

APPOINTMENT AND REMUNERATION OF MANAGERIAL PERSONNEL UNDER THE COMPANIES ACT

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The subject of appointment and remuneration of managerial personnel under the Companies Act 1956, has assumed considerable importance in the present context. Company legislation in India aims at ensuring that the management of companies does not fall in the hands of undesirable persons. There is, therefore, a blanket prohibition on undischarged insolvents or persons who have been guilty of fraud etc., from associating in any way with the management of companies.¹

The overall right to manage the affairs of a company is conferred on the Board of Directors. Basically, the ultimate authority of a company vests in its shareholders acting through a general meeting. But by their nature, general meetings are few and far between. It is therefore, provided by the Act that the Board is conferred with all the powers other than those reserved expressly for the general meeting. The Board, therefore, becomes the supreme authority in the management of a company's affairs. It is open to the Board to carry out such management by itself with the help of company executives, or to delegate it to other managerial personnel. Such delegation should be in conformity with the company's charter (Memorandum and Articles). Again, such delegation does not absolve the Board of its responsibility for proper management as it is still vested with the general powers of direction, supervision and control.

Different Kinds of Managerial Personnel

Under the Companies Act 1956, following may be the main categories of managerial personnel:

- (a) Managing Director
- (b) Managing Agents
- (c) Secretaries and Treasurers

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¹ Companies Act 1956 (hereinafter referred to as the Act) sections 202 and 203.

(d) Manager

(e) Whole-time Director

The Companies (Amendment) Act 1969 has prohibited the appointment of managing agents and secretaries and treasurers in companies after April 3, 1970. The said amendment also provides that the terms of all existing managing agents and secretaries and treasurers shall, unless it expires earlier, expire on April 3, 1970. As a result of this amendment now there remains only two categories of managerial personnel, viz., managing director and manager.

A "managing director" is a director who, subject to the superintendence, control and direction of the Board of Directors is entrusted with the substantial powers of management by virtue of an agreement between him and the company or by a resolution passed by the company in general meeting or by its Board of Directors or by provisions of its Memorandum or Articles of Association. A "manager" is an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole or substantially the whole of the affairs of a company. This may be done either by a contract of service or otherwise. Thus both, the managing director and the manager, are individuals; both act under the superintendence, control and direction of the Board and both have powers of management. But whereas, a managing director must necessarily be a director, a manager need not be a director. Subject to the provisions of the Articles of Association both can be appointed or removed by the Board. No company, unless it is a private company not a subsidiary of a public company, can appoint a managing director or a manager without obtaining approval of the Government.² It must be noted that it is not the designation that is important but the functions. A person who is not designated as managing director or manager is nevertheless a managing director or manager if he carries out the functions and enjoys the powers of a managing director or a manager.

A wholetime director is presumably one who devotes his whole time and attends to the company's affairs without exercising substantial powers of management. The Companies Act seeks to make a definite distinction between the concepts of whole time director and managing director. There is, however, no difference with regard to the terms of remuneration under section 309 or in the approval of appointment by the Government under section 269. In practice also the distinction has no special significance, particularly when they are treated at par by the Companies Act.

In the past, the companies were generally managed, barring a few exceptions, by the managing agents. The constitution of the managing

2. Hereinafter the Government means Central Government, unless otherwise stated.

agents was more or less of a family type. Generally, the promoters became the managing agents and the managing agency was hereditary. But of late, the 'professional form of management' is becoming more and more common. Under it, the management of the affairs of a company is entrusted to the specially trained, qualified and competent persons possessing the requisite technical qualifications, experience and skill such as accountants, engineers, lawyers etc.

The Act does not interfere much in the appointment of managerial personnel in private companies not subsidiaries of public companies. However, a severe control exists for all other companies. The aim of such controls is to bring the appointments before the Government for approval. In exercising these powers the Government, in turn, aims at ensuring that corporate management (other than the exempted companies) is entrusted to fit and qualified persons. Section 269 provides that except in the case of a private company not a subsidiary of a public company, appointment of a person as a managing director or a whole time director for the first time, and in the case of a company in existence on December 28, 1960 also his reappointment after that date for the first time, shall not have effect unless approved by the Government. A company shall not appoint a person as a managing director for a term exceeding five years at a time. The company may, however, re-appoint or re-employ him or extend the term of his office for a period not exceeding five years at a time.³

Under the Act, a person is entitled to become the managing director of not more than two companies, if one of the companies of which he is a managing director is a public company. It may be noted that a person can become managing director of any number of private companies. The Government is, however, authorised to permit a person to hold more than two managing directorships even though one such office may be in a public company provided the Government is satisfied that it is necessary that the companies should, for their proper working, function as a single unit and have a common managing director. As a matter of policy, the Government does not encourage any person to hold more than one managing directorships. Permission to hold two managing directorships is given very rarely and it is more an exception rather than a rule. Such exceptional circumstances are recognised in cases of small units, or units engaged in similar or allied businesses at the same place, etc. The above restrictions also apply in the case of an appointment of a person as manager.⁴

It is sometimes noticed that certain companies appoint a Committee of Directors. Formerly, the Government was of the view that the appointment of such Committees would in fact amount to the appointment

3. Companies Act 1956, section 317.

4. Companies Act 1956, section 386.

of managing directors thereby attracting the provisions of section 269. Now, it appears to be well settled that if the committee members are to act collectively without individual powers, they cannot be termed as managing directors and no government approval would be called for.

The supreme authority regarding the management of the company's affairs is the Board of Directors in whom full powers are vested by the Companies Act 1956. The present thinking and evolution of the company law is that such powers of the Board cannot be arbitrarily curtailed. Coupled with such powers is, of course, the question of duties and responsibilities. Any person who consents to be a director of a company has wide responsibilities. It is now well-settled that ordinarily a director is bound to attend a meeting of the Board whenever he has a notice thereof, and discharge his duties, not of a continuous nature,⁵ at periodical Board meetings. In determining the extent of duties regard should be had to the nature of the company's business and the manner in which the company's work is being carried on. A director is expected to perform his duties with normal standard of skill and diligence having regard to his knowledge and experience. The responsibilities of a managing director depend upon the terms of his contract with the company. He would, of course, act subject to the superintendence, control and direction of the Board of Directors. A managing director, like the other directors, is in the position of an agent as well as a trustee in a limited sense. He has, therefore, to discharge these duties with a reasonable sense of care, diligence and prudence. The position of a manager is not very much different from that of a managing director in such matters. Being the highest executive officer of the company, his duties and responsibilities are same as that of a managing director.

Remuneration of Managerial Personnel

The Companies Act contemplates detailed control over the remuneration of managerial personnel. The Act lays down in various sections overall limits by way of percentage of the net profits. The excess over the percentage may be paid with the approval of the Government. In exercising the power of approving the appointments, the Government regulates the remuneration with a view to ensure that not only fit and proper persons are included in the management but that their remuneration is fair and reasonable. It is in this context that we have various administrative ceilings and regulations in the matter of payment of remuneration to the managerial personnel.

The provisions of the Act regarding the payment of remuneration to the managing or whole-time directors, managers and other director etc.,

5. See *In re Central Calcutta Bank Ltd.*, (1959) 29 *Comp. Cas.* 437; *In re Supreme Bank of India Ltd.*, (1964) 34 *Comp. Cas.* 34.

apply to public companies, private companies subsidiaries of public companies and to deemed public companies (popularly known as section 43-A companies). The following discussion is confined to such companies.

The payment of remuneration by a company to its managerial personnel, *i.e.*, the managing or whole-time director, director and manager is governed by the provisions of section 198. According to this section, the total remuneration payable to all the managerial personnel together shall be limited to 11 per cent of the net profits of the company computed in the manner laid down in section 198(I) of the Act.

Section 309 provides the following remunerations :

- (a) Remuneration payable to a managing or a whole-time director, together with other directors, shall be determined either by the articles of the company or by a resolution, or if required by its Articles, by a special resolution, passed by the general meeting.
 - (b) Remuneration payable to directors, including any managing or whole-time director, shall not exceed, except in the event of payment of minimum remuneration, 11 per cent of the net profits excluding sitting fees paid for attending meetings of the Board of Directors.
 - (c) Such remuneration shall be inclusive of services rendered by them as directors as well as in any other capacity unless the services rendered in other capacity are of a professional nature and in the opinion of the Government the director rendering such services possesses the requisite qualification for the practice of the profession.
 - (d) A whole-time or managing director may be paid remuneration by way of a monthly salary or at a percentage of the net profits or partly by one way and partly by the other.
 - (e) Unless a minimum remuneration is approved by the Government, remuneration of one managing or whole-time director shall not exceed 5 per cent of the net profits and where there are more than one such directors 10 per cent for all of them together.
 - (f) A director who is neither a managing director nor a whole-time director may be paid remuneration either :
 - (i) by way of monthly, quarterly or annual payment with approval of the Government or
 - (ii) by way of commission, if authorised by a special resolution, provided that :
 - (a) such commission shall not exceed 1 per cent of the net profit if the company has a managing or whole-time director or a manager or
 - (b) 3 per cent of the net profits in any other case.
- Provided that remuneration in excess of 1 per cent or 3 per cent as the case may be, may be paid if sanctioned by the company in general meeting and approved by the Government.

- (g) If any director has drawn remuneration in excess of the limit mentioned above or without approval of the Government wherever required, he shall refund the excess to the company.
- (h) Unless permitted by the Government the company shall not waive the recovery of any sum refundable to it as mentioned in (g) above.
- (i) No director who is in receipt of commission from the company and who is either a whole-time director or a managing director, shall be entitled to receive any commission or other remuneration from any subsidiary of the company.

Before the amendment of section 309, in 1965, remuneration paid to a director, including a managing or whole-time director or manager, for services rendered by him in other than managerial capacity, e.g., technical services or other professional services, was not taken into account for the purposes of determining the ceiling under section 198. This view was confirmed by the Bombay High Court in *Ramaben A. Thanawala v. Jyoti Ltd.*⁶ Now, the remuneration paid to any managerial personnel for services rendered in any capacity has to be considered for the purpose of determining the ceiling, the only exception being the services of a professional nature rendered by a director who, in the opinion of the Government, possesses the requisite qualification for the practice of the profession in which case the director may be separately remunerated for professional service rendered by him and the remuneration may be determined in the manner provided by the Articles and by the Board of Directors and sanctioned by a special resolution of the general meeting as required by section 314.

The Act further provides that any provision in the Memorandum or Articles of Association, or agreement or resolution or any amendment thereof, purporting to increase, directly or indirectly, the remuneration of a managing or whole-time director or any other director shall not have any effect unless approved by the Government.⁷ There is, however, an exception that approval of the Government shall not be necessary in a case where the effect of the amendment is only of increasing the amount of fee payable for such meetings of the Board or committee thereof attended by any such director and the amount of such fee so increased that it does not exceed rupees two hundred and fifty.

The above provisions relating to remuneration which apply to a managing or whole-time director or any other director also apply to a manager. Except with the approval of the Government, remuneration of a manager shall not exceed 5 per cent of the net profits⁸ and that any amend-

6. (1957) 27 *Comp. Cas.* 105.

7. Companies Act 1956, section 310.

8. Companies Act 1956, section 387.

ment of any provisions having the effect of increasing the remuneration of a manager shall not have effect unless approved by the Government.⁹

The Company Law Board, a department of the Government responsible for the administration of the Companies Act, is the sanctioning or the approving authority for the remuneration of managerial personnel of companies to which the provisions of sections 198, 309, 387 and 388 are applicable. It has laid down certain guidelines for the purpose of approving remuneration of managerial personnel and has also fixed certain administrative ceiling on such remuneration. Such guidelines and administrative ceiling are reviewed and revised by the Company Law Board from time to time.

According to the present guide-lines, Company Law Board approves remuneration of a managing or a whole-time or a part-time director or a manager of a company within the following scales subject to exceptions in appropriate cases :

- (a) Salary not exceeding Rs. 90,000 per annum and commission not exceeding Rs. 45,000 per annum, *i.e.*, total cash remuneration will not generally exceed Rs. 1,35,000 per annum.
- (b) Perquisites of the total monetary value not exceeding 1/3rd of the amount of salary subject to a maximum of Rs. 30,000 per annum. But this ceiling of 1/3 of the salary would not include the following :
 - (i) Company's contribution towards provident, pension/ superannuation funds not exceeding the limit laid down under the Income tax rules.
 - (ii) Gratuity payable in accordance with the rules not exceeding the limit laid down in the Income tax Act.
 - (iii) Reimbursement of medical expenses actually incurred for self and for the family, subject to a limit of one month's salary per annum or Rs. 5,000 whichever is less or 3 months salary with a maximum of Rs. 15,000 for a period of every three years' service.
 - (iv) Passage benefits allowed to expatriate directors for self and for the family not more frequently than once in a year by economy class or once in two years by first class.
 - (v) Leave travel concessions by way of only actual fares to Indian managerial personnel for self, wife and minor children once in a year to and from any place in India.
 - (vi) Leave, with full pay and allowances, at the rate allowed to other employees of the company but not exceeding one month's leave for every eleven month's service. In the case

of expatriate directors the limit can be relaxed up $1\frac{1}{2}$ to 2 months having regard to the leave rules of the company.

Leave not-enjoyed cannot be encashed. Monetary value of the above perquisites in excess of the limits mentioned in each case and all other perquisites will be taken into account in determining the limit of $1/3$ of the salary or Rs. 30,000 within which the company may allow any perquisites it wants to allow, e.g. furnished residential accommodation, free use of telephone facility at the residence, etc.

In exceptional cases, depending upon merits, the Company Law Board may allow even a higher remuneration, for example where a person has already drawn a higher remuneration.

Company Law Board does not now permit payment of sitting fees to a managing or whole-time director for meetings of the Board of Directors or a committee thereof attended by him.

**COMPANY
SHAREHOLDERS**

