

## M&A Hotline

July 17, 2014

### POSTAL BALLOTS CANNOT REPLACE ACTUAL SHAREHOLDER MEETINGS

- All companies to follow postal ballot requirements along with convening physical shareholder meetings.
- Postal ballot - an additional facility which a company has to provide in order to improve shareholder participation and awareness.
- Provisions for compulsory voting by postal ballot to the exclusion of an actual meeting do not apply to court-convened meetings in a scheme of amalgamation.

The text of the new Companies Act 2013 ("CA 2013") has brought about many ambiguities in almost every sphere of corporate action. One of the first judgements to analyse one such an ambiguous position is the ruling of the Bombay High Court ("**High Court**") in *Godrej Industries Limited*.<sup>1</sup> The ruling interprets the provisions of Section 110 of the CA 2013 when dealing with mergers and amalgamations.

In this judgment the High Court discussed whether the provisions of the CA 2013 had the effect of eliminating the need for actual shareholder meetings, the same being substituted by a majority of the equity shareholders casting their vote by postal ballot<sup>2</sup>. The High Court ruled that the provisions for compulsory voting by postal ballot to the exclusion of an actual meeting do not apply to court-convened meetings in a scheme of amalgamation. Observing that Section 110<sup>3</sup> of CA 2013, to the extent that it does away with holding a physical meeting, requires greater consideration and while leaving this issue open for an authority to appreciate the matter in full and decide, the High Court has directed all companies to follow postal ballot requirements along with convening physical shareholder meetings.

This *Hotline* analyses the issues raised in this order and the impact it would have on corporate governance and shareholder democracy.

### BACKGROUND

Pursuant to a scheme of amalgamation, *Godrej Industries Limited* ("**Applicant**") proposed to merge with its group company, Wadala Commodities. In April 2014, it approached the High Court for seeking dispensation for the conduct of the court convened shareholder meeting under the provisions relating to mergers and amalgamations under the Companies Act, 1956 ("**CA 1956**") and pleaded that it may be allowed to conduct the voting entirely through postal ballot and electronic voting as permitted under the CA 2013. Before analyzing the issues which were raised in the instant application and the reasoning behind this order, it would be pertinent to consider the earlier existing provisions that dealt with postal ballots<sup>4</sup> and gauge the changes that CA 2013 has brought about.

Section 110 of the CA 2013 stipulates that certain items of business as notified by the Central Government ("**CG**"), shall be transacted only through a postal ballot. The question that arose was whether the use of the word 'shall' operates notwithstanding any other provision to the contrary under the CA 2013 or the CA 1956.

### RULING OF THE HIGH COURT

The Applicant approached the High Court for seeking dispensation from conducting a physical meeting for approval of a scheme of amalgamation. In support of the same, the Applicant's counsel contended that the legislative mandate of CA 2013 is to do away with all meetings other than those required in certain limited circumstances and that shareholders must express their views only by postal ballot or electronic voting.

The High Court while interpreting the provisions of the CA 2013 clarified that where Section 110 (1)(a) mandates a company to allow for a postal ballot, Section 110(1)(b) specifies that if a requisite majority of shareholders has assented to a resolution by postal ballot, it is deemed to have been passed. Deliberating further on Section 110, the High Court pointed out that meetings called under Section 391 of CA 1956 or Section 230/232 of CA 2013 for approval of a scheme of arrangement are not "called" by the company but are instead "ordered" by the court and the court has the power to dispense with such meetings irrespective of any provisions for postal ballot.

While discussing the legislative purpose and intent behind Section 110 of CA 2013, the High Court held that the provision is clearly directed toward greater inclusiveness and encouraging more shareholders to vote. It was observed that in cases where postal ballot or electronic voting were not provided, the attendance of shareholders and members attending was very low, mainly because the shareholders are often dispersed throughout the country and they find it difficult to attend all such meetings in person. The High Court observed that the underlying principle behind 'voting' is not merely a right to vote on any particular item of business but it also encompasses the right of the shareholder to ask questions, seek clarifications and receive responses before he decides to vote. Therefore to say, that no meeting is required and that the shareholder must cast his vote only on the basis of the information that has

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been sent to him by post or email seems to be completely contrary to the legislative intent and spirit of the impugned provisions of the CA 2013.

The High Court also referred to the SEBI circular dated April 17, 2014 which was relied upon by the Applicant's counsel in his contentions, wherein SEBI mandates voting by postal ballot in cases pertaining to Clauses 35B and 49 of the Listing Agreement and clarified that though these amendments by SEBI have been deferred until October 1, 2014, any such notification by the SEBI which makes postal ballots the exclusive mode of voting on any scheme under Sections 230/232 of CA 2013 would be unlawful and against the legislative intent.

In light of the arguments raised and authorities cited, the High Court ruled in favour of the *Amicus Curiae's* submission that 'postal ballot' is an additional facility which a company has to provide in order to improve shareholder participation and awareness.

## ANALYSIS

One of the most pertinent reasons for the sweeping changes brought about through CA 2013 was the need for greater shareholder protection and transparent corporate governance. Earlier, when meetings were held at any one location, shareholders found it burdensome to travel all the way to such location just to attend the meeting in person. 'Postal ballots' therefore are perceived to be a step in the right direction as they help increase voter participation. On the flipside, it is not advisable to completely uproot the importance of physical attendance at meetings, considering that many shareholders attend meetings in order to gain clarity on the resolutions to be passed and form an opinion for or against the resolutions after consulting and listening to the views of other shareholders. In the total absence of a physical meeting, such pro-active shareholders would be at a loss. Similarly, some shareholders wish to make their opinions known to other shareholders and such a step would rob them of any chance to voice their opinion. These rights, including the right to participate effectively and vote in general shareholder meetings, are captured by SEBI through the recent amendments made to Clause 49 of the Listing Agreement.

The principles which form the basis of this order are extremely pro-shareholder democracy. Though the order in the instant case was passed on technical grounds, the observations made by the High Court are in sync with the present requirements and expectations in relation to corporate governance. The High Court went on to observe that even if a vote has been casted by a shareholder through postal ballot, nothing can stop him from attending the meeting or raising his concerns there. This highlights the High Court's attempt to preserve the interests of pro-active shareholders. By furthering the rights of shareholders through this order, the High Court has laid out the foundation for future judgments regarding shareholder activism and protection.

This is one of the first decisions on the CA 2013 and sets the ball rolling for what we might expect in the future regarding its interpretation.

– Harshita Srivastava & Simone Reis

You can direct your queries or comments to the authors

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<sup>1</sup> Company Summons for Direction No. 256 of 2014

<sup>2</sup> Section 2(65), CA 2013 defines postal ballot as “*voting by post or through any electronic mode*”.

<sup>3</sup> **Section 110 - Postal ballot**

(1) Notwithstanding anything contained in this Act, a company--

(a) shall, in respect of such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot; and

(b) may, in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, transact by means of postal ballot, in such manner as may be prescribed, instead of transacting such business at a general meeting.

(2) If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf

<sup>4</sup> The term postal ballot also includes within its meaning e-voting for the purposes of this *Hotline*.

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