

Independent Director: Perspectives as to Appointment, Re-appointment and Cooling off Period

The author examines the applicability of various Sections, sub-sections, and provisions related to the Independent Director under the Companies Act, 2013. Since there is no specific provision in the Act laying down the manner of appointment or re-appointment of an Independent Director, the author contemplates two probabilities with regard to the appointment or re-appointment of an Independent Director, which is the prerogative of the Board of Directors of a company. Conditions for Appointment of an Independent Director as an Additional Director by the Board, along with the terms of tenure & office of Independent Director, are discussed. The author interprets the proviso to sub-section (11) dealing with the cooling-off period. The cooling-off period under SEBI LODR regulations, of one year, is only when an Independent Director resigns from the company.



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INTRODUCTION

REQUIREMENTS AS TO INDEPENDENT DIRECTORS

Section 2(47) defines "Independent Director" as an Independent Director referred to in sub-section (5) of Section 149 of the Companies Act, 2013 (hereinafter referred as the Act).¹ There is no definition of 'Independent Director' as such. Accordingly, directors appointed as Independent Directors pursuant to Section 149 of the Act are Independent Directors.

As per sub-section (5), every company existing on or before the date of commencement of this Act shall, within one year from such commencement or from the date of notification of the rules in this regard as may be applicable, comply with the requirements of the provisions of sub-section (4).

According to sub-section (4) of Section 149, "Every listed public company shall have at least one-third of the total number of directors as Independent Directors and the Central Government may prescribe² the minimum number of Independent Directors in case of any class or classes of public companies."

WHO SHOULD APPOINT INDEPENDENT DIRECTOR?

There is no specific provision in the Act laying down the manner of appointment or re-appointment of an Independent Director. The selection of a person to be appointed as an Independent Director, and his/her appointment, is the prerogative of the Board of Directors of a company.

There are two probabilities with regard to the appointment or re-appointment of an Independent Director:

- First, the appointment/re-appointment is made by the members at the annual general meeting to be effective prospectively, after the Board has approved and recommended it to the members;
- Second, the appointment/re-appointment is made by the Board prospectively, and it is approved by the members at the annual general meeting retrospectively.

Both the ways of appointment/re-appointment seem to be in conformity with the law as discussed below.

The use of the words 'in the opinion of the Board' in Section 149(6) indicates that selection of a person to be appointed as an Independent Director is the prerogative and responsibility of the Board of directors of a company. In other words, the duty of selection of a person to be appointed as an Independent Director has been cast on the Board of directors of a company.

The Board may select and appoint a person as an Independent Director, subject to the approval by the members of the company at a general meeting. After an Independent Director is appointed by the Board, it may be placed at a general meeting, or get the appointment made by the Board approved by the members by a resolution passed by postal ballot.

The appointment made by the Board is subject to the approval of the members, since Section 150(2) provides that the appointment of an Independent Director shall be approved by the company in a general meeting. The words 'approved by the company in a general meeting'

¹ This should be read as section 149 (4).

² See Rule 4, *Companies (Appointment and Qualification of Directors) Rules, 2014*.

contemplate an act subsequent to the appointment. Thus, the Board may appoint an Independent Director subject to the approval by the members of the company at a general meeting.

One more provision that needs to be noted, is Section 152(2) of the Act, according to which in respect of appointment of directors of a company, every director must be appointed by the shareholders in general meeting, except those directors in respect of whom the Act provides that they may be appointed in a manner other than in general meetings by the shareholders. For instance, under Section 152(6) of the Act, the directors who are not liable to retirement by rotation may be appointed in a different manner than by the shareholders. Likewise, under Section 161 of the Act, additional directors, alternate directors, and directors to fill a casual vacancy may be appointed by the Board of directors.

The Independent Directors are required to be appointed by the Board, but their appointment is subject to the approval of shareholders; Section 150(2) of the Act expressly provides for it. Besides, Item IV(1) of Schedule IV states that:

(2) The appointment of Independent Director(s) of the company shall be approved at the meeting of the shareholders.

These two provisions make it mandatory to get the approval of members of the company to the appointment (and also re-appointment) of an Independent Director. The explanatory statement annexed to the notice of the general meeting (pursuant to Section 102 of the Act) shall indicate the justification for choosing the appointee for appointment as Independent Director.

WHETHER AN INDEPENDENT DIRECTOR NEEDS TO BE APPOINTED AS AN ADDITIONAL DIRECTOR BY THE BOARD?

The Act has created an independent category of directors, i.e. Independent Directors and divided the powers relating to appointment and other matters with a distinct statutory framework in connection therewith, between the Board and shareholders of the company.

Usually, a person is appointed as an additional director in the independent category (or designated as an Independent Director) by the Board, although there does not appear to be a need for the appointment of an Independent Director as an additional director in the first instance by the Board and then as a director at the annual general meeting, and even if an Independent Director is appointed by the Board as an additional director (pursuant to Section 161) subject to, as discussed below, there is no need to pass two resolutions: one for his appointment as a director (as a result of expiration of his term at the annual general meeting) and one for his appointment as an Independent Director; only one resolution for his appointment as an Independent Director should suffice.

The Board may appoint a person as an Independent Director and recommend him to the shareholders for their approval at the general meeting or by postal ballot. The company may then just pass a resolution approving the appointment of the Independent Director made by the Board.

The Board may appoint/re-appoint a person as an Independent Director subject to the approval by the members of the company at a general meeting and afterwards the appointment made by the Board may be placed at a general meeting, or get the appointment made by the Board approved by the members by a resolution passed by postal ballot. There is no need to appoint or re-appoint an Independent Director as an additional director in the instance by the Board.

Even where an Independent Director is appointed by the Board as an additional director in terms of Section 161(1), there is no need to pass two resolutions at the general meeting: one for his appointment as a director (since his tenure as an additional director expires), and a second resolution for approval of his appointment as an Independent Director. The resolution for approval of his appointment as an Independent Director itself would imply that his appointment as a director (as a result of expiration of his term as an additional director), where he/she is being appointed as a director (with the tag of 'Independent Director'). Some companies, however, do pass two separate resolutions at the annual general meeting, one for his appointment as a director (since his tenure as an additional director expires), and a second resolution for approval of his appointment as an Independent Director.

For instance, the following single resolution would serve the purpose:

"RESOLVED THAT in accordance with the provisions of Sections 149, 150 and 152 read with Schedule IV and other applicable provisions of the Companies Act, 2013 ("the Act") and the Companies (Appointment and Qualifications of Directors) Rules, 2014 and the applicable provisions of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (including any statutory modification(s) or re-enactment(s) thereof, for the time being in force), Shri (DIN:), who was appointed as an Additional Director, designated as an Independent Director, pursuant to the provisions of Section 161(1) of the Act and the Articles of Association of the Company and in respect of whom the Company has received a notice in writing under Section 160 of the Act from a member proposing his candidature for the office of Director, be appointed as an Independent Director of the Company, not liable to retire by rotation and to hold office for a term up to"

WHETHER INDEPENDENT DIRECTORS ARE LIABLE TO RETIREMENT BY ROTATION?

In terms of Section 149(13), the provisions of sub-sections (6) and (7) of Section 152 in respect of retirement of directors by rotation shall not be applicable to the

appointment of Independent Directors. Moreover, in terms of the *Explanation*, appended to Section 152(6), of the Act, the expression “total number of directors” shall not include Independent Directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company.

Thus, Independent Directors are to be excluded from the calculation of the number of directors who are liable to retirement by rotation. For instance, if a company has 12 directors, including 4 Independent Directors, the number of directors to be considered to determine the numbers of retiring and non-retiring directors would be 8 out of which two-thirds should be liable to retirement by rotation.

WHETHER SECTION 160 OF THE ACT IS APPLICABLE IN RESPECT OF THE APPOINTMENT OF AN INDEPENDENT DIRECTOR?

A detailed discussion is set out elsewhere in this treatise. Section 160, entitled “Right of persons other than retiring directors to stand for directorship”, lays down the requirements in this regard and it is applicable in the case of “A person who is not a retiring director in terms of Section 152”. The words “A person who is not a retiring director in terms of Section 152 shall ... be eligible for appointment to the office of a director” make it clear that a company may appoint at an annual general meeting a person who is not a director, retiring director at any general meeting, if the requirements under Section 160 and the Rule 13, the Companies (Appointment and Qualification of Directors) Rules, 2014 are duly complied with.

Section 160(2) of the Act provides that the company shall inform its members of the candidature of a person for the office of director under sub-section (1) in such manner as may be prescribed.

Obviously, when a company receives a notice under Section 160(1) of the Act, the Company Secretary must place it before the Board of directors of the company and the Board must take cognizance of the same and direct the Company Secretary to comply with sub-section (2) and the aforesaid Rules, if the notice is in order.

According to the *Explanation* appended to Section 152, for the purposes of Section 152 and Section 160, the expression “retiring director” means a director retiring by rotation in terms of Section 152(6) of the Act.

Undoubtedly, the appointment of an Independent Director (whether in the first term or the second term) is a case of a person who is not a retiring director in terms of Section 152 of the Act. We have already noted above, that an Independent Director is not liable to retirement by rotation under Section 152(6) of the Act.

APPOINTMENT OR RE-APPOINTMENT AT THE GENERAL MEETING

An Independent Director may be appointed at a general meeting (usually at an annual general meeting) before the commencement of his first or second term, after the Board has approved and recommended it to the members. In such a case, the appointment or re-appointment will be effective prospectively.

WHETHER APPOINTMENT OR RE-APPOINTMENT OF INDEPENDENT DIRECTOR REQUIRES PREVIOUS APPROVAL OF MEMBERS?

Neither Section 152(2) nor Section 149(10) provide for or imply prior or previous approval of the members to the appointment or re-appointment of an Independent Director.

There is nothing in the language of Section 149(10) suggesting that the Board cannot appoint an Independent Director subject to the approval of the members subsequently (post facto approval) sub-section (10) merely says “an Independent Director *shall hold office for a term up to five consecutive years* on the Board of a company, but *shall be eligible for re-appointment* on passing of a special resolution by the company.”

On the contrary, Item IV(2) of Schedule IV of the Act, clearly states that “The appointment of Independent Director(s) of the company shall be approved at the meeting of the shareholders.” Thus, ‘appointment’ shall be approved by the shareholders. This contemplates that

an Independent Director has been appointed before the appointment is approved by the shareholders.

Therefore, there is nothing illegal in following the course of action of Board appointing an Independent Director subject to the approval by the members of the company at a general meeting and afterwards getting appointment made by the Board approved by the members. Thus, appointment by the Board in the first instance and approval by the members subsequently the appointment of an Independent Director effective from the date of the Board meeting (or the date mentioned in the resolution of the Board) is not illegal and in contravention of Section 149(10) of the Act.

Moreover, the words “*shall be approved at the meeting of the shareholders*” in Item IV(1) and (2) of Schedule IV clearly indicate the intention of the Legislature that the approval of the members to the appointment of an Independent Director may be taken subsequently.

In the case of a listed company, under Regulation 17(1C) of the LODR Regulations, the listed entity shall ensure

that approval of shareholders for appointment or re-appointment of a person as an Independent Director is taken at the next general meeting or within a time period of three months from the date of appointment, whichever is earlier; in other cases, the approval may be taken at the next annual general meeting.

TENURE OF OFFICE OF INDEPENDENT DIRECTOR

According to sub-section (10) of Section 149, subject to the provisions of Section 152, an Independent Director may hold the office of Independent Director for a term of five consecutive years but may be re-appointed by a special resolution. Disclosure of such appointment must be made in the Board's Report.

For the purposes of the provisions of the Act, there is no difference between 'appointment' and 're-appointment', except that under Section 149(10) of the Act, appointment of an Independent Director for the second term of five years, requires approval of members of a company by special resolution.

For the purposes of the Companies Act, the terms 'appointment' and 're-appointment' have been used synonymously with the same meaning and there is no difference between the two terms. In fact, Section 152(6) does not use the term 're-appointment'.

The words 'up to five consecutive years' means for the uninterrupted or unbroken period of five years. The expression 'up to five consecutive years' facilitates the appointment for less than five years at a time, in which case the person can be reappointed for the balance period of five years. Term means tenure or period of office or position. One term must be of five years, and those five years must be consecutive. Up to means until, till, up to the time of is used to indicate a limit or boundary; during the time or period before.

The MCA's view is set out in its General Circular No. 14/2014, dated 9-6-2014

"Section 149(10)/(11) - Appointment of 'IDs' for less than 5 years: Clarification has been sought as to whether it would be possible to appoint an individual as an ID for a period less than five years.

It is clarified that Section 149(10) of the Act provides for a term of "up to five consecutive years" for an 'ID'. As such while appointment of an 'ID' for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term under Section 149(10) of the Act. Further, under Section 149(11) of the Act, no person can hold office of 'ID' for more than 'two consecutive terms'. Such a person shall have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years. In such a case the person completing 'consecutive terms of less than ten years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of three years."

The MCA seems to have taken the abovementioned view as sub-section (10) states: "an Independent Director shall hold office for a term up to five consecutive years...". Although the words "up to" have been used, they must be understood in the light of the word "term" and the words "five consecutive years". Thus, the expression "term up to five consecutive years..." must be read together. When so read, the legal interpretation that emerges is that a period of less than five years will be treated as one term and that will exhaust the five consecutive years' term. So, the next five years shall be the term on his reappointment for five consecutive years.

In the absence of any specific provision as to the point from which the five-year period will commence to run, it appears that it will begin to run from the date of the general meeting at which the appointment is made or 1 April, 2014 if the resolution passed at the general meeting says so. Therefore, if a person is appointed in the annual general meeting and the resolution does not provide that the tenure shall begin from 1 April, 2014, the five-year period may be counted from the date of the general meeting. In as much as the Section gives one-year time from 1 April, 2014, a company may make fresh appointments at a general meeting for a period of five years beginning on the date of the general meeting.

According to sub-section (11), notwithstanding anything contained in sub-section (10), an Independent Director cannot hold the office for more than two consecutive terms (each of five years), but he may be appointed again as an Independent Director after an interval of three years.

Sub-section (11) has two features: prohibitive as well as permissive or enabling. The first part of it is prohibitive; it is couched in negative language; it prohibits an Independent Director from holding an office for more than two consecutive terms. The second part of sub-section (11) (which is an enabling provision) permits a company to appoint the Independent Director who had completed two terms of a total of ten years and also the cooling off period of three years (after he had ceased to hold the office of Independent Director).

Thus, the purpose of sub-section (11) is two-fold: first, to prohibit reappointment of an Independent Director as such, after he has completed two terms of a total of ten years; and second, to permit appointment of such person as Independent Director after the cooling off period of three years is over.

Sub-section (11) also impliedly prohibits an Independent Director who has completed two consecutive terms of a total of ten years, for being appointed as an Independent Director for three years after the conclusion of the second term. The period of three years mentioned in this provision is the cooling-off period, i.e. the period of time that must pass before you can do something. In terms of sub-section (11), before the expiry of the cooling-off period, the Independent Director who ceased to hold that office after the expiration of the second term, cannot be re-appointed as Independent Director.

A combined reading and a reasonable interpretation of the provisions in Sub-sections (10) and (11), having regard to the intention of the Legislature, seems to be that no individual should hold the office of Independent Director for two terms of 10 years, each term being a maximum of five years. The words “a term *up to five consecutive years*” indicate that one term may consist of five years or less than five years. In other words, a period of less than five years should be treated as one term. Thus, an individual may be appointed as an Independent Director for five years or less than five years and if he is appointed for a period of less than five years, he may be appointed again for five years at a stretch or for a broken period. The word ‘consecutive’ must be given its ordinary meaning. The ordinary meaning of ‘consecutive’ is: following one another in uninterrupted succession or order; successive; following one after the other in a series; following each other without interruption. If so, there should not be a break between expiry of one period of less than five years and the following period. Likewise, there should not be a break between two terms of five years each.

For the purposes of sub-sections (10) and (11), any tenure of an Independent Director on the date of commencement of this Act shall not be counted as a term under those sub-sections. There is no express provision to the effect that, if there is any deviation in compliance with the criteria laid down as Independent Director, the incumbent will cease to be an Independent Director of the company. Section 196(6) does not say so; it only specifies the qualification/disqualification criteria. No other provision says so.

In the absence of any specific provision to that effect, if any of the criteria stipulated in Section 149(6) is not fulfilled, it cannot be said that, he will not be even a director of the Company, as the shareholders have appointed the person to the position of Independent Director only not an ordinary director. In such a case, the concerned person would not be treated as an Independent Director but would continue to be a non-Independent Director until he resigns or is removed.

THE COOLING-OFF PERIOD: IMPACT OF THE PROVISO

The proviso to sub-section (11) reads as follows:

“Provided that an Independent Director shall not, during the said period of three years, be appointed in or be associated with the company in any other capacity, either directly or indirectly.”

The words “said period” means the period of three years referred to in sub-section (11). This is called cooling-off period. It will be observed that the prohibition under the cooling-off period is only when an Independent Director completes his tenure of two terms and not when an Independent Director resigns from his office of Independent Director.

This contains another prohibition. It comes into play during the cooling-off period. It seeks to prohibit the said Independent Director from being appointed in, or be

associated with, the company in any other capacity, either directly or indirectly, during the cooling-off period.

The proviso is an extension of the main provision of sub-section (11) and hence it applies in relation to the Independent Director who is in the mode of the cooling-off period.

Reading sub-section (11) and its proviso together, the following picture emerges:

- An Independent Director cannot hold the office as Independent Director for more than two consecutive terms (each of five years);
- An Independent Director who has completed the two consecutive years (a total of ten years) can be appointed as Independent Director after the expiration of three years of ceasing to be³ an Independent Director;
- An Independent Director cannot, during the said period of three years, be appointed in or be associated with the company in any other capacity, either directly or indirectly.

RULES OF INTERPRETATION OF A PROVISO

The subject matters of the sub-section (11) and the proviso are different. The third proviso has nothing to do with the subject matter of sub-section (11), namely tenure of Independent Director. The subject matter of the proviso is the cooling-off period of an Independent Director who has completed two terms in all of ten years.

It has been held by courts in numerous cases that a proviso in a statutory provision has several functions, and while interpreting a provision of the statute, its main function is to carve out an exception to the main provision to which it has been enacted and to no other. The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule.⁴

It has also been held that a proviso and the main part of the Act or Rule are to be harmoniously read together and interpreted to give effect to the object of the provision.⁵ In other words, a proviso must *prima facie* be read and considered in relation to the principal matter to which it is a proviso; it is not a separate or independent enactment; the words of the proviso are dependent on the principal enacting words to which they are tacked as a proviso; they cannot be read as divorced from their context.⁶

However, in spite of the fact that the general rule of interpretation of provisos is that a proviso must *prima facie* be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. Words are dependent on the principal enacting words, to which they are appended as a proviso. In other words, the proviso may be really an independent legislative

^{3.} The word “become” in sub-section (11) is a drafting error. It should be read as “be”.

^{4.} *Balchandra Anantrao Rakvi v Ramchandra Tukaram* (2001) 8 SCC 616.

^{5.} *Sales Tax Commissioner v B.G. Patel* AIR 1995 SC 865.

^{6.} *Thompson v Dibdin* [1012] AC 533.

provision of the Act and though it has been inserted by the draftsman in the form of a proviso, it is in substance not really a proviso to the main provision.⁷

The Supreme Court has held that there are also instances where a proviso is in the nature of an independent enactment and not merely, an exception or qualifying what has been stated before. In other words, if the substantive enactment is worded in the form of a proviso, it would be an independent legislative provision concerning different set of circumstances than what is worded before or what is stated before. Sometimes, a proviso is to make a distinction of special cases from the general enactment and to provide it specially.⁸

It was observed by the Supreme Court in another case, that it may ordinarily be presumed in construing a proviso that it was intended that the enacting part of the Section would have included the subject-matter of the proviso. There is no rule that the proviso must always be restricted to the ambit of the main enactment. Occasionally in a statute, a proviso is unrelated to the subject-matter of the preceding section, or contains matters extraneous to that section, and it may then have to be interpreted as a substantive provision, dealing independently with the matter specified therein, and not as qualifying the main or the preceding section.⁹

The Supreme Court has comprehensively dealt with this issue and held: "Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognized that in exceptional cases a proviso may be substantive proviso itself."¹⁰

In *Commissioner of Income-Tax v. Nandlal Bhandari and Sons* [1963] 47 ITR 803 (MP), it was observed that "though ordinarily a proviso restricts rather than enlarges the meaning of the provision to which it is appended, at times the legislature embodies a substantive provision in a proviso. The question whether a proviso is by way of an exception or a condition to the substantive provision, or whether it is in itself a substantive provision, must be determined on the substance of the proviso and not its form."

To conclude, the proviso to sub-section (11) can be interpreted as an independent provision and not as an extension of sub-section (11). The substantive provision in sub-section (11) and the proviso deal with two separate subjects, the former regarding tenure and the latter regarding the cooling-off period after the expiry of the tenure.

TWO PROBABLE INTERPRETATIONS

Now, two interpretations of the proviso prevail. First, the said proviso has a role to play only when the Independent Director who has completed the tenure of two terms is proposed to be appointed or associated with the company as an Independent Director during the cooling off period, but he can be appointed or be associated with the company in

any other capacity (e.g. a managing or whole-time director or non-independent non-executive director or as a consultant or employee) if the company 'intends to appoint' the said person as an Independent Director, again as an Independent Director after the cooling-off period is over.

This appears to be a preposterous view. The company cannot decide at the beginning of the cooling-off period that it intends or proposes to the said Independent Director after three years. Who will decide the 'intention to appoint' the said person as an Independent Director at the beginning of the cooling-off period and where will it be recorded and in what form – whether as a resolution of the Nomination and Remuneration Committee (NRC) or the Board of directors or shareholders? It is highly impracticable and inconsistent with the Act to so decide at the stage of beginning of the cooling-off period. There is no provision in the Act authorizing the NRC or the Board or shareholders to so decide three years in advance. There is no legal basis to it. And even if the Board so decides, situation might change during the course of the cooling-off period and that person may not be actually appointed as an Independent Director after three years; the Board itself might decide not to appoint that person or decide to appoint someone else or that person might express a desire not to get appointed or he/she might not be in a position to be appointed or the Board might undergo a change and the new Board might not want that person to be appointed or the law might undergo a change. Thus, there are innumerable contingencies, one or more of which might come onto play that would make the company's 'intention' impossible to be put into operation.

The interpretation based on the first view would virtually nullify the effect of the proviso and render it superfluous and otiose. No statutory provision should be read so as to render it ineffective and redundant. It is a well-settled canon of interpretation that in construing a statutory provision or rule, every word occurring therein must be given its proper meaning and weight. The necessity of such an interpretation is all the more important in a definition clause.¹¹ An interpretation which would leave without effect any part of the language of a statute will normally be rejected. Every word and expression used by the legislature has to be given its proper and effective meaning as the legislature uses no expression without a purpose or meaning; a meaning must be given if possible, to every word of a statute, for a statute is never supposed to use words without a meaning,¹² and no word should be considered as redundant. Every word must be given its true and legitimate meaning and it is improper to omit any word which has a reasonable and proper place in it or to refrain from giving effect to its meaning.¹³ Legislature does not incorporate any words which are irrelevant or redundant and every word used in a statutory provision has some purpose.¹⁴

⁷ *State of Orissa v. Debaki Debi* [1964] AIR 1964 SC 1413.

⁸ *Prabha Tyagi v Kamlesh Devi* (2022) 8 SCC 90; AIR 2022 SC 2331.

⁹ *Ishvarilal Thakorel Almaula v Motibhai Nagbhai* AIR 1966 SC 459: 68 Bom LR 645:1966 Mah LJ 1049.

¹⁰ *Commissioner of Commercial Taxes, Board of Revenue, Madras v Ramkishan Shrikishan Jhaver* AIR 1968 SC 59; see also *State of Rajasthan v. Leela Jain* AIR 1965 SC 1296.

¹¹ *Nagpur Electric Light and Power Co. Ltd. v K. Shreepathirao* AIR 1958 SC 658.

¹² *Auclletterader of Presbytery v Lord Kinnou*/l 6 Cl & F 646, 686.

¹³ *A. K. Gopalan v State of Madras* AIR 1950 SC 27.

¹⁴ *Bhaskar Shirachi Alloys Ltd. etc. v Damodar Valley Corporation* AIR 2019 SC (Civil) 436.

The second interpretation that prevails is that during the cooling-off period of three years, the Independent Director who completed two terms as an Independent Director cannot be appointed or associated with the company in any capacity whatsoever in which he exercises powers in relation to the company's business and is paid any remuneration for his services (such as a director or employee or consultant).

The second interpretation seems reasonable and rational

If the proviso was intended to contemplate the capacity or position none other than that of an Independent Director, then there was no need to mention "any other capacity"; rather, there was no need to enact the proviso. In the ordinary sense, the word 'other' is used to refer to the one person or thing that remains or that has not been mentioned; in addition to the person or thing that has already been mentioned; different or separate from the person or thing that has already been mentioned.

The use of the words "any other capacity", and in particular the word "other", is significant. Any other (presumably) means any different than what is stated in sub-section (11), i.e. Independent Director. In other words, any other capacity means a capacity, position or role different than that of Independent Director.

In the context of the proviso, 'capacity' means position, office, role; the official position or function that somebody has. Therefore, for the purpose of the proviso to sub-section (11), the expression "any other capacity" means capacity (role, position or job) different than the capacity of Independent Director. Thus, the proviso would come into operation if a company appoints the said Independent Director in any position, office or role, whether as employee or under a contract as a consultant, adviser on a retainer basis or assignment basis.

This interpretation would seem to be consonant with the purposive interpretation rule. It can also be justified on the ground that if the first interpretation is said to be correct, then there was no need to insert the proviso as sub-section (11) was sufficient to achieve the purpose that the Legislature intended. It is true that a proviso should be read and interpreted in the light of the main provision to which the proviso has been appended and not in isolation, but at the same time there is a principle that no part of a statutory provision can be so interpreted as to render it redundant or otiose.

It will be noticed that the proviso is in very wide terms. It applies when it is proposed to appoint the Independent Director in or getting him associated with the company, directly or indirectly in any other capacity, i.e. a capacity other than as Independent Director, during the cooling-off period. While the words "be appointed" contemplate appointment by the company by a resolution or an agreement, the words "be associated" are extremely wide in scope and it is difficult to envisage in which situation a person can be associated with the company. Be associated with means to be connected with something or someone in some way. When one thing is associated with another,

they happen together or are related or connected in some way. Even a person appointed as a non-independent, non-executive director can be said to be associated with the company. Besides, a person appointed as an employee, consultant, service provider, supplier of goods and services, agent, etc. can be said to be associated with the company. The intention appears to be to restrict this prohibition only to the cases of appointment or association which would enable such person to exercise any powers in connection with the company and to appoint in a position that would facilitate any remuneration, fee or other compensation to be paid or other pecuniary advantage, but not every and any kind of association. For example, if the person is associated with the CSR activities in an honorary capacity without any pecuniary advantage or remuneration, it cannot come within the ambit of this prohibition. The proviso should justifiably be interpreted by applying the purposive interpretation rule. The purpose behind this proviso seems to restrain the Independent Director who has completed the tenure of ten years from deriving any pecuniary advantage from the company during the cooling-off period and keep away from holding any position that would enable him to get pecuniary advantage or exercise any powers in relation to the company's affairs for three years. The literal rule of giving undue importance to grammatical and literal meaning has, of late, gave place to "rule of legislative intent". The world over, the principle of interpretation according to the legislative intent is accepted to be more logical, as more often than not, literal interpretation of a statute or a provision of a statute results in absurdity. Therefore, while interpreting statutory provisions, the courts should keep in mind the objectives or purpose for which the statute has been enacted. In several cases, the Supreme Court has applied the principle of purposive construction.

In conclusion, the correct interpretation of the proviso to Section 149(11) seems to be that the said proviso would come into operation regardless of the fact that the company 'intends to appoint' the Independent Director who has completed the tenure of two terms is proposed to be appointed or associated with the company as an Independent Director after the cooling-off period and during the cooling off period he cannot be appointed in the company or be associated with the company in any capacity (e.g. a managing or whole-time director, non-independent non-executive director or as a consultant, advisor or employee).

COOLING-OFF PERIOD UNDER LODR REGULATIONS

The LODR Regulations do not stipulate any cooling-off period after an Independent Director completes his tenure.

Regulation 25(11) provides that "No Independent Director, who resigns from a listed entity, shall be appointed as an executive / whole-time director on the Board of the listed entity, its holding, subsidiary or associate company or on the Board of a company belonging to its promoter group, unless a period of one year has elapsed from the date of resignation as an Independent Director."

Thus, the cooling-off period of one year is only when an Independent Director resigns from the company. □