INDEPENDENCE IN THE LAW OR INDEPENDENCE IN THE MIND ?

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The primary objective for appointing independent directors on the board of companies is to ensure that any action for wrong doing by the majority stakeholders is brought under check and also as a value addition on the board of companies. It is the opinion of the law makers that directors who are free of any interest in the Company will be in a position to objectively judge the management process and decisions being taken by them. For this purpose, both the Companies Act and the Listing Agreement have laid down the criteria for deciding whether a particular director is independent or not.

The question that arises is what exactly constitutes "independence" and to what extent the independent directors will be able to do justice to the responsibilities bestowed on them. As per Webster's New World Dictionary, "independent" means (1) free from the influence or control of others; specific (a) free from rule of another; self-governing (b) free from persuasion or bias (c) self-confident or reliant (d) not adhering to any political party (an independent voter) (e) not connected with others; grocer (an independent grocer); (2) not depending on another, of, or having an income large enough to enable one to live without working, (3) a person who is independent in thinking. Similar meaning is given in Oxford Dictionary also. Ideally, "independence" should refer to independence of mind and the ability to judge a matter without any prejudice or bias towards any individual's interest. Independent directors should be knowledgeable individuals, of proven integrity who are able to ensure compliance with financial, regulatory and corporate laws and make a meaningful contribution to business. However, the law makers have completely different ideas. To them, it is material financial interest which constitutes the benchmark for deciding whether or not an individual director will be able to conduct his duties independently. These directors may or may not have sufficient knowledge about the business of the company and may or may not be able to express their independent opinion and voice their dissent, if any.

Further even if we find out the ideal combination of people who are free of any financial interest in the business, are not related to any of the promoters and are well versed people having sufficient knowledge of financial and legal regulations, then also one is doubtful as to whether such individuals will be able to do justice to the expectations from them. Before expressing their opinion on any financial decision, it will be necessary that such directors have sufficient access to all financial records and information that are fundamental to understanding the said subject. In many cases, it has been seen that a Non-Executive Director is not able to access information which is easily known to the Executive Directors. Support is usually not forthcoming especially in case of family run business. In case such information is not forthcoming, independent directors should be able to demand such information in the face of resistance shown by the Executive members of the Board. Further, independent director shall be able to make a meaningful contribution as a Board member only if he is able to voice his dissent and strongly object if he finds any wrong being done by the majority stakeholders towards the others. For this, it is also important that he should devote sufficient time and commitment towards the overall operations of the company.

The moot point of the aforesaid discussion is that though the initiative taken by the law makers towards ensuring effective governance of public limited companies is laudable, the intention may not materialize in all the situations. As discussed above, pecuniary interest is not the only benchmark for deciding independence. Since independence is only

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a state of mind, even the so-called non-independent directors could have carried out their jobs quite independently. Similarly, even after appointment as independent directors on the board of public companies, such directors may not be able to function in the manner expected of them. The aforesaid can be illustrated by the following example: a person may be providing consultancy services to the promoter company and still act as an independent director in the associated company. Such director shall himself take a call as to when to withdraw from a voting process in case he finds himself to be interested in a particular Board decision being taken.

The above is not to say that the initiative taken by the law makers is absolutely fruit-less or are only good thoughts put on paper. The guidelines for establishing independence help to ensure that the individual directors are not guided by any kind of financial interest while taking a call at the Board Meetings but there is more of independence than that. One fears that absolute independence may actually take the form of aloofness. A certain extent of interest in the Company may actually lead to a feeling of belonging and it is only human nature that one gets more concerned when a personal stake is involved than otherwise.

In the given context, it may be noted that a nominee of a financial institution is held to be a Non-Executive and an Independent director. However, the question that arises is that in all situations, the financial institution which such director represents normally has a stake involved in the said company, either in the form a loan given, assets held or ownership of shares, etc. Thus, the nominee director is actually having a pecuniary interest in the Company and therefore, any decision he takes in any Board Meeting will be influenced by the interests of the financial institution which he represents. If so, should such nominee director still be held to be an independent director, considering the guidelines laid down by the statute in this regard.

Further, it may be argued that the said provision for appointing an independent in a public limited company should also apply to a private limited company (at least one independent director should be appointed) or else, there will be an incentive to form a new private limited company and merge / transfer the majority business and asset to the private limited company. Also, the provision should apply squarely to a government company and independent directors should be appointed in the same manner in order to bring uniformity in law and professionalism and independence in the management of such companies.

We may conclude by saying that bringing independent directors is definitely a good move in the direction of a more holistic approach towards good corporate governance. However, the method is not full-proof and the success of such an initiative totally depends on the merit of the individual being brought to the Company Board rooms than anything else. Independence does not merely imply absence of bad faith or fraud. Representation of the financial interests of others imposes on a director an affirmative responsibility to protect those interests and to oversee with a critical eye.