



Removal of Director

Under the Companies Act, 1956/2013: Precautions to be taken by a Company Secretary

- A person can be said to have ceased to be a director of a company under Section 283 (1) (g) of the Companies Act, 1956 for not attending three consecutive Board Meetings without obtaining leave of absence. This section should not be abused to avenge a director by removing him without his consent but will be useful where the director is not traceable, or is in jail or a criminal proceeding has been initiated against him.

Section 283 of the Companies Act, 1956 deals with vacation of office by directors. Sub-section (1)(g) thereof states that the office of a director shall become vacant if he absents himself from three consecutive meetings of the Board of directors, or from all meetings of the Board for a continuous period of three months, whichever is longer.

There are many instances where this section has been misused for the removal of directors when there exists various groups among directors of the company or there is animosity between the members of the board. There are many controversial issues that were raised when such directors were removed without service of proper notice of the meetings or where the meetings were held in the absence of such directors.

In this article it is proposed to discuss mainly the case laws on the subject and the precaution to be taken while invoking section 283 (1) (g) of the Companies Act, 1956 or section 169 of Companies Act 2013 for the removal of a director before the expiry of his term. There is a duty on the company secretaries to advise the management as to the applicability and correct implications of the above sections and the board of directors





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are also duty bound to abide by the real intention of the sections. No one should try to misuse the section to ventilate his animosity against their fellow directors or with the opposite group of directors.

JUDICIAL ELUCIDATIONS

1. *Col. (Retd.) Dalip Singh Sachar v. Maa Karni Coal Carriers P. Ltd.* [In the high Court of Delhi, CCP(CO). 25 of 2005 & Co. Appl. 1545 of 2005]

The plaintiff claimed that he had been divested of his position of director by citing the reason that he had not attended three Board Meetings under section 283(1)(g). The petitioner alleged that he had not received any notice for the meetings and as such the question of his attending these meetings did not arise. Further as per Article 40(b) of the respondent company, without the prior approval of Director General of Resettlement under Ministry of Defence, no director can be removed/inducted. The plaintiff argued that the application of Section 283(1)(g) in his case was erroneous, and he should be reinstated on the Board as a director. In this case, CLB was of the view that the stand of the respondent that the petitioner vacated the office in terms of Section 283(1)(g) was not correct when it was on record that the petitioner did attend a meeting on 23.9.96. CLB found that there was an infringement of section 283(1)(g). For all future Board Meetings, CLB ordered that the notices should be mailed to all directors by Registered Post acknowledgement due with 7 days notice. It is to be noted that under section 173 of the Companies Act 2013, it is mandatory to give minimum 7 days notice for a board meeting, and it should be either by hand-delivery or by post or through e-mail or fax.

2. *Hanuman Prasad Bagri & Ors v. Bagress Cereals Pvt. Ltd. & Ors.* [AIR 2001 SC 1416]

The plaintiff sought winding up of the company for misuse of section 283(1)(g). The Supreme Court did not order winding up of the company for the violation of the section 283(1)(g) and suggested appropriate remedy by way of company suit which can give the plaintiff full relief if such action had been taken by the company on inadequate ground. This case suggests that a plaintiff cannot seek winding up a company for the unjust removal from director's position.

3. *Shri Sanjiv Kothari v. Shri Vasant Kumar Chordia* [2005 61SCL 68CLB]

In this case, the CLB opined that despite the fact that there was a request from the petitioner to send the board meeting notices by registered post and the petitioner also having deposited an amount of Rs 200 to meet the cost of the registered post, the company's action in sending the board meeting notice through the certificate of posting raised doubts.



The CLB also raised its objection on the justification of the company to despatch notice of the board meeting from Puri when the registered office and venue for board meeting was fixed at Bhubaneswar. The CLB criticised the respondents and directed it to reinstate the petitioner immediately as director of the company. Thus, a company secretary may serve notice of board meeting under section 169 of the Companies Act, 2013, by hand-delivery or by post or through e-mail or fax or by registered post or courier and simultaneously through e-mail also.

4. *Akbarali A. Kalvert and Anr. v. Konkan Chemicals Pvt. Ltd.* [1997 (88) CC245]

It was alleged by the petitioners that the respondent had fabricated notices and minutes of the meetings (board and general body) and other documents and created records to show fictitious meetings; removed the petitioners as directors by falsifying records to show as if the petitioners had ceased to be directors; the respondent company admitted that the petitioners did attend the board meeting held on 29 April and 17 June, 1991. Hence, CLB held that the company action was void.



5. **Kamal Kumar Dutta & Anr v. Ruby General Hospital Ltd. & Ors. [2008(3) SCR184]**

In this case, after going through the records submitted, CLB came to the conclusion that the board meeting held on 3-3-1997 was doubtful and that the resolution removing the petitioner cannot be maintained. The CLB reinstated the directors who were removed earlier by abusing section 283 (1)(g).

6. **Vinod Kumar Mittal v. Kaveri Lime Industries Ltd. [2000 100 Comp Cas 66 CLB]**

In this case, two sons of the petitioner who were on the board of respondent company, were claimed to have relinquished the office of the director in terms of Section 283(1) (g) . The CLB found from copies of letters annexed to the additional documents that the company had written to both these directors on April 24, 1998, stating that since they had not attended three meetings of the board during the current quarter, they were liable to vacate the office of director in terms of Section 283(1)(g). The CLB also found from the agenda for the meeting on May 4, 1998, that there was an item to discuss vacation of office by the directors. If a director absents himself from three consecutive meetings of the board or from all meetings of the board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the board, then, he has to vacate his directorship under Section 283(1)(g). Since the counsel for the petitioner did not contest the authenticity of these notices, the CLB came to a conclusion that these directors had vacated their office by operation of law.

In *Puneet Goel v. Khelgaon Resorts Limited* [2000], it was observed by the CLB that in the absence of any material evidence to demonstrate that notices of the board meetings had been issued to the petitioner, it had to come to a conclusion that the respondents had misused the provisions of the section 283(1)(g) and held that there was no cessation of office by the petitioner's directors.

PROOF OF SERVICE OF NOTICE IS THE MAIN CRITERIA

Marble City Hospital and Research Centre P Ltd. v. Sarabjeet Singh Mokha. [2010] 155 CAS 13 (MP) decided on 17-7-2009.

In this case, the Madhya Pradesh High Court held that service of notices by post and in person were not established and Minutes of the meeting in the statutory form were not produced. The company failed to discharge its onus regarding service notice. The CLB refused to accept the certificate of posting as proof of service of notice on the ground that collateral evidence like dispatch register, register showing

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payment of postage stamps, accounts books, etc. were not produced. Hence, the CLB held that removal of the director under section 283 (1) (g) was not valid. The CLB's decision was challenged in appeal before the High Court by the appellant. The High Court held that mere filing of postal certificates did not corroborate service of notice.

REMOVAL OF A DIRECTOR UNDER SECTION 169 OF THE COMPANIES ACT 2013

Section 169 of the Companies Act 2013 deal with removal of a director and states that a company can remove a director before the tenure of his office by passing an ordinary resolution, unless he has been appointed as a director by the Tribunal under section 242 of the Act of 2013 after providing him a reasonable opportunity of being heard. However, a company cannot remove a director if he has been appointed under the principle of proportional representation under section 163. Thus, under the 2013 Act, a company can remove a director only in a general meeting by passing an ordinary resolution and if he has not been appointed as a director under the principle of proportional representation or under section 163. Further, a special notice is required for removal of a director and such director is entitled to attend the general meeting and is eligible to be heard on the resolution at the meeting. The affected director is entitled to make a representation in writing and can ask the company to circulate the same to all the members of the company and the company is bound to circulate the same if there is adequate time. If time is too short, his representation has to be read out at the



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meeting. The Tribunal can order that no such representation is to be circulated or read out in the meeting, if it feels that such power is being abused by the company or any other member. Another director may be appointed in place of the director so removed by passing a special notice and such director shall hold office till the date up to which his predecessor would have held that office. If no new director is appointed in the general meeting where a director is removed, the board can fill it as a casual vacancy. The board cannot appoint the same director so removed through the casual vacancy.

According to section 149 of the Companies Act 2013, in case of resignation or removal of an independent director, a new independent director is to be appointed within 180 days of such resignation or removal. A whole-time director under the Act of 2013 has to vacate his office if he is absent for a continuous period of 12 months in the board meeting of the company even if leave of absence has been granted to him by the board. In case of resignation the directors are also required to file their resignation to ROC along with detailed reason and such reason has to be sent to the Registrar of companies concerned separately by the director himself.

A director is to vacate office if he remains absent from all the board meetings held during 12 months. Thus, a director to keep his position alive shall have to attend the board meeting once in a year compulsorily under the Companies Act, 2013. Otherwise, this would be adequate ground to disqualify for removal of a director.

Under section 242(2)(h) of the Companies Act, 2013, the Tribunal may order removal of the managing director, manager or any of the directors of the company.

Hence, as a company secretary, if the management sought the advice to remove a director under section 283 (1) (g), or under section 169 of the Companies Act, 2013, one has to take all precautionary measures as enumerated in the above cases, particularly to establish the proof of service of notices of board meetings to the concerned directors whom the management wanted to remove.

FURTHER PRECAUTIONS

A company secretary should take note of the following precautions before removal of a director under this section:

1. He should see that the notice of the board meeting is despatched through the registered post with acknowledgement due as the postal department now has ceased the certificate of posting facilities and also through the registered email-address of the directors with read request of the mail sent with clear 7 days notice under Companies Act 2013. This will ensure that the director has received the notice and also has gone through the contents of the notice of the board meeting. The notice should specify that if the director wants to participate through audio or video-conferencing, then he has to intimate the same to the company at least 3 days before the board meeting. A director who attends the meeting through audio or video-conferencing will be counted for the quorum of the meeting.
2. Where a director is removed, the certified copies of minutes can be attached to Form 32 or the new form under the Companies Act, 2013. However, in order to avoid future disputes in such matters, it is better to have the evidence of dispatch of notice for the meetings to the said Director, confirming due procedure followed as per the Act and as per the AOA.
3. Optionally, one can also attach Board resolution in this regard and attendance sheet of these meetings and/or minutes sheet copies of these meetings.

It is worth noting that in *D.S.Dhillion v. M/s Honeyrex Products Pvt. Ltd.* [CP No.60/2000] the CLB has asked the petitioners to move a civil court for redressal of grievances by the affected director under the above section.

Generally, a director on the company's board could be removed by shareholders at an annual or extraordinary general meeting.

A director who holds 99% of the shares, is a powerful director, and can remove the directors holding 1% non-consenting director for the smooth running of the business.

However, care and diligence ought to be exercised if one wants to invoke the above provisions to remove a director. Otherwise, it will result in unnecessary legal battle between the parties.

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