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**ROLE OF INDEPENDENT DIRECTOR**

**Shiva Sah & Nikita Bokil**

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## ABSTRACT

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*Despite the fact that corporate governance in India can be back dated to as long as the period of Kautilya's Arthashastra, it has picked up its prominence in mid-1990's when liberalization occurred and in perspective of major corporate scams happening since liberalization. In last 10-15 years, corporate governance has turned into a broadly examined subject and an essential thought for financial specialists around the globe. Speculators and governments have begun requesting better governance rehearses from all organizations especially after the wide exposure over corporate outrages, for example, Enron, Parmalat, Xerox, World Com and numerous others amid early parts of this century. Essentially, the entirety structure of good corporate governance is subject to viability and adequacy of independent directors. Independence of Directors is basic to guarantee that Board satisfies its job unbiasedly and considers the board responsible to organization. The paper tries to feature how the autonomy of Independent Directors is critical to guaranteeing corporate governance.*

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**Keywords:** Corporate Scandals, Independent Directors, Corporate Governance.

**Hypothesis-** A company is bound to collapse if independence of independent directors is not realized truly.



## INTRODUCTION

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*“The best teamwork comes from men who are working independently towards one goal in unison”*

**-Unknown.**

According to section 149 (6) of The Companies Act, 2013, Independent Director means any director other than a managing director or whole-time director or a nominee director.<sup>1</sup>

Role towards shareholders and stakeholders:

Independent directors have number of roles to fulfill in their official capacity. Following, in my opinion, are the most important ones:

- They must fulfill their duties and must try to bring transparency and accountability in the working mechanism of the company. Since shareholders, especially minority shareholders, are usually not equipped to look into those workings of the company, and thus they look forward to independent directors so as to provide such transparency.
- When the management or Board is taking any decisions which would affect the rights of the shareholders or creditors or employees, the independent directors must have a significant role in such decisions, and they ought to act in the welfare of the stakeholders.
- Further, they are required to review the related party transactions to ensure the efficiency of the tag “Whistle Blower”.

These, essentially, safeguard the interests of the stakeholders.

### **COMMITTEE MEMBERSHIP**

The Companies Act, 2013, provides for mandatory appointment of independent directors in following committees so they meet the corporate governance requirements:

- Nomination committee
- Remuneration committee
- Committee related to investor relations,
- Audit committee.

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<sup>1</sup> Mca.gov.in, <http://www.mca.gov.in/SearchableActs/Section149.htm> (last visited Jan 28, 2019).

## **RESPONSIBILITIES OF INDEPENDENT DIRECTORS FOR GOOD CORPORATE GOVERNANCE.**

Being a member of the Board, their role and responsibilities are similar to any other director of the Board. The fiduciary duties of care, diligence and acting in good faith apply equally well to independent directors as to other directors of the company.

### **ROLE TOWARDS THE BOARD.**

It is also the duty of the independent director to make sure that all those concerns that are important for the company are properly addressed by the board of directors. The objectives and duties of independent directors are same as that of the executive directors. But still, as compared to the executive directors the time that is needed to be devoted by the independent director and the degree of skill and care required for the company, both are seemingly less.

*Exhaustive list of roles and duties is given in Schedule IV of the Companies Act, 2013.*

Independent directors acquire independent reasoning and rich involvement in their separate fields. It very well may be reasoned that independent directors help keep up a moral atmosphere in the association. A few cheats and outrages have surfaced in the corporate world as of late. The basic purpose behind breakout of these tricks is that most Indian organizations are constrained by promoters and independent directors are just independent on paper. They are people recognizable to a promoter or from a known close gathering. This nature among promoters and independent directors aggravates the genuine independent job of directors. Despite the fact that the Code for Independent Directors indicated in Companies Act, 2013 underlines the job, capacities and obligations of Independent Directors, concerns are being raised over their genuine freedom and successfully releasing their obligations, job and duties.

Independent directors (ID), as name suggests, are required to be independent from the administration and go about as trustees of investors. This infers they are committed to be completely mindful of and question the lead of associations on important issues. After probably the biggest corporate tricks in nation hit the market as of late after the expansion in number of abdications by IDs, there is an elevated spotlight on their job and obligations as custodians of stakeholders' interests.

## CASE ANALYSIS

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### 1. TATA SONS CASE<sup>2</sup>

Decision to evacuate Mr. Cyrus Mistry from position of executive head of Tata Sons has made a type of an emergency and has undermined the apparent ethically numero uno position enjoyed by Tata India Inc. Independent Directors on IHCL (Indian Hotels Company Limited) Board have While great corporate governance in Indian associations like ICICI and HDFC have been inspected and listed Bhat and Kumar (2008), the Satyam disaster has opened everything up. Poor corporate governance has been the most despicable aspect of Indian industry and the disintegration of financial specialist certainty and it is currently evident that specific key IT, media and stimulation contents are as a rule shamelessly controlled on the stock trades (Chemical Business, 2002)

Kriplani (2009) in an investigation with reference to Satyam states poor governance can prompt fiasco, and India has seen a lot of that lately. Before Satyam, Mumbai business First Global assessments, investors had lost some \$2 billion from embarrassments and awful governance since 2003. Corporate morals and bookkeeping have been customarily poor in India, in spite of the presentation of numerous organizations to worldwide benchmarks (Range and Lublin, 2009). A few scientists have been hopeful in their methodology. Chakrabarti et al. (2008) guarantee the Indian corporate governance framework has both upheld and kept down India's climb to the best positions of the world's economies. In any case, Indian corporate governance has stepped toward turning into a framework fit for rousing certainty Rajagopalan and Zhang (2008) have additionally featured a few explanations behind disappointment of corporate governance in India and China.

### ISSUES AND QUESTIONS RAISED

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1. To what extent have independent directors really been independent since the inception of law.
2. To what extent the role of Independent directors in Satyam Computers was justified.

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<sup>2</sup> Cyrus Mistry v. Tata Sons [164(2009)DLT95; 2009(41)PTC753(Del)]

## HOW INDEPENDENT ARE INDEPENDENT DIRECTORS IN INDIA?

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An independent director is relied upon to be the watch dog of the board and ensure the enthusiasm of investors. Since they are handpicked by the promoters himself so they like to be a companion of the promoters as opposed to be the guard dog of the board. Despite the fact that independent director is paid by the organization, it must be borne as a main priority that the organization isn't just possessed by its promoters however all investors so they should speak to the enthusiasm of the minority shareholders. There are circumstances where independent directors are not independent, which broadly includes: -

a) Selection procedure- A great deal of accentuation is set on the "independence" of independent directors their choice is still in the hands of proprietors of the organization. No procedure of determination has been recommended for the independent directors, as they are specifically handpicked by the promoters. Promoters in control may take choices that are not in light of a legitimate concern for little investors, an independent director must remember the enthusiasm everything being equal. Such strategy for their choice brings up issue on their independence at the board. They can't be as independent as they are required to be, on the off chance that they will be selected by the proprietors. This technique must be changed for the independence of directors. For whatever length of time that they are selected by the board, the idea of independent directors is a fantasy, for really independent directors, they must be named by the SEBI which is an administrative specialist. On the off chance that they have a directly to manage, without a doubt they have a directly to try and propose the arrangement of directors.<sup>3</sup>

b) No age limit- There is no age limit given under Companies Act, 1956 and by the SEBI. As per Indian companies Act a minor can turn into a director since no age limit is endorsed. This point must be reevaluated as an individual who is under 18, as clearly can't possess enough understanding to end up an independent director of an organization.<sup>4</sup>

c) No specific qualification is required- There is need to concentrate on the nature of independent directors who will be named. They ought to be sufficiently qualified with the goal that they can make right inquiries at the perfect time when they are at load up. The most essential necessity is his capacity to stand up for minority shareholders, who are not spoken to on company boards.

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<sup>3</sup> 9.Pearce II, J.A, and Zahra S.A. (1991), The relative power of CEOs and Boards of directors, Associations with Corporate Performance Strategic Management Journal 12.

<sup>4</sup> VCCircle, <https://www.vccircle.com/the-legal-implications-rajus-confession%20-%2047k> (last visited Jan 27, 2019).

They should be sound in judgment with an inquisitive personality. Clause 49<sup>5</sup> of the Listing Agreement of the stock exchanges and the Companies Bill, 2008 introduced in Lok Sabha's last session does not prescribe the minimum qualification or experience essential. Presence of independent director on the board bodes well just in the event that they are knowledgeable, can increase the value of the organization, and speak to minority investors' interests. The administration and SEBI must audit the capability for independent directors.

d) No right to interfere in the day-to-day operations- An Independent director has no right to directly meddle in the everyday activities of organization. They have right to directly intercede in any wrongdoings. They should bolster the administration in getting the conveyance of what the objectives of the organization are to its shareholders. On the off chance that a director can't get into an organization's everyday activities, he can't see how it is represented and won't be in the situation to satisfy his duties.

e) No time limit for replacement of an independent director- There is no rule endorsing a period limit for substitution of an independent director on the off chance that there is a renunciation or evacuation or passing of a current one and promoters are taking a request that they have not possessed the capacity to discover a substitution, which could extend for uncertain period. To hold the independence of director there is need to pivot such directors intermittently or by some other technique whereby the independence of independent director is anchored.

Independent directors are as yet the main want to ingrain discipline in the dim world of corporate finance, given their independence isn't being endangered. On the off chance that they are not any more independent, their arrangement in an organization will be pointless. This position needs to be redressed by SEBI and the Indian government.

### **INDEPENDENT DIRECTORS IN INDIAN COMPANIES.**

Table 1- Table of Independent Directors on the board.

Independent directors less than 33%	33%-50%	51%-100%	Total
39	30	31	100

Source: Hitesh J Shukla, Separation of Chair man and CEO in the Organization, Indian Corporate Governance and Board Structure, the Accounting World, July 1995, P. 15<sup>6</sup>

<sup>5</sup> Indianboards.com, [http://indianboards.com/files/clause\\_49.pdf](http://indianboards.com/files/clause_49.pdf) (last visited Jan 28, 2019).

<sup>6</sup> Corporate Governance and Indian FMCG Industry Questia.com, <https://www.questia.com/library/journal/1P3-1948666401/corporate-governance-and-indian-fmcg-industry> (last visited Jan 28, 2019)

consistently rested confidence in Mr. Mistry. Since Boards have collective responsibility, the independent directors alongside Mr. Mistry are similarly in charge of mis-governance. Mr. Cyrus properties all issues as inheritance issues and hotspots. On what premise, independent directors of IHCL and Tata Chemicals have chosen to back Mr. Mistry? Do they know reality? In the event that truly, why they kept mum for every one of these years and enabled issues to continue? For what reason are they supporting Mr. Mistry when they are all in all in charge of issues of IHCL from year 2000 onwards? Does the choice of independent directors to help Mr. Mistry satisfies the goal of good governance? Is their activity securing shareholders esteem? Can an isolated board improve investor esteem or it devastates the equivalent. The corporate structure of Group which won under the authority of Mr. J. R. D. Goodbye for more than 50 years and from that point Mr. Ratan Tata for more than 20 years, exemplified the best corporate governance rehearses. Mr. Mistry deliberately destroyed this since quite a while ago settled corporate structure by recognizing himself as the main Tata Sons agent on sheets of Tata working companies. It is applicable to specify that under Governance Guidelines Framework which Mr. Mistry himself presented in 2015, there is a clause such that all representatives of a Tata organization should, after their business stops, quickly leave from Boards of all Tata companies where they are working as Non Executive Directors. Therefore, Mr. Mistry, on stopping to be the Executive Chairman of Tata Sons, ought to have promptly surrendered from Boards of every single other organization under his very own rules. However he has decided not to do as such in willful breach of Governance Guidelines Framework.

## **2. SATYAM EPISODE**

Indeed, even where there is an outstanding independent board of directors, it may not be feasible for them to perform their job viably if the conditions that encourage legitimate performance don't exist. The Satyam scene shows a portion of the reasons why the viability of independent directors in India may keep on being in uncertainty.

i) Satyam Computer Services Limited (as of late renamed Mahindra Satyam) is a main Information Technology Services Company incorporated in India. Satyam's promoters, represented by by Mr. Ramalinga Raju and his family, held about 8% shares in the organization toward the finish of 2008, while the rest of the shareholding in the organization was diffused. Its securities are listed on the Bombay Stock Exchange and the National Stock Exchange. Besides, the organization's securities are cross-listed on the NYSE. This required Satyam to go along with Clause 49 as well as the necessities of the Sarbanes-Oxley Act just as NYSE Listed Company Manual. Satyam took gigantic pride in its corporate governance practices.

At the relevant time (end 2008), Satyam had a majority independent board, over-complying with the requirements of Clause 49. Its board consisted of the following:

Executive Directors -

- (a) B. Ramalinga Raju, Chairman;
- (b) B. Rama Raju, Managing Director and Director Executive Officer;
- (c) Ram Mynampati, Whole Time Director;

Non-Executive, Non-Independent Directors

- (a) Prof. Krishna G. Palepu, Ross Graham Walker Professor of Business Administration at the Harvard Business School

Independent Directors

- a. Dr. Mangalam Srinivasan, management consultant and a visiting professor at several U.S. universities;
- b. Vinod K. Dham, Vice President and General Manager, Carrier Access Business Unit, of Broadcom Corporation;
- c. Prof. M. Rammohan Rao, Dean, Indian School of Business;
- d. T. R. Prasad, former Cabinet Secretary, Government of India; and
- e. V. S. Raju, Chairman, Naval Research Board and former Director, Indian Institute of Technology, Madras.

The board had 3 executive directors, 5 independent directors and 1 grey (or affiliated) director. Amongst the non-executives, 4 happened to be academics, 1 was from government service and the last was a business executive. At a bigger level, it can be said that very few Indian boards can lay claim to such an impressive array of independent directors.

ii. The Maytas Transaction: On December, 16 2008, a gathering of Satyam's board was assembled to think about a proposition for acquisition of two companies, Maytas Infra Limited and Maytas Properties Limited. Two arrangements of realities increase monstrous pertinence to the exchange. One is that the Maytas match of companies was dominantly claimed in abundance of 30% each by the Raju family, in this manner making the proposed acquisition bargain a related gathering exchange. The other is that the Maytas companies were in the businesses of land and foundation improvement, both random profoundly business of Satyam. The exchanges were likewise noteworthy as the all out buy thought for the acquisition was Rs. 7,914.10 crores (US\$ 1,615.11

million). It is critical to take note of that, whenever affected, the exchange would have brought about a lot of money spilling out of Satyam, a freely listed organization, to its individual promoters, the Raju family. The executive gathering on December 16, 2008 was gone to by all directors, with the exception of Palepu and Dham who taken an interest by sound meeting. By virtue of the related party circumstance and disconnected business enhancement, it is normal to anticipate a lot of opposition from the independent directors to the Maytas exchanges. After the organization's officers made an introduction to the board in regards to the exchanges, the independent directors raised a few concerns.

## **CONCLUSION AND SUGGESTION**

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Independent directors or non-executive directors of the organization screen and control the administrator/CEO; they fill in as a connection with outside condition and give a universal point of view. Aside from this, independent directors attempt to enhance board forms and acquire master learning, they give coherence, help distinguish collusion and acquisition. It tends to be reasoned that independent directors help keep up a moral atmosphere in the association.

- A company should have a clearly laid out policy where there should be specified role played by him at board, age limit, skills required and so forth.
- The attention must be on the nature of individual who will be designated. Selection of independent directors by SEBI and government would be fair and bring transparency in the selection procedure as well as can secure their independence to some degree.
- So far as age limit is concerned, minors ought not be viewed as qualified for the seat of independent director; the base age limit for an independent director must be between 30-35.
- The individual must be accomplished with required knowledge so he can perform the job of an independent director.
- Organization should obviously set down capability and experience required for the post of independent director.
- The delegated director must be pivoted occasionally to guarantee the straightforwardness and reasonableness in their choice.



- Lawful assurance must be given to independent directors with the goal that they can raise their voice against the administration and force their perspectives in light of a legitimate concern for shareholders. In the event that independent director performs not satisfy their responsibility as a guard dog, it would add up to submitting an offense.
- As Supreme Court in Municipality of *Bhiwandi and Nizampur v. Kailas Sizing Works*<sup>7</sup> has seen that "the authority is not acting honestly where an authority has a suspicion that there is something wrong and does not make further enquiries. Being aware of possible harm to others, and action in spite thereof, is acting with reckless disregard of consequences.." So, an independent director can't escape from his obligation. They will be held at risk similarly in the event that they don't make any move against the wrong dedicated/wrong choices taken, in his insight. Satyam scene is turned out to be shocking for the Indian corporate world, however it ought to be considered as a reminder to many. The Satyam case drew out the disappointment of the present corporate governance structure, in which independent directors neglected to perform their duty viably. As in Satyam case independent directors needed to act responsibly, they neglected to satisfy the stakeholders' desires. The only way by which independent directors can stop wrong doing is by being aware of their rights and duties and their desire to serve the shareholders judiciously.

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<sup>7</sup> Bhiwandi and Nizampur v. Kailas Sizing Works 1975 AIR 529, 1975 SCR (2) 123.