REMOVAL OF A DIRECTOR – BRIEF ANALYSIS, JUDICIAL PROSPECT AND LEGISLATIVE PROCESSES

Introduction:

Board of Directors are rightly referred to as the vertebra of the Company, being formed with individual directors acting together, forming backbone of the Company to steer the Company throughout its time span. The Company enjoys perpetual succession; but the director does not, irrespective of the director being an executive director, non-executive director or an independent director. The Company may, by virtue of power vested in the hands of shareholders of the Company, can remove a director before expiry of the period of his office.

Section 169 of the Companies Act 2013 substituted Section 284 of the Companies Act 1956 which contains provisions relating to the removal of a director before expiry of period of his office.

Referring to Section 169 of the Companies Act 2013, A Company can remove a director before expiry of the period of his office, and after giving him reasonable opportunity of being heard, by passing an ordinary resolution in a duly conveyed general meeting. The Company however, by virtue of MCA Notification S.O. dated 768(E) called the Companies (Removal of Difficulties) Order dated 21st February 2018, shall remove an independent director re-appointed for a second term under Section 149(10) of the Companies Act, 2013 only by passing a special resolution in a duly conveyed general meeting, and after giving his reasonable opportunity of being heard. It was held in a case of LIC of India Vs. Escorts Limited – AIR 1986 SC 1370 (1986) 59 Comp Cas 548 SC by the apex court that, a shareholder cannot be restrained from calling an extra ordinary general meeting for removal of director.

A special notice as per Section 115 of the Companies Act, 2013 and rule 23 of the Companies (Management and Administration) Rules, 2014 is required to remove a director or to appoint a new director in place of director so removed.

In the matter of B. V. Thirumalai Vs. Best Ventures Trading Private Limited (2005) 57 SCL 98(CLB), it was held that the removal of director from his office without giving him special notice under Section 284 of the Companies Act 1956 was contrary to the provisions. In Queens Kuries & Loans P Ltd. V Sheena Jose {1993} 76 Comp Cases 821 [Ker], it was held that the special notice should disclose the grounds of removal of a director.

Pre-requisites of a special notice:

- A special notice shall be signed by member(s), either individually or collectively holding not less than one percent of total voting power or holding shares having paid up share capital value of not less than Rupees Five Lakhs.
- The notice shall be sent by member(s) to the Company not earlier than three months but at least 14 days prior to the date of meeting at which resolution is to be moved, excluding the day on which the notice is given and the day of the meeting.
- The Company on receipt of such notice give its members notice of resolution along with the explanatory statement pursuant to Section 102 of the Companies Act 2013 and with the representation made by director concerned in writing, if any, at least seven days before the meeting excluding the day of

dispatch and day of the meeting, in a same manner as notice of any other general meeting.

- Where it is not practicable to give the notice in the same manner as it gives notice of any general meetings, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper, both having wide circulation in the State where the registered office of the Company is situated and such notice shall also be posted on the website, if any, of the Company.
- The notice shall be published at least seven days before the meeting, exclusive of the day of publication of the notice and day of the meeting.

A vacancy created by such removal of the director, irrespective of director being appointed in a board meeting or as an Additional Director or as a Director in a General Meeting, be filled by appointment of another director in his place at a meeting at which the erstwhile director was removed, provided a special notice for intended appointment is being given. If the vacancy is not filled this way, it may be filled as casual vacancy as per the provisions of Section 164 of the Companies Act 2013. A director so appointed, shall hold the office till the date up to which his predecessor would have held the office if he had not been removed.

The director who was removed from office shall not be re-appointed as a director by the Board of Directors.

What constitutes reasonable opportunity of being heard before removal?

In Queens Kuries & Loans P Ltd. V Sheena Jose {1993} 76 Comp Cases 821 [Ker], it was held that, it is essential that by way of principle of natural justice, the director concerned should be given a reasonable opportunity of being heard to defend his case as to why he should not be removed. Only after hearing his defence that the decision of removal should be taken by the members.

In terms of Section 169(4) of the Companies Act, 2013, a Director concerned can make a representation in writing to the Company and requests its notification to the members of the Company. The Company shall, if time permits,

a) State the fact of the representation having been made in notice of resolution given to members
b) Send a copy of representation to every member to whom the notice of meeting is sent

In case copy of representation is not sent due to insufficient time or due to Company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting.

However, the representation need not be sent out and the representation need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved by such representation, the Tribunal (NCLT) is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and the Tribunal (NCLT) may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it.

Director appointed on basis of principle of Proportional Representation:

At an outset, it may be noted that, the director, if appointed according to a principle of proportional representation cannot be removed in terms of provisions of Section 169 of the Companies Act 2013.

Section 163 of the Companies Act 2013 says that, "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 company in accordance with the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise and such appointments may be made once in every three years and casual vacancies of such directors shall be filled as provided in sub-section (4) of section 161"

Single transferable vote system means, each shareholder irrespective of his shareholding is entitled for one vote per post of directors to be appointed.

Cumulative voting system means, each shareholder is entitled to have number of votes as per his shareholding. For instance, in a situation where a shareholder has 500 number of shares in a company and there are 2 directors to be elected out of a total of 5 candidates, he is eligible to cast 500*2=1000 number of votes. He can use all these votes for a single candidate or he can divide his votes amongst all the candidates to be elected.

As stated earlier, the director appointed by adopting an option of Proportional Representation cannot be removed as per the provisions of Section 19 of the Companies Act 2013. However, there is no enough clarity on removal of director appointed by adopting an option of Proportional Representation.

Can averments made in an Explanatory Statement as per Section 102 of the Companies Act 2013 by the Company be treated / prosecuted for defamation in a court of law?

Section 499 of the Indian Penal Code defines defamation in the following manner:-

"Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

The Hon'ble Bombay High Court in the matter of Ratan N. Tata and Ors. Vs. The State of Maharashtra and Anr. (Writ Petition No. 1238 of 2019), where the impugned independent director who was removed as a director has opted for legal recourse for defamation for statements contained in the special notice, has taken a view that, *"the imputation contained in the Special Notice cannot be viewed independent of the purpose for which it is included in the Special Notice and if the petitioners have adopted a legal course permissible to be adopted under the frame work of statute governing it, we do not think the allegations can be termed as 'per se defamatory'"*

On circulation of alleged defamatory imputations contained in the Special Notice, the Hon'ble Bombay High Court has observed that, *"we are satisfied that there is no prima facie case of defamation in the present case as there was no intent on the part*

of the petitioners to cause harm to the reputation of the respondent as contemplated by Section 499 of the IPC nor can we discern any actual harm caused to his reputation, since the element of mens rea being absent and since the publication was only limited to the Board of Directors of the holding Company and the respective shareholders of these Companies, it could not be said that it was circulated widely over a section of general public."

In light of the above stated judgement, a conclusion can be drawn as the contains of the special notice and the averments made in the explanatory statements are not defamatory per se, as the same falls under the permissible legal course under framework of Section 169 of the Companies Act, 2013, provided the contains of the special notice and the averments made in the explanatory are factual.

Can a director so removed be restored as Director again by the Judicial Process?

This forms a very intricate question in the available legal framework. A director who is removed from a position of a director by passing an ordinary / special resolution in a general meeting as applicable, cannot be restored as a director again for the remaining of the term, in stricter legal sense. However, a director who is aggrieved on being removed as a director, is also a shareholder in a Company holding not less than one tenth of the total issued share capital of the Company or in concert with not less than hundred members of the company or one tenth of total number of members whichever is less, and most importantly on having reasonable cause to file an application to the National Company Law Tribunal under Section 241 of the Companies Act for oppression and mismanagement, praying for specific directions in this regard.

The Tribunal may, if it deems fit and proper, under the powers conferred to it under Section 242 of the Companies Act 2013 may pass order(s) including restoration of director who was removed as a Director of the Company for remaining of his term for smooth conduct of operations of the Company in the future.

In a very recent judgement, the Hon'ble National Company Law Appellate Tribunal, in Company Appeal No. 254 of 2018 and in the matter of Cyrus Investments Pvt. Ltd. V/s. Tata Sons Limited and Ors. Has passed an orders and directions declaring removal and other action taken against Mr. Cyrus Pallonji Mistry illegal and setting aside the same, and also to restore Mr. Cyrus Pallonji Mistry to his original position as Executive Chairman of 'Tata Sons Limited' and consecutively as Director of 'Tata Companies' for rest of the tenure.

Method(s) of removal of directors other than as prescribed under Section 169 of the Companies Act 2013

Sub section (8) of Section 169 of the Companies Act provides that nothing in Section 169 will be taken as derogating the Company from any power to remove a director under other provisions of the Act. Articles of Association are in the nature of an agreement between the shareholders who are the joint owner(s) of the Company. If some specific methodology is devised by consent, nothing precludes the members / shareholders from doing so, as held by the Hon'ble Delhi High Court in Ravi Prakash Singh Vs. Venus Sugar Limited & ors. [(2008) 1 CompLJ 283 Del;2008 84 SCL 75 Delhi]. For instance, where the Articles of Association of the

Company empowers the Board to remove director(s) including the managing director, such power will not be affected by Section 169 of the Companies Act 2013, as was held by the Hon'ble Allahabad high Court in Home Choudhary (A.K) Vs. National Textile Corporation U.P. Limited [184(48) Indian Factories and Labour Reports at page no. 101]

Non deprival of person removed as director of the Company

Referring to Section 169(8)(a) of the Companies Act 2013, nothing in this section shall be taken as depriving a person removed under this section of any compensation or damages payable to him in respect of the termination of his appointment as director as per the terms of contract or terms of his appointment as director, or of any other appointment terminating with that as director.

The Company cannot, on a reason of such removal deny the rightful compensation to the person so removed as director and the removed director is lawfully apt to get all the damages and compensation, as may be specified in the contract, except stated otherwise.

Conclusion

Section 169 of the Companies Act 2013 is like a whip for director(s) of the Company, making them apprehend that the shareholders of the Company are as powerful as anyone else, individually or together holding requisite power, even to remove a captain of a ship, if deem fit and proper.

(Sources: www.taxman.com, mca.gov.in, premier on company law published by ICSI)

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