

## COMPANY LAW

[2017] 136 CLA (Mag.) 37

**Decoding established principles of 'removal of director' under the Company Law**

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*The provision relating to 'removal of director' under the Companies Act, 2013 has been in limelight ever since Tata-Mistry Boardroom erupted. However, in the past, Apex Court, High Courts and Company Law Board (now, National Company Law Tribunal, 'NCLT') have laid down established principles. This article is a compilation and analysis of the established principles for removal of director under the Companies Act, 1956 vis-a-vis the Companies Act, 2013.*

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**Provisions of removal of director under Companies Act, 1956  
vis-a-vis Companies Act, 2013**

1. Section 284 of the Companies Act, 1956 ('the 1956 Act') provided for the provisions relating to removal of directors. This section corresponds to section 169 of the Companies Act, 2013 ('the 2013 Act'). The broad provisions and procedure relating to removal of director are the same under the 1956 Act vis-a-vis the 2013 Act. Such provision relates to requirement of special notice from a shareholder, intimating the director about receipt of such notice, obtaining director's representation, issuing notice of meeting along with representation of director and passing of resolution in general meeting. However, under the 2013 Act, there is a change in the provisions relating to 'special notice'. Pursuant to section 190 of the 1956 Act, there was no specific minimum shareholding requirement to issue special notice for removing director of the company. However, under section 115 of the 2013 Act, minimum shareholding requirement is prescribed [which is : (i) number of members holding not less than 1 per cent of total voting power or (ii) holding shares on which such aggregate sum not exceeding Rs. 5,00,000 has been paid-up and the company shall give its members notice of the resolution in such manner as may be prescribed].

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**Can shareholders be restrained from calling general meeting to remove existing directors and elect new directors?**

2. The Supreme Court in the case of *LIC v. Escorts Ltd.* [1986] 59 Comp Cas 548 held that shareholders have an inherent right to remove directors of the company. It stated :

“Holders of majority of the stock of a corporation have the power to appoint, by election, directors of their choice and the power to regulate them by a resolution for their removal. And, an injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint another. The only way in which the general body of the shareholders can control the exercise of powers vested by the articles in the directors is by altering the articles or, if opportunity arises under the articles, by refusing to re-elect the directors of whose action they disapproved.”

The Court held that minority of shareholders in the saddle of power could not be allowed to pursue a policy of venturing into a litigation to which the majority of the shareholders were opposed. The Court also observed that LIC, as a shareholder of Escorts Ltd., had the same right as every shareholder to call an extraordinary general meeting for the purpose of moving a resolution to remove some directors and appoint others in their place. It ruled that LIC could not be restrained from doing so. In another case, Karnataka High Court in the case of *Prakash Roadlines Ltd. v. Vijaya Kumar Narang* [1995] 83 Comp Cas 569 held that when a person has contributed to company's shareholding, he has a right to participate in matter of electing or removing a director. The Court held that such rights should be considered as member's right inherent as they are allowed to directly participate in company's management.

**Shareholder's right to remove director is an Individual right and enforcement cannot be restrained even by a court of law**

3. The Karnataka High Court in the case of *Prakash Roadlines Ltd. (supra)* held that every shareholder of a company has the right to call an extraordinary general meeting. It held that every shareholder has a right (which is his individual right) that can be enforced after complying with procedural and other requirements. The Court ruled :

“Enforcement of this right is independent of the requirements of section 188 of Companies Act, 1956 [corresponding to section 111 of Companies Act, 2013] governing other kinds of resolutions. If the attempt of the individual to remove a director or to elect any other director in a vacancy is frivolous, the said attempt will be lost at the meeting and there will not be any undue harassment of the company at all to prevent speculative ventures to get elected.”

**Civil court inappropriate forum and lacks jurisdiction  
over removal of director**

4. The Bombay High Court in the case of *Khetan Industries (P.) Ltd. v. Manju Ravindra Prasad Khetan* [1995] 4 SCL 21 held that the appointment and removal of directors is specifically governed by provisions of the 1956 Act. The High Court stated that the specific remedy provided under the Act has to be availed of by a person seeking relief and no suit can lie to civil court. The Court ruled that the right to appoint and/or remove the directors of a company being a creature of the Companies Act which itself provides machinery for the enforcement of the said right, the civil court's jurisdiction is impliedly barred in such matters.

**Company law provisions relate to removal of director and not  
managing director**

5. The Madras High Court in the case *S Varadarajan v. Venkateswara Solvent Extraction (P.) Ltd.* [1992] 9 CLA 39 held that section 284 of the 1956 Act does not affect powers of board of directors to revoke appointment of managing director or other director made by board. The High Court observed that section 284 deals with the removal of directors and it does not deal with the power of the board of directors to revoke the appointment of managing director.

**Can company remove its 'permanent directors'?**

6. In a very unique case, the Delhi High Court in the case *Tarlok Chand Khanna v. Raj Kumar Kapoor* [1983] 54 Comp Cas 12 held that the company has power under section 284 of the 1956 Act to remove a permanent director even if articles of association put restriction on removal of permanent director. The High Court observed that the shareholders have no power, apart from that given in the statute or the articles of association, to intervene in the management of the company's affairs, section 284 of the 1956 Act is designed to enable them to control the directors by their removal. The only exception is director appointed by the CLB/NCLT under section 242 of the 2013 Act. The High Court concluded that even where in terms of the articles of association of a company a permanent director was to hold office for life and also had a right during his life time to nominate his successor on the board in event of his death, that director could nevertheless be removed under section 284.

**Can the co-promoters have right to remove their nominees from the  
Board of directors?**

7. In *Ravi Prakash Singh v. Venus Sugar Ltd.* [2008] 84 SCL 75 (Del.) with unique facts, the question was whether, in accordance with the provision of articles

of association, the co-promoters had a right to withdraw their nomination as directors and whether such withdrawal amounted to 'removal of director'? The Delhi High Court relied on *A K Home Chaudhury v. National Textile Corpn. (UP) Ltd.* [1948] 48 IFLR 101, and held :

"It is not in doubt that, though there is a mandate contained under section 284 of the 1956 Act, yet that is not the only methodology for removing a director. There may be eventualities, like retirement, dismissal, removal or vacation of office voluntarily."

The judgment made it clear that where articles of association confer power on the Board of directors to remove a director, such power is not affected by the provisions of section 284. The Court ruled that "articles of association are in the nature of an agreement between the shareholders who are the joint owners of the company. If some specific methodology is devised by consent, nothing precludes the members/shareholders from doing so."

**Can a private company provide in its articles of association provisions relating to 'compulsory resignation' as an additional ground for 'vacation of director'?**

8. Section 283 of the 1956 Act relates to 'vacation of office by directors' and provides for twelve grounds for vacation of his office. Sub-section (3) of section 283 of provided that a private company (which is not a subsidiary of a public company) may, by its articles of association, provide that the office of director shall be vacated on any grounds in addition to those specified in sub-section (1) to section 283. The provisions relating to vacation of office of director is provided in section 167 of 2013 Act. The question is : can a private company provide for 'compulsory resignation' in its articles of association as an additional ground for 'vacation of director'? The Ministry of Corporate Affairs (MCA) had addressed the issue by a letter<sup>1</sup>, wherein it clarified that private company (simpliciter, i.e., company which is not a subsidiary of a public company) cannot circumvent the provisions of section 284 of 1956 Act in the guise of including additional grounds in its articles of association for the vacation of office by directors as contemplated in sub-section (3) of section 283. The MCA stated that whenever any such additional ground included in articles of association, it virtually results in the removal of a director and such power can only be exercised in general meeting as contemplated by section 284. The MCA concluded that any such power given in articles of association to Board of directors would not be effective considering the provisions of section 9 of the 1956 Act. However, the Privy Council in *Lee v. Chou Wen Hsien* [1985] BCLC 45 observed that although the power of expulsion vested in the directors was a fiduciary power and

1. Letter No. 8/43(283)/63, dated 17th August, 1963

accordingly in exercising it they had to act in what they believed to be the best interests of the company and not for ulterior purposes, the expulsion provisions in the company's articles of association was so drafted as to require a director to vacate immediately his office once he had been requested to do so by the other directors. The Privy Council held that "even if one or more of the requesting directors acted from ulterior motives the expulsion would be effective, provided the stated events for a valid expulsion had been satisfied.

#### **Removal of trustee in trust vis-à-vis removal of director in company**

9. The Calcutta High Court in the case of *Bengal Luxmi Cotton Mills Ltd., In re.* [1965] 35 Comp Cas 187 ruled that directors are liable to be removed on the grounds on which trustees are liable to be removed. However, the High Court differentiated between removal of director *vis-a-vis* removal of trustee. It stated that members of a company have the right to deal with conduct of directors, and irregularities in company administration may be overlooked and condoned by members in general meeting. However, such grounds would be considered for removal of trustee. The Court ruled that only in cases of more serious misconduct by directors (*i.e.*, fraud, misappropriation and violation of statutory provisions), the court will interfere with administration of company's affairs. The Court, however, clarified that even in the case of charges of misappropriation and misapplication of funds, the court hesitates to interfere in a company's affairs. Court interferes only when remedy available in domestic forum has become ineffective or cannot be invoked or pursued for one reason or another.

#### **Conclusion**

10. Removal of director is an extreme case in the lifetime of the company. Before such removal of director, the Board ensure that requisite exit options are offered to such director (depending whether such director is non-executive director or executive director). When all the legal options are tried and tested, the company may propose to remove such director. Therefore, the legal advisors and company secretaries ought to be conversant with the provisions in the law relating to 'removal of directors' along with the landmark rulings. In my view, there is a very less probability that the principles laid down by the Court would be changed or altered under the 2013 Act. ❖❖❖