Proportional Representation under section 265 of the Companies Act, 1956

265. Option to company to adopt proportional representation for the appointment of directors.

Notwithstanding anything contained in this Act, the articles of a company may provide for the appointment of not less than two-thirds of the total number of the directors of a public company or of a private company which is a subsidiary of a public company, according to the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise, the appointments being made once in every three years and interim casual vacancies being filled in accordance with the provisions, mutatis mutandis, of section 262.

(b) each shareholder entitled to vote at an election of directors has the right to cast a number of votes equal to the number of votes attached to the shares held by him multiplied by the number of directors to be elected, and he may cast all such votes in favour of one candidate or distribute them among the candidates in any manner;

(c) a separate vote of shareholders shall be taken with respect to each candidate nominated for director unless a resolution is passed unanimously permitting two or more persons to be elected by a single resolution;

(d) if a shareholder has voted for more than one candidate without specifying the distribution of his votes among the candidates, he is deemed to have distributed his votes equally among the candidates for whom he voted;

(e) if the number of candidates nominated for director exceeds the number of positions to be filled, the candidates who receive the least number of votes shall be eliminated until the number of candidates remaining equals the number of positions to be filled;

(f) each director ceases to hold office at the close of the first annual meeting of shareholders following the election;

(g) a director may not be removed from office if the votes cast against his removal would be sufficient to elect him and such votes could be voted cumulatively at an election at which the same total number of votes were cast and the number of directors required by the articles were then being elected; and

(h) the number of directors required by the articles may not be decreased if the votes cast against the motion to decrease would be sufficient to elect a director and such votes could be voted cumulatively at an election at which the same total number of votes were cast and the number of directors required by the articles were then being elected.

Procedure of proportional representation

(A) Consult the Articles of Association of your company to see whether they authorise the appointment of directors by proportional representation; otherwise, complete proceedings to alter them accordingly.

(B) State in the Articles of Association that not less than two-thirds of the total number of your directors shall be appointed according to the principle of proportional representation, whether by a single transferable vote or by a system of cumulative voting or otherwise, the appointment being made once in every three years and casual vacancies being filled as usual under section 262. The precise mode has to be spelt out in the Articles of Association. [*Section 265*].

(C) In cumulative voting system several directors are voted for at the same time by casting votes for the total number of shares multiplied by the number of directors to be elected *i.e.* each shareholder for one share has as many votes as there are directors to be elected. A shareholder in respect to each share can give all votes due from him to a single candidate or distribute it between two or more candidates. Thus the minority group can cast all their votes in favour of one candidate and secure his election.

(D) There are two main systems of proportional voting which provide for representation also of minority *viz.*, (i) cumulative voting, and (ii) voting by single transferable vote. These are explained below:—

Cumulative Voting[1].—Cumulative voting is the system by which several directors are to be voted for at the same time by casting votes for the whole number of shares held multiplied by the number of directors to be elected for a candidate or distributing the votes among a part of the vacancies to be filled instead of straight voting or casting votes according to the number of shares held, for all the vacancies;

1. See, Cumulative Voting, by C.M. Williams in 33 Harvard Business Review 108; 1955-11 Business Lawyer 9.

Thus a minority is allowed to secure representation on the Board of Directors. Without a cumulative voting a bare majority of the shareholders may elect the full Board and thus the control of the company could be exercised without having representatives of the minority on the Board.

Examples: Suppose there are 1000 shares, 800 shares from a majority group and the other 200 shares from a minority group. The shareholders have to elect five directors to the Board. A, B, C, D and E are nominated by the majority group and F is nominated by the minority group. Since five directors have to be elected, each shareholder has five votes for holding one share. Shareholders, in respect of each share, can give all the five votes to a single candidate or distribute it to two or more candidates.

Total votes cast will be : $1000 \times 5 = 5000$
Total number of vacancies : 5

$$\text{Each candidate receiving} = \frac{5000}{5} = 1000 \text{ votes}$$

or more shall be deemed to be elected to the Board although those who get less may also be considered elected. Therefore, the result will depend on the cumulative voting secured.

The minority group can cast all their votes in favour of F. F will get 200 x 5 = 1000 votes.

A,B,C,D and E will together get 800 x 5 = 4000 votes. Average votes for each of the candidates in this group will be 4000 ÷ 5 = 800 votes. Each and everybody among A,B,C,D and E cannot get more than 800 votes. If any of them gets single additional vote *i.e.* 801 votes, another of them will get less than 800 votes. If the minority concentrates on one candidate, he is very likely to get elected unless the minority is negligible.

(ii) The system of voting by single transferable vote: Under this system all the names of the candidates for election are entered in the ballot paper. Each voter has only one vote. He is to indicate his first, second, third preferences and so on by marking in the ballot paper for the candidates.

These preferences will be equal to the number of candidates to be elected. In the first instance, only the first preferences are counted and any candidate who receives the number of votes called "quota" is declared elected.

$$\text{The quota is} = \frac{\text{Total number of votes polled}}{\text{Number of candidates to be elected} + 1} + 1$$

Suppose there are four candidates to be elected as directors. The votes polled are 500. Then the quota is

$$\frac{500}{4+1} + 1 = 101$$

If four candidates get 101 votes each they will get elected. They will together get 404 votes. The balance is 96 votes. Even if all their remaining votes go to a single candidate, he cannot be elected. Every person who can obtain the support of 101 votes among 500 votes will surely get elected as a director.

If a person obtains more than the quota number of votes, the surplus votes in his favour will be transferred to other candidates in order of preference. They are added to the first preference votes obtained by the other candidates until some of them also get the quota number of votes. The process is repeated until all the required number of candidates for the directorate obtain the quota number of votes.

When the candidates do not get the quota number of votes even after distribution of surplus votes the candidate who has obtained the least number of first preference is eliminated. The second preferences on these ballot papers are transferred to other candidates against whose names they are marked. Thus the process is repeated until sufficient number of candidates get the quota number of votes.

Example: Let it be assumed that five directors are to be elected and seven candidates A,B,C,D,E,F and G are contesting.

The first preferences are counted

A	gets	200	votes
B	"	95	"
C	"	93	"
D	"	74	"
E	"	60	"
F	"	58	"
G	"	20	"

Total 600 votes. The quota is $\frac{600}{5+1} + 1 = 101$

A gets more than the quota and he is declared elected, and if A has surplus 99 votes in his favour, his papers are scrutinised and the second preference found in them are counted.

It is found that second preference on D are	=	25
on E are	=	5
on F are	=	10
and on G are	=	160
Total :		200

Surplus first preference of A

—to be transferred to D $\frac{25}{200} \times 99 = 12$

—to be transferred to E $\frac{5}{200} \times 99 = 2$

—to be transferred to F $\frac{10}{200} \times 99 = 4$

—to be transferred to G $\frac{160}{200} \times 99 = 81$

Total votes of A transferred = 99

Now the poll is :—

A	=		200
B	=		95
C	=		93
D	=	74 + 12 =	86
E	=	60 + 2 =	62
F	=	58 + 4 =	62
G	=	20 + 81 =	101

G gets the quota and he is deemed to be elected. There is no surplus vote in favour of G. F who has got the lowest first preference is eliminated. His 58 papers are scrutinised and the second preference—

in favour of	B =	6
do	D =	16
do	E =	30
do	C =	6
		58

After transferring second preference in F's papers to the appropriate candidate the poll is:—

A	=	200
B	= 95 + 6 =	101
C	= 93 + 3 =	96
D	= 86 + 16 =	102
E	= 62 + 30 =	92
F	=	62
G	=	101

B and D get elected having obtained the quota. Now E who has got the next lowest first preference of 60 is eliminated. His ballot papers are scrutinised and it is found that there are 27 second preferences on C. These are ordered C's votes. Now C's votes will be 99 + 27 = 126

The final poll will be:—

A	=	200
B	=	101
C	=	126
D	=	102
E	=	62 (eliminated)
F	=	62 (eliminated)
G	=	101

A, B, C, D and G are elected as directors.

(E) By these systems, a majority of 51% or more of the shareholders cannot monopolise all the directorships. A minority of respectable strength is enabled to elect their representatives and while the minority is given representation, the majority still elects directors proportionate to their strength.

(F) File Form No. 29 within thirty days of his appointment with the concerned Registrar of Companies [*Section 264(2)*] after paying the requisite fee as prescribed under Schedule X to the Companies Act, 1956, either in cash, postal order, demand draft or treasury challan. [*Rule 22*].

(G) File Form No. 32 in duplicate within thirty days of his appointment with the concerned Registrar of Companies [*Section 303(2)*], after paying the requisite fee prescribed under Schedule X to the Companies Act, 1956, either in cash, postal order, demand draft or treasury challan. [*Rule 22*].

(H) Make necessary entries in the Register of Directors and in the Register of Directors' Shareholdings. [*Sections 303(1) & 307*].

Casual vacancy

The section says that the interim casual vacancies can be filled in accordance with the provisions of Section 262.

Removal of director

Section 284 which empowers shareholders of a company in general meeting to remove a director says in its second proviso to sub-section (1) that nothing contained in this sec-