

Section.135 Under The Companies Act 2013 – A Study

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Abstract

This article states the development of the concept of Corporate Social Responsibility in India and further development in norms related to it till today, then states about the Corporate Social Responsibility functions performed by the companies as per the provisions of Companies Act 2013 and explains that how they are helpful for the effective implementation of CSR for India to sustain in the present global era, next part of the article explains CSR Indian scenario i.e. how important legal CSR provisions in S.135 of Companies Act 2013 & its advantages. The boons and banes of mandating CSR initiatives for the sustainable development of the society has been discussed and thus it had been clarified that how this is different and more beneficial from the voluntary CSR spending done by a number of large companies and businesses earlier. The article has thrown light that increase in stakeholder's satisfaction automatically leads to increase in profits without compromising with the future resources and this difference a statutory provision is bringing to the overall CSR objectives in India. The problems and issues involved in the Rules issued by the Government are also highlighted and the paper had offered suggestions as to how these deficiencies can be dealt effectively so as to plug the loopholes of this law. But the major aim of this article is to focus that the statutory CSR provisions is changing the way of thinking and operations of the companies. Due to this positive change, for the corporations and government in India the economic, social and environmental development is major focus while deciding upon business activities.

Keywords: Corporate social responsibility, CSR Rules, S.135 of Companies Act 2013, Companies Act 2013, CSR Provisions.

Introduction

Corporate Social Responsibility is the uninterrupted commitment by business to follow ethics and contribute to economic, social & environmental development consecutively improving the working conditions of the workforce and welfare of their families as well as society at large. Corporate social responsibility is also referred as corporate citizenship and it not only involves incurring costs that do not provide a quick financial benefit to the company, but also it should promote positive economic, social and environmental change without compromising with the

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resources of the future generation¹. It may serve as the solution to unlock the problems of business existing at the cascading levels of society. The above discussed definitions bring out responsibilities of large companies in relation to society i.e.

- Improving Welfare of the Stakeholders.
- Today CSR is a voluntary Social and Legal Responsibilities.
- It represents responsibility of business towards entire society and its constitution².

CSR is linked with the maxims of sustainable development, due to which companies should be obliged to make decisions based not only on the social, environmental and other consequences of their activities. According to Sustainability, 'The Triple Bottom Line focuses large companies not just on the economic value addition, but also on the environmental and social value addition and destruction. At the minutest, the term 'Triple Bottom Line' is used as a framework for measuring and reporting corporate performance related to economic, social and environmental parameters³.

The Companies Act 2013 was enacted with the aim of improving the corporate governance norms and legislate the CSR norms. One of the revolutionary provisions is that of making mandatory the Corporate Social responsibility (CSR) activities in India. The reason behind the enactment is that a corporation should not only achieve its economic goal but also take over the objectives of corporate social responsibility. S.135 in the Act states that a company with the set down net worth or turnover should constitute a CSR Committee; with clearly defined structure, also the activities to be undertaken, budgets and responsibilities of the Committee⁴. This ensures that right steps are taken by companies in pursuance of the CSR provisions of the Act. But complying with this law is not an easy task due to some grey areas in the provision and its rules which require clarifications. Thus, the large companies in India have a mixed opinion about this act. The Sustainable development and stakeholder's rights protection through enforcement of corporate social responsibility provisions is an accepted approach internationally and concern over social, environment and economic development is gathering momentum. People, planet and profit should be nurtured. The number of corporate scandals are reported, especially cases of earning profit illegally i.e. by violating Human rights law, Environmental Law, and disclosure norms are increasing abysmally. It is to be noticed that very few companies currently spend the 2% of net profit which is being envisaged in Companies Act 2013. Along with this the Act itself in Schedule VII lays down nine activities according to which companies will formulate their CSR policy which complicates the situation and makes companies more and more powerless as there is little left to the discretion of the companies how to frame their CSR policies. CSR provisions under S.135 of Companies Act, 2013, being the prominent legislation in this area, need to be revisited and its enforce mechanism studied for suggesting possible changes to invigorate the legal system so as to promote welfare needs of society related to social, economic and environment. In today's globalized world, companies are subject to international expectations. Sustainable development deals with the economic, environmental and social responsibilities of worldwide companies

¹ Slaper, Timothy F. and Hall, Tanya J. (2011). "The Triple Bottom Line: What Is It and How Does It Work?" Indiana Business Review. Spring 2011, Volume 86, No.1.

² Aravossi, K. G., Panayiotou, N.A. and Tsousi, K. (2006), "A proposed methodological framework for the evaluation of corporate social responsibility", Environmental Economics and Investment Assessment, Vol 98, pp. 145-154.

³ Cochran, P. (2007), "The evolution of corporate social responsibility", Business Horizons, Vol.50 No. 2, pp. 449-454.

⁴ Nishith Desai Associates, Corporate Social Responsibility & Social Business Models in India- A Legal & Tax Perspective, Nov2013, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Corporate_Social_Responsibility_Social_Business_Models_in_India.pdf.

without compromising with the future's resources. The triple bottom line theory of CSR recommends that a business entity must exert much effort to balance these three areas of responsibility. Due to this CSR reporting is generally known as sustainability reporting. In India, generally, the focus was on charity, which is not really CSR. Sustainable CSR programs mean an integrated approach of economic, legal, ethical and philanthropic parameters⁵. In today's world, there is an increased rivet on giving back to society, creating a framework which works long term, which is sustainable & it is essential that the best practices for comprehensive growth are apportioned with the stakeholders. Current series of scandals involving major corporate giants throughout the world have brought to the attention of public, the need to analyze these issues.

Availability of legal remedies and access to justice are crucial in protection of stakeholder's rights related to economic, social and environmental development generally, and particularly in addressing grievances related to economic, social and environmental issues. This study aims to reveal not only the obstacles but also the potential of the existing legal framework. A scrutiny of the working of CSR provisions of Companies Act, 2013 might enable discovering more appropriate methods in facing the challenges of welfare of people in India. With the opening up of economy and rapid advancement in technology, economy, society and environment have become more vulnerable. This vulnerability is absolute in industrial sector. This study aims to suggest legal reforms through a comprehensive analysis of provisions of CSR under S.135 of Companies Act, 2013 and other legislations in this area such as S.134(3) of the Indian Companies Act, 2013, S. 198 of the Indian Companies Act, 2013, S.469 (1) & S.469(2) of the Indian Companies Act, 2013. Sustainable development and social, economic development as well as environmental protection are a far cry, when there is no access to remedy. This study aims to find out methods ensuring people, their Right and Might. Though among Indian states there are extremities in terms of political, economic and human rights atmosphere which can reflect in the enforcement of CSR provisions under Companies Act also, this article will be analyzing the effectiveness of the Act in India, generally. CSR is the process by which an organization thinks about and evolves its relationships with for the common good, and demonstrates its commitment in this regard by adoption of appropriate business processes and systematic plans. Hence, CSR is not charity or mere donations. CSR is a way of conducting business, by which corporates visibly contribute to the social good. Companies with social responsibility do not limit themselves to using resources to carry out only those activities which will only increase their profits rather they are interested in sustainable development. The companies should use CSR to integrate economic, environmental and social objectives with their business operations for sustainable growth. The study is expected to explore the area of no incentive if company pays more than 2% of net profit.

The CSR provisions under Companies Act 2013 were passed with high hopes that such legislation will guide the Companies to spend the 2% in CSR activities as per the defined criteria. But carry forward of such a contribution not being mentioned under the provision of CSR. It means if any of the company not able to spend 2% of average profit in any financial year so that expenditure not being carry forward for next year. However, the experience with this quasi-judicial forum is not perfectly satisfactory. This article aims to bring out methods to implement an efficient CSR provisions.

1- Corporate Social Responsibility: In India

Corporate Social Responsibility exists in India since long time and plays an important role. The companies have actualized that apart from profit making, an organization should involve in faith building by focusing on environmental issues, societal relationships & economic issues. Furthermore, the organizations which truly adopt the principles of social responsibility have brand

⁵ Companies (Corporate Social Responsibility Policy) Rules, 2014.

value and attain branding amongst common public without any advertisement⁶. CSR is an act of moral, social and business responsibility with the aim to defend, conserve and foster human values also promotes socio-economic welfare⁷. CSR has developed over a period of time for example the industrial families like Birla, Tata, Reliance, Godrej, etc. had a disposition for such socio welfare activities. These corporations have involved themselves in different kinds of CSR activities without any law or statutes related to CSR provisions, in order to build goodwill, esteem and brand⁸. Mahatma Gandhi had influenced various businessmen to take up the CSR practices related to socio-economic development because of which various firms had started educational institutions for example schools and colleges and vocational course's training centers. Furthermore, in CSR activities the focus was on effective implementation of the labor as well as environment protection. As in European Union the emphasis is on sustainable business strategy, thus the same CSR trend is now evolving in India also⁹. CSR is closely connected with the maxim of sustainable development, it states that companies should make policies based not only on factors like profits, dividends but also it should be established on short and long term social and environmental effects due to its business activities. Thus it can be stated that corporate social responsibility would mean that companies should be more pragmatic in order to analyze the positive as well as negative effects of their business activities and decisions which affects the people and society at large.

The implementation of corporate social responsibility differs from company to company. The company's size, sector, its culture and the commitment of its top level management plays a crucial role in the implementation of socially responsible aspects. Some companies may focus on a single area i.e. on the social issues, or environmental issues, however others may integrate all the aspects of triple bottom line. The vision and mission of a socially responsible company frequently specifies that it will engage in responsible and ethical businesses practices. Also these kinds of corporations maintain the balance related to the requirements of stakeholders which include employees, shareholders, customers, communities, CSR plays an important role in controlling the hazards of today's business development, by maintaining the balance between satisfying the needs of the current generation and on the other hand assuring that the resources of future generation is not endangered. Companies are inclined towards to report on their contributions towards the environment, society as well as ethical business activities. But in CSR reporting, there is the area often lacking is area of labor rights and industrial relations. One of the major focuses of CSR should be the quality of industrial relations within an organization. World is a global village, corporations are seeking for new opportunities for expanding their business outside their own country. In few years Corporate Social Responsibility (CSR) has advancing in developing credit as an important and rising kind of governance in business and it is already laid down in a global setting; with international reference standards as set up by the United Nations, International Labor Organization (ILO) conventions and Organization for Economic Co-operation and Development (OECD) guidelines. As an organization's valuable assets are brand value and its image hence CSR plays a vital role in it. CSR builds the loyalty among the employees, customers, creditors, government and shareholders. It is applicable to different company activities that functions nationally as well as internationally in varied environmental, social and economic backdrops.

2- Provisions under S.135 of Companies Act 2013

CSR practices are followed in India in past as well. It is an activity which is not debated or discussed but rather implemented. In India CSR activities have developed by mode of several projects like institutional development, community development and it focuses on the utilization

⁶ Sunita (1991), "Politics, Ethics and social Responsibility of Business". Paragon Books, New Delhi.

⁷ Ibid.

⁸ Kotler Philip & Lee Nancy. (2005), Corporate Social Responsibility, John Wiley & Sons, Inc., Hoboken, New Jersey.

⁹ Ibid.

of profits made by a company for society, economy and environmental development as well¹⁰. Furthermore, taking up such steps were a volunteer work for all corporations till it was made mandatory by the Companies Act 2013. Section 135[7] of this Act provides that every company in India, whether private or public, which have a net worth of Rs 500 crore, or a turnover of Rs 1,000 crore or net profit of rupees five crore, have to comply to the criteria to spend a minimum amount of 2% of its average net profit for the immediately preceding three financial years on CSR activities¹¹.

The CSR activities should be undertaken related to the specific areas, as listed in Schedule VII of the 2013 Act, some of them are: promotion of preventive healthcare, activities to eradicate poverty and poor nutrition, education and gender equality, setting up homes for orphans, women and senior citizens, taking measures for reducing social and economic inequalities, undertaking measures for the benefit of defense personnel, veterans & widows of Martyrs as well as their dependents, providing training to promote Paralympic or Olympic sports, ensure environmental sustainability, balance in the ecology and welfare of animals, conservation of national heritage, art & culture, contribute to Prime Minister's National Relief Fund, relief and welfare of SC, ST, OBCs, minorities and women¹². In the provision it has been clearly stated that a company has to give preference for their CSR activities to the local areas and the areas around which the company operates its business.

In addition to former, one more statutory requirement under section 135 is that every company having net worth of rupees five hundred crore or more otherwise with a turnover of rupees one thousand crore or more or else a net profit of rupees five crore or more in any given financial year shall constitute a Corporate Responsibility Committee of the Board, which should consist of minimum three directors, wherein at least one director shall be an independent director. The Committee should recommend and suggest the amount of expenditure that the company has to incur on the activities as specified in Schedule VII. The Board shall approve the CSR policy for the company after considering the recommendations of the Committee. The Section 135 and Schedule VII under Companies Act 2013, also the provisions of the rules came into effect since 1st April 2014. This Statute provides CSR activities to be undertaken through a registered trust or society, or a firm established by its subsidiary or holding company. Furthermore the company needs to specify the activities that they will take up and the modes for utilizing the funds. The report which shall be submitted by the Directors along with the financial statements of a company shall include an annual report on the CSR Activities of a company in the prescribed format under the Rules, a brief outline of the CSR policy, also the composition of the CSR Committee, with the information of the average net profit for the last three financial years and set down by rule the CSR expenditure. In case a company has not been able to spend the minimum required amount on its CSR initiatives then the specific reasons for failing to do so should be divulged in the Board Report¹³. On the other hand, failure to report CSR spending or the specific reasons for non-expenditure will lead to contravention of the provision under section 134 of the Companies Act 2013 and the company will have to pay penalty in the form of fine and which shall not be less than fifty thousand rupees, also it may extend to INR 2.5 Million. Furthermore, every officer who will be liable for contravening the rules will be punished with an imprisonment for a term up to 3 years, with fine of minimum fifty thousand rupees but which may extend to INR five lakh rupees or both¹⁴.

¹⁰ Agarwal Sanjay "Corporate Social Responsibility in India" Sage publication, 2008 – 36.

¹¹ Companies Act 2013, The Gazette Of India Extraordinary, pp 80.

¹² Ibid.

¹³ www.mca.gov.in/Ministry/pdf/HLC_report_05102015.pdf.

¹⁴ Companies Act 2013, The Gazette Of India Extraordinary, pp 80.

3- Corporate Social Responsibility Functions in Indian Corporations as per CSR provisions under S.135 of Companies Act 2013

The aim of the Corporate Social Responsibility policy is to establish guidelines for corporations to make Corporate Social Responsibility (CSR) as one of the key focus areas in accordance to CSR provisions of S.135 of Companies Act 2013 that focuses on making important contribution to society through important sustainable programs as cited in Schedule VII.

3.2 Objective:

As per this policy the CSR activities to be undertaken by the Company should be aligned with the Schedule VII of the Act as in when amended. The corporations generally propose to implement its CSR activities in various sectors stated hereunder:¹⁵

Rural Development

Education

Green Initiatives

Facilities for Senior Citizens

Entrepreneurship Skills

Vocational Skills

Medical Aid

Employment Opportunities

Old Aged Homes

Healthcare

Special Employment Opportunities for Women

Women Hostels

Animal Welfare

Environment Protection

Protection of National Heritage

Conservation of Natural Resources

Public Libraries

Promoting and Development of Art and Culture

Measures for Armed Forced Veterans, War widows and their dependents

Development of Slum Area

Advancement and growth of Traditional Arts and Handicrafts

Advancement and growth of Sports in Rural areas as well as National Game

3.3 CSR Committee

3.3.1 The Board of Directors shall constitute the Corporate Social Responsibility Committee as per the provisions of Section 135 of the Act¹⁶. The Board of Directors of the Company shall appoint the members of CSR, which must consist of at least two or more Directors.

3.3.2 The Powers of CSR Committee

- a. To form CSR Policy as per S.135 of Companies Act 2013 and for approval, recommend the same to the Board of Directors of the Company.
- b. To propose the CSR Budget.
- c. To recommend CSR activities as stated under Schedule VII of the Act.
- d. To spend the allocated CSR amount which is approved by the Board of Directors of the Company in accordance with S.135 of Companies Act 2013 and the CSR Rules on the CSR activities.
- e. To submit the Reports of the CSR activities undertaken by the Company to the Board.
- f. To keep tabs regularly on the CSR Policy.

¹⁵ Ministry of Corporate Affairs, Government of India, as passed by the Lok Sabha. Companies Act 2013.

¹⁶ Ibid.

- g. To authorize executives of the Company to attend the CSR Committee Meetings.
- h. To create transparent monitoring guidelines for execution of CSR activities in India.
- i. To submit the report to the Board in respect of the CSR activities undertaken by the Company.
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- k. To create transparent monitoring guidelines for execution of CSR activities in India.
- l. To submit the report to the Board in respect of the CSR activities undertaken by the Company.

3.3.3 Frequency of the Meetings of the CSR Committee: The meeting should be at least twice in a year. CSR Committee's members can decide mutually regarding time and place for the meetings. The quorums for the meeting should have minimum three members. The committee members might participate in the meeting either in person or else by video conferencing otherwise through audio visual means as per the provisions of the Companies Act, 2013¹⁷.

3.3.4 CSR Budget: The Act mandates companies that comes under criteria stated as per S.135 of Companies Act 2013, apportion certain amount of its annual net profit i.e. profit before tax, during the three immediately preceding financial years, should be spent on CSR activities as stated under Schedule VII of the Act.

a. CSR Expenditure: The profit described under Rule 2(f) of the CSR Rules, is the Net profit¹⁸. The CSR spending shall include all expenditure including contribution to programs or on projects relating to CSR activities as approved by the Board of Directors on the recommendation of its CSR Committee. However it does not include any expenditure on an item which is not in conformity with activities listed under Schedule VII of the Act.

b. Failure to spend the CSR allocated fund: In case the corporation fails to spend the CSR allocated fund in that particular financial year, the Committee has to submit a report in writing to the Board of Directors, in which they have to specify the reasons for not spending the amount which in turn has to be reported by the Board of Directors in their report for that financial year. Any surplus which arises out of the CSR initiatives shall not form any part of the business profits¹⁹.

3.3.5 Monitoring Mechanics: The Committee should appoint an internal monitoring group which shall comprise of three members in order to ensure effective execution of the CSR programs as per the CSR Policy and to check the implementation of the CSR Projects. The progress report of the execution will be presented to the Board of Directors in every half year. The implementation of CSR Policy should be calculated on the basis of the technical assessment of the project, financial assessment of the project especially on the basis of cost estimates and fund arrangement, Documentation of project, project schedules as well as time chart and fund requirements during each stage. All relevant progress reports of the project shall be studies for the gap analysis i.e. the gap between the targeted goal and actual achievement. Meeting with the execution team shall be held for identification of reasons for the gaps, if found any and corrective measures which is to be taken in order to bridge the gap. Reports by the Company shall be submitted to the Board of Directors to determine the status of the impact of the carried out CSR activities. Not only this but also the report of the potency of CSR activities carried out by the company.

3.3.6 Reporting Mechanism: In CSR Committee report the contribution made by the Company shall be reported to the Board of Directors along with the comments. The Board shall be reported on a regular basis, all the documentation related to company's CSR policy, CSR activities which are carried out annually, CSR expenditure implicated and also about the executing partners.

3.3.7 CSR Policy & Program's Publication: As the Board's report is a part of Annual Report hence it shall disclose the composition of the CSR Committee, the contents of CSR Policy and the CSR activities entered upon. The same CSR Policy shall also be uploaded on the company's website.

¹⁷Paranjape, NV. (2014).The New Company Law. Central Law Agency, pp.19-28

¹⁸Ibid.

¹⁹Ministry of Corporate Affairs, Government of India, as passed by the Lok Sabha. Companies Act 2013.

3.3.8 Amendment: After annual review, the Committee shall amend its CSR Policy as in when so as to make suitable changes and has to submit the same for the approval of the Board.

4- Corporate Social Responsibility Provisions under S.135 of Companies Act 2013: The Best Provision till date

As per a recent study top 100 companies in the country had incurred an expenditure of Rs 5,240 crore on CSR activities in last financial year and are expected to spend an additional Rs 850 crore during the current fiscal year²⁰. This has happened due to the statutory provisions under S.135 of Companies Act 2013. During financial year 2013, the amount spent under CSR by these companies was at Rs 3,000 crore, as per the study conducted by proxy advisory firm IiAS. Iias had stated that out of 100 corporations, 95 were required to comply with the requirements of CSR expenditure under the Act as the rest of the corporations have recorded three-year average losses. Rs 5,190 crore was aggregate of the CSR expenditure by these 95 corporations. However, as per the study Rs 50 crore was spent on CSR activities by the corporations, who were on a loss. It was analyzed that nearly 65 per cent of the aggregate CSR expenditure was for philanthropic events. Nearly, nineteen corporations had contributed sixty one crore rupees in the PMNRF. Not only have this but 7 corporations have given forty seven crore rupees to Swachh Bharat Kosh.

As per the data nearly two thousand nine hundred sixty three crore rupees, i.e. maximum amount is spent on poverty, hunger, education as well as healthcare. Fewer amounts were spent on armed forces veterans, sports and incubation of technology. The study has also revealed that the corporations has spent 26 per cent less amount than the prescribed amount as per S.135 of Companies Act 2013²¹. The study revealed that the main reason for missing the target was delay, which means that out of hundred corporations twenty companies take up CSR activities by company-owned foundations or trusts and nearly nineteen corporations are doing CSR activities through promoter's foundations and trusts.

Furthermore it was stated in the study that CSR expenditure by promoter owned foundations and trusts was nearly one thousand one hundred twenty crore. IiAS has reported that 16 percent of corporations are not complying with the provision that corporations should have minimum one independent director in the CSR committee²². Not only this but five percent of the companies have not even disclosed the details of the chairperson of the CSR committee. The government is trying to ensure that the CSR funds of any company must be invested wisely in the projects which bring socio-economic benefits in the long term with the objective of social development and social justice. The recent CSR expenditure is validating that the CSR provisions under S.135 of Companies Act 2013 have brought revolutionary changes in comparison to earlier voluntary spending prior to the implementation of the Act.

5-Conclusion

The essential component is to manage ethical, social, environmental, economic matters as seriously like other important commercial issues. Therefore, it can be concluded that the recent CSR provision in the Companies Act 2013 has brought changes in the corporate world in India. Compliance of statutes, rules and regulations and standards set up by various regulators ensure thorough check up of a corporate and hence provides license to such giant companies to operate their businesses in the society. Despite of the various practical difficulties with respect to the implementation of the CSR provisions, the initiative by the government has been praised on the basis that it confers responsibility on corporations to contribute towards social, environmental and economic welfare of the society. It has been observed that there is shift from corporate social

²⁰Economic Times from THE TOI group of publications, Tuesday, Jan 05, 2016, e Paper.

²¹Ibid.

²²Ibid

responsibility to corporate social obligation. It is necessary to properly channelize the huge funds expected to be generated by 2% mandatory CSR norm. There should be an integrated approach by companies to pursue CSR by collaborating with other companies and NGOs and sharing their core-competencies on their own²³. Business enterprises are realizing that its CSR activities not only build confidence of various stakeholders, but also it helps the management to steer the business dynamically. The companies can serve well researching and developing innovative solutions for Indian socio-economic problems by using their core-competencies. Furthermore CSR also must involve environment friendly solutions and integrate social and ecological aspects in their CSR work. There is an urge that CSR is as much about how companies earn their money as about how they spend it on society. Sustainable development and stakeholder's rights protection through enforcement of corporate social responsibility provisions is an accepted approach internationally and concern over social, environment and economic development is gathering momentum. People, planet and profit should be nurtured. The number of corporate scandals are reported, especially cases of earning profit illegally i.e. by violating Human rights law, Environmental Law, and disclosure norms are increasing abysmally. It is to be noticed that very few companies currently spend the 2% of net profit which is being envisaged in Companies Act 2013. Along with this the Act itself in Schedule VII lays down nine activities according to which companies will formulate their CSR policy which complicates the situation and makes companies more and more powerless as there is little left to the discretion of the companies how to frame their CSR policies. CSR provisions under S.135 of Companies Act, 2013, being the prominent legislation in this area, need to be revisited and its enforce mechanism studied for suggesting possible changes to invigorate the legal system so as to promote welfare needs of society related to social, economic and environment.

²³ Samir Saran and Vivan Sharan, Less corporate, more social, 10th August 2013, available at: <http://www.thehindu.com/opinion/op-ed/less-corporate-more-social/article5007515.ece>