek clarification on affairs of company or know the all information and if it is necessary take professional advice or opinion of experts from outside, concentrate on protection of interest of the company and its all stakeholders, ensure fair functioning of vigil mechanism, pay sufficient attention to related party transactions and report to concerned authorities regarding violation of any norms prescribed by them.

- **Liabilities of Independent Directors**

Being an outsider, independent director is liable, only if any illegal commission or omission occurred with his knowledge and consent. Secondly, they will be liable if they do not act diligently while discharging their duties. The Supreme Court held that the director who was in charge of company's

administration and had responsibility to conduct the day-to-day business of the company shall be liable for the offence if that offence was committed during the tenure of such responsible director[3]. However an independent member will not involve in the day-to-day affairs and not liable if any wrong happened in such daily functions of the company[4].

- **Failures of Directors including Independent Directors**

Control on directors is prevailing in all countries irrespective of jurisdictions. For various reasons and circumstances, many of the cases left unreported. Though there is dependence of directors in reality, plaintiffs were able to prove only in few reported cases and many cases like *Cent Laborers' Pension Fund, In Re the Goldman Sachs* and *McElrath* remained unproved. Independence of director has been tested through various tests and endorsed by Indian and Foreign courts. Especially Delaware Supreme Court fixed evolved Aronson test for demand futility and the same was applied to find out independence of director in the following cases.

- **Aronson v. Lewis**[5]

In this case the plaintiff, who was a Stockholder of Meyers Parking System, Inc. (Meyers) a Delaware corporation filed a derivative action before the Court of Chancery against Meyers and its ten directors, where most of them were also company officers. The plaintiff alleged that there were certain transactions between one of the Directors, namely Leo Fink and Meyers. Fink owned 47% of the outstanding shares and was also alleged to have selected the rest of the board members. The defendants had sanctioned an employment agreement between Fink and Meyers which paid hefty sums of money to Fink for his services as consultant after retirement and also included death benefits. The complaint also stated that the Board approved interest-free loans to Fink which stood unpaid during the time of filing the complaint. These transactions to Fink were claimed by the plaintiff as a waste of corporate assets and added that they were merely additional compensation to Fink without any consideration to Meyers.

The complaint stated three reasons for demand futility, which are: (i) All the directors are listed as defendants to the suit and have been accessories to approve the transactions, which make them personally liable; (ii) Since all the directors were appointed by Fink, they are all not independent and

[3]*S MSPharmceuticalsimited*v.*Netha Bhalla,*(2005)8 SCC89

[4]*KanarathPayattiyath Balraj*v.*RajaArora*2017(3)TMI624- DelhiHigh Court

[5]473 A.2d 805(1984)

are under the control and dominance of Fink; (iii) If the demand were to be submitted to the board, it would mean that they would have to sue themselves, which would thereby prevent effective execution of demand. The trial court decided in favor of the plaintiff and held that there were enough particularized facts to support the claim of demand futility. This decision was appealed by defendants.

The Supreme Court had stated that in order for a plaintiff to prove demand futility, they need not prove that the transaction is not of best interest to the business but rather prove that the pre-suit demand cannot be considered by the board as there is an inference that the business judgment rule cannot be applied under Rule[187] 23.1. The court further stated that any issue related to demand futility[188] will definitely revolve around the doctrine of Business judgment and that the rule is an acknowledgment of the managerial authority of Directors u/s 141(a) of Delaware general corporation law. From the various cases cited, the court observed that when the directors or officers are influenced to misuse their discretion, they cannot be allowed to sue on behalf of the Corporation.

The Supreme Court found that the trial court must use its discretionary powers to determine from the particularized facts whether there is reasonable doubt as to: (i) The interest and non-independence of directors; and (ii) The transaction in question is a product of a valid business judgment. The court declared that the concept of director independence is derived from the applicability of the doctrine of business judgment. According to this observation, Independence would mean that the director's decision would mean that the director must make decisions that are beneficial to the corporation without being influenced by external factors. While they can discuss and confer among fellow directors or other qualified persons, the final decision must be a solution derived from the consolidated advice and counsel of others which is a product of their own sense of business judgment.

As per the analysis of the Supreme Court, for a plaintiff to claim excusal of demand under Rule 23.1 of the Delaware Chancery Court Rules, he must provide adequate particularized facts that could possibly create a reasonable doubt that; (i) the directors could be interested in the transaction or (ii) the decision made by the board to make such alleged transaction was not a product of business judgment rule. The Supreme Court of Delaware applied the Aronson test and added some more aspects in the following cases to determine the independence of director.

- **Rales v. Blasband**[6]

Easco Hand Tools, Inc., a Delaware corporation, merged with Danaher in 1990 wherein Danaher wholly-owned Easco as its subsidiary. Blasband was a stockholder of Danaher at the time of filing the

[6] 634 A.2d 927(Del.1993)

complaint and he derivatively filed against the directors of Easco, which made it a double derivative suit. The Rales Brothers were originally directors of Easco prior to the merger and continued to be directors after the merger too. Prior to the merger, the Rales brothers also had office posts in Danaher and resigned it to become a member of the board after the merger. The board after merger consisted of eight members including the Rales bros., out of which a number of them were either directly connected to the Rales bros. or are in relationship with entities that are controlled by them. In 1998, Easco sold $100 million worth of notes in a public offering and pledged to use the amount for repaying outstanding debts, funding corporate expansion and other corporate purposes. The prospectus further stated that the balance amount would be used to invest in government and other marketable securities that would yield a comparatively lower return rate than the interest attached to the notes.

However, as per Blasband's allegations, the defendants did not invest the balance amount as stated in the prospectus but instead used it to buy "Junk Bonds' of Drexel Brumham Lambert Inc., which substantially declined in value, thereby creating losses for Easco and its stockholders. The plaintiff alleged that the Easco Board breached its fiduciary duty by enabling Rales bros. to act against the interest of Easco by approving the purchase of the junk bonds which was an action by the Rales bros. to improve their business relationship personally with Drexel. Blasband also alleged in his complaint that the board of directors of both Easco and Danaher did not consider his request for investment related information.

Since this case was a double derivative suit where the stockholder of the parent company Danaher was seeking a cause of action for the subsidiary Easco, the court faced with the problem as to determine the applicability of the Aronson case tests for demand excusal. According to the Aronson tests, the plaintiff has the burden to create reasonable doubts as to the independence or interest of directors in the transaction in issue or if a majority of the directors have been beholden of the interested director which created a conflict of interest that could sterilize their decisions. Although the principle is clear in the aspect of establishing reasonable doubt to invoke demand excusal, the court found that the principle can only be applied when the Board that would be considering the complaint, had it been made prior the suit, would be able to make an uninfluenced business decision. Therefore, the court concluded that it must analyze the particularized facts of the complaint to determine if there is reasonable doubt as to whether the board would appropriately exercise its powers independently and disinterestedly to respond to the demand or not. For the purpose of determining if a director is interested, the plaintiff must prove that the director in question will receive any material benefits from the transaction which is not equally shared among the stockholders. Similarly, the director is considered to lack independence if he or she is

beholden to the interested director or is under the influence of the interested person in such a way that their discretion would be sterilized.

In the current case, as per the particularized facts submitted by Blasband, it can be concluded that the majority of directors are directly interested or lack independence to consider the demand had it been made before them. Further the court inquired whether the board would have been able to exercise their disinterested and independent power to consider the demand if it were made before them. The court felt that the particularized facts pled by Blasband were sufficient to create a reasonable doubt on the above grounds and hence declared the demand futile, thereby excusing it.

- **Brehm v. Eisner**[7]

The case stems from the stockholder derivative complaint filed before the Court of Chancery, which was dismissed due to failure of submission of particularized facts that created reasonable doubts that the Board of directors was interested or dependent or had acted beyond the ambit of business judgment rule. On appeal, the SC dealt with three claims; (i) The old board of the Walt Disney Company constituted in 1995 had breached their fiduciary duty by allowing the extravagant employment agreement of the then president of Disney, (ii) The new board constituted in 1996 also breached their fiduciary duties by approving the "non-fault" termination of the president's extravagant employment agreement, and (iii) The directors involved were interested and not independent with respect to the challenged transaction. The plaintiff cited quotes from media in order to comply with the Chancery Rule 11(b)(3) and Rule 23.1, which were considered inadmissible since they were merely an extension of the plaintiff's conclusory allegations against the defendant. The court however considered each claim one by one in an effort to draw inference in favor of the plaintiff and decided to review the complaint de novo.

Firstly, the issue of the employment agreement being admitted by the old board was considered. The plaintiff claimed that the board did not exercise due care upon the costs that would be incurred upon the termination of the president. The defendants challenged this claim by establishing that the decision to approve the agreement was made by taking into consideration of an expert's advice. So the court was of the opinion that the board's decision fell under the presumptive protection of the business judgment rule as the board was acting in compliance with the expert's advice and not on self-interest.

[7]746.A.2d.244.(Del. 2000)

Secondly, the issue of termination of agreement by the new board with an exorbitant termination cost was examined. The court presumed that the new board acted within the ambit of the business judgment rule while approving the severance agreement as the board had to also deal with the possibility of a litigation at that point of time. The contention of the plaintiff that the new board made a loss by agreeing to the lucrative payout deal under the non-fault termination agreement was well received by the trial court but could not decide on it because the complaint failed to establish sufficient proof to show that any reasonable businessman would not have done the action.

Thirdly, while considering the independence of the Disney Board, the court placed reliance on the Aronson case's two prong test. The test requires that there must be reasonable doubt created by particularized facts that the directors are dependent or interested or that the challenged transaction is not a product of a business judgment by the board. The trial court in this regard held that there was no reasonable doubt about whether Eisner was disinterested or not with the employment agreement made between Disney and the president. The SC affirmed this stance of the trial court. Finally, the SC partly agreed with the trial court and partly reversed the decision. The plaintiffs were asked to replead the facts to support that the board was not protected by the business judgment rule.

- **Biondi v. Scrushy**[8]

This derivative suit was filed by the stockholders of HealthSouth Corporation against its Board of directors. The cause of action for the suit arose when a few directors allegedly sold large blocks of company stocks with the help of non-public information that they possessed. One of the purchasers in these transactions was Richard Scrushy, who was the then CEO of HealthSouth. Once the insider information was made public, the stock prices of the company plummeted and HealthSouth was deeply impacted. So the plaintiffs filed these well pled suits on behalf of the corporation. The Special Litigation Committee (SLC) of HealthSouth board moved the court to stay these actions on two grounds; (i) There was a derivative action already filed and pending before the Circuit Court of Jefferson County, Alabama, so the present actions must be stayed, and (ii) The SLC must first finish its investigation and find out what course of action is best for the company before the court can decide on it. The court considered the two motions separately in detail.

As for the first ground to stay, the court felt that although the action was filed first by Tucker in Alabama, the contents of the two complaints filed are completely different and the facts pled here are well researched stating particularized facts of the entire process. While considering whether to defer to

[8]820. A2d.1148. (DelCh 2003)

a first-filed suit, in cases of derivative actions where the plaintiff requires representation, the interest of the plaintiff who is being harmed must be considered and not the lawyer who filed the suit first. In comparing the claims made in the Tucker complaint and the Delaware complaint, the emphasis lies on different transactions in each of the complaints. By giving important to the quality of the complaints over the speed of filing the actions, the court decided not to allow the stay of the action under the first ground.

The second issue regarding the SLC's investigation was also extensively analyzed by the court. The plaintiffs countered this motion by stating that the SLC will not decide upon the actions in an impartial way and when there is clear evidence that the committee will simply decide on its self-interest without consideration to the plight of the corporation, the court must not accept the motion. It is the duty of the court to give space for a SLC to complete its processes properly without any interference when asked for. But the court opined that under dire circumstances where there is reasonable doubt as to whether the committee will act without bias, the court can defer to the SLC's decision to terminate only when it is made sure that the members of the committee were independent, had a valid reason for coming to the conclusion and that they were acting in good faith. The entire purpose of setting up a committee is to entrust the decision making process to a set of trustworthy directors who would act indifferently at all costs. The court found that when the SLC is not able to decide upon the forum for litigation is a clear indication that the same confusion would arise leading to the termination of the Delaware action suit. Hence the court declared that the motion to stay will be dismissed on the second grounds too. Hence the SLC's motion to stay the actions was denied.

V. In re Oracle Corp Derivative Litigation[9]

A set of derivative actions were filed by the stockholders of Oracle Corp against the Board of Directors of Oracle for insider trading using non-public information known to them due to their position in the board. According to the complaint, the defendant possessed material non-public information that the company would not be able to make the cut for the earnings and revenue guidance. The plaintiffs made two certain claims against the defendants; (i) the defendants have breached their fiduciary duty of loyalty by misappropriating the intimate information that they possessed for their own good without consideration to the impact it would have on the corporation; (ii) as for the directors who were not involved in the trading, they are alleged to have been indifferent to the gross variation in the guidance and reality.

[9]824. A.2d.917.(Del. Ch.2003)

The Special Litigation Committee (SLC) which consisted directors as members was constituted by the board to decide on whether the derivative actions must be settled or terminated or if Oracle should press the charges raised and the committee had full authority to proceed with their decision without having to consult the other board members. The SLC decided to terminate the litigation and moved the court to dismiss the complaints.

The court looked into whether the plaintiffs have pled that the SLC was independent in making the decision to terminate, whether SLC acted in good faith and if the committee exercise reasonable business judgment to arrive at the decision. Regarding the independence of the committee, the court found during discovery that a few members of the SLC were related to the members of the board by being associated with Stanford University. The SLC contended against this claim by stating that the merely establishing that the trading defendants, Oracle, Stanford and the members of the SLC are connected; this does not raise reasonable doubt regarding independence of the SLC. The SLC stated that the independence of the directors is predominantly questioned only when a proper economically consequential relationship between the involved parties is established, as seen in the various precedents of the court. The court examined the facts to see if the committee has demonstrated adequately about its independence and if the committee has applied its reasonable business judgment to arrive at the decision.

The court found that the SLC did not meet the standards and that the SLC did not sufficiently prove its independence. It was found in the discovery that the SLC was ignorant to the transactions made by the directors and the impact it had over the corporation, which made the court to infer a reasonable doubt as to the ability of the committee to be able to consider the demand of breach of fiduciary duty by the directors. Since there was sufficient doubt as to the independence of the SLC, the court did not venture into the good faith and reasonable judgment aspects of the case and thereby declared that the committee was filled with members who have bias- creating relationships. The court ordered to dismiss the SLC's motion to terminate.

Beam Ex Rel. M. Stewart Living v. Stewart[10]

The plaintiff filed a derivative action before the Court of Chancery against Martha Stewart Living Omnimedia, Inc. (MSO) and six of its board of directors, wherein the plaintiff was a shareholder of MSO. Out of the four claims filed, three were dismissed under Court of Chancery Rule 12(b)(6) and only one issue remained for consideration. In the claim appealed, the plaintiff alleged that Martha

[10]845 A.2d 1040(2004)

Stewart who was a director and held majority shareholding had breached her fiduciary duties of loyalty and care when she illegally sold some stocks and took advantage of the media attention that resulted from the said sale.

The court found that Martha and another inside director were interested parties and therefore cannot consider demand, to which the defendants did not rebut. The court then considered the plaintiff's allegation that the other directors were not independent. The trial court concluded that the plaintiff did not produce enough particularized facts that created reasonable doubt as to whether the other directors were independent or not. So the trial court dismissed the claim and hence the shareholder went for the appeal.

The Supreme Court of Delaware affirmed the decision of the trial court that the plaintiff did not plead enough particularized facts to provoke reasonable doubt against the incapacity of the other directors to consider demand. In the current case, the court of chancery felt that since there were only six directors in the board out of which two were already declared to be non-independent directors, the plaintiff had to prove that at least one other director was not independent for demand purposes. The SC reviewed de novo the decision of the trial court and hence it is obligated to draw all possible inferences from the particularized facts given by the plaintiff. These inferences must also be in favor of the plaintiff. So, in case these inferences are not objectively reasonable, then it cannot be considered in favor of the plaintiff.

The court further stated that in cases concerned with director independence, there is always a presumption that they were loyal to their fiduciary duties. The burden lies on the plaintiff to prove that the director had freedom to act objectively and independently with respect to the presuit demand. This can be done by producing particularized facts that support the fact that the director had an interest in the outcome of the suit or is otherwise not independent. When the court does not have reasonable doubt in this regard, the presumption stands valid. In case the presumption is successfully rebutted, the demand will be excused as futile.

In Re Jp Morgan Chase & Co. Shareholder Litigation[11]

Three stockholders of JP Morgan Chase & Co (JPMC) filed a class action suit on behalf of all common stockholders of JPMC under the provisions of Court of Chancery Rule 23.1. The defendants in the suit were JPMC and the board of directors. The complaint was filed against to the board on the grounds that they had breached their fiduciary duties by merging JPMC with Bank One Corporation.

[11]906. A2d.808.(DelCh2005)

The merger between JPMC and Bank One was unanimously approved by the Board of directors of both the corporations and JPMC had declared that it would issue shares @14% premium over the closing price of Bank One. The merger agreement stated that the erstwhile CEO of JPMC would continue as CEO of the merged entity for two year, during which period the CEO of Bank One would act as COO and president; subsequent to which the CEO of Bank One would succeed as CEO of the merged entity. The issue arose from the statement made by the CEO of Bank One before the closing of the merger in which he stated that he would have agreed for a no premium deal had JPMC allowed him to be CEO of the merged entity immediately. The plaintiffs here pointed out that the CEO of JPMC could have taken the no premium deal if only he hadn't acted in self-interest to hold onto the CEO title for another two years, but instead he agreed to pay 14% premium to the shares which were considered to be overvalued. The plaintiff claimed that the board breached their fiduciary duty by approving the 14% premium merger deal after declining the no premium offer as the merger diluted their shares and the stockholders of JPMC had a lesser stake in the post-merger entity.

The defendants claimed that the demand made cannot be excused and that the claims made were derivative in nature. Also, the board members were all claimed to be disinterested and independent with respect to the merger and hence their decision would be covered by the business judgment rule.

The court first determined whether the claims of the plaintiff were direct or derivative. It found that the claims were derivative as the injury of dilution was felt more harshly by JPMC rather than the stockholders who owned stocks in the harmed company. Hence, the plaintiffs were only harmed indirectly because they owned stocks in JPMC that was harmed by the premium paid for consummation of the merger, which made their claim derivative under the first prong of Tooley. According to the second prong also, it was found that any remedy that would be availed from the Bank One would only reach JPMC and not the stockholders included in the class and hence the plaintiffs were only making a derivative claim and not a direct claim.

The other issue considered by the court is that of the demand futility. Under Chancery Court Rule 23.1, the stockholders are to first present the demand before the bard before approaching the court, unless the demand is proved to be futile. The court relied on the Aronson tests to determine if the demand can be excused. Under the first prong, the plaintiff has the obligation to prove that a majority of the directors were interested in the transaction and non-independent in decision making. As per the analysis of the court, the plaintiffs failed to bring enough facts to create reasonable doubts as to the interestedness or the non-independence of the directors. Similarly, under the second prong too, the plaintiffs couldn't prove that the directors acted in bad faith or made a decision beyond the scope of the business

judgment rule. Hence, there plaintiffs did not provide adequate particularized facts to create reasonable doubt against the board. Since the conditions of the Aronson test were not met by the plaintiffs, the demand was not excused and hence considered not futile.

CONCLUSION

Good corporate governance practice protects the interest of all stakeholders of the company. Such practice enhances the investor confidence, and attracts the investments from Indian as well as foreign investors. It plays pivotal role in the growth of nation's economy through foreign investment. Each and every country's corporate affairs and security market regulators have taken various initiatives to strengthen the standard of corporate governance in their own jurisdiction.

The U.S.A corporate world realized the dire need of corporate governance norms after the 1929 stock market crash. It took many initiatives to prevent the controlling shareholders' domination over the Board. It also introduced independent Board concept of after the stock market crash and the same was strengthened by the Securities Exchanges Act of 1934. This Act introduced a new Board structure, which included the independent directors in the U.S.A corporate world for the first time. After introduction of the structure, the Boards of U.S.A companies changed its function as monitoring Board from that of advisory Board. Later the reports of Treadway Commission and Blue Ribbon Committee mandated constituting of the audit and remuneration committees with only independent directors. Later the SOX Act of 2002 came to be enacted immediately after the high profile corporate failures in U.S.A. This Act has incorporated all the above said requirements in its provisions at present. The SEC has also incorporated and timely updated the listing requirements corresponding to Committee's recommendations and current market positions.

The U.K started to improve the corporate governance only from early nineties. The Cadbury Committee played vital role in the improvement of U.K corporate governance standards. This Committee mandated the constitution of audit committee only with independent directors. It introduced either comply or explain method. In this method, the company may state the status of compliance of the Code or may explain in its annual report the reason for noncompliance. Later on, the Committee headed by Greenbury recommended the introduction of remuneration committee. The subsequent Committee headed by Mr. Ronnie Hampel consolidated the above said two Committees' recommendations and evolved the Combined Code on Corporate Governance - 1998. Thereafter the next three Committees Higgs, Smith and Dirk had revised this Code. The FRC has started updating the Code from time to time and the

U.K Listing Authority has incorporated and implemented the above said recommendations as requirements in its listing rules.

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