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Minute of Dissent by Mr.M.R.Masani, M.P., General Secretary of the Swatantra Party, to the Report of the Joint Select Committee on the Companies (Amendment) Bill laid on the table of the Lok Sabha on August 16.

In its order of the 15th May, 1957, constituting the Sastri Committee to consider the working of the Companies Act, 1956, the Government of India had laid down certain wholesome objectives, namely,

(i) to overcome certain practical difficulties in its working as may have been encountered since it came into force;
(ii) to remove such drafting defects and obscurities as may have interfered with the working of the Act; and
(iii) to consider what changes in the form or structure of the Act, if any, were necessary or desirable to simplify it.

On the basis of these directives the Committee, after an exhaustive enquiry, including the examination of many witnesses, made their Report and the present Bill was framed, containing many substantial amendments of the law. The Select Committee in its report has, however, gone a good deal further. The tenor of the amendments which have been introduced in the Select Committee, most of them by Government, would suggest that Government had second thoughts and a number of amendments have been introduced which cannot, by any stretch of imagination, be considered as necessary to "overcome practical difficulties", "remove drafting defects" or to "simplify" the form or structure of the Act of 1956.

Encroachments on management in the interests of the shareholders and by the shareholders are understandable, but it is difficult to understand how the interference of the governmental bureaucracy in the day to day affairs of a Company either safeguards the interests of the shareholders, even when it is unwanted by the shareholders, or promotes development and expansion of industries. Unfortunately, I was not able to convince the majority of my colleagues in the Select Committee about the unfair discrimination which is sought to be practised on a section of the industrial and business community represented by joint stock companies through these excessive regulations which bureaucratic zeal has sought to impose. I am opposed to this measure of over-regulation because I believe that the economic development of the country would be advanced if the entrepreneurs who are represented in large measure by joint stock enterprise in this country are given a fair chance to live and to expand, to run their businesses using their own judgement subject to the control which is exercised by the investors, namely, the shareholders and subject only to minimum interference by Government.

I shall proceed to illustrate this general consideration by a reference to certain of the provisions inserted in the Bill:

1. New Clause 7Q:

The first of these is the provision for the appointment of a Special Auditor. This provision is remarkable for the sweeping powers conferred on what might ultimately turn out to be a Deputy Secretary of Government in directing a special audit of a Company's affairs. The Central Government is given power under this section to appoint a special auditor where the Government is of opinion

(a) that the affairs of any Company are not being managed in accordance with sound business principles or prudent commercial practices (it is difficult to find a power vested in vaguer and more general language than this);
(b) that any Company is being managed in a manner likely to cause serious injury or damage to the interest of the trade, industry or business to which it pertains;
(c) that the financial position of any Company is such as to endanger its solvency.

A greater inroad on the autonomy of joint stock enterprise or in fact on the freedom which is given by the Constitution to people to carry on trade and businesses in their own interest it is difficult to find. The test applied is completely subjective. It is all a matter of Government's opinion without even the corrective powers which could be exercised judicially and impartially by a court of law. Government cannot be unaware that a decision to appoint a special auditor by itself would imperil the financial position of a Company and might even endanger its solvency. The good name and reputation of companies are plants of delicate growth, hard to build, easy to destroy. What is sound business principle or prudent commercial practice cannot surely be the prerogative of a Government department. There can be more than one view on the subject and those who are actually running industries with the help of presumably competent Boards of Directors and with the safeguards which already exist in the law are far better judges than the bureaucracy of what sound business principles are or prudent commercial practices should be in their particular class of business. The appointment of a special auditor is also a slur on the regular auditors of the Company.

This power to appoint a Special Auditor is, in my view, completely unnecessary, apart from being unjustified, because under various sections of the Act, as confirmed and strengthened by this Bill, the powers of investigation of Companies, the right of minority shareholders to approach Government in matters of management and finally the very wide powers conferred on Registrars, coupled with the audit by the Company's own auditors, fully safeguard the business interests of the Companies as entities and of the shareholders as primarily interested in the equity.

The powers conferred on the Special Auditor appear to go much further than the powers conferred on the auditors of the Company. I refer to sub-clause (5) of the new clause where, in the widest possible terms, there is an obligation cast on every person called upon to furnish such information "as may be required by the special auditor" in connection with the special audit upon pain of a penalty of Rs.500 if the information is not given. Here again, a subjective test is applied and the special auditor can call for any information, relevant or irrelevant, so long as he thinks it is required in connection with his audit.

I am opposed to the whole clause but, if a provision on the lines mentioned in the clause is to be incorporated in our Company Law, certain suitable safeguards should be provided:

First, before the Government directs a special audit, it should communicate to the Company broadly why they consider there has been a breach of either (a), (b) or (c) which has led to Government to decide on taking steps for appointing a Special Auditor. This will enable the Central Government, after hearing the Company, to withold the appointment of a Special Auditor if they are satisfied with the Company's representation.

Secondly, the Company should be entitled to call for a copy of the report and make its representations on it.

Thirdly, in keeping with the spirit of the Constitution, the Company should be at liberty to appeal against Government's decision to a Court of Law.

2. Clause 79:

The terms of the original Clause in the Bill were expropriatory in character since they conferred on Government powers to veto the transfer of shares and even the exercise of voting rights. The amendments made in Select Committee go substantially further since they extent to shares which have not yet been issued but which may be issued in the future so that the shareholder against whom the order is passed will be deprived of his quota in a "rights" issue. Such a prohibition over a period of three years must be considered a violation of Article 31 of the Constitution. The benefit of a rights issue can be very valuable property and, as Companies' issues have to be made within a limited period of time, very much less than three years, it follows that the exercise of the veto in regard to such shares means for all practical purposes a cancellation of the benefit vested in the shareholder. There is no provision in the Clause which enables a shareholder to claim damages if ultimately it is established that Government's orders were unnecessary, nor could such a shareholder ask for a postponement of the "rights" issue pending a review of the proceedings under the Clause in a Court of Law.

Under new sub-clause (3), the powers conferred by the Section become exercisable when the Central Government is of the opinion that a change in management would be prejudicial to the 'public interest'. It is really the interests of the shareholders, or minority interests of shareholders, that should be involved. Therefore the powers should be exercised by the Government at the instance of at least minority interests in a Company in much the same way as the parallel powers given to Government under Section 398(1)(b) are exercisable where there is danger of control oppressive to such minority interests or prejudicial to the Company and its shareholders.

The minority interest in this case might be the same as provided in Section 399 (1), namely, shareholders holding 10 per cent of the capital or 100 in number or one-tenth of the total number of shareholders.

As in Section 398, there should be the safeguard of inviting a Court's order before action is taken under the clause.

Further, the power under the Clause should not extent to the receipt of "right" shares.

3. Clause 99:

The amendments moved by Government and accepted by the Select Committee in regard to the appointment of sole selling agents represent perhaps a greater inroad into the internal management of a Company than any of the other amendments. Applying the now familiar subjective test, the Central Government is given the widest possible powers to write new agreements with selling agents, and even cancel certain selling agencies by declaring sole selling agents for areas where there is more than one selling agent, all upon terms which the bureaucracy dictates. This is really a form of bureaucracy run amuck and places Indian industry in an unenviable position, particularly as foreign competitors may appoint selling agents on more realistic terms and thus be able thereby to capture the trade to the loss of Indian manufacturing interests.

As the power apparently is exercisable where the Central Government is of opinion that the terms and conditions of appointment of the selling agents are "prejudicial to the interests of the Company", it is surprising that no consultation with the Board of Directors of the Company, or even with the shareholders who are the owners of the Company, is provided for. One can well imagine how the sales of products of a Company against whom the power is exercised will suffer during such period as is needed for the Government to undertake examination of the existing selling agency terms and conditions. No cogent reason has been given for the introduction of such sweeping powers at the eleventh hour. It might even be suspected that these powers have been introduced to make it easier for the State Trading Corporation to enter by the backdoor the field of sales of the productions of a particular industry.

4. Clause 136:

An objectionable type of interference by Government in the working of a Company is illustrated by the provisions of sub-section (4) of the new ~~sub~~ section 372 proposed by this clause. The normal business of an investment Company is to buy and sell shares. Proviso 2 to sub-section (2), however, unlike proviso 1, applies to investment companies so that no investment company is entitled to make investments in other bodies corporate in the "same group" beyond twenty per cent of the subscribed capital. If it has already done so by the date of the coming into force of this Act, any investment in that group has to receive the approval of the Central Government. Obviously it will take for a Company to receive that sanction. It is plain that the shareholders are the best people to judge whether or not a further investment in the "same group" beyond twenty per cent should be agreed to. Therefore, the additional requirement that, besides a resolution of the investment Company in general meeting, the approval of the Central Government is obtained is unjustified.

The proposed new sub-section (3) under this clause is objectionable, because it is retroactive in application. The retrospective character of the clause is such as to cover all investments made by a Company from the commencement of its existence so that, reading it with the proviso to sub-section (2), if the Company has already, before the commencement of the proposed Amendment Act of 1960, exceeded the prescribed percentages under provisos 1 and 2 of the proposed sub-section (2), it cannot invest in a single share unless both the sanction of the shareholders and the Central Government is received. This might even prohibit variations in investments even though no additional fresh funds are invested, because at the time of making an investment the Company will have already exceeded the prescribed percentages. These rigorous and somewhat harsh provisions seem to be quite unnecessary, and there is no reason why the provisions of the proposed sub-section (3) should have retrospective operation. In my view, therefore, the following amendments should be made in this clause:

(i) The approval of the Central Government should be deleted as unnecessary under the proposed sub-section (4); and,

(ii) Sub-section (3) should nothave retrospective effect before the commencement of the Amendment Act of 1960 or at the earliest before the commencement of the Companies Act, 1956.

Corporate Finance for Political Funds:

It is a matter for regret that the Joint Select Committee turned down certain amendments moved by me to clause 103 of the Bill and to section 13 of the Act and similar amendments by other members, the effect of which would have been to prohibit contributions from Joint Stock Company finances to any political party or fund.

The issue is one of considerable importance for the effective functioning of our nascent democracy. While the influence of money power cannot be eliminated altogether in a free society any more than the influence of labour, of landed interests or of other numerically large agglomerations of individuals with common economic interests, it is important that its influence should be limited as far as possible. Political parties are necessary for the functioning of parliamentary democracy and they naturally need finances for their functioning and for their election campaigns but such funds should come from those individual citizens who are their members or supporters. Fortunately, there are in most cases natural limits to such contributions but permitting contributions by joint stock enterprises opens the door to contributions of a magnitude which are normally not within the capacity of most citizens. They also have the serious demerit that those at whose instance they are made are not spending their own money but are utilising the funds of shareholders which were never intended for such a purpose.

It has been argued that a collective entity like a joint stock Company should not be prevented from giving support to that party with whose ideology its members have sympathy. It is obvious, however, that all shareholders of any Company cannot possibly be expected to have the same ideological bias. Members of different political parties and those holding different political views subscribe to a Company's shares without any thought of political implications. The decision of the Joint Select Committee to permit such contributions unquestionably has the effect of accentuating party and political warfare in the ranks of joint stock companies. Rival groups of shareholders will press for contributions to this or that political party and the minority will rightly complain that their money is being used to advance a political cause which is repugnant to them. A suggestion made for enabling minority shareholders to contract out of such contributions, as in the case of the political levy imposed on members of British trade unions, was also turned down by the Committee. At a time when Shri Jayaprakash Narayan is campaigning for a non-party democracy and most parties are prepared to agree that party influence and strife should be withdrawn from panchayat and district bodies, it is lamentable that partisanship and factionalism should thus be encouraged in a field which has hitherto been relatively free from it.

There are two other serious objections to this decision. In a controlled economy, the Government of the day has virtually the power of life and death over the fortunes of business and industrial enterprises. The possibility of business houses being coerced into making contributions to a political party whose policy may even be opposed to that of business and industry as a whole cannot therefore be ruled out. At the time of the last General Elections, several businessmen complained of undue pressure being exercised upon them by leaders of the ruling party, and in between elections there are numerous calls for contributions to purses and advertisements for Souvenirs published on the occasion of party meetings. The other objection is that selfish and unscrupulous elements in business seek advantages for themselves by getting into the ~~goods~~ good books of the ruling party in the hope of compensation in the months and years to come. If there is one vested interest in India today, it is that of those in office along with their satellites and hangers on in business who profess to support the policies of the ruling party in order to feather their own nests. Since every control is potentially a source of corruption, the Joint Select Committee's decision pushes the door wide open to corruption of this nature.

In this context, the fact that the majority in the Joint Select Committee turned down the salutary proposals presented to them makes it quite clear which party in this country is dependent on Big Business for filling its coffers and supporting its candidates for public office.

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(M. R. MASANI)