

Resignation by a Director - Its Ramifications under the Law

At the outset, we would state that the provisions in the Companies Act, 2013 (hereinafter “The Act”) relating to resignation are contained in Section 168 of the Act. This is a new provision in the Act and did not have a corresponding provision in the erstwhile 1956 Act.



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INTRODUCTION

Resignation by a Director is not an uncommon occurrence in the Corporate World. However, when the event happens it throws up several ramifications. In this exposition we shall endeavor to capture the quintessence of the consequences that follow.

At the outset, we would state that the provisions in the Companies Act, 2013 (hereinafter “The Act”) relating to resignation are contained in Section 168 of the Act. This is a new provision in the Act and did not have a corresponding provision in the erstwhile 1956 Act.

WHAT CONSTITUTES “RESIGNATION”

The Act does not have a definition to the term, and it is necessary for us to look at the definition provided to the term as per the Legal Lexicon.

In Ramanathan Aiyar’s Concise Law Dictionary (Seventh Edition), the term has been explained as under:

“Resignation of an Office to be complete implies that it has the consent of the incumbent; It implies that the person resigning has been elected into the office he resigns. One cannot resign that which he is not entitled to and which he has no right to occupy”.

In Latin the term has been described as “*Resignatio est juris propiis spontaneae refustatio*” which translated into English means that it is the spontaneous relinquishment of one’s own right.

The Supreme Court in its decision in *Moti Ram v Param Devi* (AIR1993 SC 1662) has explained the term “Resignation” as under:

“Resignation is the spontaneous relinquishment of one’s own right and in relation to an office, it connotes the giving up or relinquishing the office. It comes into effect when such act indicating the intention to relinquish the office is communicated to the competent Authority”.

Resignation represents, therefore, the voluntary form of termination of employment generally. For such termination to be valid, it has to be voluntarily tendered. Where resignation is forced upon the incumbent through duress or coercion, it amounts to termination under a more acceptable euphemism of resignation and does not satisfy the basic ingredient that it has to be a voluntary and unilateral act.

WHEN IS RESIGNATION SUPPOSED TO BE COMPLETE

Section 168(2) clarifies that the resignation of the Director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the Director in the notice whichever is later. This signifies that the resignation could be taken on record upon receipt thereof by the company or on a prospective date as indicated by the director whichever is later.

The above also means that there is no requirement that the resignation has to be accepted by the Board, given that as discussed above, it is an unilateral act.

Reference in this connection may be made to the decision in *Rajan Sangameshwaran v Saralaya Technologies Pvt. Ltd.* (3 Comp LJ 140) where the Madras Bench of the CLB held that there was no provision in the Companies Act, 1956 or in the Standard Articles prescribed in Table A to signify that the resignation has to be accepted by the Board.

The Court noted that submission of Form 32 as existing at that point of time could not be delayed on the pretext that the resignation had not been accepted by the Board.

It is also incorrect to opine, based on a plain reading of Section 168(2) that the resignation shall take effect only from the date on which the relevant form (DIR-12) is filed with the Registrar. Filing of the said form is a mere formality and administrative duty, which needs to be discharged by the company which has the effect of informing the Registrar

about the resignation, the same having taken effect on the date as indicated by the Director or immediately upon the same being received by the company.

The above principle also stands validated based on a postulate laid down in an old English case involving *Glossop v Glossop* (1970) (2 Ch.370) where the Court observed that the resignation goes back to the date on which the Director intended to cede his relationship with the company.

The above principle in *Glossop's* case has been applied in India in *T.Murari v The State* (46 Comp Cas 613).

That the resignation process is not consummated by the mere submission of Form DIR 12 has also been driven home by the decision of the NCLT, Kerala Bench in *Tap World v Kerala Chamber of Commerce and Industry* (135 Taxmann.com 198) where the Court observed that when the Director of the company had tendered her resignation and the same was acknowledged before the Board, mere non-submission of the prescribed Form DIR-12 by the company or the non filing of form 11 by the Director concerned, did not make the resignation invalid.

RESIGNATION COULD HAVE BEEN EVEN VERBAL OR IMPLIED FROM THE ACTION OF THE DIRECTOR BUT FOR THE SPECIFIC PROVISION IN SECTION 168(1)

Section 168(1) makes it amply clear that the Director may resign from his office by giving notice to the company in writing.

Arising from the above, it follows that the resignation cannot be verbal or implied from the conduct of the Director.

The above position in the law is in contrast to the earlier position whereby a Director could demit office verbally as held in *Latchford Premier Cinema Limited v Ennion and Peterson* (1932)(2 Comp Cas 106) where it was held that a Director could resign at a General Meeting verbally even though the Articles of the company provided that the resignation should be in writing.

The decision of the Court in *Vikram Singh v Ram Balabhji Kasat* (AIR 1995) (MP 140) that where the letter of resignation was typewritten and bore the signature of the Director, it would be considered valid also establishes the requirement that the letter should be in writing.

DICHOTOMY IN THE ACT BETWEEN SECTION 168 AND 165 AS TO WHEN RESIGNATION IS COMPLETE

We have seen above that under Section 168(2) the process of resignation culminates upon the letter of resignation from the director being received by the company and taken on record.

However, a different view emerges in the law on this point from a perusal of Section 165.

Section 165 primarily sets the upper limits as regards the number of Directorships that can be held by an individual. However, sub-section (4) thereto stipulates that where a Director resigns his position upon realizing that his number of Directorships have exceeded the maximum ceiling as stated in the Act, the resignation tendered by him shall be effective immediately upon the letter being dispatched to the company concerned. This sub-section does not emphasize on the fact that the letter as stated in Section 168(2) should be received by the company. What would be the situation if as stated in Section 165(4) the letter is lost in transit and goes astray and is not received by the company.

The pivotal question that needs to be addressed is whether it is necessary that the letter of resignation should be received by the company.

In our considered view, Section 168(2) states the correct position in the law and logically the resignation is to be considered complete only when the letter is received and taken on record.

If for some inexplicable reason the letter dispatched by the director as postulated in Section 165(4) is never received by the company, can we say that the act of resignation is complete regardless.

It is submitted that there is a clear conflict as between Section 168(2) and Section 165(4) and it is important to articulate as to which provision shall carry greater precedence in the face of such conflict.

It is pertinent to note that Section 168 is a provision which deals with the resignation process of a Director whereas Section 165 primarily deal with the limits on the number of Directorships a person can hold. Section 165 has to be therefore seen as a general provision as against Section 168 which is a specific provision.

It is a settled principle in statutory interpretation that a general provision has to necessarily yield to a specific provision.

The Supreme Court has set the principle in *Venkateshwar Rao v Government of AP* (AIR 1966 SC 828) that where a special provision has been laid down in respect of a specific matter, that matter is to be excluded from the general provision.

Reference may also be made to decision of the Apex Court in *UOI v Indian Fisheries Pvt. Ltd.* (1965) (35 Comp Cas 669(SC)) where the ruling was that when there is a conflict between two independent provisions, the special provision must prevail.

The above Rule of construction is based on the maxim "*Generalia Specialibus non derogant*" (meaning that general things do not derogate from special things). The above principle is also considered as the rule of *implied exception*.

Considering the above discussion, we can say clearly that Section 168(2) shall prevail in so far as consummation of the act of resignation is concerned.

CAN THE WITHDRAWAL OF RESIGNATION BY DIRECTOR BE UNILATERAL

In the Corporate World it is often seen that when a Director has tendered his resignation from the Board, he is persuaded by the Board to withdraw the same and requested to continue in office.

The question that needs to be examined is whether such withdrawal can be unilateral.

This question came to the fore in the AP High Court in *Smt. Renuka Datla v Biological E Ltd.* (65 Taxmann.com52). The Court held that whilst it is the prerogative of the Director to resign his position unilaterally, the withdrawal of the resignation cannot be unilateral and it can be acted upon only if the Board has reconsidered the issue and allowed the Director to withdraw his resignation. Till such time this happens, the resignation of the Director shall continue to be valid.

The Supreme Court has also ruled in *UOI v Gopal Chandra Mishra* (AIR 1978 SC 694) that a Director can withdraw his resignation till such time it takes effect.

Once the resignation has become effective through its receipt by the company, the way forward for the company is to take the resignation on record and file Form DIR 12 within the stipulated period.

If there is a re-think on the part of the Board and it wishes that the Director continues in office, the entire process relating to appointment shall have to be done afresh.

DIRECTOR WHO HAS RESIGNED SHALL BE LIABLE ONLY FOR OFFENCES IF ANY, COMMITTED BY HIM BEFORE HIS RESIGNATION

An important question that emerges is on the point at which point of time the Directors' liabilities for action taken by him shall cease upon his resignation.

The answer to this question is that his liabilities shall exist in respect of actions taken by him during his tenure even if proceedings if any, for non-compliance are initiated after his resignation from the Board.

The above becomes clear from a plain reading of the proviso under Section 168(2) which provides that a Director who has resigned shall be liable even after his resignation in respect of offences which have occurred during his tenure.

He cannot be made liable in respect of any acts committed after his resignation from the company, notwithstanding that the company may not intimated his resignation with the Registrar immediately, considering that the company has a thirty day window within which to file Form DIR 12.

The Directors' liabilities cease from the date on which his resignation has been received by the company regardless of whether the company has completed the formalities in connection thereof.

It is the duty of the Company Secretary to handle the entire process with maturity seamlessly such that no points are missed out which could spring up unpleasant surprises in the future.

IS IT COMPULSORY FOR A DIRECTOR TO FORWARD A COPY OF THE RESIGNATION WITH THE REGISTRAR TO ENSURE THAT PROCESS OF RESIGNATION IS COMPLETE- IMPLICATIONS OF THE USE OF THE WORDS "SHALL" AND "MAY" IN THE STATUTE

It is pertinent to note that the proviso under Sub-section (1) of Section 168 read originally at the time of its inception as under:

Quote

"Provided that a Director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation in such manner as may be prescribed."

Unquote

A plain reading of the proviso led to the view that in as much as the expression "shall" was used therein, there was a compulsion thrust on the resigning Director that he should also, on his part intimate the Registrar about his resignation in Form DIR 11 so that the resignation could be treated as complete. This led to an apprehension particularly amongst those directors who had not filed form DIR 11 that their resignation was incomplete till such time they had filed form DIR-11.

At this juncture it would be appropriate to articulate on the usage of the expressions "shall" and "may" in a Statutory Provision.

It is the standard rule of interpretation that whenever the expression "shall" is used in a statutory provision, it conveys that there is a mandatory force to the provision.

In *State of UP v Babu Ram Upadhyaya* (AIR1961 SC 751), the Supreme Court observed as under:

"When a Statute uses the word "shall", prima facie it is mandatory. but the Court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the Statute. For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the way or the other, the impact of other provisions whereby the necessity of complying with the provisions is avoided, the circumstance that the Statute provides for a contingency of the non-compliance

with the provisions, the fact that non-compliance with the provisions is or not visited by some penalty, the serious or trivial consequences that flow therefrom, and above all, whether the object of the legislation will be defeated or furthered”.

From the above passage, it can be discerned that the use of “shall” in a provision is not always indicative of its mandatory force and that other factors such as whether the purpose of the Statute shall be defeated by such non-compliance, the extent of penalties that would be visited shall have to be considered.

Notwithstanding the above, the use of “shall” led to apprehension in several quarters that it was compulsory for a Director to also intimate to the Registrar the fact of his resignation.

Perhaps with an intent to allay such apprehensions, the expression “shall” in the Proviso under Section 168(1) was substituted by the expression “may” with effect from 7.5.2018 by the Companies (Amendment) Act, 2017.

It is well known that the use of “may” in a statutory provision is considered as a permissive provision, giving discretionary power or authority and that the provision is not mandatory.

In *Prema Pushpamala Reddy v G.Veera Swamy (2011) (AIR SCW 1676)* it was observed that where there is no compelling duty to do something as an obligation and where the power conferred is discretionary or gives choice, the use of “may” indicates that the provision is permissive and it is not mandatory.

Considering the reasons behind the substitution of the expression “shall” by “may” in the Proviso under Section 168(1), we can conclude that it is now optional for a resigning director to file intimation about his resignation in Form DIR-11 and that the resignation process would be a *fiat accompli* once the Director’s intimation of resignation is received and taken on record by the company.

RESIGNATION SHOULD BE SENT BY THE DIRECTOR TO THE COMPETENT AUTHORITY FOR IT TO BE EFFECTIVE

The Supreme Court has observed in *Moti Ram v Param Devi (Supra)* that the decision to relinquish office should be conveyed to the competent authority. It therefore stands to reason that the resigning Director should send his intimation to the Director/Chairman or address it to the Board of Directors and not to any third party.

In *Registrar of Companies v Orissa Paper Projects Ltd. (63 Comp Cas 460)* it was held that the Director’s resignation does not require any acceptance but it should be sent to a competent person. The resignation sent to a third party would not be effective.

STEPS TO BE TAKEN UPON RESIGNATION BY DIRECTOR

It would be appropriate at this juncture to summarize the steps to be taken by the Company Secretary upon receipt of resignation by Director as under:

- a) If the letter has been received by the Company Secretary, he should send the same forthwith to the Chairperson of the Board and to the other Directors.
- b) Upon receipt of intimation from the Board that the resignation could be taken on record, in case of a listed company, the intimation as regards resignation should be sent to the Stock Exchanges within 7 days from the date of it is received along with a copy of the letter of resignation. The intimation shall also state that there are no reasons for the resignation other than what has been stated in the letter. The intimation should also state that in case a replacement is called for as the Board structure may have been destabilized by the resignation, necessary steps would be taken by the Board to appoint another person at the earliest and that consent of the members for the appointment of the new Director shall be obtained within three months as stated in the listing regulations.
- c) The Company Secretary should ensure to file Form DIR 12 within thirty days enclosing therewith the copy of the resignation letter duly acknowledged of its receipt with the Registrar.
- d) The resignation should be noted and included in the Quarterly report on corporate governance to be submitted by the company to the Stock Exchanges, in case of a listed company.
- e) Intimation on the resignation should be also sent to all regulatory authorities.
- f) The fact of resignation should be stated in the Board’s report and in case where the company is listed with the stock exchange in the Report on Corporate Governance for the year.
- g) As a matter of courtesy a letter should be sent preferably signed by the Chair Person to the Director placing on record the appreciation of the Board for the services extended by the person concerned during his tenure.
- h) At the next Board meeting the resignation should be taken on record with an acknowledgement for the services rendered.
- i) The concerning Director should also be provided for his records a copy of Form DIR12 filed with the Registrar.

CONCLUSION

In the above exposition we have traversed through almost entirely the gamut of the law and identified the action points to be taken and the implications arising from resignations. It is the duty of the Company Secretary to handle the entire process with maturity seamlessly such that no points are missed out which could spring up unpleasant surprises in the future. □