CLUSTER 2

1. Can Mr. Khan appointed as an independent director on the Board of a company, be appointed in its subsidiary or its holding or its associate company. (ICAI, Mock Test Paper, October 2018)

Ans. Section 149(6) contains conditions of eligibility for appointment as an independent director.

Some of the conditions with respect to eligibility criteria contained in Section 149(6) are as under:

(a) A person can be an independent director in a company only if he not a managing director or whole-time director or nominee director in such company.

(b) A person can be an independent director in a company only if he is not a promoter of the company or its holding company or its subsidiary company or its associate company.

(c) A person can be an independent director in a company only if he does not hold and has not held the position of key managerial personnel in the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed.

(d) A person can be an independent director in a company only if he is not and has not been an employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed.

In the given case,

1. Mr. Khan holds the office of an independent director in a company.
2. Section 149(6) does not restrict appointment of an independent director as an independent director or a director in the Subsidiary or holding or associate company. Also, Section 149(6) does not restrict appointment of a person as an independent director if he is already an independent director or a director in the subsidiary or holding or associate company.

   Therefore, Mr. Khan can be appointed as an independent director or a director in the subsidiary or holding or associate company and shall not result in vacation of his office of independent director in the company.

2. The Board of directors of M/s. PQR Limited, an unlisted company having a paid-up capital of Rs.6 crores consisting of equity share capital of Rs. 5 crores and preference share capital of Rs. 1 crore seeks your advice on the following:

(i) Is it necessary for the company to appoint a director to represent the 'Small Shareholders'?

(ii) In case the company decides to appoint such a director, the procedure to be followed by the company for such appointment and the period for which such appointment can be made. [CA (Final) May 2004, Nov 2008 (Modified)]

Ans. The provisions relating to appointment of directors by small shareholders are contained in Section 151 of the Companies Act, 2013 read with Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014. These provisions are applicable to **listed companies** only. Thus, it is not necessary for PQR Limited to appoint a director to represent the small shareholders.

PQR Limited cannot appoint a small shareholders' director because of the following reasons:

(a) Section 151 read with Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014 authorizes a listed company to appoint a small shareholders' director. However, Section 151 and Rule 7 shall not apply to PQR Limited since it is an unlisted company.

(b) A small shareholders' director is elected only by the small shareholders, and thus, his appointment is not made in the general meeting. As per Section 152(6), in the case of a

public company, the appointment of rotational directors shall be made in general meeting, and the other directors shall, in default of, and subject to any regulations in the articles of the company, also be appointed by the company in general meeting. 'Appointment in general meeting' means that at the time of appointment, every member shall be entitled to vote whether or not he is a small shareholder. Since the articles of PQR Limited do not expressly authorize the appointment of a director by small shareholders only, the appointment of small shareholders' director in PQR Limited is not possible.

3. M/s. Neemuch Pharma Limited is a company listed with Malhargarh Stock Exchange. Some small shareholders of the said company want to appoint Mr. Avadhesh as a Director as their representative on the Board of Directors of the said company. Mr Avadhesh is holding 1000 equity shares of Rs. 10 each in the said company. State the provisions of the Companies Act, 2013 in relation to the proposal to appoint Mr. Avadhesh as a Small Shareholders' Director (CA (Final) Nov. 2011)

Ans. The provisions relating to appointment of directors by small shareholders are contained in Section 151 of the Companies Act, 2013 read with Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014. These provisions are explained as follows:

1. These provisions are applicable to listed companies only.
2. A listed company may have one director elected by small shareholders.
3. The manner of election of small shareholders director and the terms and conditions of his appointment shall be such as may be prescribed.
4. The small shareholders may propose to the company the appointment of a Small Shareholders Director. Such proposal shall be made by giving a notice in writing. The notice must comply with the following requirements:
   (a) The notice shall be left at the office of the company at least 14 days before the meeting.
   (b) The notice shall be given by at least-
      (i) 1,000 small shareholders; or
      (ii) $1/10^{th}$ of the total number of small shareholders.
      Whichever is lower
   (c) The notice shall be signed by all the small shareholders proposing the appointment of Small Shareholders Director.

The notice shall specify that the small shareholders intend to propose a person as a candidate for the post of small shareholders director. The notice shall specify the name, address; number of shares held and folio number of-

(a) all the small shareholders proposing the appointment of Small Shareholders Director; and
(b) The person whose name is proposed as a 'Small Shareholders' Director.

However, if the person being proposed as a Small Shareholders Director does of hold any shares in the company, the details of shares held and folio number need not be specified in the notice.

In the given case, the notice has been given for the appointment of small shareholders director by some small shareholders. The question does not specify the total number of small shareholders in the company. Also, the number of small shareholders who have given notice to the company has not been specified. Assuming that the notice has been given by at least 1,000 small shareholders or $1/10^{th}$ of total number of small shareholders, the notice is valid.

There are no eligibility criteria in terms of shareholding in the company for being appointed as a small shareholders director. Thus, Mr. Avadhesh is not debarred from being appointed as a small shareholders director provided, he is not disqualified as per Section 164, he has been allotted Director Identification Number and he is not disqualified as per any other provision of the Act.

4. DD Ltd. is a listed company and it has been served with notice for appointment of small shareholder's director. Referring to the provisions of the Companies Act, 2013, advise on the following:

(i) Define the expression 'small shareholder' and specify the number of small shareholders who may serve notice on the company for director representing them.

(ii) Is it possible to appoint a person, who does not hold any share in the company, as small shareholders' director?

(iii) What is the tenure of small shareholders' director and whether he can be re-appointed as such, after expiry of his tenure? Also state whether he can be appointed as an officer of the company on expiry of his tenure as small shareholders director. (CA (Final) May 2016)

Ans. The provisions relating to appointment of directors by small shareholders are contained in Section 151 of the Companies Act, 2013 read with Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014.

A Small shareholder means a shareholder holding shares of nominal value of not more than Rs. 20,000 or such other sum as may be prescribed. As on date, no other sum has been prescribed.

The notice shall be given by at least-

(i) 1,000 small shareholders; or

(ii) 1/10th of the total number of small shareholders, whichever is lower.

The notice shall be signed by all the small shareholders proposing the appointment of Small Shareholders' Director.

As per Rule 7, the notice given to the company by the small shareholders shall specify the details of shares (viz. the number of shares held and folio number) held by the person proposed as a small shareholders director. However, if the person proposed as a small shareholders' director does not hold any shares in the company, such details need not be specified in the notice.

Thus, Rule 7 makes it clear that a person who does not hold any shares in the company, may also be appointed as a small Shareholders' Director.

Also, the disqualifications of a 'Small Shareholders' Director are the same as that of any other director (specified under Section 164). Since Section 164 does not disqualify for appointment a person who does not hold any shares in the company, a person not holding any shares in the company is not disqualified for appointment as a small shareholders' director. Further, there is no eligibility criterion in terms of shareholding in the company for being appointment as a small shareholders' director. Therefore, it is possible to appoint a person as a small shareholders' director even if he does not hold even a single share in the company.

(a) His tenure of office shall not exceed a period of 3 consecutive years.

(b) He shall not be liable to retire by rotation.

(c) On the expiry of the tenure, he shall not be eligible for re-appointment.

As per Rule, a small shareholders director shall not, for a period of 3 years from the date on which he ceases to hold office as a small shareholders director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

Thus, a person who ceases to be a small shareholders' director cannot be appointed as an officer of the company for a period of 3 years from the expiry of his tenure as small shareholders' director.

5. B Ltd is a listed company and it has been served with a notice for appointment of a small shareholders director. Referring to the provisions of the Companies Act, 2013, examine the following:

(i) The tenure of small shareholders' director and whether he can be re-appointed as such

after expiry of his tenure?

(ii) Whether he can be appointed as an officer of the company on expiry of his tenure as small shareholders' director. [CA (Final) May 2019]

Ans. The provisions relating to appointment of directors by small shareholders are contained in Section 151 of the Companies Act, 2013 read with Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014.

(a) The tenure of office of Small Shareholders' Director shall not exceed a period of 3 consecutive years.

(b) He shall not be liable to retire by rotation.

(c) On the expiry of the tenure, he shall not be eligible for re-appointment.

As per Rule 7, a small shareholders' director shall not, for a period of 3 years from the date on which he ceases to hold office as a small shareholders director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

Thus, a person who ceases to be a small shareholders' director cannot be appointed as an officer of the company for a period of 3 years from the expiry of his tenure as small shareholders' director.

6. Referring to the provisions of the Companies Act, 2013, examine the following:
Mr. Intelligent, was appointed as a small shareholder's director of XYZ Limited, which is in the business of Oil refining. Subsequently, A Limited and B Limited have also appointed him as small shareholder's director. Is the appointment valid? (CA (Final) Nov. 2016)

Ans. The provisions relating to appointment of directors by small shareholders are contained in Section 151 of the Companies Act, 2013 read with Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014.

As per Rule 7, a person shall not hold the position of Small Shareholders' Director in more than 2 companies at the same time. Further, it shall be ensured that the second company in which he is appointed as a Small Shareholders' Director shall not be in a business which is competing or is in conflict with the business of the first company.

In the given case, Mr. Intelligent is already a Small Shareholders' Director in XYZ Limited.

If Mr. Intelligent accepts the appointment as Small Shareholders' Director in A Limited as well as in B Limited, it would result in contravention of Section 151 read with Rule 7. Thus, appointment of Mr. Intelligent as a Small Shareholders' Director in A Limited and B Limited is not valid.

Mr. Intelligent can accept the appointment as a Small Shareholders' Director either in A Limited or in B Limited. Also, Mr. Intelligent shall have to ensure that the second company (viz. A Limited or B Limited) in which he accepts the directorship as a Small Shareholders' Director shall not be in a business which is competing or is in conflict with the business of XYZ Limited.

7. The Board of directors of M/s. Diya Steels and Aluminum Limited, a listed company having a paid-up equity share capital of Rs. 15 crores and preference share capital of Rs. 1 crore and 1100 small shareholders holding equity shares, seeks your advice on the following:

(i) Is it mandatory for the company to appoint a director to represent small shareholders?

(ii) If the company decides to appoint such a director, the procedure to be followed by the company for such appointment and the tenure for which such appointment can be made.

(iii) Whether such a director be considered as an independent director?

(iv) When does a person appointed as a small shareholders director vacate his office? Advice suitably in the light of the provisions of the Companies Act, 2013 and the rules framed there under. [CA (Final) Nov. 2018]

Ans. The given problem relates to Section 151 of the Companies Act, 2013 read with Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014, as discussed

below.

As per Section 151, a Listed Company may have 1 director elected by such small shareholders in such manner and with such Terms and conditions as may be prescribed.

According to Rule 7(1), a listed company, may upon notice of not less than 1,000 small shareholders or 1/10th of the total number of such shareholders, whichever is lower, have a small shareholders' director elected by the small shareholders:

Provided that nothing in this sub-rule shall prevent a listed company to opt to have a director representing small shareholders suo motu and in such a case the provisions of sub-rule (2) shall not apply for appointment of such director.

Rule 7(2) gives the conditions and requirements to be complied with by the small shareholders for giving notice to the company for appointment of a small shareholders director.

In the given case,

(i)

1. M/s Diya Steels and Aluminum Limited is a listed company, and so the provisions continued in Section 151 and Rule 7 are applicable to it.
2. M/s Diya Steels and Aluminum Limited have not received any notice from the eligible small shareholders requiring it to appoint the small shareholders director.
3. It is optional for M/s Diya Steels and Aluminium Limited to appoint the small shareholders director. This is evident by use of the word may in Section 151 as well as in Rule 7(1) and use of the words "nothing in this sub-rule shall prevent a listed company to opt to have a director representing small shareholders suo motu in proviso to Rule 7 (1).
4. Thus, it is not mandatory for M/s Diya Steels and Aluminium Limited to appoint the small shareholders director.

(ii)

1. Since M/s Diya Steels and Aluminium Limited has not received any notice from the eligible small shareholders requiring it to appoint the small shareholders' director, the procedure for giving notice by eligible small shareholders, as contained in Rule 7 (2) shall not be applicable.
2. Neither Section 151 nor rule 7 nor any other provision contained in the Act or the Rules specifies any specific procedure for appointment of a small shareholders' director, where a listed company opts to appoint a small shareholder director suo motu.
3. As per Section 110 read with Rule 22 of the Companies (Management and Administration) Rules, 2014, the appointment of a small shareholders director shall be made by postal ballot.
4. In voting by postal ballot, only small shareholders shall have a right to vote. If the votes cast in favour of the resolution exceed the votes cast against the resolution, the person proposed as small shareholders' director shall be appointed.

   As per Rule 7(5), the tenure of small shareholders' director shall not exceed a period of 3 consecutive years and on the expiry of the tenure, he shall not be eligible for re-appointment.

(iii)

As per Rule 7(4), a Small Shareholders' Director shall be considered as an independent director, if –

(a) he is eligible for appointment as an independent director as per sub-Section (6) of Section 149; and
(b) he gives a declaration of his independence as per sub-Section (7) of Section 149.

(iv)

As per Rule 7(7), the office of small shareholders' director shall become vacant if-
(a) he incurs any of the disqualifications specified in Section 164;

(b) any of the grounds contained in Section 167 becomes applicable on him;
(c) he ceases to meet the criteria of independence as provided in sub-Section (6) of Section 149.

A Small Shareholders' Director may be removed by passing an ordinary resolution in the general meeting in accordance with the provisions of Section 169. At the time of voting on such resolution, every equity shareholder shall have a right to vote, irrespective of the fact as to whether he is a small shareholder or not. Removal under Section 169 shall also result in vacation of office of the small shareholders' director.

8. ABC Ltd., a listed company having 5,000 small shareholders, upon receiving notice from 400 of such small shareholders has refused to appoint a small shareholders' director under Section 151 of the Companies Act, 2013. Examine the validity of refusal of the company. (ICAI, Revision Test Paper, May 2016)

Ans. The provisions relating to appointment of directors by small shareholders are contained in Section 151 of the Companies Act, 2013 read with Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014.

The provisions contained in Section 151 read with Rule 7 are applicable to listed companies only.

The small shareholders are entitled to give a notice to the company requiring the company to make appointment of a small Shareholders Director. The notice shall be given by at least-

(i) 1000 small shareholders; or

(ii) 1/10th of the total number of small shareholders,

Whichever is lower.

The notice shall be signed by all the small shareholders proposing the appointment of small shareholders Director.

In the given case,

1. ABC Ltd. is a listed company. It has 5,000 small shareholders. 400 small shareholders have given a notice to the company requiring the company to appoint a Small Shareholders' Director.
2. The small shareholders eligible to give notice for appointment of Small Shareholders' Director shall be –
   a) 1,000 small shareholders; or
   b) 1/10th of 5,000, i.e. 500 small shareholders,
   Whichever is lower.

Since lower of 1,000 and 500 is 500, the notice for appointment of Small Shareholders' Director has to be given by at least 500 small shareholders.

The notice given by 400 small shareholders does not satisfy the eligibility requirements for giving such notice since it has not been given by at least 500 small shareholders.

Therefore, since the requirements of Section 151 read with Rule 7 have not been satisfied, it is not mandatory for ABC Ltd, to appoint a Small Shareholders Director and so ABC Ltd. can validly refuse to act on such notice.

9. In Ragimudde Ltd, three directors were to be appointed. The item was included in agenda for the Annual General Meeting scheduled on 30th September, 2014, under the category of 'Ordinary Business'. All the three persons as proposed by the board of directors were elected as Directors of the company by passing a 'Single Resolution' avoiding the repetition (multiplicity) of resolution. After the three directors joined the Board, certain members objected to their appointment and the resolution. Examine the provisions of companies Act, 2013 and decide whether the contention of the members shall be tenable and whether both the appointment of directors and the 'single resolution' passed at the company's Annual General Meeting shall be void.

Ans. At a general meeting, two or more persons cannot be appointed as directors by a single resolution unless a resolution that appointment shall be so made has first been agreed to the meeting without any vote being cast against it. A resolution moved in contravention of this provision shall be void, whether or not objection was raised at the time when such resolution was passed (Section 162).

In the given case, appointment of 3 directors has been made by passing a single resolution. But before moving the resolution for appointment of 3 directors by a single resolution, no resolution was passed that the appointment of 3 directors shall be made by a single resolution. Therefore, the resolution appointing the three directors by a single resolution is void, and consequently the appointment of all the three directors is also void. It is immaterial that no member objected to such appointments. Thus, the contention of the members that the appointment of the 3 directors is void, is correct. The single resolution passed for appointments is also void.

10. Mr. Bond and Mr. James were appointed as directors of James bond Ltd. At the AGM held on 30th September, 2017 by a single resolution. State the relevant provisions of the companies Act, 2013 and identify is it possible to appoint the above directors by a single resolution? [CA (Final) May 2018]

Ans. At a general meeting, two or more persons cannot be appointed as directors by a single resolution unless a resolution that appointment shall be so made has first been agreed to the meeting without any vote being cast against it. A resolution moved in contravention of this provision shall be void, whether or not objection was raised at the time when such resolution was passed (Section 162).

In the given case, appointments of 2 directors, viz. Mr. James and Mr. Bond, have been made at the AGM by passing a single resolution.

Applying the provisions contained in Section 162, Mr. James as well as Mr. Bond can be appointed by a single resolution at the AGM, provided-

a. Before moving such single resolution, a resolution that the appointments of these 2 directors shall be made by a single resolution, has been passed at the meeting; and
b. no vote has been cast against such resolution.

Hence, it is possible to appoint Mr. James and Mr. Bond as directors by a single resolution by complying with the above requirements.

11. "Appointment of 2 or more directors can be made by a single resolution only if before making such appointments, a unanimous resolution is passed". Comment, justifying with relevant examples.

Ans. As per section 162, at a general meeting, two or more persons cannot be appointed as directors by a single resolution unless a resolution that appointments shall be so made has first been agreed to by the meeting without any vote being cast against it. A resolution moved in contravention of this provision shall be void, whether or not objection was raised at the time when such resolution was passed.

Example 1

It is proposed to appoint Mr. Dsouza and Mr. Birbal as directors at the AGM by passing a single resolution. 30 members are present in the AGM. Before appointing Mr. Dsouza and Mr. Birbal as directors, a resolution was proposed before the members as to whether such appointments be made by a single resolution. All the 30 members voted in favor of such resolution. Then, a single resolution proposing the appointments of Mr. Dsouza and Mr. Birbal was proposed before the members and it was passed as an ordinary resolution. Since the provisions of Section 162 have been complied with, the appointments of Mr. Dsouza and Mr. Birbal are Valid.

Example 2

It is proposed to appoint Mr. Thor and Mr. Loki as directors at the AGM by passing a single resolution. 40 members are present in the AGM. Before appointing Mr. Thor and Mr. Loki as directors, a resolution was proposed before the members as to whether such appointments be made by a single resolution. Out of the 40 members present, 35 members voted in favour of such resolution, but no member voted against such resolution i.e. 5 members abstained from voting). Then, a single resolution proposing the appointments of Mr. Thor and Mr. Loki was proposed before the members and it was passed as an ordinary resolution. Since the provisions of Section 162 have been complied with, the appointments of Mr. Thor and Mr. Loki are valid.

From the second example, it is evident that the requirement stipulated under Section 162 that a resolution is first passed with no vote being cast against it, has been satisfied, though unanimous resolution has not been passed.

Therefore, we can conclude that the statement "appointment of 2 or more directors can be made by a single resolution only if before making such appointments, a unanimous resolution is passed" is **not correct.**

12. Mycroft Ltd. called its eighth AGM by serving a notice which was short by 1 day. In the AGM, a resolution was passed appointing Mr. Sherlock as a director. Is the appointment of Mr. Sherlock valid?

Ans. As per Section 101 of Companies Act, any general meeting may be called by serving not less than 21 clear days' notice. However, Section 101 is silent as to the consequences where a general meeting is called by serving a shorter notice. This issue was raised before the Court in **Shailesh Harilal Shah and Others v Matushree Textiles Ltd** and Other the Court held that the provisions of Section 101 are directory and not mandatory. In case of a directory provision, it is sufficient if the requirement contained in such provision is obeyed or fulfilled substantially. So, even if a notice of general meeting is short by few days, the notice the general meeting and the resolutions passed at the general meeting shall not be invalid provided no prejudice is caused to any member of the company.

In the given case, the notice of 8th AGM is short by 1 day only. It is very unlikely that such shorter notice would have caused any prejudice to any member of the company. Therefore, the 8th AGM and all the resolutions passed thereat including the appointment of Mr. Sherlock as a director shall remain valid.

13. The articles of association of M/s Fallout Limited provide for five directors and all the five directors are in positions. How many directors are liable to retire at the ensuing annual general meeting?

Ans. As per Section 152(6), not less than 2/3rd of total number of directors shall be the directors whose period of office is liable to determination by retirement by rotation (any fraction contained in that 2/3rd shall be rounded off as one). These directors are referred to as rotational directors. At every annual general meeting, 1/3rd (or nearest to 1/3rd) of rotational directors shall retire from the office. Directors who are longest in office since their last appointment shall retire first (Section 152(6)).

In the present case, the company has 5 directors in office. As per Section 152(6), the number of rotational directors shall not be less than 4 (viz. not less than 2/3rd of 5, viz. not less than 3.33, viz, 4).

Assuming that the company has 4 rotational directors, director(s) liable to retire by rotation at the ensuing annual general meeting shall be 1/3rd (or nearest of 1/3rd) of rotational directors, viz. 1/3rd of 4, viz. 1.33. Since nearest to 1.33 is 1, one director shall retire from the office at the ensuing annual general meeting. The director who has been longest in office shall retire first. He shall be eligible for reappointment.

OR

If it is assumed that all the 5 directors are rotational directors, the director(s) liable to retire by rotation at the ensuing annual general meeting shall be 1/3rd (or nearest to 1/3rd) of rotational directors, viz. 1/3rd of 5, viz. 1.66. Since nearest to 1.66 is 2, two directors shall retire from the office at the ensuing annual general meeting. The directors who have been longest in office shall retire first. The retiring directors shall be eligible for reappointment.

14. ABC Company Ltd. in its first general meeting appointed six directors whose period of office is liable to be determined by rotation. Briefly explain the procedure and rules regarding retirement of these directors. Will it make any difference, if ABC Company Ltd. does not carry on business for profit? [CA (Final) Nov 2002]

Ans. As per Section 152(6), not less than 2/3rd of total number of directors shall be the directors whose period of office is liable to determination by retirement by rotation (any fraction contained in that 2/3rd shall be rounded off as 1).

Such directors are referred to as rotational directors. However, the articles of a company may provide for greater number of rotational directors. Articles may even provide that all the directors shall be rotational directors [Section 152(6)].

As per 152(6), at the first annual general meeting and every subsequent annual general meeting, 1/3rd (or nearest to 1/3rd) of directors liable to retire by rotation shall retire from the office. The directors liable to retire by rotation shall be those who have been longest in the office. In case, two or more directors were appointed on the same day, the directors liable to retire shall be determined by an agreement between them. In the absence of any such agreement, their names shall be determined by lots.

In the given case, it is given that the first general meeting has appointed 6 directors whose period of office is liable to be determined by rotation. It means that all the 6 directors shall be the rotational directors. Therefore, 2 directors (1/3rd of 6) shall retire at the ensuing annual general meeting. The two directors liable to retire shall be those who have been longest in office. In case, 2 or more directors were appointed on the same day, the directors liable to retire shall be determined by an agreement between them. In the absence of any such agreement, their names shall be determined by lots. These directors shall be eligible for reappointment.

A separate resolution shall be moved for reappointment of both the directors (Section 162).

Section 152(6) does not make any special provision for non-Profit Companies. Thus, the same provisions, as discussed above, shall apply even where ABC Company Ltd. does not carry on business for profit.

15. Is it possible for a retiring director to continue in his office beyond the date of the annual general meeting which had to be adjourned due to disturbances at the meeting? Explain (CA (Final) May 1998)

Ans. As per Sections 152(6), and 152(7) of the Companies Act, 2013

1. At every annual general meeting, 1/3rd (or nearest to 1/3rd) of rotational directors shall retire from office [Section 152(6)].
2. If the place of retiring director is not filled and the meeting has not resolved not to fill the vacancy, the meeting shall be adjourned automatically to the next week at the same time and place or if that day is national holiday, then to next succeeding day which is not a holiday. If at the adjourned meeting also, the place of retiring director is not filled and the meeting has not resolved not to fill the vacancy, the retiring directors shall be deemed to be reappointed [Section 152(7)].

As per **B R Kundra v Motion Pictures Association and MCA Clarification**

Where a company does not hold AGM up to the last due date, the directors liable to retire at the AGM shall have to vacate their offices on the last day AGM ought to have been held **[B.R. Kundra v Motion Pictures Association (1976) 46 Comp Case 339].**

In the given case,
The annual general meeting has been duly convened, i.e. the directors have fulfilled their obligation of convening the annual general meeting, and so the decision given in **B.R. Kundra v Motion Pictures Association** shall not apply in the case.
His reappointment depends upon the decision taken in the adjourned annual general meeting and may be discussed as follows:

a. If the adjourned meeting resolves to reappoint him, he shall be reappointed.
b. If the resolution for the reappointment of retiring director is lost in the adjourned annual general meeting, he shall not be reappointed.
c. If no resolution is passed at the adjourned meeting relating to his appointment and the adjourned meeting does not resolve not to fill the vacancy, he shall be automatically reappointed. However, the automatic reappointment shall not apply in the following cases:
   (i) Where a resolution for his appointment was put and lost.
   (ii) Where a resolution is required for his appointment.
   (iii) Where he is disqualified for appointment.
   (iv) Where the retiring director has, in writing, expressed his unwillingness to be reappointed.
   (v) Where appointment of 2 or more directors is made by a single resolution passed in contravention of Section 162.

Therefore, the retiring director can continue in office after the date of the annual general meeting. If in the adjourned annual general meeting also, the place of retiring director is not filled up and the meeting has not resolved not to fill the vacancy, he shall be deemed to be reappointed except in five cases**. <u>It is important to note that the original meeting and adjourned meeting should be held within the last day on which AGM ought to be held under Section 96</u>**

16. The promoters of Bisibele Bath Ltd., a public company, propose to have the strength of the Board of directors as eleven. They also propose to make the managing director and whole directors as directors not liable to retire by rotation. They seek your advice on the following matters:
(i) Maximum number of persons, who can be appointed as directors not liable to retire by rotation.
(ii) How many of the remaining directors will have to retire by rotation every year at the annual general meeting?

Ans. As per Section 152(6), not less than 2/3rd of total number of directors shall be the directors whose period of office is liable to determination by retirement by rotation (any fraction contained in that 2/3rd shall be rounded off as 1). Such directors are referred to as rotational directors. However, the articles of a company may provide for greater number of rotational directors.
In other words, in no case, the number of non-rotational directors shall exceed 1/3rd of total number of directors.
As per Section 152(6), at the first annual general meeting and every subsequent annual general meeting, 1/3rd (or nearest to1/3rd) of directors liable to retire by rotation shall retire from the office.
In the given case,
(i) At least 8 directors shall be rotational directors (2/3rd of 11 is 7.33; taken as 8 since not less than 2/3rd of total directors shall be rotational directors). Accordingly, only 3 directors can be appointed by Bisibele Bath Ltd. as non-rotational directors. Therefore, it is permissible to appoint managing director and whole-time director as non-rotational directors.

In case 3 directors are appointed as non-rotational directors, 1/3rd of rotational directors shall retire at the ensuing annual general meeting, i.e. 3 directors (1/3 of 8 is 2.67; nearest to 2.67 is 3). These 3 directors shall be eligible for reappointment.

17. Annual general meeting of Hero Ltd. has been scheduled in compliance with the requirements of the Companies Act, 2013. In this connection, it has some directors who are rotational and out of which some have been appointed long back, some have been appointed on the same day.
Decide in this connection,
(i) Which of the directors shall be retiring by rotation and be eligible for re-election?
(ii) In case two directors were appointed on the same day, how would you decide their retirement by rotation?
(iii) In case the meeting could not decide how the vacancies caused by retirement to be dealt with, what shall be consequences?
(iv) What will be your answer, assuming that the matter could not be decided even at the adjourned meeting? [CA (Final) Nov.2011]

Ans. The provisions relating to rotational directors, retirement of directors, reappointment of directors and automatic reappointment are contained in Section 152(6) and (7) of the Companies Act, 2013. Applying these provisions, in the given case:

1. Not less than 2/3rd of total number of directors (any fraction contained in that 2/3rd shall be rounded off as one) shall be rotational directors. Out of these rotational directors, 1/3rd (or nearest lo 1/3rd) shall retire from office at every annual general meeting.
2. A director retiring by rotation may be reappointed at the same annual general meeting. However, the Company may, instead of reappointing the retiring director, appoint some other person.
3. The directors liable to retire by rotation shall be those who have been longest in the office. In case, two or more directors were appointed on the same day, the names of directors liable to retire shall be determined-
   a) as per any agreement between them; or
   b) by lots, in the absence of any such agreement.
4. If, at the AGM, the vacancy in the place of retiring director is not filled up and the meeting has not resolved not to fill the Vacancy, the AGM shall adjourn to the next week at the same time and place or if that day is a national holiday, then to next succeeding day which is not a holiday.
5. If at the adjourned AGM also, the vacancy in the place of retiring director is not filled up and the meeting has not resolved not to fill the vacancy, the retiring director shall be deemed to be reappointed. However, at an adjourned AGM, a retiring director shall not be deemed to be automatically reappointed in the following cases:
   a) Where a resolution for the reappointment of such director was put and lost.
   b) Where the retiring director has, in writing, expressed his unwillingness to be reappointed.
   c) Where he is not qualified or is disqualified for appointment.
   d) Where a resolution is required for his reappointment.
   e) Where appointment of 2 or more directors is made by a single resolution passed in contravention of Section 162.

18. ADJ Company Limited has 10 directors on its board. Two of the directors have retired by rotation at an Annual General Meeting. The place of retiring directors is not so filled up and the meeting has also not expressly resolved not to fill the vacancy'. Since the AGM could not complete its business, it is adjourned to a later date. At this adjourned meeting also the place of retiring directors could not be filled up, and the meeting has also not expressly

resolved 'not to fill the vacancy'.

I. **Whether in such a situation the retiring directors shall be deemed to have been re-appointed at the adjourned meeting?**
II. **What will be your answer in case at the adjourned meeting, the resolutions for re-appointment of these directors were lost?**
III. **Whether such directors can continue in case the directors do not call the Annual General Meeting? [CA (Final) May 2010]**

OR

Two (2) out of Ten (10) directors on the Board of XYZ Limited have retired by rotation at an Annual General Meeting. These two (2) vacancies or place of retiring directors is not filled up and the meeting has also not expressly resolved 'not to fill the vacancy'. Since the AGM could not complete its business, it is adjourned to a later date.
Neither place of retiring directors could be filled up at this adjourned meeting nor did the meeting expressly resolve, 'not to fill the vacancy'.

I. **Analyze & apply relevant provisions of the Companies Act, 2013 and decide: Whether in such a situation the retiring directors shall be deemed to have been reappointed at the adjourned meeting?**
II. **What will be your answer in case at the adjourned meeting, the resolutions for reappointment of these directors were lost?**
III. **Whether such directors can continue in case the directors do not call the Annual General Meeting? [CA (Final) May 2019]**

Ans. As per Section 152(7), if the vacancy in the place of retiring director is not filled up and the meeting has not resolved not to fill the vacancy, the annual general meeting shall adjourn to the next week at the same time and place or if that day is a national holiday, then to next succeeding day which is not a holiday.
If at the adjourned meeting also, the vacancy in the place of retiring director is not filed up and the meeting has not resolved not to fill the vacancy, the retiring director shall be deemed to be reappointed.
Thus, in the given case, both the retiring directors shall be deemed to have been reappointed at the adjourned annual general meeting.
In case at the adjourned meeting, the resolutions for reappointment of retiring directors were lost, there is no question of reappointment or deemed reappointment. They shall have to vacate their offices.
In case the AGM is not called, the directors liable to retire cannot continue beyond the last day the AGM ought to have been held, and so their offices shall be vacated. The reason for his is that, as the calling of the AGM is a duty and responsibility of the directors, the directors by omitting to call the AGM, should not take advantage of their own default and, by that means, extend their own period of office. **(B. R. Kundha v Motion Pictures Association).**

19. **Holland and Downey were appointed as first directors on 4th April, 2014 in Sun Glass Ltd. Thereafter, Chris, Dmitri and Esther were appointed as directors on 6th July 2014 and Fuller, Greg and Harry were also appointed as directors on 7th August 2014 in the company. In the Annual General Meeting (AGM) of the company held after the above appointments, Holland and Downey were proposed to be retired by rotation and re-appointed as directors. At the AGM, resolution for Holland's retirement and re-appointment was passed. However, before the resolution for 'Downey' could be taken up for consideration, the meeting was adjourned. In the adjourned meeting also, the said resolution could not be taken up and the meeting was ended without passing the resolution for Downey's retirement and re-appointment.**
In the light of above and with reference to relevant provision of the Companies Act, 2013, answer the following:

(a) Whether proposals for retirement by rotation and re-appointment of Holland and Downey only were sufficient?

(b) What will be the status of Downey as a director in the company?

Ans. As per Sections 152(6) and 152(7) of the Companies Act, 2013:

Calculation of number of directors due to retire in the next AGM:

a) Total number of directors of the company: 8
b) Number of rotational directors: Not less than 2/3rd of 8, viz. not less than 5.35, viz. 6
c) Number of directors due to retire in the AGM: 1/3rd of 6, viz. 2.
d) Directors who are due to retire: Those directors who have been longest in office, viz. Holland and Downey.

Thus, the proposal to retire and reappoint only 2 directors (viz. Mr. Holland and Mr. Downey) is valid.

If, at the AGM, the vacancy in the place of retiring director is not filled up and the meeting has not resolved not to fill the vacancy, the AGM shall adjourn to the next week at the same time and place or if that day is a national holiday, then to next succeeding day which is not a holiday.

If at the adjourned AGM also, the vacancy in the place of retiring director is not filled up and the meeting has not resolved not to fill the vacancy, the retiring director shall be deemed to reappointed. However, at an adjourned AGM, a retiring director shall not be deemed to be automatically reappointed in the following cases:

a) Where a resolution for the reappointment of such director was put and lost.
b) Where the retiring director has, in writing, expressed his unwillingness to be reappointed.
c) Where he is not qualified or is disqualified for appointment.
d) Where a resolution is required for his reappointment.
e) Where appointment of 2 or more directors is made by a single resolution passed in contravention of Section 162.

In the given case, the AGM was adjourned without filling the vacancy in place of Mr. Downey. Also, at the adjourned AGM, the vacancy in the place of Mr. Downey was not filled up. Neither the AGM nor the adjourned AGM resolved not to fill the vacancy. Since the given case does not fall under any of the 5 exceptional cases as stated above, Mr. Downey shall be deemed to be reappointed.

20. The promoters of M/s Frontline Limited a listed public company propose to have the strength of the Board of directors as eleven. They also propose to make the Managing Director and whole-time directors as directors not liable to retire by rotation. Advice on the following matters as per the provisions of the Companies Act, 2013:

(i) Maximum number of persons, who can be appointed as directors not liable to retire by rotation.

(ii) How many of the remaining directors will have to retire by rotation every year at the Annual General Meeting (AGM)?

(iii) For the purpose of increasing the strength, certain nominations were received to nominate candidates for contesting elections. One of the nominations was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received.

(iv) Can the Board of Directors increase the strength of Companies' directors to 18 from 11 by appointing additional directors through passing single resolution? (CA (Final) May 2018)

Ans.

1) As per Section 152(6), not less than 2/3rd of total number of directors shall be the directors whose period of office is liable to determination by retirement by rotation (any fraction contained in that 2/3rd shall be rounded off as 1. Such directors are referred to as rational

directors. However, the articles of a company may provide for greater number of rational directors. In other words, in no case, the number of non-rotational directors shall exceed 1/3rd of total number of directors.

2) As per Section 152(6), at the first annual general meeting and every subsequent annual general meeting, 1/3rd (or nearest to 1/3rd) of directors liable to retire by rotation shall retire from the office.
3) Section 160 recognizes the right of a person, who is not a retiring director, to stand for directorship. A notice received under Section 160 shall be valid, if it complies with the following requirements:
   a. The notice is given at least 14 days before the general meeting.
   b. It is deposited at the registered office of the company.
   c. The notice is signed by the person eligible to give notice.
   d. A sum of Rs. 1 Lakh or such higher amount as may be prescribed, is deposited along with the notice.
4) As per Section 149(1), a company shall have a maximum of 15 directors. However, a company may appoint more than 15 directors by passing a special resolution.
5) As per Section 162, at a general meeting, two or more persons cannot be appointed as directors by a single resolution unless a resolution that appointment shall be so made has first been agreed to by the meeting without any vote being cast against it.

In the given case,

(i) At least 8 directors shall be rotational directors (2/3rd of 11 is 7.33; taken as 8 since not less than 2/3rd of total directors shall be rotational directors). Accordingly, maximum 3 directors can be appointed as non-rotational directors.
(ii) 1/3rd of rotational directors shall retire at the ensuing annual general meeting. In case 8 directors are appointed as rotational directors, the directors liable to retire by rotation at the annual general meeting shall be 3 (1/3rd of 8 is 2.67; nearest to 2.67 is 3). These 3 directors shall be eligible for reappointment.
(iii) As per Section 101, the notice of every general meeting shall be sent by the company to the members at least 21 clear days before the meeting. However, Section 160 must be received by the company before issue of notice of the general meeting by the company.
(iv) In the present case, one of the nominations under Section 160 has been received by the company after the notice of AGM was issued by the company. Further, such nomination was received after the working hours of the last day on which nomination should have been received. Such nomination has been rejected by the directors, as the directors consider that such nomination is not valid as per Section 160.

An analysis of the provisions of Section 160 and Section 101 shows that the nomination under Section 160 need not be received by the company before issue of notice of AGM by the company. The nomination received by the company shall be valid if it is received by the company at least 14 days before the date of the general meeting. Further, there is no such requirement that the nomination has to be received within the working hours of the last day for receipt of nominations.

Thus, the decision to reject such nomination is not valid.

The Board is not empowered to increase the strength of directors to 18, since any increase in number of directors beyond 15 requires the approval of the members by a special resolution. Thus, the Board can increase the strength of directors to 18, only after a special resolution authorising the number of directors to 18 or more, is passed in the general meeting.

Once a special resolution has been passed permitting the number of directors to 18 or more, the Board may increase the strength of directors to 18 by appointing the additional directors. Further such additional directors may be appointed by passing a single resolution, since the appointment of additional directors is made by the board, and not in general meeting, and

so the provisions of Section 162 shall not be attracted as Section 162 applies only in case of appointment of directors in general meeting.

21. The annual general meeting of a company for the financial year 2017-2018 was held on 30th September, 2018. Till 30th September, 2019, the company does not hold any annual general meeting for the financial year 2018-2019. Ramya, Sharon and Thorwath are the directors liable to retire at the annual general meeting. Can they continue in office?

Ans. At every annual general meeting. 1/3rd (or nearest to 1/3rd) of rotational directors shall retire from office [Section 152(6)]. As a general rule, the directors who are liable to retire at an annual general meeting cannot continue in office after the last day on which the annual general meeting should have been held. This is because the calling of annual general meeting is a duty and responsibility of the directors. They cannot, by omitting to call the annual general meeting, take advantage of their own default and by that means extend their tenure of office **[B.R. Kundra v Motion Pictures Association (1976) 46 Comp Cas 339].** Also, the rule of automatic reappointment does not apply to a case where annual general meeting is not held.

The annual general meeting of a company must be held-

(a) within 6 months of close of the financial year; and

(b) not later than 15 months from the date of its previous annual general meeting.

The registrar has the power to grant extension of time for holding the annual general meeting by a period not exceeding 3 months.

In the given case,

a. For the financial year 2018-2019, the annual general meeting must be held on or before 30th September, 2019. If it is not so held, the directors, Ramya, Sharon and Thorwath shall cease to hold their offices on 30th September, 2019. Their continuance beyond this date shall be invalid.
b. However, if the registrar grants extension of time for holding the annual general meeting, the annual general meeting may be held up to 31.12.2019, and so the directors can continue in office till that date. However, if the annual general meeting is not held up to 31.12.2019 (where extension is granted), the directors, Ramya, Sharon and Thorwath shall cease to hold their offices on 31.12.2019.

22. Notice has been received from a member proposing himself for appointment as a director after the issue of notice convening the annual general meeting. As a secretary of a public company, how will u deal with the above situation? [CA (Final) Nov. 1999]

Ans. Section 160 recognizes the right of the person, who is not a retiring director, to stand for director ship. A notice received under Section 160 shall be valid, if it complies with the following requirements:

1. The notice is given at least 14 days before the general meeting.
2. It is deposited at the registered office of the company.
3. The notice is signed by the person eligible to give notice.
4. A sum of Rs. 1 Lakh or such higher amount as may be prescribed is deposited along with the notice.
5. As per Section 101, the notice of every general meeting shall be sent by the company to the members at least 21 clear days before the meeting. However, Section 160 does not require that the notice to be given to the company under Section 160 must be received by the company before issue of notice of the general meeting by the company.

In the given case, the notice under Section 160 has been received by the company from a member after the company has issued the notice of the annual general meeting. The notice given by the member shall be in accordance with the provisions of Section160 if it is received by the company at least 14 days before the general meeting and the notice complies with

other requirements of Section 160. In case the notice given by the member is in accordance with the provisions of Section 160, the company shall inform its members about the candidature of the proposed director by serving individual notices or by advertisement in accordance with the provisions of Section 160 read with Rule 13 or The Companies (Appointment and Qualification of Directors) Rules, 2014.

23. Mr. D, proposes his candidature as a director in X Ltd. along with the deposit of 1 lac rupees. Later Mr. D failed to be appointed but received 30% of total votes. Mr. D asked X Ltd. to refund the deposit but the company denied to pay as he failed to be elected. [ICAI Mock Test]

Ans. Where a person who is not a retiring director serves to the company a notice of his candidature proposing himself as a director, he is required to deposit a sum of Rs. 1 lakh with the company along with such notice.

The amount deposited with the company shall be refunded, if the person proposed as a director-

i. gets elected as a director (i.e. if an ordinary resolution is passed for his appointment); or
ii. gets more than 25% of the total valid votes cast (whether on a show of hands or on poll)

In the given case, Mr. D has deposited a sum of Rs. 1 lakh with the company, but he failed to get elected as a director. However, Mr. D secured 30% of total valid votes, i.e. the condition of securing more than 25% of total valid votes cast, has been satisfied.

Therefore, Mr. D is entitled to a refund of Rs. 1 lakh deposited with the company. Accordingly, the decision of the company not to refund Rs. 1 lakh to Mr. D is not valid.

24. Examine the validity of the following appointment with reference to the provisions of the Companies Act, 2013:

The Board of Directors of MNP Limited appointed Ms. Neha as a Women Director in the Board Meeting held on 10th September, 2014. The said appointment was made to fill the vacancy of the woman director, which had occurred as a result of resignation of Ms. Sheela on 30th June, 2014.

Will your answer differ if the Board Meeting of the company was held on 8th November, 2014? [CA (Final) May, 2015]

Ans. The provisions relating to woman director are contained in second proviso to Section 149(1) of the Companies Act, 2013 read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014. As per these provisions, any vacancy in the office of a woman director shall be filled-up by the Board at the earliest but not later than-

i. Immediately next Board meeting: or
ii. 3 months from the date of such vacancy, whichever is later.

In the given case, vacancy in the office of Ms. Sheela arose on 30th June, 2014. The period of 3 months (from the date of vacancy) shall expire on 30th September, 2014 (the date on which the vacancy arose viz. 30th June, 2014 shall be excluded, and therefore, the period of 3 months shall start from 1st July, 2014 and end on 30th September, 2014).

The vacancy in the office of Ms. Sheela has been filled by the Board by appointing Ms. Neha in the Board meeting held on 10th September, 2014. The said appointment has been made within a period of 3 months from the date of the vacancy, and so the said appointment has been validly made. Even if the Board meeting held on 10th September, 2014 is not the first Board meeting held after the vacancy arose (viz. 30th June, 2014), the said appointment is valid, since the vacancy has been filled up within 3 months.

If the vacancy is filed up on 8th November, 2014 instead of 10th September, 2014, the said appointment shall be valid only if the Board meeting held on 8th November, 2014 is the first Board meeting held after 30th June, 2014.

Observations not to form part of the answer

1. Section 173(1) requires a company to hold at least 4 Board meetings in every calendar year, and the gap between any 2 consecutive Board meetings shall not be more than 120 days.
   In the given question, if the vacancy is filled up in a board meeting held on 8th November, 2014, and such Board meeting is the first Board meeting held after 30th June, 2014, in such case there would be a contravention of the provisions of Section 173(1)
2. Section 9 of the General Clauses Act, 1897 reads as under:
   "In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from', and for the purpose of including the last in a series of days or any other period of time, to use the word 'to'."

Applying Section 9 of the General Clauses Act, 1897, the date of creation of vacancy (viz. 30th June, 2014) shall be excluded, and so the period of 3 months shall start from 1st July, 2015 and end on 30th September, 2014.

25. Sky Limited, a listed company has been incorporated under the Companies Act, 2013. An intermittent vacancy of woman director has arisen on 15th June, 2016. Advise the company to fill the vacancy as per the provisions of the Companies Act, 2013. The Board meeting was held on 14th August, 2016 (CA (Final) Nov. 2016)

Ans. The provisions relating to woman director are contained in second proviso to Section 149(1) of the Companies Act, 2013 read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014. As per these provisions, any vacancy in the office of a woman director shall be filled-up by the Board at the earliest under the following-

Immediately next Board meeting or

3 months from the date of such vacancy, whichever is later

In the given case, vacancy in the office of a woman director arose on 15th June, 2016. The period of 3 months (from the date of vacancy) shall expire on 15th September, 2016 (the date on which the vacancy arose viz. 15th June, 2016 shall be excluded, and therefore, the period of 3 months shall start from 16th June, 2016 and end on 15th September, 2016).

After the creation of vacancy in the office of woman director, the next Board meeting was held on 14th August, 2016.

Out of these two dates, viz. 15th September, 2016 and 14th August, 2016, the later date is 15th September, 2016. So, if the vacancy in the office of woman director is filled on or before 15th September, 2016, it would be a sufficient compliance of second proviso to sub-Section (1) of Section 149 read with Rule 3.

Thus, the company may fill the vacancy in the office of woman director in the Board meeting held on 14th August, 2016 or any subsequent Board meeting to be held on or before 15th September, 2016.

Observations not to form part of the answer

Section 9 of the General Clauses Act, 1897 reads as under:

"In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from', and for the purpose of including the last in a series of days or any other period of time, to use the word 'to'."

Applying Section 9 of the General Clauses Act, 1897, it is clear that the date of creation of vacancy (viz. 15th June, 2016) shall be excluded, and so the period of 3 months shall start from 16th June, 2016 and end on 15th September, 2016.

26. Referring to the provisions of the Companies Act, 2013, examine the validity of the following appointment of directors:

a. Brown Limited, having a turnover of Rs. 60 crores in the financial year 2016-17 appoints

b. Ms. Rose as the woman director on 1st March 2017. Ms. Rose already holds directorship in twelve companies including ten public companies. She is whole time Cost Accountant in practice.

c. Ms. Jasmine holds directorship in eight public companies including managing directorship in two companies and directorship in six companies. In addition, she also holds alternate directorship in three companies and independent directorship in three subsidiary companies of Brown Limited. [CA (Final) Nov. 2017]

OR

Excel Limited is a listed company with a turnover of Rs. 60 crore in the financial year 2017-2018. The company appoints Ms. W as the woman director on 1st March, 2018. Ms. W is already a director in 12 companies including 10 public companies. Also, Ms. W is a chartered accountant in practice. Evaluate in the light of the given facts, the validity of appointment of Ms. W in Excel Limited. [ICAI, RTP, May 2018; Mock Test Paper, April 2018]

Ans. a) As per Section 149(1) second proviso read with Rule 3, it is mandatory for the following classes of companies to appoint one or more-woman director:

I. Every listed company; and
II. Every public company having paid up share capital of Rs. 100 crore or more; and
III. Every public company having turnover of Rs. 300 crore or more.

For this purpose, the paid-up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

As per Section 165 (1)-

a. no person shall hold office as a director (including alternate directorships) in more than 20 companies, whether public or private.
b. no person shall hold office as a director (including alternate directorships) in more than 10 public companies (including any private company which is either a holding company or a subsidiary company of a public company).
c. The provisions of Section 165(1) shall not apply to a company licensed under Section 8 if it has not committed any default in filing with the Registrar its financial statements under Section 137 or annual return under Section 92 (Notification No. G.S.R. 466 (E) dated 5th June, 2015).

In the given case,

d. The provisions relating to woman director are not applicable to Brown Limited since Brown Limited is not covered under Section 149(1) second proviso read with Rule 3. In the absence of adequate information, it has been assumed that Brown Limited is not a listed company, its turnover during the financial year 2015-16 (as per the audited financial statement) was less than Rs. 300 crore and its paid-up capital as on 31.03.2016 (as per the audited financial statement) was less than Rs. 100 crore. The turnover of Brown Limited during the financial year is Rs. 60 crore, which is irrelevant for determining the applicability of provisions of woman director.
e. However, there is nothing in Section 149 or any other provision of the Companies Act, 2013 which prevents a company from appointing a woman director, even if the provisions relating to woman director are not applicable to it.
f. Neither Section 164 nor any other provision contained in the Companies Act, 2013 disqualifies for directorship any cost accountant in practice. Thus, for examining the validity of appointment of Ms. Rose as a director of Brown Limited, it is immaterial that Ms. Rose is a practicing cost accountant.
g. The number of directorships already held by Ms. Rose is twelve, out of which directorships

held in public companies are ten. As per Section 165 (1), it is not permissible for any person to hold more than 10 directorships of public companies. However, any directorship in a company licensed under Section 8 is not counted for the purpose of Section 165 (1).

h. The appointment of Ms. Rose as a director of Brown Limited would result in holding of eleven directorships of public companies, which is in contravention of Section 165(1) However, there would be no contravention if out of these eleven public companies, any public company is a company licensed under Section 8 if such Section 8 company has not committed any default in filing with the Registrar its financial statements under Section 137 or annual return under Section 92.

i. Also, there would be no contravention, if Ms. Rose resigns from directorship of any of the 10 public companies and afterwards accepts the directorship in Brown Limited.

b) The directorships held by Ms. Jasmine are as under:

Nature of directorship	**Counted as directorships of public companies, as per Section 165**
Alternate directorship in companies	0 or 1 or 2 or 3 depending upon the fact as to whether these 3 alternate directorships are in public companies or other than public companies
Independent directorship in subsidiary companies of Brown Limited (Directorships in 3 subsidiary companies of Brown Limited shall be considered while reckoning directorships in public companies, as per Section 165(1)	3
Managing directorship in public companies	2
Directorships in public companies	6
Total number of directorships held in public companies	11 or 12 or 13 or 14

It is seen here that the number of directorships held in public companies by Ms. Jasmine exceeds ten, which are the maximum permissible directorships as per Section 165(1). Thus, Ms. Jasmine has contravened the provisions of Section 165(1), and therefore, she is punishable with fine as specified under Section 165(6), i.e., she shall be liable to a penalty of Rs. 5,000 for each day after the first during which such contravention continues.

27. Case 1. Royal Limited is a company listened at Madras Stock Exchange, incorporated on 1st January, 2015. The Board of Directors of the company decides to appoint in its Board 'woman director' and the 'Resident Director'.

i. Explaining the provisions of the Companies Act, 2013, state whether it is mandatory for the company to appoint such directors in its Board.

ii. What would be your answer in case the company is a non-listed company and the

Board of directors decided not to have the woman director on the company's Board?

iii. What shall be your answer in case the company in question is not listed at any of the exchanges, the paid-up share capital of the company is Rs. 50 crore and the turnover of the company is Rs. 200 crore. Decide whether the company is mandatorily required to appoint the woman director. [ICAI Revision Test Paper, Nov. 2016]

Case II. M Ltd. is an unlisted company engaged in FMCG sector having 11 directors on its Board.

The company has paid-up share capital of Rs. 300 crore and a turnover of Rs. 500 crore. The provisions contained in the Companies Act, 2013 require the companies to have the following categories of directors on their Board:

a. Woman director

b. Independent director.

Keeping in view of the Companies Act, 2013, M Ltd. appointed the directors as required by the Act. State the relevant provisions. [ICAI, Revision Test Paper, May 2017]

Ans.

Case I

1. As per Section 149(1) second proviso read with Rule 3, it is mandatory for the following classes of companies to appoint one or more-woman director:
   a. Every listed company; and
   b. Every public company having paid up share capital of Rs. 100 crore or more; and
   c. Every public company having turnover of Rs. 300 crore or more.
2. As per Section 149(3), every company shall have at least 1 director who stays in India for a total period of not less than 182 days during the financial year.
3. As per Section 149(4), every listed public company shall have at least 1/3rd of the total number of directors as independent directors. For this purpose, any fraction contained in such 1/3rd shall be rounded off as one.
4. Further, Section 149(4) read with Rule 4 provides that there shall be at least 2 directors as independent directors, if –
   (i) the company is a public company having a paid-up share capital of Rs. 10 crore or more: or
   (ii) the company is a public company having a turnover of Rs. 100 crore or more; or
   (iii) The company is a public company having in aggregate, outstanding loans, debentures and deposits, exceeding Rs. 50 crore.

In the given case,

(i) It is mandatory for Royal Limited to appoint at least one-woman director since it is a listed company. It is also mandatory for Royal Limited to appoint at least one Indian Resident Director since every company is required to appoint such director.

(ii) In case Royal Limited is not a listed company, it would still be required to appoint a woman director if it satisfies one or more of the following conditions:
   a. The paid-up share capital of Royal Limited is Rs. 100 crore or more as on the last day of the preceding financial year.
   b. The turnover of Royal Limited is Rs. 300 crore or more during the preceding financial year.

(iii) In case Royal Limited is not a listed company, its paid-up share capital is Rs. 50 crore and its turnover is Rs. 200 crore, it is not mandatory for Royal Limited to appoint any woman director since none of the requirements contained in second proviso to sub-Section (1) of Section 149 read with Rule 3 is satisfied in such a case.

Case II-

(i) Though M Ltd. is not a listed company, it is required to appoint at least one-woman director since its paid-up share capital is Rs. 300 crore (i.e. the criterion of paid up share

capital of Rs. 100 crore or more is satisfied) and its turnover is Rs.500 crore (i.e. the criterion of turnover of Rs. 300 crore or more is satisfied).

(ii) Though M Ltd. is not a listed company, it is required to appoint at least 2 directors as independent directors since its paid-up share capital is Rs. 300 crore (i.e. the criterion of paid up share capital of Rs. 10 crore or more is satisfied) and its turnover is Rs. 500 crore (i.e. the criterion of turnover of Rs. 100 crore or more is satisfied).

28. Case I. ABC Limited is an unlisted public company having a paid-up equity share capital of Rs. 20 crores and a turnover of Rs. 150 crores as on 31st March, 2018. The total number of directors on the Board is 13. Referring to the provisions of the Companies Act, 2013 answer the following:

(i) The minimum number of independent directors that the company should appoint.

(ii) How many independent directors are to be appointed in case ABC limited is a listed public company? [CA (Final) Nov. 2018]

OR

XYZ Limited is an unlisted public company having a paid-up capital of twenty crore Rupees as on 31st March, 2015 and a turnover of one hundred fifty crore rupees during the ended 31st March, 2015. The total number of directors is thirteen.

Referring to the provisions of the Companies Act, 2013 answer the following:

(i) State the minimum number of independent directors that the company should appoint.

(ii) How many independent directors are to be appointed in case XYZ Limited is a listed public company? [CA (Final) May, 2016]

OR

Case II. XYZ Limited is an unlisted public company having a paid-up capital of Rs. 20 crore as on 31st March, 2017 and a turnover of Rs. 150 crore during the year ended 31st March 2017. The total number of directors is 13.

Answer the following questions:

(i) Minimum number of directors to be appointed as independent directors in XYZ Limited.

(ii) What will be the consequences XYZ Ltd. ceases to fulfil any of the required conditions win respect of appointments to independent directors for 3 continuous years?

(iii) XYZ Ltd. (unlisted public company) were a dormant company, what shall be the law relating to the appointment of independent directors? (ICAI, Mock Test Paper, March 2018)

Ans. As per Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class(es) of companies shall have at least 2 directors as independent directors:

a. Public companies having paid up share capital of Rs. 10 crore or more.
b. Public companies having turnover of Rs. 100 crore or more.
c. Public companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding Rs. 50 crore.

If a Company ceases to fulfil the prescribed criteria above, for 3 consecutive years, it shall not be required to comply with these provisions (i.e. it shall not be required to appoint any independent director) until such time as it meets any of such conditions.

As per Rule 4, the paid-up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

Rule 4 also provides that the following classes of unlisted public companies shall not be required 1o have any independent director:

(a) A joint venture

(b) A wholly owned subsidiary

(c) A dormant company as defined under Section 455 of the Act.
In case of listed public companies, Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 does not apply, and such companies are required to appoint the independent directors in accordance with Section 149(4).
As per Section 149(4), in case of a listed public company, at least 1/3rd of its total number of directors shall be independent directors, and any fraction contained in that 1/3rd shall be rounded off as 1.
In the given case,
(i)ABC Limited is an unlisted public company. The paid-up capital of ABC Limited is Rs. 20 crore, and turnover is Rs. 150 crore.
ABC Limited fulfils two criteria out of the 3 criteria given under Rule 4. Accordingly, ABC Limited is required to appoint a minimum of 2 independent directors.
(ii)In case ABC Limited is a listed public company, if is required to appoint at least 1/3rd of its total number of directors as independent directors.
Accordingly, out of 13 directors, at least 5 directors (1/3rd of 13 = 4.33; any fraction contained in such 1/3rd shall be rounded off as one) shall be independent directors.

Case II-
(i) XYZ Limited is an unlisted public company. The paid-up capital of XYZ Limited is Rs. 20 crore, and turnover is Rs. 150 crore. XYZ Limited fulfils two criteria out of the 3 criteria given under Rule 4. Accordingly, XYZ Limited is required to appoint a minimum of 2 independent directors.
(ii) If XYZ Limited ceases to fulfil all the 3 criteria contained in Rule 4 for a continuous period of 3 years, then, it shall not be required to appoint any independent director until such time as it meets any of these 3 criteria.
(iii) If XYZ Limited were a dormant company, then, provisions contained in Rule 4 shall not apply to it, and so it shall not be required to appoint any independent director.

29. The composition of the Board of Directors of a listed public company as on 31-03-2017 comprised of (i) Mr. A, Director (ii) Mr. B. Director, (iii) Mr. C. Director (iv) Mr. D. Director (v) Mrs. E, Independent Director (vi) Mr. F, Independent Director and (vii) Mr. G. Independent Director.
Mr. D & Mrs. E vacated their office of director on 30-04-2017.
You are required to examine with reference to the provisions of the Companies Act, 2013 and what course of action would you suggest which can be taken up by the company in this regard? (CA (Final) May, 2017)

Ans. As per Section 149(4), every listed public company shall have at least 1/3rd of the total number of directors as independent directors. For this purpose, any fraction contained in such 1/3rd shall be rounded off as one.
As per Section 149(1) second proviso read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, every listed company shall have at least 1 woman director.
Rule 3 further provides that any vacancy in the office of a woman director shall be filled-up by the Board of the earliest but not later than-
(i) Immediately next Board meeting: or
(ii) 3 months from the date of such vacancy whichever is later.
In the given case,
Because of vacation of office of director by Mr. D and Mrs. E, -
a. total number of directors have reduced to 5;
b. number of independent directors have reduced to 2 (viz. Mr. F and Mr. G);
c. there is no woman director in the company.

Despite the vacation of office of Mr. D and Mrs. E, the requirement of independent directors being not less than 1/3rd of total number of directors is satisfied. Thus, there is no requirement to appoint any independent director. However, the company is required to appoint at least 1-woman director, such appointment shall be made by making an appointment by the Board in the next Board meeting or within 3 months of the date of vacancy, whichever is later.
After the vacancy in the office of woman director is filled,

a) total number of directors shall be 6
b) number of independent directors shall be 2 (assuming that the woman director appointed to fill the vacancy of Mrs. E is not an independent director)
c) there will be 1-woman director.

The above constitution shall be valid as per the provisions of Section 149 (4) and second proviso to Section 149(1).
To conclude, the company is required to fill the vacancy of Mrs. E by appointing a woman director, who may or may not be an independent director. Such vacancy shall be filled-up by the Board in the immediately next Board meeting or within 3 months from the date of such vacancy, whichever is later.

30. Queens Limited is a company listed at Bombay Stock Exchange. Company's Articles empower the Board of directors to appoint additional director. The Board of directors, therefore, appoints Mi. K, as the additional director. It may, however, be pointed out that earlier, the proposal to appoint Mr. K, as a director on the company's Board was rejected by the members at the company's annual general meeting.
Examining the provisions of the Companies Act, 2013 answer the following:

I. Whether Mr. K's appointment as additional director by the Board of directors is valid?
II. Whether the company's annual general meeting can appoint Mr. K as the additional director when the proposal to appoint comes before the meeting for the first time?
III. In case the AGM of the company is not held within the stipulated time, decide whether Mr. K who was appointed by the Board as additional director, for the first time, can continue to act as a director? (CA (Final) May 2015)

Ans. As per Section 161(1),

(i) a person, who fails to get appointed as a director in a general meeting, cannot be appointed as an additional director. Since, earlier, the proposal to appoint Mr. K as a director of the company was rejected by the members at the company's Annual General Meeting. Mr. K cannot be appointed as an additional director.
(ii) The power to appoint additional directors is expressly conferred on the Board of directors by Section 161(1) of the Companies Act. 2013. Accordingly, it is not possible for the members to exercise this power. Thus, additional directors cannot be appointed in the annual general meeting or any other general meeting **(Blair Open Hearth Furnace Co. Ltd. v Reigart (1914) 1 Ch. 390].**

However, in some exceptional cases like when there is a deadlock in the Board or where all the directors become interested, the power to appoint additional directors may be exercised by the members **(Barron v Patter (1914) 1 Ch 895).**

(iii) An additional director holds office up to the date of next annual general meeting or the last day, on which the annual general meeting should have been held, whichever is earlier.

Therefore, if the AGM is not held up to the last day AGM ought to have been held as per Section 96 of the Companies Act, 2013, Mr. K shall have to vacate his office on the last day on which the AGM ought to have been held.

31. Mr. Abhi was appointed as an additional director of Pioneer Limited on 14th March, 2016. The annual general meeting of the company was scheduled to be held on 29th September,

2016 but due to heavy rains and floods all records of the company were destroyed. In order to rebuild the records, the company approached the Registrar of Companies for extension of time for holding the annual general meeting till 30th December, 2016. In the light of the Companies Act, 2013 advise Mr. Abhi, who was appointed as additional director during the year. (CA (Final) May 2017)

Ans. As per Section 161(1), an additional director holds office up to the date of next annual general meeting or the last day, on which the annual general meeting should have been held, whichever is earlier.

If the AGM is not held up to the last day AGM ought to have been held as per Section 96, the additional director shall have to vacate his office on the last day on which the AGM ought to have been held.

As per Section 96, the company shall hold AGM within 6 months of the close of the financial year.

As per Section 96, the Registrar may, for any special reason, grant extension of time (not exceeding 3 months).

In the given case,

1. AGM of Pioneer Ltd. could not be held on 29th September, 2016 due to heavy rains and floods. Generally, such reasons are considered as special reason within the meaning of Section 96, and accordingly extension of time is granted by the Registrar.
2. Pioneer Ltd. has applied to the Registrar for extension of time for holding the AGM till 30th December. 2016. The question is silent as to whether the Registrar has granted extension of time or not.
3. Assuming that the Registrar granted the extension of time for holding the AGM till 30th December, 2016, the issue that arises is 'whether Mr. Abhi can continue as additional director till 30th December, 2016?
4. The last date for holding the AGM without any extension of time is 30th September, 2016, and the last date for holding AGM including extension of time is 30th December, 2016.
5. As per Section 161(1), the additional director cannot continue beyond the last date on which the AGM ought to have been held. However, in the situation raised in the given question in which the extension of time is granted by the Registrar, Section 161(1) is silent as to whether the additional director can continue in office up to the last date of the AGM including the extension granted by the Registrar.
6. As per reasonable construction, where extension is granted by the Registrar, the additional director should have a right to continue in office up to the date of the AGM including the extension granted by the Registrar.

Therefore, Mr. Abhi is entitled to continue office as additional director up to 30th December, 2016. If for any reason AGM is not held up to 30th December, 2016, Mr. Abhi shall have to vacate his office on 30th December, 2016.

32. Virat, vice-president of PQR Ltd., was appointed as an additional director in January, 2014. On the office of managing director falling vacant he was appointed as managing director on existing remuneration. Whether Virat will cease to be managing director in the next annual general meeting? (CS (Final) Dec. 2000 (Modified))

Ans. As per Section 161(1), an additional director holds office up to the date of next annual general meeting.

As per Explanation to Section 152(7), "retiring director" means a director retiring by rotation. Since an additional director does not retire by rotation, he is not a retiring director as per Explanation to Section 152(7). Therefore, an additional director may be appointed as a regular director in the annual general meeting only if the conditions prescribed under Section 160 are complied with.

The term 'managing director' is defined under 2(54) of the Companies Act, 2013 as under:

"Managing director means a director who..." The use of the words 'a director' in clause (54) of Section 2 makes it clear that a managing director has to be a director first. If a managing director ceases to be a director, he will automatically cease to be a managing director.
In the given case, Virat will hold office up to the date of next annual general meeting. Since, he will cease to be a director; he will also vacate the office of managing director. Further, even if the annual general meeting is not held, he will cease to be an additional director on the last day, on which the annual general meeting ought to have been held (Section 161(1) of the Companies Act, 2013).
However, if a notice is given of the candidature of Virat under Section 160 and at the annual general meeting he is appointed as a director, he shall continue as a managing director. [MCA Clarification]

33. The maximum number of directors as per the articles of association of Maleficent Ltd. is 12. At present, Maleficent Ltd. has 10 directors. The Board of directors of Maleficent Ltd. proposes to appoint 6 additional directors, Can the Board do so?

Ans.

1. As per Section 149(1), a company shall have a maximum of 15 directors. However, a company may appoint more than 15 directors by passing a special resolution.
2. As per Regulation 66 of Table F, the number of the directors and additional directors together shall not at any time exceed the maximum strength fixed for the Board by the articles.
3. As per Section 161(1), the Board may, at any time, in its discretion, appoint the additional directors.
4. Assuming that Regulation 66 of Table F is applicable to Maleficent Ltd., the Board of directors of Maleficent Ltd. may appoint 6 additional directors. However, if Regulation 66 of Table F is not applicable to Maleficent Ltd. and the articles of association of Maleficent Ltd. do not authorize the appointment of additional directors, then, Maleficent Ltd. shall have to alter its articles (by passing a special resolution) authorizing its Board of directors to appoint the additional directors.
5. The appointment of 6 additional directors may be made either by passing a resolution at a Board meeting or by passing a resolution by circulation.
6. However, before the appointment of 6 additional directors is made by the Board of directors, Maleficent Ltd. shall ensure the following:
   a. That a special resolution has been passed by the members approving the appointment of more than 15 directors (Section 149 (1)).
   b. That a special resolution has been passed by the members for alteration of articles of association or the company, and the amended articles provide for the maximum number of directors as 16 or more than 16. The company shall have to comply with other legal requirements for alteration of articles as contained in Section 14.

34. The maximum number of directors as per the articles of association of Stone Ltd. is 12. The company has appointed 9 directors out of which 6 are rotational directors and 3 are non-rotational directors. The Board of directors of Stone Ltd. intends to appoint 3 additional directors. Can the Board appoint 3 additional directors as per Section 161(1) of the Companies Act, 2013?

Ans. As per Section 161(1) of the Companies Act, 2013:
"The articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director of any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier".

The provisions relating to rotational and non-rotational directors are contained in Section 152(6) of the Companies Act, 2013.
It is clear from the language of Section 161(1) of the Companies Act, 2013 that Section 161(1) that the additional director remains in office only "up to the date of the AGM" i.e commencement of the AGM. Hence additional directors should not be counted in the total number of directors
In the given case, the total number of directors of A Ltd. is 9 out of which 6 are rotational directors and 3 are non-rotational directors. If 3 additional directors are appointed by the Board, the total number of directors will increase to 12 and there would be no change in the calculation
Therefore, the Board of directors of A Ltd. can appoint the 3 additional directors, if the Board is so authorized by the articles.

35. Mr. D who fails to get appointed as a director in the general meeting of AJD Limited was subsequently appointed as an additional director by the Board of directors of the company. Examine the validity of appointment of Mr. D., with reference to the provisions of the Companies Act, 2013. (ICAI, Revision Test Paper, May 2016)

Ans. As per Section 161(1), a person who fails to get appointed as a director in a general meeting cannot be appointed as an additional director. Since, earlier, the proposal to appoint Mr. D as a director of the company was rejected by the members at the company's Annual General Meeting. Mr. D cannot be appointed as an additional director.

36. The Board of directors of XYZ Limited appointed Mr. A as a director in the casual vacancy caused by resignation of Mr. X Mr. A is proposed to be reappointed as a director at the annual general meeting, when he vacates his office.
Examine with reference to the relevant provisions of the Companies Act. 2013. Whether Mr. A can be considered as a 'retiring director' and state the legal requirements to be fulfilled to give effect to the proposed appointment of Mr. A as a director at the annual general meeting. (CA (Final) Nov. 2003)

Ans. A, 'retiring director' means a director retiring by rotation (Explanation to Section 152(7). Where a director retires by rotation, he may be reappointed without complying with the requirements of Section 160 (Section 152(6) read with Section 160).
However, a director filling a casual vacancy holds office till the expiry of the term of the director in whose place he was appointed, i.e. he does not retire at an annual general meeting. He is appointed by the Board (i.e. he is not appointed in the general meeting), and so he is not a rotational director, and consequently, he is not a 'retiring director within the meaning of Sections 152(6) and 160 [As per Explanation to Section 152(7)].
Thus, in the given case, his appointment as a regular director (i.e. appointment as a director by members at a general meeting) requires compliance with the following legal requirements of Section 160:

a) Notice proposing the appointment of Mr. A must be given to the company either by Mr. A himself or by some other member of the company.
b) Notice shall be given at least 14 days before the annual general meeting.
c) Notice shall be deposited at the registered office of the company.
d) A sum of Rs. 1 lakh shall be deposited along with the notice. The amount deposited with the company shall be refunded, if the person proposed as a director-
   - gets elected as a director; or
   - gets more than 25% of the total valid votes cast (whether on a show of hands or on poll).
e) The company shall also inform its members about the candidature of the person proposed as a director in such manner as may be prescribed.

37. The Board of Directors of XYZ Ltd. filled up a casual vacancy caused by the death of Mr. P by appointing Mr. C as a director on 3rd April, 2014. Unfortunately, Mr. C expired on 15th May, 2014 after working about 40 days as a director. The Board now wishes to fill up the casual vacancy by appointing Mrs. C in the forthcoming meeting of the Board. Advise the Board in this regard. (CA (Final) June 2009)

Ans. As per Section 161(4) of the Companies Act, 2013, the Board is authorized to fill a casual vacancy in the office of a director only if he was appointed by the company in general meeting. Further, the appointment made by the Board shall be subsequently approved by the members in the immediately next general meeting.

In the given case, a casual vacancy has arisen as a result of death of Mr. P. Assuming that Mr. P was appointed as a director in a general meeting; such casual vacancy could be filled up by the Board under Section 161(4), and has actually been filled up by appointing Mr. C. The appointment of Mr. C also required the approval of the members in the immediately next general meeting, but before any general meeting could be held, Mr. C died. With respect to appointment of Mr. C, there is no contravention of Section 161(4).

The death of Mr. C has also resulted in a casual vacancy. However, this casual vacancy cannot be filled up by the Board under Section 161(4) since the casual vacancy has arisen in the office of Mr. C who was not appointed in a general meeting.

However, MCA allowed such a vacancy to be filled by the Board in the interest of smooth functioning of the company. MCA also expressed the view that if originally an appointment was made in a general meeting, the Board may fill the casual vacancy arising in such office as many times as may be necessary. Thus, the reply of the MCA implies that, the Board had the power to appoint even a new person, say C, when filling the casual vacancy created by resignation of B.

38. VGP Ltd. is a listed public company with a paid-up capital of Rs. 100 crores as on 31st March, 2018. Mrs. Jasmine, who was one of the promoters of PDS Ltd. (a Joint Venture Company of VGP Ltd.), was appointed as woman director on the Board of VGP Ltd. VGP Ltd. has the following proposals:

i. To remove Mr. Z, an independent director who was re-appointed for a second term.
ii. To appoint Mr. N, a nominee director in the Board as an independent director.
iii. To appoint Mrs. Jasmine as an independent-cum-woman director.

With reference to the relevant provisions of the Companies Act, 2013, examine:

(i) The validity the above proposals and the appointment of woman director already made.
(ii) Whether Mr. N, can be appointed as an independent director of PDS Ltd.?
(iii) Is an independent director entitled for stock option? (CA (Final) Nov 2018)

Ans. As per Section 149(1) second proviso read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, it is mandatory for the following classes of Companies to appoint one or more-woman director:

(i) Every listed company: and
(ii) Every public company having paid up share capital of Rs. 100 crore or more; and
(iii) Every public company having turnover of Rs. 300 crore or more.

For this purpose, the paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

In the given case, VGP Ltd. is a listed company, and so it is mandatory for VGP Ltd. to appoint one or more-woman director

As per Section 169, a company may, by ordinary resolution and by complying with the requirements of Section 169, remove a director before the expiry of the period of his office.

However, as per first proviso to Section 169(1), an independent director re-appointed for second term under sub-Section (10) of Section 149 shall be removed by the company only

by passing a special resolution and after giving him a reasonable opportunity of being heard.
As per Section 149(9) –

a) an independent director shall not be entitled to any stock options:
an independent director may receive remuneration by way of sitting fees;
the company may reimburse to the independent director the expenses for participation in the Board and other meetings:
b) an independent director may be paid profit related commission as may be approved by the members.

In the given case,

1. As per first proviso to section 169(1). Mr. Z can be removed by VGP Ltd. only by passing a special resolution and after giving him a reasonable opportunity of being heard.
2. As per Section 149(6)(a), a person can be appointed as an independent director only if he is not a managing director or a whole-time director or a nominee director.
Since Mr. N is a nominee director in VGP Ltd., he cannot be appointed as an independent director in VGP Ltd.
3. As per Section 149(6)(b), an independent director means a director who is not a promoter of the company or its holding, Subsidiary or associate company.
4. Mrs. Jasmine is a promoter of PDS Lid., which is an associate company of VGP Ltd. (since as per Section 2(6), an associate company includes a joint venture company).
Therefore, Mrs. Jasmine cannot be appointed as an independent director of VGP Ltd.
5. Section 149 does not contain any ground of disqualification for appointment as a woman director. Thus, a person who is a promoter of a joint venture company is not disqualified for appointment as a woman director. Accordingly, Mrs. Jasmine's appointment as a woman director of VGP Ltd. is valid.
6. As per Section 149(6) (a), a person can be appointed as an independent director only if he is not a managing director or a whole-time director or a nominee director.
As per Section 149(6) (b), an independent director means a director-
(i) who is not a promoter of the company or its holding, subsidiary or associate company:
(ii) Who is not related to promoters or directors in the company, its holding, subsidiary or associate company?
7. As per Section 149 (6) (e) (i), an independent director means a director who, neither himself nor any of his relatives holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed.
8. In the given case, Mr. N is a nominee director in VGP Ltd., but he is not a nominee director in PDS Ltd. So, he is not disqualified for appointment as independent director in PDS Ltd as per Section 149(6)(a). Also, he is not disqualified for appointment as independent director in PDS Ltd. as per Section 149(6) (6) or 149(6) (e) (i).
Therefore, Mr. N can be appointed as a nominee director in PDS Ltd.
9. As per Section 149(9), an independent director is not entitled to any stock options.

39. Considering the regulatory provisions of the Companies Act, 2013 and the rules thereof regarding the appointment of Independent directors on a company's Board, state whether Z Limited, a listed public company is required to appoint Independent directors. Also state whether appointment of independent director is required in the following cases:

(i) The public company has a paid-up share capital of Rs. 10 crores
(ii) What shall be your answer in case the company's paid up share capital is only Rs. 2 crores.
(iii) Whether a person who holds the position of a Key Managerial Personnel in the

same company can be appointed as an independent director?

(iv) In relation to mandatory women directors as required under the Companies Act, 2013 should such directors also be independent directors? (CA (Final) Nov. 2018)

Ans. As per Section 149(4), every listed public company shall have at least 1/3rd of the total number of directors as independent directors. For this purpose, any fraction contained in such 1/3rd shall be rounded off as one.

As per Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class(es) of companies shall have at least 2 directors as independent directors:

a. Public Companies having paid up share capital of Rs. 10 crore or more.
b. Public Companies having turnover of Rs. 100 crore or more.
c. Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding Rs. 50 crore.

However, the following classes of unlisted public companies shall not be required to have any independent director:

(a) A joint venture
(b) A wholly owned subsidiary
(c) A dormant company as defined under Section 455 of the Act.

Relevant date- The paid-up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

In the given case,

1. Z Limited is a listed public company. In case of listed public companies, Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 does not apply, and such companies are required to appoint the independent directors in accordance with Section 149(4). Thus, Z Limited is required to appoint at least 1/3rd of its total number of directors as independent directors, and any fraction contained in that 1/3rd shall be rounded off as 1.
2. A public company having a paid-up share capital of Rs. 10 crore fulfils criterion out of the 3 criteria given under Rule 4. Accordingly, it is required to appoint a minimum of 2 independent directors.
3. In case the paid-up share capital of an unlisted public company is Rs. 2 crores, it is not required to appoint any independent director.
4. As per Section 149(6) (e) (i), an independent director means a director who, neither himself nor any of his relatives holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed.
5. Thus, a person who is presently holding the position of a Key Managerial Personnel in the same company cannot be appointed as an independent director.
6. Neither second proviso to sub-Section (1) of section 149 nor Rule 3 requires that a person can be appointed as a woman director only if he is an independent director. Thus, a woman director need not be an independent director. However as per SEBI regulations, we need to appoint one-woman independent director for top 1000 listed companies as on April 1 2020

40. Examine the validity of ABC Ltd's Board of directors' decision in respect of the following appointments of directors:

(i) Board of directors of a company which is not listed at any of the stock exchanges, having a turnover of Rs. 500 crore decides not to appoint women director on the company's Board.

(ii) Board of directors of a company, which is not listed at any of the stock exchanges,

decides not to appoint a resident director.

(iii) Board of directors of a company, having paid-up share capital of Rs. 50 crore decides not to appoint an independent director. The company is listed at Bombay Stock Exchange.

Ans.

1. As per Section 149(1) second proviso read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, it is mandatory for the following classes of companies to appoint one or more-woman director:
   - Every listed company: and
   - Every pubic company having paid up share capital of Rs. 100 crore or more; and
   - Every public Company having turnover of Rs. 300 crore or more.
2. For this purpose, the paid-up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.
3. In the given case, the turnover of the company is Rs. 500 crore which is more than the required limit for mandatory appointment of woman director. Accordingly, it is mandatory for the company to appoint one or more-woman director. Thus, the decision of the Board not to appoint any woman director would result in contravention of second proviso to sub Section (1) of Section 149 read with Rule 3.
4. As per Section 149(3), every company shall have at least1 director who stays in India for a total period of not less than 182 days during the financial year. This requirement applies to all companies, whether listed or unlisted.
5. In the given case, the Board has decided not to appoint any resident director. This would amount to contravention of Section 149(3).
6. As per Section 149(4), every listed public company shall appoint at least 1/3rd of its total number of directors as independent directors. Thus, for listed public companies, it is mandatory to have at least 1/3rd of total number or directors as independent directors, irrespective of its paid-up share capital.

In the given case, the company is a listed public company, and so at least 1/3rd of its total number of directors shall be independent directors. The amount of paid up share capital is not relevant. Accordingly, the decision of the Board of XYZ Ltd. not to appoint any independent director would result in contravention of Section 149(4).

41. Mr. Person together with one of his relatives holds 3% of the total voting power of XYZ Ltd. The Board of directors of the company appointed him as an independent director. Examine the validity of such appointment with reference to the provisions of the Companies Act, 2013. (ICAI, Revision Test Paper, May 2016)

Ans. Section 149(6) contains conditions with respect to eligibility for appointment as an independent director. If a person does not fulfil any condition with respect to eligibility criteria contained in Section 149(6), he cannot be appointed as an independent director.

Besides other conditions, one of the conditions with respect to eligibility criteria contained in Section 149(6) is that a person cannot be an independent director in a company if he along with his relatives holds 2% or more of the total voting power of the company.

In the given case,

a. Mr. Person, together with one of his relatives, holds 3% of the total voting power of XYZ Ltd. Mr. Person has been appointed as an independent director in XYZ Ltd.
b. Section 149(6) does not allow the appointment of a person as an independent director, if he, along with his relatives, holds 2% or more of the total voting power of the company.
c. Therefore, Mr. Person does not satisfy the eligibility criteria contained in Section 149(6), and so he cannot be appointed as an independent director in XYZ Ltd.
d. The appointment of Mr. Person as an independent director in XYZ Ltd. is not valid.

42. Mr. Azad, an independent director of X company, was appointed in the AGM for a period of three years. After the expiry of 3 years he was re-appointed for a period of 5 years. Considering that though Mr. Azad has completed two tenures/terms but hasn't completed ten years in total, therefore he may be appointed in the upcoming AGM for another 2 years to complete his total term of 10 years. In the light of the Companies Act, 2013, state the validity of reappointment of Mr. Azad for further term in the company. (ICAI, Revision Test Paper, Nov. 2017)

Ans. As per Section 149(10) -

a. an independent director shall hold office for a maximum term of 5 consecutive years;
b. he shall be eligible for reappointment if-
   (i) a special resolution is passed for his appointment; and
   (ii) disclosure of such appointment is made in the Board's report;

As per Section 149(11), -

a. no independent director shall hold office for more than 2 consecutive terms.
b. an independent director shall be eligible for appointment after the expiry of 3 years of cessation of his office as an independent director, and during the said period of 3 years, he shall not be appointed in or be associated with the company in any other capacity, either directly or indirectly.

In the given case:

1. Mr. Azad was appointed as an independent director for a period of 3 years. Such appointment is valid as the period of his office is 3 years, i.e. does not exceed 5 years as specified under Section 149 (10).
2. On completion of fist tenure of 3 years, Mr. Azad was reappointed as an independent director for a period of 5 years.
3. On completion of his second tenure of 5 years, the total period for which he has continuously served as independent director is 8 years.
4. It is proposed to reappoint Mr. Azad as an independent director on completion of his second tenure.
5. Section 149(11) expressly provides that an independent director shall not hold office for more than 2 consecutive terms. No exception has been provided under the Act by way of which an independent director can hold office for 3rd consecutive term.
6. Neither Section 149(10) nor Section 149(11) states that an independent director shall be appointed for a total period of 10 years. So, where a person has held his office as an independent director for 2 consecutive terms, he cannot be further reappointed although his period of office during these 2 consecutive terms was less than 10 years.

Hence, on expiry of his second term, Mr. Azad cannot be further reappointed for a period of 3 years.

In case Mr. Azad is further reappointed for a period of 2 years, such appointment constitutes a contravention of Section 149(11), and so such reappointment shall not be valid.

43. M/s. Bharat Pharma Limited is a company listed with Bombay Stock Exchange. The company has 500 small shareholders. Some of the small shareholders want to appoint Mr. A as a director as their representative on the Board of directors of the said company. Mr. A holds 1000 equity shares of Rs. 10 each in the said company. State, in the light of the Companies Act, 2013, whether the proposal to appoint Mr. A as a Small Shareholders Director can be adopted by the company. What would be your answer if Mr. A is already holding a position of Small Shareholders' Director in two companies. (ICAI, RTP. Nov. 2015)

Ans. The provisions relating to appointment of directors by small shareholders are contained in Section 151 of the Companies Act, 2013 read with Rule 7 of the Companies [Appointment and Qualification of Directors) Rules, 2014.

The provisions contained in Section 151 read with Rule 7 are applicable to listed companies

only.
The small shareholders are entitled to give a notice to the company requiring the company to make appointment of a Small Shareholders' Director. The notice shall be given by at least-

- 1,000 small shareholders; or
- 1/10th of the total number of small shareholders,

Whichever is lower.
The notice shall be signed by all the small shareholders proposing the appointment of Small Shareholders' Director.
A person shall not hold the position of Small Shareholders' Director in more than 2 companies at the same time.
In the given case,

1. M/s Bharat Pharma Limited is a listed company. Some small shareholders have given a notice to the company requiring the company to appoint a Small Shareholders' Director.
2. The small shareholders eligible to give notice for appointment of Small Shareholders' Director shall be –
   (a) 1,000 small shareholders; or
   (b) 1/10th of 500, i.e. 50 small shareholders,
   whichever is lower.

Since lower of 1,000 and 50 is 50, the notice for appointment of Small Shareholders' Director has to be given by at least 50 small shareholders.
Therefore, if the notice is given by 50 or more small shareholders of M/s Bharat Pharma Limited, then, the company shall adopt the procedure given in Rule 7 for appointment of the Small Shareholders' Director.
Neither Section 151 nor Rule 7 states any eligibility criterion for appointment of a person as a Small Shareholders' Director. Thus, any person may be appointed as a Small Shareholders Director, whether or not he himself is a small shareholder. Thus, Mr. A, holding 1,000 shares of Rs. 10 each, may be appointed as a Small Shareholders' Director.
If Mr. A already holds position of Small Shareholders' Director in 2 companies, then, he cannot be appointed as a Small Shareholders' Director in M/s Bharat Pharma Limited.

44. M, who was appointed as additional director at the Board meeting held on 31st May, 2014 continues to be in his office on the ground that the annual general meeting for the financial year 2013-14 was not held as required under the Act. Whether continuation of M in the office is valid? Will your answer be different if M was also appointed as managing director for a period of 5 years with effect from 1st June 2014 at the same Board meeting? [CA (Final) May 1996 (Modified)]

Ans. As per Section 161(1) of the Companies Act, 2013, an additional director holds office up to the date of next annual general meeting or the last day on which the annual general meeting should have been held, whichever is earlier. Hence, an additional director vacates his office on the last day on which the annual general meeting ought to have been held as per the provisions of section 96 of the Companies Act, 2013, and cannot continue in office thereafter on the ground that the meeting was not called or could not be held within the time prescribed under Section 96.
A managing director must be a director of the company. Therefore, if a managing director ceases to be a director, he automatically ceases to be a managing director. Accordingly, where an additional director, who is also appointed as a managing director, vacates the office of the additional director at the annual general meeting, the office e of the managing director also ceases simultaneously with the cessation of office of additional director. However, if the additional director is re- elected as a regular director at the annual general meeting (by complying with the provisions of Section 160 of the Companies Act 2013) and thereby he continues as a director, he shall continue as a managing director also for the

period for which he has been appointed as a managing director.
Thus, in the given case-
M would vacate the office of a director on the last day on which the annual general meeting ought to have been held as per Section 96.
Only a director can be appointed as a managing director. Since, M vacates the office of additional director, the office of managing director is also vacated, as he is not re-elected as a regular director at the annual general meeting. He shall vacate the office of managing director irrespective of the fact that his appointment as a managing director was made for a period of 5 years.

45. One of the items to be considered at the annual general meeting of a public company is the reappointment of a director who has been appointed as an additional director at a Board meeting. State the statutory requirements under the Companies Act, 2013. (CA (Final) Nov. 1996 (Modified)

OR

Mr. Suresh, an additional director appointed by the board of directors of a public company, is proposed to be appointed as a regular director in the Annual General Meeting. Explain the requirements under the Companies Act, 2013 to give effect to the proposed appointment. (CA (Final) Nov. 2008)

Ans. 'Retiring director' for the purpose of Sections 152 and 160 of the Companies Act, 2013, means a director retiring by rotation [Explanation to Section 152(7]. Where a director retires by rotation, he can be reappointed without complying with the requirements of Section 160 of the Companies Act, 2013 [Section 152(6) (e)].
However, an additional director holds office up to the date of next annual general meeting (Section 161(1) of the Companies Act, 2013), i.e. he does not retire by rotation. Therefore, if an additional director seeks appointment as a regular director, he must comply with the requirements of Section 160.
Following requirements shall be complied with:
(a) Notice proposing the appointment of additional director must be given to the company either by the additional director himself or by some other member of the company.
(b) Notice shall be given at least 14 days before the annual general meeting.
(c)Notice shall be deposited at the registered office of the company.
(c) A sum of Rs. 1 lakh shall be deposited along with the notice.
(d) The amount deposited with the company shall be refunded, if the person proposed as a director-
(i) gets elected as a director; or
(ii) gets more than 25% of the total valid votes cast (whether on a show of hands or on poll).
(e) The company shall inform its members about the candidature of the person proposed as a director in such manner as may be prescribed.

46. Granger Ltd. desires to appoint an additional director on its board of directors. The Articles of the company confer upon the board to exercise the power to appoint such a director. As such Molly is appointed as an additional director. In the light of the provisions of the Companies Act, 2013 examine:
(i) Whether Molly can continue is director if the annual general meeting of the company is not held within the stipulated period and is adjourned to a later date?
(ii) Can the power of appointing additional director be exercised by the Annual General Meeting?
(iii) As the Company Secretary of the company what checks would you make after Molly is appointed as an additional director?

Ans. As per the Section 161(1) of the Companies Act, 2013:
An additional director holds office up to the date of next annual general meeting or the last day on which the annual general meeting should have been held, whichever is earlier.
In the given case, the AGM could not be held as scheduled, and is adjourned to a later date. Therefore, Molly shall have vacated his office on the last day on which the annual general meeting ought to have been held as per Section 96 of the Companies Act, 2013.
The power to appoint additional directors is expressly conferred on the Board of directors by Section 161(1) of the Companies Act, 2013. Accordingly, it is not possible for the members to exercise this power. Thus, additional directors cannot be appointed in the annual general meeting or any other general meeting **[Blair Open Hearth Furnace Co. Ltd. v Reigart (1914) 1 Ch. 390].**
However, in some exceptional cases like when there is a deadlock in the Board or where all the directors become interested, the power to appoint additional directors may be exercised by the members **[Barron v Patter (1914) 1 Ch 895].**
The Company Secretary of the company should apply the following checks:

(i) Mr. M is not disqualified as per the provisions of Section 164 and other applicable provisions of the Companies Act, 2013.
(ii) Mr. M holds a valid Director Identification Number before he is appointed as an additional director.
(iii) Before appointment, Mr. M furnished to the company his Director Identification Number and a declaration that he is not disqualified to become a director under this Act.
(iv) Mr. M has furnished to the company his consent in writing to act as a director in Form DIR-2.
(v) The consent filed by Mr. M with the company is filed by the company with the Registrar in Form DIR-12 Within 30 days of appointment of Mr. M.
(vi) The particulars of Mr. M along with the details of his shareholding are entered into the register or directors and key managerial personnel maintained as per the provisions of Section 170.

47. The Board of directors of Sonu Ltd., in terms of the articles of the company, filled up the causal vacancy caused by the resignation of Mr. Titu (who was appointed in a duly held general meeting) by appointing Mr. Sweety as a director on 1st May, 2019. Unfortunately, Mr. Sweety expired on 10th May, 2019 after working for a period of about 10 days as a director. The Board now intends to fill up the causal vacancy by appointing Mrs. Nannu (wife of late Mr. Sweety) in the forthcoming meeting of the Board. Referring to and analyzing the provisions of Companies Act, 2013, Advise the Board whether it can do so.

Ans. As per Section 161(4) of the Companies Act, 2013, the Board is authorized to fill a casual vacancy in the office of a director only if he was appointed by the company in general meeting. Further, the appointment made by the Board shall be subsequently approved by the members in the immediately next general meeting.
In the given case, a casual vacancy has arisen as a result of resignation of Mr. Titu. Since Mr. Titu was appointed as a director in a general meeting, such casual vacancy could be filled up by the Board under Section 161(4), and has actually been filled up on 1st May, 2019 by appointing Mr. Sweety. The appointment of Mr. Sweety also required the approval of the members in the immediately next general meeting, but before any general meeting could be held, Mr. Sweety died on 10th May, 2019. With respect to appointment of Mr. Sweety, there is no contravention of Section 161(4).
The death of Mr. Sweety has also resulted in a casual vacancy. However, this casual vacancy cannot be filled up by the Board under Section 161(4) since the casual vacancy has arisen in the office of Mr. Sweety who was not appointed in a general meeting.

However, MCA allowed such a vacancy to be filled by the Board in the interest of smooth functioning of the company. MCA also expressed the view that if originally an appointment was made in a general meeting, the Board may fill the casual vacancy arising in such office as many times as may be necessary. Thus, the reply of the MCA implies that, the Board had the power to appoint even a new person, say C, when filling the casual vacancy created by resignation of B.

48. Mr. Sachin was appointed as an additional director of Conservative Finance Ltd. w.e.f. 1st October, 2014 in a casual vacancy by way of a circular resolution passed by the Board of directors. The next annual general meeting of the company was due on 31st March, 2015, but the same was not held due to delay in the finalization of the accounts. Some of the shareholders of the company have questioned the validity of the appointment of Mr. Sachin and his continuation as additional director beyond 31st March, 2015. Advise the company on the complaints made by the shareholders. (CA (Final) May 2010 (Modified)

Ans. Additional Directors [Section 161(1)]

a) The Board may appoint the additional directors in pursuance of the provisions of Section 161(1).
b) The Board may, in its discretion, appoint the additional directors whenever it deems fit.
c) The appointment of additional directors may be made by the Board either by passing a resolution by circulation.
d) An additional director holds office up to the date of next annual general meeting. However, if AGM is not held up to the last date for holding AGM as per the provisions of Section 96, the additional director shall vacate his office on the last day on which the AGM should have been held.

Director filing a casual vacancy [Section 161(4)]

a) The Board is authorized to fill a casual vacancy arising in the office of a director appointed in general meeting.
b) The director filling a casual vacancy shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.
c) A casual vacancy cannot be filled by passing a resolution by circulation under Section 175.

In the given case-

a) The Board has appointed Mr. Sachin as an additional director in a casual vacancy.
b) The appointment of Mr. Sachin has been made by passing a circular resolution.
c) The last date for holding the annual general meeting was 31st March, 2015. The annual general meeting has not been held till 31st March, 2015.

Analysis and conclusion

1. Neither Section 161(1) nor Section 161(4) authorizes the Board to appoint an additional director to fill the casual vacancy.
2. If appointment of Mr. Sachin is made as an additional director, then, the provisions of Section 161(1) apply, and so such appointment cannot amount to filing a casual vacancy.
3. If Mr. Sachin is appointed to fill a casual vacancy, then, the provisions of Section 161(4) apply to him, and so Mr. Sachin shall not be an additional director.
4. Thus, a combined reading of Sections 161(1) and 161(4) makes it clear that the appointment of Mr. Sachin as an additional director to fill the casual vacancy is not possible at all.
5. Mr. Sachin has been appointed to fill the casual vacancy by passing a circular resolution. The appointment of a director filling a casual vacancy requires passing of a resolution in a Board meeting only, and subsequent approval by the members in the immediately

next general meeting. However, Mr. Sachin has been appointed to fill the casual vacancy by passing a circular resolution. So, it is evident that the appointment of Mr. Sachin is in contravention of Section 161(4), and is therefore, invalid.
6. Therefore, the complaint made by the shareholders is valid.
7. The appointment of M. Sachin is not valid since it is contravention of Sections 161(1) and 161(4).
8. Mr. Sachin cannot continue as a director after the date of annual general meeting, since his very appointment is void ab initio.

49. M/s. Bright Motors (P) Limited at the Annual General Meeting (AGM) held on 30.09.2016 appointed Mr. Anmol as a Non-Executive Director on the Board of the company for a period of three years. On 2nd October 2017 Mr. Anmol suffered a severe heart failure and expired. The Board of directors of the company on 16th October. 2017 appointed Mr. Prateek to fill the casual vacancy so created. The appointment of Mr. Prateek was made for a term of three years by the Board. Subsequently at the AGM held on 29.09.2018 Mr. Prateek's appointment was not proposed or approved as the Board was of the view that it is not required. But the CFO of the company is of the opinion that the Board of directors has contravened the provisions of the Companies Act, 2013 in respect of non-approval of the appointment of Mr. Pratek and his office tenure. Decide. (CA (Final) May 2019)

Ans. As per the provisions of the Companies Act, 2013-
1. The Board is authorized to fill a casual vacancy arising in the office of a director appointed in general meeting. However, a casual vacancy can be filled by the Board only by passing a resolution at a Board meeting, i.e. a casual vacancy cannot be filled by passing a resolution by circulation under Section 175.
2. Where a casual vacancy is filled by the Board, the appointment made by the Board shall be subsequently approved by the members in the immediately next general meeting.
3. The director filing a casual vacancy shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

In the given case-
1. Mr. Anmol was appointed as a director in the annual general meeting of M/s. Bright Motors (P) Limited held on 30th September, 2016. The tenure of his appointment was 3 years.
2. On 2nd October, 2017, Mr. Anmol expired. The casual vacancy that arose in the office of Mr. Anmol was filled up by the Board on 16th October, 2017 by appointing Mr. Prateek. The resolution passed by the Board provides that the tenure of appointment of Mr. Prateek shall be for 3 years.
3. After the casual vacancy was filled by the Board by appointing Mr. Prateek, the appointment of Mr. Prateek was not proposed for approval by the members in the immediately next general meeting. i.e. the annual general meeting held on 29-09-2018.
4. The appointment of a director filling a casual vacancy requires passing of a resolution in a Board meeting, and subsequent approval by the members in the immediately next general meeting. However, the appointment of Mr. Prateek was not approved in the immediately next general meeting. i.e. the annual general meeting held on 29-09-2018. Thus, it is evident that M/s Bright Motors (P) Limited has contravened the provisions of Section 161(4).
5. The resolution of the Board filling the casual vacancy provided that the appointment of Mr. Prateek was for a period of 3 years with effect from 16th October, 2017, i.e. from 16th October, 2017 to 15th October, 2020.
   However, if the casual vacancy had not arisen in the office of Mr. Anmol, Mr. Anmol would have held his office of director up to 29th September, 2019.

6. As per the provisions of Section 161(4), the tenure of office of the director filling a casual vacancy shall be up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated. Accordingly, the tenure of office of Mr. Prateek should have been Up to 29th September, 2019, and not up to 15th October, 2020 (i.e. 3 years from 16th October, 2017, as per the resolution of the Board). Thus, the resolution of the Board passed on 16th October, 2017 is defective.
7. Therefore, the opinions of the CFO is correct.

50. Mr. Q, a director of PQR Limited proceeding on a long foreign tour, appointed Mr. Y as an alternate director to act for him during his absence. The articles of the company provide for the appointment of an alternate director. Mr. Q claims that he has a right to appoint an alternate director. Examine the given case in the light of the provisions of the Companies Act, 2013. [CA (Final) May 2002 (Modified)]

OR

Examine the following with reference to the provisions of the Companies Act, 2013:
Mr. Narayan, a Director of KPR Limited who is proceeding on a long foreign tour, appointed Mr. Shankar as an alternate director to act for him during his absence. The Articles of the company provide for appointment of alternate directors. Mr. Narayan claims that he has a right to appoint an alternate director. [CA (Final) May, 2017]

Ans.

1. As per Section 166(6), no director shall assign his office to any other person, and if a director, in contravention of Section 166(6) assigns his office, such assignment shall be void.
2. As per Section 161 (2), the Board is empowered to appoint an alternate director in place of a director during his absence for a period of not less than 3 months from India. The Board can appoint an alternate director only if it is authorized by the articles or by a resolution passed at a general meeting.
3. In the given case, the Board of directors of PQR Ltd. may appoint Mr. Y or any other person as an alternate director for Mr. Q since PQR Ltd. is authorized by the articles to appoint the alternate director, provided the duration of foreign tour of Mr. Q is not less than 3 months.
4. However, if the appointment of Mr. Y as an alternate director is made by Mr. Q, it would amount to assignment of office which is prohibited under Section 166(6) and therefore, the appointment of Mr. Y as an alternate director would be void. Further, an alternate director is appointed by the Board of directors and not by the director in whose place he is appointed (i.e. the original director).
5. Therefore, in the present case Mr. Q has no power to nominate a person to act as an alternate director in his place and the appointment of Mr. Y is not in order.

51. Referring to the provisions of the Companies Act, 2013, examine the validity of the following:
The Board of directors of AJD Limited appointed Mr. N as an alternate director for a period of two months against a director who has proceeded abroad on leave for a period of six months. Articles of Association of the company are silent. (CA (Final) Nov. 2014)

Ans. As per Section 161 (2), the Board may appoint an alternate director for a director (original director) during the absence of the original director from India for a period of 3 months or more. The Board may appoint an alternate director only if it is authorized by the articles or by an ordinary resolution passed at a general meeting. The alternate director shall vacate his office when the original director returns back to India.
In view of Section 161(2), the appointment of Mr. N as an alternate director is not valid since the Board, in the given case, is not authorized to appoint the alternate director by the articles

or by a resolution passed in general meeting. Also, the Board is not authorized to appoint an alternate director for any fixed period (2 months in the given case) since the term of office of alternate director has been fixed by the Act, viz. Section 161(2), which is up to the date when the original director returns back to India.

52. Referring to the provisions of the Companies Act, 2013, examine the validity of the following:
Mr. Pappu who is not qualified to be appointed as an independent director is appointed by the Board of Directors of Hogwarts Company Limited, for an Independent director, as an alternate director.

Ans. As per Section 161(2), the Board may appoint an alternate director for a director (termed as original director) during the absence of the original director from India for a period of 3 months or more. Section 161 (2) also provides that a person can be appointed as an alternate director for an independent director only if he is qualified to be appointed as an independent director as per Section 149(6).
In the given case, the appointment of Mr. Pappu as an alternate director for an independent director is not valid, since Mr. Pappu is not qualified to be appointed as an independent director.

53. Vandana, an employee of Apna Ltd., was appointed as an alternate director. In the meantime, the original director returned and wanted to attend the Board meeting, Advise.

Ans. An alternate director shall not hold office for a period longer than that permissible to the original director. The alternate director shall vacate his office when the original director returns back to India, irrespective of the fact as to whether the original director attends the Board meetings or not. Thus, after an original director comes back to India, only he can attend the Board meetings. The alternate director would automatically cease to be director.
In the given case, the contention of the original director is correct and he is entitled to attend the Board meeting.

54. Mr. Single, a director or XYZ Ltd. goes to Singapore for a period of 6 months. The Board appoints Mr. Replacement in his place as an alternate director. Mr. Replacement was also holding directorship in XYL Ltd. Identify the nature of appointment of Mr. Replacement in XYZ Ltd. as an alternate director. (ICAI, Mock Test Paper, August 2018)

Ans. Section 161(2) empowers the Board of directors to appoint an alternate director for a director (i.e. original director) during the absence of the original director for a period of not less than 3 months from India, Further, as per Section 161(2), a person cannot be appointed as an alternate director, If-

a. he already holds any alternate directorship for any other director in the company; or
b. he holds any directorship in the same company.

In the given case, Mr. Replacement himself holds a directorship in the same company, viz. XYZ Ltd. Therefore, Mr. Replacement as an alternate director for Mr. Single is not valid.

55. Mr. Bumblebee, a director of Supreme Ltd., goes to USA for a period of 4 months. The Board of directors of Supreme Ltd., authorized by the articles of the company to appoint the alternate director, appoints Ms. India as an alternate director to act for Mr. Bumblebee. Is the appointment of Ms. India as an alternate director for Mr. Bumblebee valid in the following cases?
(i) If Ms. India is already an alternate director for Mr. Short, another director of Supreme Ltd.
(ii) If Ms. India is already a director of Supreme Ltd.

(iii) If Ms. India is already a director of Fabulous Ltd.

(iv) Ms. India is already an alternate director for Mr. Fast, another director of Fabulous Ltd.

Ans. Section 161(2) empowers the Board of directors to appoint an alternate director for a director (i.e. original director) during the absence of the original director for a period of not less than 3 months from India.

Further, as per Section 161(2), a person cannot be appointed as an alternate director, if-

a. he already holds any alternate directorship for any other director in the company; or
b. he holds any directorship in the same company.

The given problems are answered as under:

a) Ms. India cannot be appointed as an alternate director for Mr. Bumblebee since he already holds an alternate directorship for another director of Supreme Ltd., viz. Mr. Short.
b) Ms. India cannot be appointed as an alternate director for Mr. Bumblebee since he himself holds directorship in the same company, viz. Supreme Ltd.
c) Ms. India may be appointed as an alternate director for Mr. Bumblebee since he is neither himself a director in Supreme Ltd. nor an alternate director for any other director in Supreme Ltd.

56. Referring to the provisions of the Companies Act, 2013, examine the validity of the following:

On the request of bank providing financial assistance the Board of directors of PQR Limited decides to appoint on its Board Mr. Peter, as nominee director. Articles of Association of the company do not confer upon the Board of Directors any such power. Further, there is no agreement between the company and the bank for any such nomination. (CA (Final) Nov. 2014)

OR

The Board of directors of Sakthi Limited decides to appoint on its Board, Mr. Ravi as a nominee director upon the request of a bank which has extended a long-term financial assistance to the company. The Articles of Association of the company do not confer upon the Board any such power. Also, there is no formal agreement between the company and the bank for any such nomination. (CA (Final) May. 2017)

Ans. As per Section 161(3) of the Companies Act, 2013, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement. The provisions of Section 161(3) are subject to any provision contained in the articles of the company.

In the given case, no agreement has been entered into between PQR Limited and the bank providing the financial assistance with respect to appointment of nominee director. Also, no provision contained in any law for the time being in force authorizes the appointment of nominee director. Further, the articles of the company do not confer any power on the Board to appoint the nominee directors. Thus, the appointment of Mr. Peter as nominee director is not valid.

57. Mr. SDR, a shareholder in M/s. JKP Ltd. holding 50,000 equity shares of Rs. 10 each fully paid up, wants to give a special notice to the company for removal of Mr. EDM, a director of M/s. JKP Ltd. without stating any reason in the notice. You are required to state as per the provisions of the Companies Act, 2013 and/or any decided case law whether Mr. SDR is entitled to do so. (CA (Final) Nov. 2007, May 2004)

Ans. Section 169 gives a statutory right to the members to remove a director before the expiry of his tenure of office. Section 169 requires that a special notice shall be given to the company where a director is proposed to be removed under Section 169.

As per Section 115, the intention to move the resolution for removal of a director must be-

a. given to the company at least 14 days before the general meeting (excluding the day on which such notice is given and the day of the general meeting):
b. signed by member(s) holding not less than 1% of total voting power or member(s) holding paid up share capital of Rs.5 lakh.

In the given case, a special notice has been given by a member of the company holding 50,000 equity shares of Rs. 10 each fully paid up. The member has not stated any reason for removal of a director.

Also, the paid-up share capital held by Mr. SDR is Rs. 5 lakh. Thus, Mr. SDR is eligible under Section 115.

It was held in **[LIC v Escorts Ltd, (1986) 59 Comp Case 548]** that it is not necessary for a member to state the grounds of removal of a director at the time of calling the extraordinary general meeting. As per the provisions of Section 102 of the Companies Act, 2013, it is the duty of the Board to disclose in the explanatory statement all the material facts, all the necessary information and facts that may enable the members to understand the meaning, scope and implications of the proposed business and take decision thereon. Thus, neither Section 169 nor Section 102 requires a member to disclose the reasons for the resolutions proposed at the meeting.

Therefore, non-disclosure of reasons for removal of a director does not make a special notice invalid. Therefore, the notice is as per the requirements of Companies Act, 2013, and the company is required to act on such notice as per the provisions of Section 169.

58. Mr. X is named as a director for life in the articles of association of M/s. XYZ Private Limited which was incorporated on 1st April, 1977. The articles of association of the company also provide that he cannot be removed by the members in general meeting. Some of the members want to remove X by passing an ordinary resolution in general meeting. State with reference to the relevant provisions of the Companies Act, 2013 whether the proposed action is valid. (CA (Final) Nov. 1997)

OR

'X' was appointed as managing director for life, by the articles of association of a private company incorporated on 1st June, 1970. Is it possible for the company in general meeting to remove 'X' from his office of directorship during his lifetime? (CA (Final) Nov. 1995)

Ans. Section 169 of the Companies Act, 2013 gives a statutory right to every shareholder to remove a director before the expiry of his term by following the prescribed procedure. It applies to public as well a private company.

Any provision in the articles that a director shall not be removed, violates the statutory right given to the shareholders, and is Ultra vires the Act as provided by Section 6. Section 6 stipulates that the provisions of the Act have an overriding effect on clauses contained in the memorandum, articles or any other agreement, if they are not in conformity with the provisions of the Act.

As was seen in **Tarlok Chand Khanna v Rajkumar Kapoor (1983) 54 Comp Cas 12**, where the Articles of a company entitled a director to hold office for life, where the Court held that Section 169 has been enacted to enable the shareholders to exercise control over the directors and therefore the shareholders have been empowered to remove the directors. Therefore, the said permanent director could be removed from the office.

In the present case, the articles of the company provide that X shall be a permanent director holding office for life and he shall not be removed by the members in general meeting. In view of the over-riding effect of Section 6, this clause is repugnant to Section 169 and is therefore void. Accordingly, the proposed action of removal of X by passing an ordinary resolution in general meeting is valid subject to compliance of the procedure laid down in Section 169.

59. Adam, a 15% shareholder of a company and other shareholders have lost confidence in the Managing Director (MD) of the company. He is a director not liable to retire by rotation and was re-appointed as Managing Director for 5 years i.e. 1.4.2015 in the last Annual General Meeting of the company.
Mr. Adam seeks your advice to remove the MD after following the procedure laid down under the Companies Act, 2013.
(i) Specify the steps to be taken by Mr. Adam and the company in this behalf;
(ii) Is it necessary to state reasons to support the resolution for his removal? (CA (Final) Nov. 2006)

Ans. Section 169 of the Companies Act, 2013 empowers the members of a company to remove any director, whether he is a rotational or non-rotational director, or managing director, whole time director or a non-executive director.
In the given case,
Mr. Adam shall have to give a special notice to the company in accordance with the provisions of Section 115. In the special notice, Mr. Adam shall propose a resolution for removal of the managing director. The special notice must be-

(i) given to the company not earlier than 3 months before the date of the general meeting but at least 14 days before the general meeting (excluding the day on which such notice is given and the day of the general meeting:
(ii) Signed by member(s) holding not less than 1% of total voting power or member(s) holding paid up share capital of Rs. 5 lakh.

Steps to be taken by the company-

a. The company shall send a copy of special notice to the managing director.
b. The managing director has a right to make a representation against his removal.
c. Representation given by the managing director, if any, shall be sent by the company to every member at least 7 days before the general meeting.
d. If the representation is not sent to the members, the representation shall be read at the general meeting.
e. The general meeting shall be held.
f. The managing director shall have a right to be heard at the meeting. The right to make an oral representation in addition to written representation.

(iii) Whether the special notice must disclose the reasons for removal of a director?

As was seen in **[LIC v Escorts Ltd. (1986) 59 Comp Cas 548]**, it is not necessary for a member to state the grounds of removal of a director at the time of calling the extraordinary general meeting. The Court held that, under Section 102, it is the duty of the Board to disclose the material facts in the explanatory statement. Neither Section 169 nor Section 102 requires a member to disclose the reasons for the resolutions proposed at the meeting. In other words, a member cannot be compelled to disclose the reasons for proposing a resolution for removal of a director.
Therefore, non-disclosure of reasons for removal of managing director does not make a special notice invalid. Accordingly, the special notice given by Mr. Adam is as per the requirements of Section 169, and the company is required to act on such notice.

60. The articles of association of a company provided that X will be a permanent director of the company so long as he holds one-third of the issued share capital. A shareholder sends a special notice to the company for removal of the director X in the general meeting by ordinary resolution. Can X be removed from the directorship? (CS (Final) Dec. 1997)

Ans. Section 169 gives a statutory right to every shareholder to remove a director before the expiry of his term by following the prescribed procedure.
Any provision in the articles that a director shall not be removed, violates the statutory right

given to the shareholders, and is ultra vires to the Act as provided by Section 6. Section 6 stipulates that the provisions of the Act have an overriding effect on clauses contained in the memorandum, articles or any other agreement, if they are not in conformity with the provisions of the Act.

As was seen in **(Tarlok Chand Khanna v Rajkumar Kapoor (1983) 54 Comp Cas 12)**, where the articles of a company entitled a director to hold office for life, the Court held that Section 169 has been enacted to enable the shareholders to exercise control over the directors and therefore the shareholders have been empowered to remove the directors the said permanent director could be removed from the office.

In the given case, the articles of the company provide that X will be a permanent director of the company so long as he holds 1/3rd of the issued share capital. In view of the overriding effect of Section 6, this clause is repugnant to Section 169 and is therefore void Thus, Mr. X can be removed under Section 169.

61. A, one of the shareholders of a company, filed a civil suit in a Court for removal of directors B, C and E, Is the suit maintainable? (CA (Final) June 96; June 1998)

Ans. A Civil Court has no jurisdiction to entertain a suit for removal of a director since the matter relates to the internal management of the company which is governed by the Companies Act, 2013 **[Khetan Industries Pvt. Ltd v Manju Ravindra Prasad Khetan (1995) 16 CLA 169 (Bom)].** Section 169 has given to the shareholders necessary powers to remove a director and thus a Civil Court have no jurisdiction to entertain a suit for removal of a director. This is subject to adequate safeguards