<u>Removal Of Director</u>

Removal/Vacation of Director and Power of Tribunal

It is the duty of every director irrespective whether they are appointed as Independent Directors under Section 149 of the Act or as appointees of certain shareholders or institutions as per the provisions of Section 152, to uphold the interest of the company and all the stakeholders at large.

The position of nominee directors of the company was established by referring the judgments given in Re: Neath Rugby Limited *and* Central Bank of Ecuador and others vs. Conticorp SA and others *(Bahamas) nd accordingly* it cannot be denied that the nominee directors have dual fiduciary duties – one of which is the shareholder which nominated them and the other, is the company on whose Board they are nominated.

Provisions attracting removal of Director

Section 169 of Companies Act, 2013

(1) A company may, ***by ordinary resolution***, remove a director, not being a director appointed by the Tribunal under section 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard:

Provided that an independent director re-appointed for second term under sub-section (10) of section 149 shall be removed by the company only by passing a ***special resolution*** and after giving him a reasonable opportunity of being heard

Provided further that nothing contained in this sub-section shall apply where the company has availed itself of the option given to it under section 163 to appoint not less than two-thirds of the total number of Directors according to the principle of proportional representation.

Thus, under the 2013 Act, a company can remove a director only in a general meeting by passing an ordinary resolution and if he has not been appointed as a director under the principle of proportional representation or under section 163.

Section 241 of the Companies Act, 2013 provides that any member of a company who complains that:

> (a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or oppressive to him or any other member or members or to the interests of the company; or
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> (b) the material change, not being a change brought about by, or in the interests of any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, *may apply to the Tribunal, provided such member has a right to apply under Section 244 of the Act.*

Section 244 specifies not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one tenth of the issued share capital of the company, may make an application on the aforesaid grounds unless the said requirement is waived by the Tribunal on an application made by the applicant.

Section 242 The Tribunal is empowered under the provision of Section 242 of the Act to make such order as it deems fit, on receipt of such an application, if it is of the opinion that:

a) the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; 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

Powers of the Tribunal

Sub-section (1) of section 242 of the Act states "*the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit*". Thus, Section 242 confers the Tribunal with the power to make an order directing several actions.

However it has been established under this ruling that such powers of the Tribunal are bound by the reliefs enlisted under the provisions and it may make any supplementary orders which are necessary for putting an end to the matters complained of and giving effect to the order made under the provision.

Therefore it is beyond the scope of the Tribunal, to make orders which are specifically barred by law under any other Act in force, for instance reinstatement of a director.

Removal of director as ground for oppression

Poor business decisions and the removal of a person from directorship cannot be justified as acts oppressive or prejudicial to the interests of the minorities. Even in cases where the Tribunal finds that the removal of a Director was not in accordance with law or was not justified on facts, the Tribunal cannot grant a relief under Section 242 *unless the removal was oppressive or prejudicial.*

The removal of director which has not been made in accordance with law or is not justified by the facts and made with the intent to oppress or prejudice the interests of some members may provide for relief under section 242 of the Act.

Items to be incorporated in Agenda/Circulation of Notice with detailed agenda

The law provides for certain items not expressly stated in the agenda, which is circulated prior to the board meeting to be taken up at the meeting itself with the consent of majority of the directors.

In **M.I. Builders Pvt. Limited vs. Radhey Shyam Sahu & Others***,* The requirement of sending an adequate notice with the items to be discussed is an important requirement, so as to enable the directors to consider and plan their schedule as well as action to attend and participate in the meeting. Thus it may be detrimental to the company if an important agenda item is tabled at the meeting with no prior intimation given to the directors.

Section 167 of Companies Act, 2013

MCA in its Press Release issued on September 6, 2017, expressed that the government will soon take steps against the directors of the shell companies which have not filed returns for three or more years. Post this, the Registrar of Companies of the respective states started issuing the list of disqualified directors2 u/s 164 (2) (a) of the Companies Act, 2013 ('Act').

Without any opportunity of being heard, approximately three lakh directors have been disqualified from being re-appointed in the company and for appointment in any other company.

As per Section 164 (2) (a) read with Section 167 (1) (a) of the Act, a director who is or has been a director of a company which has not filed financial statements or annual returns for any continuous period of three financial years, he will not be able to be reappointed as a director in that company or appointed in other company for a period of five years from the date on which the said company fails to do so. Further, he shall have to vacate his office of directorship in that company (i.e., the defaulting company).

Nexus between Section 164 and 167

Act has been drafted in such a way that disqualification under Section 164 leads to automatic vacation. In such a case, one has to harmoniously interpret the provisions of Section 164(2) and Section 167 of Act, 2013.

If we compare the language with that of sec. 167 (1) (a) with 164(1), there is a clear mismatch in the language, as sec. 167 (1) (a) provides that the person attracting any of the disqualifications as in sec. 164 will immediately vacate his office. If the person immediately vacates his office, then the question of the disqualification arising at the time of reappointment does not arise.

This discrepancy was corrected by the changes in Companies Amendment (Bill), by inserting the following proviso in sec. 167 (i)(a):

"Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section." Therefore, by virtue of the proposed amendment, a disqualification under Section 164(2) will trigger automatic vacation of office of directors in other companies only and not in the company in respect of which such disqualification has incurred

Procedure for Removal of Director

A special notice is required for removal of a director and such director is entitled to attend the general meeting and is eligible to be heard on the resolution at the meeting.

The affected director is entitled to make a representation in writing and can ask the company to circulate the same to all the members of the company and the company is bound to circulate the same.

If time is too short, his representation has to be read out at the meeting.

The Tribunal can order that no such representation is to be circulated or read out in the meeting, if it feels that such power is being abused by the company or any other member.

Another director may be appointed in place of the director so removed by giving a special notice and such director shall hold office till the date up to which his predecessor would have held that office.

If no new director is appointed in the general meeting where a director is removed, the board can fill it as a casual vacancy.

The board cannot appoint the same director so removed through the casual vacancy.

According to section 149 of the Companies Act 2013, in case of resignation or removal of an independent director, a new independent director is to be appointed within 180 days of such resignation or removal.

A whole-time director under the Act of 2013 has to vacate his office if he is absent for a continuous period of 12 months in the board meeting of the company even if leave of absence has been granted to him by the board.

Thus, a director to keep his position alive shall have to attend the board meeting once in a year compulsorily under the Companies Act, 2013. Otherwise, this would be adequate ground to disqualify for removal of a director.

Under section 242(2)(h), one has to take all precautionary measures as enumerated below.

In D.S.Dhillion v. M/s Honeyrex Products Pvt. Ltd. [CP No.60/2000] the CLB has asked the petitioners to move a civil court for redressal of grievances by the affected director under the above section. Generally, a director on the company's board could be removed by shareholders at an annual or extraordinary general meeting. A director who holds 99% of the shares, is a powerful director, and can remove the directors holding 1% non-consenting director for the smooth running of the business. However, care and diligence ought to be exercised if one wants to invoke the above provisions to remove a director. Otherwise, it will result in unnecessary legal battle between the parties.

Kamal Kumar Dutta & Anr v. Ruby General Hospital Ltd. & Ors. [2008(3) SCR184] In this case, after going through the records submitted, CLB came to the conclusion that the board meeting held on 3-3- 1997 was doubtful and that the resolution removing the petitioner cannot be maintained. The CLB reinstated the directors who were removed earlier by abusing section 283 (1)(g).

Hanuman Prasad Bagri & Ors v. Bagress Cereals Pvt. Ltd. & Ors. [AIR 2001 SC 1416] The plaintiff sought winding up of the company for misuse of section 283(1)(g). The Supreme Court did not order winding up of the company for the violation of the section 283 (1) (g) and suggested appropriate remedy by way of company suit which can give the plaintiff full relief if such action had been taken by the company on inadequate ground. This case suggests that a plaintiff cannot seek winding up a company for the unjust removal from director's position.

Akbarali A. Kalvert and Anr. v. Konkan Chemicals Pvt. Ltd. [1997 (88) CC245] It was alleged by the petitioners that the respondent had fabricated notices and minutes of the meetings (board and general body) and other documents and created records to show fictitious meetings; removed the petitioners as directors by falsifying records to show as if the petitioners had ceased to be directors; the respondent company admitted that the petitioners did attend the board meeting held on 29 April and 17 June, 1991. Hence, CLB held that the company action was void.

Regards

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