VOLUME 13 ISSN 2456-9704

ONE PERSON COMPANY- A NEED FOR CHANGE

By *Somya Virk*
From Symbiosis Law School, Pune

ABSTRACT

We live in the 21st Century where it is very difficult for small businesses to sustain themselves when multinationals are hunting like big fish in the sea. Governments all across the globe are making a genuine effort towards promoting small businesses by changing laws, shaping policies and giving them subsides.

In the Indian scenario the bulk of business is undertaken by unorganised small scale setups which do not get government loans or support like big companies. With the same hope of scaling up these companies the Indian legislature amended the Companies Act in 2013 and added new types of companies. This article will analyse the issues with the laws relating to One Person Company (OPC) using International case laws and legislations as a base for comparison. Towards the end suggestions will be listed for giving these companies advantage over other private companies in order to fulfil the objective with which these OPC were allowed to be incorporated.

Note- After extensive research for case laws on various websites like Manupatra, SSC Online and all the reference books not even one Indian case was found relating to OPC's. Thus I filed an RTI application as guided by the faculty, which has been attached with this assignment. Therefore for reference all foreign courts judgments have been taken

INTRODUCTION

'In One Person Company, I am the CEO, the technical staff and the janitor' -Mal Steifel

The Companies Act sloughed its skin in 2013 to form a more modern version of itself due to dire need of complying with the international standards and growing pressure in the economic ecosystem. Many new types of companies were included in its ambit and one of them was One Person Company (OPC). The amended laws are more flexible and encourage people to start companies over any other form of business like sole entrepreneurship etc.

One person Company is defined under Section 2(62)[1] of the Companies Act, 2013 as any company which has only one member. The member in this case is also a subscriber to Memorandum of Association thus is also called a shareholder.

The foundation of this new type of company was laid in the year 2004 after Ministry of Corporate Affairs constituted a committee to look into this matter under the chairmanship of JJ Irani[2]. The committee submitted a detailed report in 13 chapters which discussed the classification of companies.

After the new act, now one person can incorporate a company, this concept of OPC dates back to the time when United Kingdom made efforts to promote sole entrepreneurship and also realised need for

[1]The Companies Act, 2013, Section 2(62).
[2] Dr. J. J. Irani Committee Report, Report of the Expert Committee on Company Law, 2005, http://www.primedirectors.org/pdf/JJ%20Irani%20Report-MCA.pdf.

giving it a legal entity; thus it resulted in the formation of first law with regards to OPC. The Solomon case is the birth father to this modern version of company law. Subsequently many countries adopted OPC and in recent times have allowed artificial entities to start OPC but in India only a Natural person can start an OPC.

HISTORICAL EVOLUTION

The ***Salomon v Salomon & Co***, Limited Respondents[3] case laid the foundation of concept of lifting corporate veil, it also becomes important while discussing the concept of OPC as Lord Watson while giving the dissenting opinion on judgement of Court of Appeals said that in the Companies Act 1862 the wording clearly represents that legislature's intent was to not give any minimum number of individuals who can incorporate a company. Hence One Man Company is not against any law.

The view was supported by the judiciary in New Zealand in the case of ***Trevor Ivory v Anderson***[4] the judges in this case stated the existence of One Person Company is not against any law, the creditors should take same level of precaution like they take while dealing with other private companies.

The first country in the world's history to give OPC recognition was Liechtenstein which was followed by countries, all over the globe. They created different set of legislations and rules to regulate OPC's existence in accordance to their respective economic frameworks.

Germany was one of the few European companies which had OPC's in the 17th century. These companies were not in accordance with law but one single person acquired all the shares and started the company. Later in the 20th century these types of companies were officially recognized. Countries like USA, China and Singapore, Hongkong[5] were pioneers of making modern law in this aspect.

As this concept of OPC is new in India the courts have not been approached on vagueness of certain section for clarification and interpretation. All the laws and rules regarding this type of company are based on case laws of other countries and their respective acts.

INDIAN LEGISLATION

Various provisions were added in the new amendment which define and regulate the functioning of OPC. Section 2(62)[6] of the Companies Act defines One Person Company as *'a company which has one member*.' Also it is given under Section 3(1)(c)[7] that '*Any single person can form a company for any lawful purpose.*'[8]

The objective with which this type of company was introduced in the Indian Economic System was twofold firstly to promote the small businesses; secondly to help entrepreneurs get all benefits of sole proprietorship and also free the promoters for the legal liability by giving this company an individual legal identity.

The next point to be noted here is that only natural person who is an Indian Citizen and resident in India shall be eligible to incorporate an OPC. Another unique feature about this type of company is that the sole

[3] Salomon v Salomon & Co (1896), UKHL 1, AC 22.
[4] Trevor Ivory v Anderson (1992)2 NZLR 517.
[5] Sectary of Justice v Lee Chaug Ping(1999) 2 HKC 103.
[6] The Companies Act, 2013, Section 2(62).
[7] The Companies Act, 2013, Section 3(1)(c).
[8] Avtar Singh, Introduction to Company Law, Eleventh Edition, Eastern Book Company, 2014.

member has to select a nominee which needs to be mentioned in memorandum thus leads to perpetual succession; wherein the nominee becomes the member on death of the previous one and this goes on until company is dissolved. The person who is chosen as a nominee has to file written consent with the registrar at time of registration of OPC.

Salient Features of One Person Company-

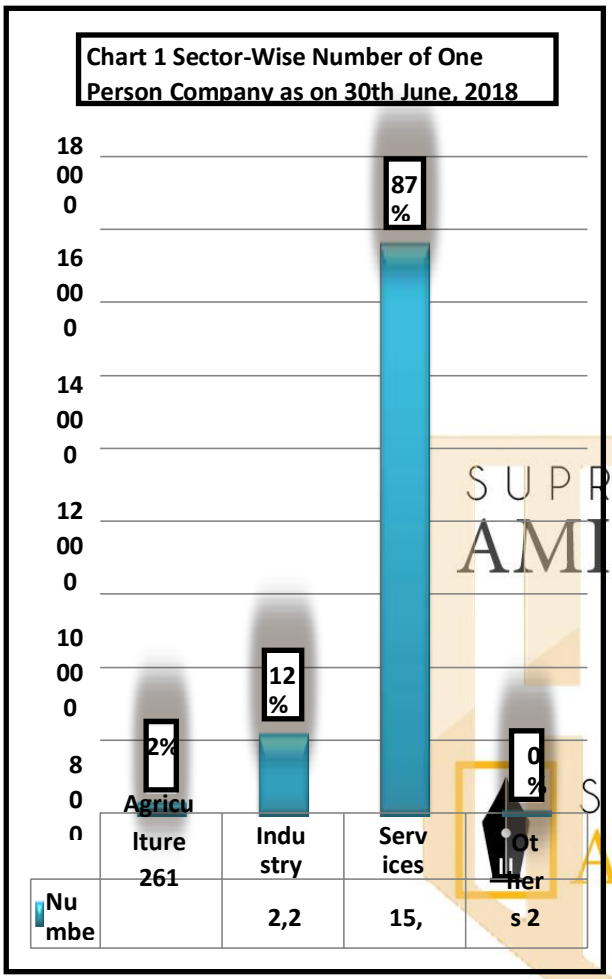
- OPC can be either limited by share or Company limited by guarantee or an unlimited Company.
- The turnover limit if exceeds Rs 2 Crores average for three previous consecutive years then the OPC has to mandatorily become public or private company under Section 18[9] of the Act. There are restrictions placed on transfer of shares like any private company. They can do this in a general meeting as prescribed under Section 8[10] of the Act.
- OPC cannot give public notices to subscribe for securities of the company.
- It has to be indicated on the sign board of the company that it is an OPC as mandated in these provision so that people getting in any kind of deal are aware of the prior arrangement.
- Section 122(1)[11] of the Act provides that all rule and regulations relating to extra ordinary meeting etc are not mandatory for OPC.
- OPC' have the law of perpetual succession which means even if the person who was sole member dies the nominee will take over the company and elect another nominee in this way the company lives forever until dissolved. In case of ***Abdul Aziz Bin Atan v Ladang Rengo Malay Estate***[12], the court of Malaysia held that from the day of incorporation the promoter and the company are two distinct legal entities thus death of member should not lead to direct dissolution of OPC. The same law is valid in India and this judgment can be taken as a persuasive judgment.
- These are some of the main procedural aspects for OPC but the discussion in this article deals with the evolution. A limited liability clause further protects the owner; if in any case the company has to go through the process of liquidation then the owner's personal assets cannot be attached in this case. The maximum directors that can be appointed are fifteen.

There are some advantages of OPC from Section 96 to Section 111 of the Act it gives legal status to the company which is not the case with sole proprietorship and that of limited liability as discussed earlier. This limited liability was upheld by the court in the case of ***T.R. Pratt v E.D Sasoon & Co Ltd***[13] There are a lot of issues in the laws of OPC's which will be discussed in details. Due to existence of these problems the main objective of promotion of business and incorporation of small businesses is being hampered. This limited liability does not extend to criminal deeds of a director as held in the case of **Pepper v Litton**[14]**.**

[9] The Companies Act, 2013, Section 18.
[10] The Companies Act, 2013, Section 8.
[11] The Companies Act, 2013, Section 122(1).
[12] Abdul Aziz Bin Atan v Ladang Rengo Malay Estate SDN BHD (1985) 2 MLJ 165.
[13] T.R. Pratt v E.D Sasoon & Co Ltd, AIR 1936 Bom 62.
[14] Pepper v Litton, 308 U.S. 295 (1939).

VOLUME 13 ISSN 2456-9704

STATISTICS



Data collected on June, 2018 by an independent research team headed by Dr. P. Govidan in the Journal Pratidhawani[15]. This bar chart shows the number of one person companies in India, the total of 18,531 have been incorporated till now. After the amendment of 2013 the government of India had envisioned a steep growth in the OPC ventures but the growth remained low due to issues in the legislation. This Chart also points out that the maximum companies are in the Service Sector thus if other than natural person even artificial person are allowed this graph will show sudden growth. The small businessmen in other areas do not prefer opening OPC due to lack of awareness and many Factors states below.

ISSUES IN THE LAW

- The first issue here is that the turnover of an OPC cannot exceed an average Rs 2 Crores in previous three financial years other conversion to Public or Private Company mandatory under Section 18[16] of the Act. This restricts the growth of business directly, as soon as company exceeds this limit of turnover it is considered as any normal private company all the benefits given to this company are taken away. Thus the very purpose for which an individual started this company is gone plus the legislative intent of promotion of such business completely fails. Hence the promoters are not encouraged enough in investing in such ventures because of restriction on turnover.
- The other issue comes with the taxation policy imposed on these companies which is very similar to what is imposed on any private company at 30% tax rate. In sole

[15] Dr.P.Govidan, A Study on Growth and Impacts of One Person Companies (OPCs) In India- A Innovative Business Vehicle for Small and Medium Scale Entrepreneurs, APRIJSS, 2018.

[16] The Companies Act, 2013, Section 18.

proprietorship the tax slabs are much more relaxed. This difference in tax slabs lead to firstly evasion of taxes by companies and secondly decreased interest in OPC venture.

- In the instances where there is contract between one person and OPC there are a lot of procedural formalities which is not a requirement if those contracts are in '*Ordinary course of business'*. This term of ordinary course of business is vaguely defined and requires interpretation by the judiciary. Lack of case laws leads to confusion and chaos, furthermore this leads to loopholes in formation of contracts. Thus increasing the pendency of cases relating to clarification.
- In India OPC can only be incorporated by Natural person unlike China, Singapore where artificial entities can own OPC's this provision is given under Rule 2.1(1) of the draft rules under the Companies Act. The general clauses Act has clearly defined person as both natural and artificial but the legislature has restricted the meaning of person in the case of OPC.

❖ This clause restricts any public or private company to have solely owned subsidiary. Further in investments in this sector are affected, the big private companies can bring inflow of cash thus they can support the entrepreneurship ventures. If this clause is relaxed then many foreign national companies will invest bringing FDI's in India. Due to this reason companies prefer countries like Singapore over India.

❖ Also when Company has been given a separate legal entity like any other company they should also be given a right to incorporate OPC.

- The laws regarding OPC discourage foreign nationals from investing in the country as there is a prerequisite to be an Indian citizen and resident of India for 182 days prior to incorporation of OPC. The legislative intent here was to promote small local businesses but in order to keep up with the international standards opening up in this sector will firstly increase the competition and bring impetus to the crawling growth of OPC's. The investing capability with the foreign national is way beyond any resident thus this is the opportunity to gain trust of the creditors in these OPC ventures.
- One person can only incorporate one OPC and be a nominee of only one such company. This restriction does not exist for any other form of company. When the idea is to promote small companies then why does law restrict having more than one company? In India people having small business often have multiple ventures running side by side to increase their gross profits. Amending this law will encourage those people having multiple businesses to open different OPC's.
- OPC's cannot invest in other companies this basically means that any OPC cannot invest in any non banking functions, which is another hurdle for these companies to exist. The OPC's cannot secure themselves by investing in other companies when on the other hand all the leading powers of the world have allowed these investments as they contribute in the growth. OPC's have to inform the registrar about every contract that was entered because of existence of Section 193(2)[17] of the Act. This creates extra procedural formalities and delay in the functioning of OCP's.

Conclusion and Suggestion

After undertaking research on this topic it can clearly be noted that the amendment to

[17] The Companies Act, 2013, Section 193(2).

companies Act 2013 has proved to be a milestone. Many types of new companies were introduced in this amendment out of which one was One Person Company. The legislative intent behind adding this type was to promote small businessmen and give impetus to the growth in this sector. But to the contrary these small advantages given to OPC's have not been fruitful due to the reasons stated above.

Certain changes in the policy will increase the number of OPC's and also bring our laws at power with the international standards. These suggestions can be implemented in the Indian scenario after analysing several international judgments. The reason for these suggestions has been stated above.

Suggestions

- The turnover limit should be increased to Rs 5 Crores for OPC's
- The tax rate should be relaxed for OPC's bringing it to as low as for sole proprietorship.
- The vague terms in the legislation like Ordinary course of business should be brought to clarity either by amendment or judicial pronouncement.
- The term person in this law should include both natural and artificial person.
- The foreign national and non-resident Indians should be allowed to start OPC's.
- One person should be allowed to incorporate more than one OPC.
- The OPC's should be allowed to invest in other companies and participate in all the non- banking functions.

BIBLIOGRAPHY

- **Case Laws**
  - Salomon v Salomon & Co (1896), UKHL 1, AC 22.
  - Trevor Ivory v Anderson (1992)2 NZLR 517.
  - Sectary of Justice v Lee Chaug Ping(1999) 2 HKC 103
  - Abdul Aziz Bin Atan v Ladang Rengo Malay Estate SDN BHD (1985) 2 MLJ 165.
  - T.R. Pratt v E.D Sasoon & Co Ltd, AIR 1936 Bom 62.
  - Pepper v Litton, 308 U.S. 295 (1939).
- **Reports**
  - Dr.P.Govidan, A Study on Growth and Impacts of One Person Companies (OPCs) In India- A Innovative Business Vehicle for Small and Medium Scale Entrepreneurs, APRIJSS, 2018.
  - Dr. J. J. Irani Committee Report, Report of the Expert Committee on Company Law, 2005.
- **Statutes**
  - The Companies Act,2013.
- **Books**
  - Avtar Singh, Introduction to Company Law, Eleventh Edition, Eastern Book Company, 2014.
  - Legal Imperial Advocates and Solicitors, One Person Company under the Companies Act 2013, Wolters Kluwers (India) Pvt.Ltd Haryana,2014.
  - Corporate Professionals India Pvt Ltd Analysis of Companies Act 2013, Wolter Kluwer (India) Pvt.Ltd.
- **Online Sources**
  - Sabarnee Chatterjee, One Person Company and Limited Liability on Its Members, 5 Comp LJ 1 (St.), 2013.
  - P.K. Chandy, One Person Company- An Assault on Indian Corporate Law, 122 CLA 9 (Mag) 6, 2014.
  - T.N. Pandey, One Person Company- The new concept under the Companies Bill whether necessary? 35 taxmann.com 136, 2013.

- Ashhok Saxena, One Person Company (OPC)- An Innovative Concept, 82 SCL 49 (MAG) 2008.
- SSC Online.
- Manupatra.
- Jstor.

*****