



Whether the idea of Single Member Company (SMC), is a device to exploit and to avoid the corporate liability by the Capitalist? A critical Analysis of Section 160 of (Pakistan) Companies Ordinance, 1984

by Rehmat Ali

Abstract

The concept of Single Member Company (the “SMC”) was introduced in Company law of Pakistan in 2002. However, besides having created anomalies within the existing legislation that have already been analyzed by different academics, there remains potential for abuse of the concept of separate legal entity and/or the doctrine of limited liability at the hand of the single member of the SMC. In this view of matter, this article proposes to review the Section 160 of Companies Ordinance, 1984 to argue that there is no provision in the law in Pakistan to effectively place a mechanism of checks and balances so as to reduce the risk of escaping the corporate liability by the SMC in Pakistan. In the same context, this article also dilates upon the inadequacies of SMC legislation in relation to the concept of social, economic and environmental responsibilities of corporate entities.

1. Introduction

The word “company” has no strict legal meaning;¹ however, in legal theory, the term implies an association of a number of people, for some business purpose or similar objects. English law provides two main types of organizations for such associations: *partnership* and *companies*, although the term “company” is colloquially applied to both, the modern lawyer regards companies and company law as distinct from partnership and the law of partnership. Partnership law, which is now largely codified in partnership Act, is based on law of agency; each partner becoming an agent of others, and it therefore affords a suitable framework for an association of a small body of persons having trust and confidence in each other.² Company is described as a body of persons associated for the purpose of business.³ Since the inception of corporations, it is synonymous to multimembers, working on behalf of the company. Thus, keeping in view this rule, a “partnership” and an “individual” can be termed as company, so the concept of plurality in company has no meaning.

In this context, the idea of a SMC seems to create a special atmosphere for business activities irrespective of its proper sense. On the other hand, in Pakistan the idea has been transplanted in a manner that it has created legislative misconceptions in addition to the inherent defects of the philosophy of the concept of SMC. In this view of matters this article aims to answer a question in relation to Pakistan that whether there still remains potential for the single members forming a SMC to escape the corporate liability under the SMC disguise? However, before going

¹ Per Buckley J. in *Tennant v Stanley* [1905] 1 CH 131,134 (Ch)

² Davies, Pual, L, *Gower’s Principles of Company Law* (6th, Sweet & Maxwell, London 1997) 3

³ e.g. as discussed in case *Progress of Pakistan v J.S.C, Karachi* [1958] PLD 887 (Lahore High Court)

further it would be beneficial if the methodology of legislation of Company law in Pakistan is discussed in brief in perspective of its historical background.

2. Single Member Company in Pakistan

The scheme of legislative transplant in Pakistan when seen in the perspective of historical background gives very interesting picture. Before partition of British India, the Companies Act, 1913 was in place and after partition,⁴ the Republic of India took only 9 years to introduce their new version of Companies Act, 1956. However, in Pakistan it took 38 years to introduce Companies Ordinance, 1984. Similarly, the parent jurisprudence of both India and Pakistan owed its genesis from the English Principles of Common Law system, where Board of Trade, Committees and commissions have contributed a lot for development of Company Law. On the other hand, in Pakistan we see only one commission for legislation of Company law.⁵ Similarly, the Company law in Pakistan is not a result of trials and errors but is fixed type of statute which has just transplanted the principles of corporate law borrowed from India and U.K. So much so, the Courts in Pakistan even do not hesitate to quote the precedents from these jurisdictions while deciding the dispute in the corporate world.⁶ This law of SMC was introduced during a Martial Law regime without any public consultation, hence, owes the liability for conceptual fault lines of the current corporate legislation of Pakistan. It is due to these reasons that the concept of SMC in Pakistan has not only an anomalous legislation but appears to have also failed to meet its' social, economic and environmental responsibilities. In this respect, it would not be out of place to mention here that Ilahi⁷ in his article has referred to some anomalies of the SMC legislation and the Companies Ordinance, 1984, however, this article aims to add to the subject and discuss the concept of social, economic and environmental responsibilities of the corporate sector in addition to the question of escape of corporate liability by SMC in Pakistan.

3. Social, Economical and Environmental Responsibilities of SMC in Pakistan

In context of Social, Economical and Environmental responsibilities of Corporation, it is by now well settled that the object of the company should be to promote business, contribute to sustainable development and this calls for a new social and environmental role for business in a global economy.⁸ Hence, in view of latest developments in the forms of SMC law, the question remains that what sort of duties can be performed by the SMC in the society? The visible object behind the SMC is to boost the economic activities in the country with manageable risk. However, by virtue of being the SMC comprising single member it will not be responsible to anybody in the company management as opposed to multimember company. There is no question of quorum of meeting single man is performing one man show. The culture of one man show is mostly disliked by the majority of people. This lack of accountability of single director may cause serious issues with reference to his social, economic as well as environmental responsibilities. It is worth mentioning that in order to monitor the activities of the SMC more officials are required for this purpose. It may be

⁴ Indian Independence Act, 1947 partitioned British India into two sovereign states of Dominion of Pakistan (which later on split into Islamic Republic of Pakistan and Peoples' Republic of Bangladesh) and Dominion of India (now known as Republic of India).

⁵ E.g. see, Rehmat Ali, 'Historical Evolution of Company Law' [2001] Punjab University Law Journal 84, 91

⁶ Ibid.

⁷ "Unsuitable legislative pluralism of the law of the single member company and the legislation on multi-member corporations in the Islamic Republic of Pakistan" by Mazhar Ilahi, The Company Lawyer, Issue 11, (2012); also see Ilahi, M.. "Legislative Transplant of Single Member in Islamic Republic of Pakistan: Anomalies in the Companies 1984", Statute Law Review, 2012.

⁸ As pointed out by Kelly Parsons, Patrick Wilkins, 'European Lawyer' [2003] Euro.Law.12 e.g. 2, 6

stated that SMC have limited role in developing a responsibility, in relation to social, economic and environmental factors of responsibility.

On the other hand, the SMC legislation in itself as transplanted in the legal system of Pakistan is inherently defective and does not commensurate with the exiting corporate mechanism as is already in place. This poses serious question in relation to the facts that: Whether SMC is another tool to escape from risk by the capitalists?

4. Escape from direct liability by the single member in SMC

In this respect, an analysis of section 160 of the Companies Ordinance, 1984 reveals that there remains enough potential for the single member in SMC to abuse the protection of limited liability clause which needs to be addresses to maintain the certainty in the legislation.

This section provides the holding of general meetings of the companies and the quorum. In case of SMC the presence of the single member constitutes the quorum for the meeting of the SMC. The law should provide a mechanism, that any company official can be associated, in conducting of general meeting or other legal activities without any material powers, affecting the business interest of the director (owner) of company but just to witness the proceedings. This implies that there is no one in the meeting to check the mismanagement or arbitrary actions of the single member. On the other hand, if there is mismanagement in company it cannot be checked by the same person. There is a famous rule of natural justice that "no one is judge in his own cause". Same is case with single member who have to take decisions for running of corporate affairs. Who will judge the honesty and transparency of SMC? It is fact that single member has its own capital and energy for flourishing his business, but it should be kept in mind that he is a member of family, society and country as well and he has some environmental, social and economic responsibilities. With this point of view he cannot be allowed to get undue benefits under disguise of separate legal entity. Whatever the case may there should be mechanism for checking the corporate affairs of SMC. The possible method can be, the mandatory official website having all the information regarding the corporate activities of SMC. It should be monitored only by authorized official of the concerned department. This object can also be fulfilled by using the video link conferences as to monitor the activities of the single member companies. The apprehension is that, in absence of positive and active monitoring of the activities of SMCs, there will be deterioration in the development and economic growth in the country.

5. Conclusion

Pakistan came into existence in 1947 and prior to that, it used to follow law laid down by the English Courts. There is great evolutionary development in UK but in Pakistan we borrow the principles of corporate laws from different countries particularly England. In India, there is separate corporate practice, entirely different from banking. It provides a method of feedback regarding the practical hardships in the corporate field. It further motivates the legislature to make amendments in law. Now at this time the mother statute of Indian Company Act 1956 is amended at large scale. Apart from all there is no doubt that Pakistan's Companies Ordinance covers most of corporate aspects but it is not a complete and updated law as compare to other countries. In case of SMC law has been legislated to provide that a single individual or person may form a company just by subscribing to memorandum of association but at the same time it is also necessary to provide certain mechanism for the proper implementation of law, checks and balances on the SMC to ensure maximum benefits for country. The transformation of sole proprietorship into SMC will, of course, help in documentation of economy, however, introduction of SMC in the Ordinance of 1984 is not compatible to the entire existing scheme of company law. Meetings, quorum, management and

other plural functions of the company cannot be performed properly. As already proposed by Ilahi, the best solution is to make separate legislation keeping in view single member responsibility and joint businesses. It is another aspect that SMC be given certain privileges and incentives, keeping in view the betterment of small industry. There should be assurance of non-exploitation in the name of any company whatsoever. SMC should be treated as separate legal entity but liability of single member should be subject to certain qualifications.

Rehmat Ali *Member of bench (working as Civil Judge), District Judiciary, Punjab, Pakistan. LLM candidate BZU, University (Lahore Campus) Pakistan*