THE DECISION IN ELUFIOYE V. HALILU: A VIOLATION OF THE RIGHTS OF MEMBERS UNDER THE COMPANIES AND ALLIED MATTERS ACT (COMPARING NIGERIA, UNITED KINGDOM AND INDIA JURISDICTIONS)

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1.0 **Introduction**

This discourse borders on the rights of members of a company. Members of a company are generally shuffled into two positions, that is, the majority and the minority shareholders. Therefore, this paper explains the Foss v Harbottle rule, the minority shareholders protection reliefs, comparing the provisions of these concepts in Companies and Allied Matters Act of Nigeria, with that of the Indian and UK Companies Acts, revealing if they have any similar provisions, and also better reliefs for the protection of minority shareholders.

1.1 The case of ELUFIOYE AND 9 OTHERS V. HALILU AND 17 OTHERS:

1.1.1 FACTS

The plaintiffs were members of the eighteenth defendant, a union operating in the financial services industry. The first to eleventh defendants were part-time officers elected to the union in 1985. The plaintiffs had commenced an action at the High Court for determination of a number of issues relating to the term of office of the defendants, and for injunctive relief. The matter was heard ex parte, and an interim relief was granted. On application by the defendants, the interim order was set aside. The plaintiffs appealed to the Court of Appeal which found that the plaintiffs' right to a fair hearing had been violated, with the result that the appeal had to be allowed. The High Court's decision setting aside the interim order was set aside. Aggrieved by the decision of the Court of Appeal, the defendants appealed to the Supreme Court. This was the first appeal.

In a preliminary objection by some of the defendants, it was contended that the court had no jurisdiction to entertain the action as, at common law, such an action does not lie at the instance of individual members of the union. Instead, the right of action conferred by Section 16(1) of the Trade Union Act 1973 is exercisable only at the instance of five or more members of the union. The High Court and the Court of Appeal dismissed the objection, leading to the further appeal to the Supreme Court. This was the second appeal.

The dispute between the parties in the second appeal related to the extent of the right of individual union members to institute action. Rule 7(v) of the union's Constitution conferred on a member a right to initiate action, whenever any breach of the Constitution arose, and at the

expense of the individual concerned. The defendants were opposed to an unfettered exercise of that right on the ground that it would overrule the common law rule in Foss v Harbottle.[1]

1.1.2 The court decision:

HELD Unanimously (Dismissing the appeal by a majority of 6 to 1, Ogundare JSC dissenting))

1. On the Foss v Harbottle rule; The rule in Foss v Harbottle provides that where a wrong is done to a company or where there is an irregularity in the management of its internal affairs, which is capable of confirmation by a simple majority of its members, the court will not interfere at the suit of a minority of its members. Certain exceptions to that rule exist in which instances individual members can take action against their company or union.

2. On the exceptions to the rule in Foss v Harbottle; Certain exceptions to the Foss v Harbottle rule exist, in which instances individual members can take action against their company or union. The rule and the right conferred by rule 7(v) of the union's Constitution were not conflicting rights, but complementary rights. The rights conferred by rule 7(v) would only arise in case of a breach of the Constitution, and where the individual was prepared to foot the bill of the litigation. In other cases, the rule in Foss v Harbottle would apply unheeded. The right conferred by rule 7(v) was thus really an exception to the general rule in Foss v Harbottle.

3. On the applicability of the rule in Foss v Harbottle; That the rule in Foss v Harbottle is binding on trade unions was established in the case of Abubakri v Smith, and that finding remains good law.

4. On the permissibility of individual members of a union suing for injunctive relief; Section 16 of the Trade Union Act, 1973 provides for the granting of injunctive relief by a High Court, on application by inter alia, any five or more members of the union.[2]

[1] ALEX OLADELE ELUFIOYE & ORS. V. IBRAHIM HALILU & ORS. (1993) LPELR-SC.310/1989.
[2] https://nigerialii.org/ng/judgment/supreme-court/1993/7 .

1.2 Rights of Members

1.2.1 Majority Rule

The rule in Foss v Harbottle states that, where a company is wronged, the company itself should seek the remedy, not a member. In Foss v Harbottle[3], directors who allegedly misapplied company property and entered illegal transactions were sued by two members 'on behalf of themselves and all other members other than the directors.[4]

The court dismissed the action as there was nothing to prevent the company from taking the action if it desired, this is also known as the 'proper claimant' principle. Individual members may not bring an action where the company can settle an alleged wrong itself, nor where a company can ratify or condone an irregularity by its own internal procedures. These rules cause difficulties to aggrieved minority shareholders: wrongdoing directors will hardly mandate the company to take action against themselves.[5]

The majority rule stands for the proposition that the decisions and choices of the majority will always prevail over those of the minorities. By virtue of the majority rule, the minority shareholders are required to accept the decisions made by the majority shareholders. In such circumstances, the minority shareholder cannot ask for court intervention because Foss v Harbottle does not cater for minority members who complain of a wrong done to the company provided that the majority shareholders do not wish to take any action against the wrong committed.

As a general principle laid down in Foss v Harbottle, where it is alleged that a wrong has been done to the company then proper claimant in such an action is the company itself and where the company is competent to settle the alleged wrong itself or, the company is competent to ratify or condone an irregularity by its own internal procedure, then no individual member may bring action.[6]

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[3] Foss v Harbottle [1843] 2 Hare 461.
[4] http://eprints.hud.ac.uk/10578/1/MAJORITY_RULE.pdf.
[5] https://www.academia.edu/4056872/OBSTACLES_TO_PROTECT_THE_MINORITY_SHAREHOLDERS_INTEREST_IN_BANGLADESH_WAYS_OF_ACCOMPLISHMENT_WITHIN_THE_CONTEXT_OF_THE_UK_CORPORATE_LAWS_AND_THE_OECD_PRINCIPLES.
[6] https://www.lawteacher.net/free-law-essays/company-law/majority-rule-shareholders.php.

This rule was followed in the Nigerian case of Abubakri &Ors v. Smith[7] where the court held, amongst other things that; 'we therefore hold that the rule in Foss v. Harbottle applies to an unincorporated association possessing a constitution or a set of rules and regulations entitling it to sue and be sued as a legal entity, and that the janat-ul-muslim of Lagos is such a body. It follows that the rule in Foss v. Harbottle applies to religious body in the same way and to the same extent as it does to a limited liability company or a trade union'.

The Nigerian court in the case of Elufioye & Ors. v. Halilu & Ors[8] held that the rule in Foss v. Harbottle[9] has two limbs, viz; 'that in respect of any wrong against the company or union only the company or union can sue in its own name; and that the court will not interfere in any transaction where it is within the power of the majority shareholders to ratify or undo such action.'[10]

Section 299[11] provides for the common law rule, the irregularity principle, that states thus;

"Subject to the provisions of this Act, where an irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct."

The rule in Foss v. Harbottle also incorporates judicial policy that the court will normally not judge intra-corporate disputes, if the shareholders decide that the matter will not be heard. Hence, under this 'majority rule', if the majority shareholders decide in general meeting that no action shall be taken against offending directors, that, in principle, is the end of the matter.

This controversial possibility was confirmed in Tika Tore press Ltd. v. Abina[12], where it was held that; 'however wrong the directors' action might have been, it was open to the shareholders in general meeting to ratify their wrong doings'.[13]

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[7] Abubakri & Ors v. Smith (1973) 8 NSCC 451.
[8] Elufioye & Ors. v. Halilu & Ors (1973) N.S.C.C 451 at 457.
[9] (1993) 6 NWLR 570.
[10] Aderibigbe , O. I., Corporate Litigation and the Majority Rule: Retreating from the Precipice,. Faculty of Law, Bowen University, Iwo, Nigeria. International Journal of Advanced Legal Studies and Governance, Vol. 3, No. 3, Dec. 2012.
[11] Section 299, Companies and Allied Matters Act, Laws of the Federation of Nigeria, 1990.
[12] Tika-Tore Press Ltd. v. Abina & Ors. (1973) 12 S.C.
[13] Aderibigbe , O. I, op cit, at note 11.

The rationales for the rule are;

i. It prevents multiplicity of suits over one or similar incident on same arising from the same set of facts. That is, if each shareholder is allowed to sue over a single wrong done to the company, the company would be exposed to multiplicity of suits;
ii. the members in annual meeting can ratify the wrongful acts of the Directors. That is, if the individual shareholders could sue, the powers of the general meeting to ratify the wrongful acts of the Director would have been meaningless;
iii. it is a logical consequence of separate legal personality of a company. That is, since it lies within the prerogative of the company that suffers the wrong, it would be the one who institutes legal action or ratify the wrongful conduct.
iv. It preserves the principle of majority rule.[14]

1.2.2 Minority (Shareholder) Protection:

Even though the rule in Foss v Harbottle allows majority to have a higher stand than the minority under company law affairs, Section 81 of the Companies & Allied Matters Act ascribes to every member of an incorporated company, who has fully paid for his or her shares, a right to attend all the shareholders' meetings of such a company; and to speak and vote at such shareholders meetings.

All the members of a company, majority or minority, also have the right to receive copies of the Memorandum and Articles of Association of the company as they do further have the right to receive and comment on the audited accounts of the company.[15]

Section 300[16] has codified the exceptions to the majority rule, to include the minority, and it states thus:

"Without prejudice to the rights of members under sections 303 to 308[17] and sections 310 to 312[18] of this Act or any other provisions of this Act, the court on the application of any member, may by injunction or declaration restrain the company from the following:

[14] Ogbuanya, N. C. S., Essentials of corporate law practice in Nigeria. 2nd edition, 2014.
[15] https://www.proshareng.com/articles/Proshare%20Law/Minority-Shareholders-Rights/2201
[16] Section 300, Companies and Allied Matters Act, Laws of the Federation of Nigeria, 1990.

(a) Entering into any transaction which is illegal or ultra vires;

(b) Purporting to do by ordinary resolution any act which by its constitution or the Act requires to be done by special resolution;

(c) Any act or omission affecting the applicant's individual rights as a member;

(d) Committing fraud on either the company or the minority shareholders where the director fail to take appropriate action to redress the wrong done;

(e) Where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; and

(f) Where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of duty".[19]

The Supreme Court in Nigeria in Edokpolo & Company Ltd v. Sem - Edo Wire Industries Ltd[20], added an exception to the list, stating that "the rule in Foss v. Harbottle will not apply when the interest of justice requires it". But this is a lamentable omission in our statute.

Capacity in Corporate litigation is the foundation of Minority Protection; therefore, a shareholder has three options of maintaining corporate litigation, these include; Direct or Personal Action; Representative Action and Derivative Action.[21]

1.3 COMPARISON OF THE MAJORITY RULE AND MINORITY RIGHTS AMONG DIVERSE JURISDICTIONS

1.3.1 Various statutory provisions have been introduced in the Companies and allied matters act of Nigeria and the Indian Companies Act to essentially balance the inequality between majority rule and the protection and welfare of the minority shareholders.[22]

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[17] Sections 303-308, Companies and Allied Matters Act, Laws of the Federation of Nigeria, 1990.
[18] Section 310-312, Companies and Allied Matters Act, Laws of the Federation of Nigeria, 1990.
[19] Sec 300, *op cit*, at note 14.
[20] Edokpolo & Company Limited v. Sem-Edo Wire Ind. Ltd & Ors. (1984) LPELR-SC.89/1983.
[21] Aderibigbe, O. I, op cit, at note 11.
[22] Akshat Sulalit, *Rise of the Minority shareholder*. Indian Law Journal.

These may be regarded as the exceptions created by law to the general rule and they are for the protection of the minority shareholders who may be injured by the majority decisions of the company.

Under CAMA[23], the exceptions to the rules are provided for in section 299 and 300, while under the old Indian companies Act[24], similar exceptions are provided for under section 397 and 398. The provision includes;

Sec 397 - Application to Company Law Board for relief in cases of oppression.

(1) Any member of a company who complains that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Company Law Board is of the opinion

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members;

and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;

the Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

Sec 398 - Application to Company Law Board for relief in cases of mismanagement.

(1) Any members of a company who complain

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or

[23] Companies and Allied Matters Act Cap 20, 1990, Laws of the Federation 2004.
[24] Indian Companies Act, 1956.

(b) that a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by an alteration in its Board of directors or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change,

it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.

By virtue of Section 399, it can be understood that the minority shareholders have been set out as those with 10% of shares or 100 shareholders (whichever is less) in the companies with share capital; and it is 1/5th of the total number of its members, in case of the companies without any share capital.

Thus, a minority shareholder may bring actions against or on behalf of the company, by either a direct action or a derivative action where the member of the company etc sues in the name of the company, this is the position in both Nigeria and India.[25]

Under the Indian law, a member has a right to approach the tribunal where he has a complain that the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company.[26]

In case of oppression and mismanagement, under the new companies Act 2013 of India, the relief, has been provided under the Sections 241-246, according to which the affected party can approach the National Company Law Tribunal (NCLT).

The provisions of minority protection is present under both Nigerian and Indian company laws, but the new Companies Act, 2013 of India contains extra beneficial provisions for the protection of the minority shareholders, the relevant provisions are found under Sec 13 (8) (ii); Sec 236 (4) and Sec 236 (5) of the Companies Act 2013. It introduced new concepts and Sections like

[25] Emmanuel Umbu, http://www.principality.com.ng/2018/03/13/minority-shareholders-rights-protection-in-nigeria-india-and-south-africa/.
[26] S 397, Indian Companies Act, 1956.

purchase of minority shareholdings, class action; the class action suits can be instituted against the company as well as against the auditors of the company[27], etc.

1.3.2. Minority Protection under UK Companies Act

Similar provisions are contained as reliefs in order to address the imbalance of power between majority and minority shareholders and to secure protection for minority shareholders under both Companies and Allied Matters Act of Nigeria, and Companies Act 2006 of the UK. There are a number of protections afforded to minority shareholders, contained in the UK Companies Act 2006. They include Derivative claims, Personal claims and Protection against Unfair Prejudice.

A. Derivative Claims; Under Section 260 of the Companies Act 2006, shareholders are given the right to bring a derivative action which replaces the common law exceptions to the rule of Foss & Harbottle that shareholders previously had to rely on.

Section 260(3) provides that a derivative claim may be brought only in respect of a cause of action arising from an actual or a proposed act or omission involving negligence, default, breach of duty, or breach of trust by a director of the company.

B. Personal Claims; Shareholders do have a number of statutory rights particularly in relation to alterations to the company constitution, unilateral variation of class rights attached to shares, prevention of ultraviolent dealings by directors amongst others.
C. The Companies Act 2006 gives specific statutory protection to shareholders against unfair prejudice.

Under Section 994(1) of the Companies Act 2006, a company shareholder may petition the court for an Order protecting him from unfair prejudice on the ground:

(i) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of shareholders generally or some part of its members (including at least himself), or

(ii) that an actual or proposed act or omission of the company, (including an act or omission on its behalf), is or would be so prejudicial.

[27] Section 245 of the Companies Act of 2013 deals with Class Action Suit.

The remedy that is most often sought under a Section 994 Petition is that the other shareholders buy their shares for a fair value. Other remedies could include; it may make an order that the minority shareholder purchases the majority shareholding; it can order repayment of any monies found to have been wrongfully taken out of the company by those in control of it; and, as a last resort, the court has the power to wind up the company on just an equitable grounds.[28]

Conclusion

Therefore, in view of the comparison of Nigeria's companies and allied matters act, with the old and new Indian Companies Acts, and UK's Companies Act, it can be seen that there are similar provisions, but India and UK have gone a step further to protect the minority shareholders' interests.

As seen in the above discourse, the rule of Foss v Harbottle strongly protects the majority shareholders, but there have been exceptions to that rule that offer relief to the minority shareholders as well. Under the New Indian Companies Act of 2013, it can be noted that the introduction of purchase of minority shareholdings and class action suits; which can be instituted against the company as well as against the auditors of the company, is a step higher in providing solid minority protection in companies.

Also, UK Companies Act of 2006 has reliefs that include for other shareholders to buy minority holders' shares for a fair value, that the minority shareholder purchases the majority shareholding; and can also include the repayment of any monies found to have been wrongfully taken out of the company by those in control of it.

[28] https://www.jacksonlees.co.uk/protection-minority-shareholders.