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FRAUD AND CORPORATE GOVERNANCE : **UNFOLDING THE SCANDALS WITH SPECIFIC** **REFERENCE TO DEVAS-ANTRIX CASE**

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Abstract

If one wished to unearth the ground stone of all legislation, beneath all considerations one may find that there are three elements which are of paramount importance and hence take precedence over every other statutory consideration, they are : firstly, mens rea or in simpler terms the intention behind an action, secondly, national security interests and thirdly, welfare of the citizens of a nation. The Devas-Antrix deal challenges all three of these aspects by posing a threat to the nation's income set-up and simultaneously breaching the boundaries of the nation's security interest. This note discusses at length the implications that deals such as Devas-Antrix, which are of such vast magnitude have when it clashes with the government's armour, its resultant effect on corporate governance and whether it initiates a need for a pragmatic approach in the Indian sea of corporate governance. This discussion is initiated by tracing the trajectory of the series of corporate scandals and frauds that resulted in the dissolution of the corporations in question, followed by an analysis of the impact such frauds have on the system of corporate governance. The conclusion focuses on the need for more stringent laws and their observation to regulate the operations of these firms so that they are in consonance with the public interests.

Introduction : What Is The Key To Effective Corporate Governance?

Before dwelling into the aftermath of the Devas-Antrix deal, its important to underline the meaning of corporate governance and what it means in the economic and legal set up of any country. To put simply, every organisation that comes into existence needs a set of rules that are needed for its functioning and defining the limits of its operations. To formulate an analogy, corporate governance can be defined as a set of rules that guide the operations of a corporation which is akin to the way the brain sends signals to different parts of the body through the nervous system for proper allocated working, where each organ has a unique and distinctive function from the other. The brain in this case is formed by the array of shareholders who have financial stakes in the growth of the company, while the board of directors of the company form the nervous system through which the management and supervision of the organs of the body, that is, the executives is regulated, who are thereupon charged with the ground operations and management of the day-to-day activities of their corporations. Another way of understanding the concept of corporate governance can be by seeing it not as body of rules but rather as a dialogue of exchange where power flows from one channel to another, starting with the shareholders of the company that provide funds without which the company cannot exist to begin with and thereby contribute by electing a supervisory body known as the "board of directors" who further delegate their work upon the executives by breaking it down into simpler pieces.

Just as there are three primary elements that guide as legislative intent - mens rea, social welfare and national security interests, there are three central principles of corporate governance :

1. Supremacy of Shareholders of the corporation
2. Security of interest holders of the corporation
3. Community participation and transparency in the operations of the company¹

¹ Kyle Peterdy, Corporate Governance, Corporate Finance Institute (August 14,2022), <https://corporatefinanceinstitute.com/resources/knowledge/other/corporate-governance/>

Elaboratively, these three principles can be seen as the key constituents for good corporate governance. The first of these principles, focuses on the pre-eminent role of those who purchase the shares of the company, and hence partake in the assets and liabilities of that particular corporation. Financial stability is a prerequisite for the formulation of a company and as these shareholders part away with their capital to utilize it for the functioning of the company, their voice in its operations gains a fundamental superiority. These shareholders have an essentially monetary interest in the growth of the company and hence voice their concerns for the well being of the company both directly and indirectly. The former is done through selecting the body of representatives who would compromise the board of directors and the latter is achieved by initiating a conversation with those outside the company who are nevertheless impacted by its existence, therefore connecting the first and the last principle inevitably. For effective engagement in the way a company functions and to regulate its impact on the public of the nation, transparency in the rules and regulations of company is required. This transparency is further linked to the accountability of the company foremostly, to their shareholders and secondly, to those who buy the services of the company, this is assured by insuring the security of the data of these investors and consumers and preventing it against any fraudulent activities and breach. Any leaks in the private data and trade secrets of the corporation does not only negative impact the interests of those who have a stake in the company, but it also impacts the reputation of the company in the market and compromises its position in the eyes of the public who are potential consumers of its services.

Bad Corporate Governance: Scandal Stories Around The Globe

An analysis of these principles takes us to the next question - what if these principles are comprised? An easy answer would be that jeopardizing such essential features would lead to bad or inefficient corporate governance. As mentioned before, accountability of a corporation to its shareholders and the general public is ensured by the transparency in its operations, an important aspect of which is maintaining true accounts of the company's finances and reporting them correctly to the shareholders. When a company fails to abide by these principles, it could result in not only huge fiscal losses to its contributors but also its liquidation. It's important to look at examples of bad corporate governance that exist beyond the territorial boundaries of India as well as those that are rooted inside the country to gain a more holistic and drone like view of the

implications of failing to achieve these three principles.

Two of the most momentous scandals that can be located internationally involves the fallacy in making the true accounts of the company known to the shareholders by the United States based giants - Enron, a Texas based energy, commodities, and services company and Waste Management Inc. which as the name suggests deals in waste management services. In the Enron scandal the executives of the company utilized loopholes in the system of accounting to hide the debt of the company by overstating the capital inflow from the assests of the company to the Securities and Exchange Commission (SEC).² The losses suffered by the company were hidden by the top executives of the company including the CEO Jeff Skilling by bringing into existence a number of shell companies which were to be utilised for primitive method cost accounting making it difficult to to trace the transactions to Enron Corporation. Therefore, while the company suffered huge financial losses the numbers reported to the shareholders by the board of directors manifested an altogether different reality. However, when the scandal surfaced in front of the public and the true accounts of the company became known, it culminated in the company being declared bankrupt with executives charged with numerous felonies and a loss to the shareholders much beyond the company was in a position to compensate. This not only hurt the shareholders but also the other employees of the company as it made their pension funds redundant.

The second scandal, that is, the 1998 Waste Management Scandal, was of similar magnitude where the scale of the fake reporting of accounts amounted to nearly 2 billion dollars, 1.7 billion to be exact. Similar to the Enron scam, this accounting fraud also comprised of the involvement of its CEO, Dean L Buntrock in addition the five top tier executives of the corporation. In terms of capital losses suffered by the investors, this scandal is marked as one the biggest corporate frauds in the history, defrauding the stakeholders of a hefty amount of 6 billion dollars which was initiated through the fall in the share prices of the company as the fraud came into light. In an action against the company and the six officials involved in the scam which was filed by the shareholders, the company was declared by the Court to be liable to compensate the shareholders with an amount of 457 million dollars cumulatively.³

² CFI Team, Top Accounting Scandals, Corporate Finance Institute (January 30, 2022),<https://corporatefinanceinstitute.com/resources/knowledge/other/top-accounting-scandals/>

³ Arti Bhatt, Waste Management Scandal, 1998, The Company Ninja (2019),<https://thecompany.ninja/waste-management-scandal/#Aftermath>

Within the domestic boundaries, a scandal which becomes an imperative part of the discussion is the Satyam Computer Services scandal, which was until the last decade India's largest fraud in the corporate scandal. Much like its counterparts in the United States, this fraud also involved showcasing non-existent profits by the company which inflated its prices in the share market. This scandal involved the founder and the board of directors of the company who stole the company's funds to invest into several properties located in the Indian state of Hyderabad. The fraud was discovered through a confession by Byrraju Ramalinga Raju, the chairman of the corporation which was preceded by the collapse of the property market in Hyderabad. The downfall of India's fourth largest exporter in softwares also witnessed an eight year ban of the company from contracting and conducting business with the World Bank. The Indian arm of the auditors of the corporation, PricewaterhouseCoopers (PWC) were also by the US Securities and Exchange Commission (SEC) for non-observance of proper code of conduct and failing to conform to the required standards of auditing.

Corporate scandals are also not unknown to the corporations having its functioning above the solid grounds of the nation, that is, the corporations in the airline industry. The first of these scandals was the infamous Kingfisher Airlines scam, where the company made its funds redundant by taking out huge loans from banks and other financial institutions against the guarantee of its financial value, which turned out to be grossly overestimated. An estimate of 1600 crores was taken out as a loan from State Bank of India alone, followed by other banks namely - IDBI Bank (800 crores), Punjab National Bank (800 crores), Bank of India (650 crores), Bank of Baroda (550 crores), United Bank of India (430 crores), Central Bank (410 crores), UCO Bank (320 crores), Corporation Bank (310 crores), State Bank of Mysore (150 crores), Indian Overseas Bank (140 crores), Federal Bank (90 crores), Punjab & Sind Bank (60 crores), Axis Bank (50 crores) and three other banks (603 crores) - amounting to a total of 6963 crores.⁴ The scam thus severely threatened the fiscal condition of the banking sector of the country and resulted in loss of jobs of the employees of the companies and a correlative impact on the owner Vijay Mallya's subsidiary liquor business from the same name. This scandal, however, while being one of its kind, was not the only scandal in this industry as Jet Airways stepped in the shoes of the Kingfisher Airlines in the years that followed thereafter.⁵

⁴ Aron Almeida, Vijay Mallya Scam Demystified, Trade Brains (October 14, 2021), <https://tradebrains.in/vijay-mallya-scam/>

⁵ Anushka Agarwal, 9 Major Corporate Frauds in India, The Company Ninja (2019), <https://thecompany.ninja/9-major->

An illustration of these cases is indicative of the fact that at the heart of all scandals is the involvement of the top personnel of the company and the party most affected party is the group of shareholders who have stakes in the company. Therefore, the risk and reward in share trading is severely high, while the shareholders stand to gain colossal margins of profit from the purchase of shares of growing firms, in cases of inflated share prices they are also hit the hardest and some have to compromise with their life savings as well.

Antrix-Devas Deal : An Attempt At Innovation Or Fraud?

When a deal impacts the finances of the State to such an extent that it alarms the Ministry of Finance, its relevance to the current economic environment becomes prima facie evident. Antrix-Devas is best categorised as a heated and over a decade long battle between the machinery of the State and a Bengaluru based start-up company called Devas Multimedia. Rewinding to the year 2005, a deal was signed between Devas Multimedia and the commercial arm of the Indian Space Research Organisation (ISRO) for the allotment of S-band satellite spectrum with such high frequency which is otherwise made available solely for and essential to national security purposes. Consequently, six years following this arrangement between the then officials of Antrix and Devas Multimedia, the deal was cancelled on grounds that the company gaining access to 70 MHz of S-band satellite spectrum, a service reserved for the maintaining the "nation's security interests" is driven by fraudulent and malicious intent as it very evidently goes against the considerations of national security interests, a provision that is often seen as a ground that overrides all over considerations in the eyes of the law and is envisaged as such by the constitution of India itself. According to reports, this deal also indicated signs of being a "quid pro quo" entered into by the startup for selling multimedia services to mobile service providers in the country and came into light concurrently along with the disclosing of the 2G scam by the Comptroller-Auditor General (CAG) of India in front of the Parliament.⁶

This legal tussle between the Government of India and Devas transgressed the boundaries of the nation and was litigated internationally as well. While within the confines of the nation the Apex Court of India upheld the findings of NCLT (National Company Law Tribunal) and its appellate

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⁶ Kshitij Bhargava, What is Antrix-Devas case? All you need to know about decade-long legal tussle between India and a startup, Financial Express (January 18, 2022), <https://www.google.com/amp/s/www.financialexpress.com/industry/what-is-antrix-devas-case-all-you-need-to-know-about-decade-long-legal-tussle-between-india-and-a-startup/2409744/lite/>

body NCLAT (National Company Law Appellate Tribunal), internationally the tides were not in favour of India. Devas Multimedia initiated arbitration in the International Chambers of Commerce (ICC) in addition to two other arbitrations initiated simultaneously by a German company named Deutsche Telekom and by the Mauritius based investors of Devas under the Bilateral Treaty signed between the countries of Mauritius and India. Taking a hit at all three of these arbitrations, the Indian government was ordered to pay a total of 1.29 billion dollars in the way of damages to Devas for cancellation of the deal. Commenting on this situation, the Finance Minister of India Nirmala Sitharaman called out the UPA government during whose reign this controversial deal was finalized. It was asserted that the government was bound on litigating this matter to victory lest all of the taxpayers' good money would go towards settlement of these international arbitration awards in favour of Devas.

Winding Up Operations : Is Fraud A Ground?

Winding up operations with relation to corporations connote the liquidation of that particular organisation which implies that all its affairs including operations would be brought to an end. The liquidation of a corporation is set in motion based on three basic considerations : firstly, the insolvency of that firm, secondly, the corporation has become redundant in its functionality and is no longer needed and thirdly, its existence is prejudicial to the interests of the public.⁷ Winding up can be both voluntary and involuntary, depending upon the will of the company behind such decisions. In cases of voluntary winding up, the process is kick-started through a resolution passed by the shareholders of the company in order to escape bankruptcy and possible consequent individual liability to pay off the debts of the company. The latter case of liquidation is one insinuated through a compulsory order of the court, similar as in the case of the Devas-Antrix deal. Such a compulsory winding up process is to be followed up with the appointment of a liquidator charged with the management of the assets of the company to set off its liability to creditors.

In the context of the Devas-Antrix case, where the Supreme Court sided with the NCLT and NCLAT in their concurrent findings and analysis that it was right to order the liquidation of the company based on evidence which was mined by the top investigation agencies, namely Central

⁷ Bisacre, Josephine, and Claire McFadzean. *Company Law Essentials*. Edinburgh University Press, 2011. <http://www.jstor.org/stable/10.3366/j.ctvxcrkr2>.

Bureau of Investigation and the Enforcement Directorate of India, laying conclusive proof of fraud in the execution of agreement, it therefore becomes imperative to analyse whether fraud amounts to a just ground for winding up a company and if yes, then what other considerations may be applied for such compulsory actions. A company may be subjected to compulsory winding up based on the following plausible grounds as provided by the Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016 :

1. The first ground is when the corporation's debts exceed their assets tremendously which makes the company incapable of paying off its creditors to satisfy its debts to them
2. The second ground is technical and establishes that for a company to be recognised, it is mandatory for it to commence business within a year of its incorporation, otherwise it would be subjected to compulsory winding up.
3. The third ground similarly mandates that all requirements for the legal existence of a corporation must be met, including the provision for having a minimum number of members in the company.
4. The fourth ground embraces the importance of the stakeholders in a company and provides for winding up by a special resolution where the process is initiated by the votes of 75% shareholders of the company who deem that the company's existence must come to an end.
5. The fifth ground deals with the misappropriation of funds by the board of directors who are responsible for the supervision over the operations of the company.
6. The sixth and the most important ground in context of the discussion is one which provides for the liquidation of the company on account that it was formed with a fraudulent intent or for the conduct of fraudulent activities that can harm public interest.

The sixth ground needs to be elaborated while referencing the Supreme Court's stance or judgement in the Devas-Antrix case.

Supreme Court's Take : An Analysis

The infamous instance of a joint-venture between Antrix, ISRO's commercial arm, and Forge Advisors LLC that culminated in a ten year litigation battle in the case of Devas Multimedia Private Limited vs. Antrix Corporation Limited⁸ is of utmost relevance with respect to corporate governance and how fraud impacts it thereby putting the stakeholders in a compromising position of fiscal and other losses that accompany it. The Supreme Court judgement was in reference to an appeal filed by Devas against the observations of NCLT, which were later confirmed by NCLAT and answered questions related to the importance of fraud as a ground for compulsory winding up, the role of auditors in preventing corporate frauds and whether the absence of fraud discovered by these audit reports over the years estopped Antrix from withdrawing from the deal.

It was with the introduction of Section 271(c) of the Companies Act, 2013 that fraud was recognised as a valid ground for initiating winding up operations against a corporation. Public policy considerations matched by the regulations of the New York Convention were the primary forces behind the addition of fraud as a legitimate ground for the compulsory liquidation of a company. However, in relation to international arbitrations the Supreme Court judgement falls short as it cannot prevent rulings against the State by other countries which are invested with discretionary powers for the endorsement of their separate orders by virtue of Article V of the New York Convention.

The Top Court judgement becomes significantly relevant to the diaspora of laws that govern the corporate world in relation to its observations about the role of auditors in investigating frauds with diligence. It was argued by the Court that Antrix cannot be estopped from filing of the case against the deal solely on the grounds that the auditors failed in reporting the connivance between the then officials of Antrix and Devas timely. The Court pointed out that while it is the duty of the auditors to prepare the report to the best of their ability, "the auditor's report can neither be taken as gospel truth nor act as estoppel against the company". This judgement, thus, in contradiction to the previous judicial precedents that make it the ceremonial duty of the auditor to act as watchdogs and protect the shareholders of the company as established in the cases of Institute of Chartered Accountants vs P.K. Mukherjee⁹ and Hindustan Lever Employees' Union vs Hindustan

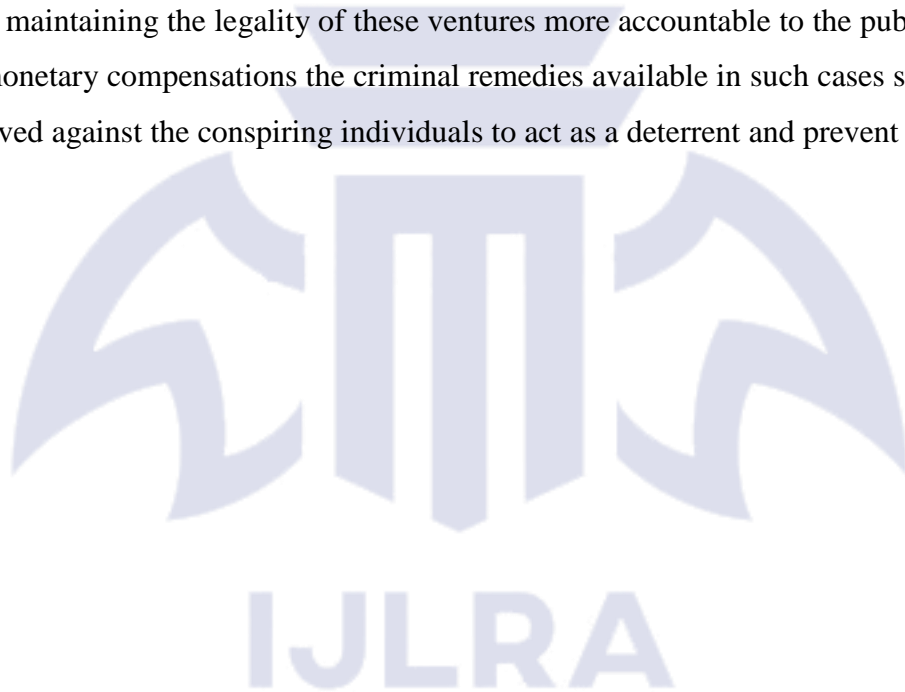
⁸Devas Multimedia Private Limited vs. Antrix Corporation Limited, Civil Appeal No. 5766 of 2021 (Ind.)

⁹Institute of Chartered Accountants vs P.K. Mukherjee (1968) SC 1104 (Ind.)

Lever Ltd¹⁰, functions to make the value of audit reports flaccid as evidence in the court of law.

Conclusion And Recommendations

It is evident from the study of the various cases of corporate fraud that firstly, on a micro level these instances severely impact the trust of shareholders in the company causing them irreparable monetary damage and secondly, on a macro level are a huge hit to the nation's financial stability. It is important that the laws that govern business transactions that are in numbers beyond the imagination of the common man are more stringent and make the auditors and those who are charged with maintaining the legality of these ventures more accountable to the public. Further, in addition to monetary compensations the criminal remedies available in such cases should be more strictly observed against the conspiring individuals to act as a deterrent and prevent such instances in the future.



¹⁰Hindustan Lever Employees' Union vs Hindustan Lever Ltd (1995) 83 Com Cases 30 (Ind.)

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