

BEFORE THE SECURITIES APPELLATE TRIBUNAL  
MUMBAI

**Date of Hearing: 22.02.2023**

**Date of Decision: 27.04.2023**

**Appeal No.185 of 2023**

Nectar Life Sciences Ltd.  
Vill Saidpura Tehsil Derabassai  
Dist. S.A.S. Nagar (Mohali)  
Punjab – 140507.

...Appellant

Versus

1. Securities and Exchange Board of India  
SEBI Bhavan, Plot No.C-4A,  
G Block, Bandra Kurla Complex,  
Bandra East, Mumbai - 400 051.

2. National Stock Exchange of India Ltd.  
Exchange Plaza, Block G,  
C 1, Bandra Kurla Complex,  
Bandra East, Mumbai - 400 051,  
Maharashtra.

...Respondents

Mr. Anand Kankani, PCS with Ms. Muskan Mubarakali  
Kadiwar, Advocate for the Appellant.

Mr. Ravishekhar Pandey, Advocate with Mr. Nishit  
Dhruva, Ms. Shefali Shankar and Ms. Rasika Ghate,  
Advocates i/b. MDP & Partners for the Respondent No.1.

Mr. Gaurav Joshi, Senior Advocate with Mr. Krushi N. Barfiwala, Mr. Shlok Bodas, Advocates i/b. Parinam Law Associates for the Respondent No.2.

CORAM: Justice Tarun Agarwala, Presiding Officer  
Ms. Meera Swarup, Technical Member

Per: Justice Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order dated 12<sup>th</sup> July, 2022 passed by the Committee of National Stock Exchange of India Ltd. (hereinafter referred to as 'NSE') rejecting the waiver application which was filed for waiver of the fine on account of non-compliance of Regulation 17(1A) of the Securities and Exchange Board of India (Listing Obligation and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as 'LODR Regulations').
2. The facts leading to filing of the present appeal is, that one Dr. (Maj. Gen.) S.S. Chauhan (Retd.) was a Non-Executive Independent Director in the Company

and unfortunately died on 22<sup>nd</sup> November, 2020 resulting in a casual vacancy in the Board of Directors.

3. The casual vacancy was required to be filled up by an appointment of another Independent Director under the provisions of the Companies Act, 2013 (hereinafter referred to as the Companies Act) read with the provisions of the LODR Regulations within three months.
4. On the recommendation of Nomination and Remuneration Committee of the Company, the Board of Directors in the meeting held on 13<sup>th</sup> February, 2021 resolved and filled the casual vacancy in the office of Independent Director by appointing Maj. Gen (Retd.) Dr. Ajit Singh Dhillon as an Additional Independent Director. At that time the age of Major General was 75 years and 9 months.
5. Under the Companies Act the casual vacancy can be filled up by the Board of Director but the same is required to be approved by the shareholders of the

Company within a stipulated period. Before such resolution could be passed by the general body of the Company, Maj. Gen (Retd.) Dr. Ajit Singh Dhillon resigned from the post of Additional Director with effect from 24<sup>th</sup> June, 2021. Thus, the total tenure of Maj. Gen (Retd.) Dhillon was 132 days i.e. from 13<sup>th</sup> February, 2021 to 24<sup>th</sup> June, 2021. As a result of the resignation of Major Gen (Retd.) Dhillon, no resolution approving his appointment as an Independent Director could be passed by the shareholders of the Company.

6. NSE issued a notice dated 20<sup>th</sup> August, 2021 regarding non-compliance of the LODR Regulations and directed the appellant to pay a fine of Rs.3,11,520/- for non-compliance of Regulation 17(1A) for the quarter ended 30<sup>th</sup> June, 2021.
7. The appellant accordingly made an application dated 25<sup>th</sup> August, 2021 for waiver of the fine which application was rejected by the impugned order dated 12<sup>th</sup> July, 2022.

8. The Committee of NSE justified the imposition of fine on the ground that the provisions of Regulation 17(1A) is mandatory and that no person can be appointed as a Non-Executive Independent Director who is more than 75 years of age unless a special resolution is passed by the shareholders of the Company. The Committee observed that under Regulation 17(1A) of the LODR Regulations prior approval of the shareholder is required. The Committee observed that the requirement of passing a special resolution is a qualificatory condition for appointment of a person as a Director under Regulation 17(1A).

9. We have heard Mr. Anand Kankani, PCS assisted by Ms. Muskan Mubarakali Kadiwar, Advocate for the appellant and Mr. Ravishekhar Pandey, Advocate assisted by Mr. Nishit Dhruva, Ms. Shefali Shankar and Ms. Rasika Ghate, Advocates for the respondent no.1 and Mr. Gaurav Joshi, Senior Advocate assisted by Mr.

Krushni N. Barfiwala and Mr. Shlok Bodas, Advocates  
for the respondent no.2.

10. The core issue is whether prior approval is required to be taken from the shareholders of the Company through a special resolution before a person who has attained the age of 75 years can be appointed to fill up a casual vacancy.
11. Before we deal with this aspect it would be necessary to refer to a few provisions of the Companies Act, the Rules and certain provisions of the LODR Regulations.
12. Section 149 of the Companies Act, 2013 provides that every Company shall have a Board of Directors consisting of individuals as Directors. Section 152(2) of the Companies Act provides that Directors can only be appointed by the Company in a general meeting. Section 161(4) provides for filling up of a casual vacancy by the Board of Director. For facility, Section

152(2) and Section 161(4) of the Companies Act, 2013

is extracted hereunder:

**Section 152(2)**

*“(2) Save as otherwise expressly provided in this Act, every director shall be appointed by the company in general meeting.”*

**Section 161(4)**

*“(4) If the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.*

*Provided that any person so appointed 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.”*

13. A reading of Section 152(2) and Section 161(4)

makes it clear that a Director can only be appointed by the shareholders of the Company in the general meeting. However, in case where the office of a Director is vacated before his term of office expires

which results in a casual vacancy then such casual vacancy can be filled by the Board of Directors which shall subsequently be approved by the members in the immediate next general meeting.

14. In exercise of the powers conferred under the second proviso to sub-section (1) and sub-section (4) of Section 149, the Central Government made the following rules, namely, Companies (Appointment and Qualification of Directors) Rules, 2014. Rule 4(1) of the Rules relates to appointment of Independent Directors according to the class/classes of Companies.

The second proviso to Rule 4(1) reads as follows:

**Rule 4 (1)**

***“Number of Independent directors***

*(1) The following class or classes of companies shall have at least two directors as independent directors –*

.....

*Provided further that any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate*

*next Board meeting or three months from the date of such vacancy, whichever is later:”*

15. A perusal of the aforesaid proviso indicates that any intermittent vacancy of an Independent Director shall be filled up by the Board immediately but not later than three months from the date of the vacancy.
16. Thus, from a reading of Section 161(4) of the Companies Act read with the proviso to Rule 4(1) of the Rules it is clear that a casual vacancy which occurs in the office of the Director is required to be filled up by the Board of Directors within three months from the date of such vacancy and such appointment is required to be approved by the members in the next general meeting.
17. Regulation 25 of the LODR Regulations, 2015 relates to obligations with respect to Independent Director. Regulation 25(6) of the LODR Regulations provides as under:

***“Obligation with respect to independent directors.***

25. (1) .....  
 .....

*(6) An independent director who resigns or is removed from the board of directors of the listed entity shall be replaced by a new independent director by listed entity at the earliest but not later than the immediate next meeting of the board of directors or three months from the date of such vacancy, whichever is later:*

*Provided that where the listed entity fulfils the requirement of independent directors in its board of directors without filling the vacancy created by such resignation or removal, the requirement of replacement by a new independent director shall not apply.”*

18. The aforesaid provision provides that where an Independent Director resigns or is removed from the Board of Directors. Such Independent Director is required to be replaced by a new Independent Director within three months from the date of such vacancy.

19. We find that this provision relates to a vacancy being created on account of removal or resignation of a

Director under Section 168 and 169 of the Companies Act. It does not relate to filling up a casual vacancy under Section 161(4) on account of death of a Director.

20. The composition of the Board of Directors is provided under Regulation 17 of the LODR Regulations. Regulations 17(1A) and 17(1C) provides as under:

***“Board of Directors***

*17. 1) The composition of board of directors of the listed entity shall be as follows:*

.....

*(1A) No listed entity shall appoint a person or continue the directorship of any person as a non-executive director who has attained the age of seventy five years unless a special resolution is passed to that effect, in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such a person.”*

.....

*(1C) The listed entity shall ensure that approval of shareholders for appointment of a person on the Board of Directors or as a manager is taken at the next general meeting or within a time*

*period of three months from the date of appointment, whichever is earlier.”*

21. Regulation 17(1A) provides that no person shall be appointed or continue the directorship as a Non-Executive Director who has attained the age of 75 years unless a special resolution is passed to that effect by the members in the general meeting.
22. A perusal of the Regulation 17(1C) indicates that the listed entity shall ensure that the appointment of a person on the Board of Directors is approved by the shareholders at the next general meeting or within a period of three months from the date of appointment whichever is earlier.
23. Thus, upon the death of Dr. Chauhan on 22<sup>nd</sup> November, 2020, a casual vacancy in the office of Independent Director came into existence which could be filled up by the Board of Directors under Section 161(4) of the Companies Act read with Regulation 17(1C) of the LODR Regulations and proviso to Rule 4

of the Rules. Such appointment was required to be subsequently approved by the shareholders of the Committee in the next general meeting.

24. From the aforesaid it is clear

- (i) That there is no provision in the LODR Regulations for filling up a casual vacancy of a Director in a Company.
- (ii) Casual vacancy can only be filled up under Section 161(4) of the Companies Act read with the proviso to Rule 4 of the Rules.
- (iii) Regulation 17(1A) is not applicable for purpose of filling up a casual vacancy under Section 161(4) of the Companies Act.
- (iv) Appointment of a Director made by the Board of Directors is required to be approved by the shareholders/members of the Company in the next general meeting or within three months from the date of appointment whichever is earlier as provided under Regulation 17(1C) of

the LODR Regulations read with the proviso to Rule 4 of the Rules.

- (v) Regulation 17(1A) cannot be read in isolation. It has to be read along with Section 152(5) of the Companies Act which reads as under:

*“Provided that in the case of appointment of an independent director in the general meeting, an explanatory statement for such appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfils the conditions specified in this Act for such an appointment.”*

- (vi) The above provision provides that the appointment of an Independent Director is to be made by the shareholders in the general meeting and an explanatory statement for such appointment is to be annexed in the general meeting which shall include a statement that in the opinion of the Board of Directors the person fulfills the conditions specified in the Act for such appointment. Regulation 17(1A)

of the LODR Regulations provides that a special resolution is required to be passed by the shareholders of the Company and the explanatory statement shall indicate the justification for appointment of such a person.

(vii) Thus, under the proviso to Section 152(5) the Board of Directors has to justify that the person who is going to be appointed as an Independent Director fulfills the conditions for appointment of such a Director as specified in the Act whereas under Regulation 17(1A) a special resolution is required to be passed indicating the justification for appointment of such person.

(viii) Therefore on a harmonious reading of the proviso to Section 152(5) and Regulation 17(1A), we are of the opinion that when an appointment of an Independent Director above the age of 75 years is made by the Board of

Directors under Section 161(4) such appointment is required to be approved by the shareholders of the Company in the next general meeting to be passed by a special resolution. The Board of Director would be required to indicate in the explanatory statement that the person fulfills the qualifications specified in the Act and also quote reasons for appointing such person who has crossed the age of 75 years.

- (ix) Section 17(1A) should be read harmoniously with the provisions of Sections 152, 161(4) of the Companies Act read with Rule 4 of the Rules and Regulation 17(1C) of the LODR Regulations which makes it clear that even if a person above the age of 75 years is appointed by the Board of Directors to fill up a casual vacancy, such appointment is required to be approved subsequently within the prescribed

period by a special resolution in the next general meeting by the members of the Company.

- (x) The word “unless” depicted in Regulation 17(1A) does not mean “prior approval” nor the requirement of passing a special resolution is a qualificatory condition for appointment of a person as a Director.

25. In view of the aforesaid, the finding of the respondent that no persons can be appointed or continued to be appointed as a Non-Executive Director unless prior approval of the shareholders is made is erroneous.

26. In view of the aforesaid, the impugned order cannot be sustained. No penalty could have been imposed for violation of Regulation 17(1A) of the LODR Regulations. Nothing has been brought on record to indicate violation of any provision of the Companies Act or Regulation 17(1C) of the LODR

Regulations. In view of the aforesaid, the impugned order cannot be sustained and is quashed. The appeal is allowed.

27. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.

Justice Tarun Agarwala  
Presiding Officer

Ms. Meera Swarup  
Technical Member

27.4.2023  
RHN