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## ICICI Bank Case: How it invoked various Sections of the Companies Act 2013 - Issues & Solutions

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*This research paper will focus on some principles of corporate governance and different sections of the Companies Act, 2013 that this case invoked. This paper will give a brief analysis of section 184 of the Companies Act, 2013 i.e., the concept of non-disclosure of conflict of interest by the director. The paper will touch upon the fiduciary duties that directors have towards the company as per section 166 of the Companies Act, 2013 and in general as a Board of Directors as per the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. It will also put forward the instance where the directors of the ICICI bank lacked which led to the violation of the above-mentioned sections. The importance of independent directors and a critique on the transaction between ICICI Bank and Videocon group being under the ambit of a related party transaction has also been posited in this paper. At last, the paper will give out some solutions regarding these issues of corporate governance."*

**Keywords:** bank, company, law.

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### INTRODUCTION

“Governance and leadership are the yins and the yang of successful organizations. If you have leadership without governance, you risk tyranny, fraud, and personal fiefdoms. If you have

governance without leadership, you risk atrophy, bureaucracy, and indifference.” One must balance leadership and governance to keep the organization safe from any risk. Chanda Kochhar was one of the leading businesswomen and was always in the spotlight regarding her achievements. In 2018 a corruption case was filed against Chanda Kochhar for misusing her position and giving out a loan to Videocon groups, 86% of which the ICICI bank declared as Non-Performing Assets.<sup>1</sup> This research paper will focus on some principles of corporate governance and different sections of the Company Act, 2013 that this case invoked. The paper will focus on the concept of non-disclosure of conflict of interest by the director. It will also touch upon the fiduciary role of the directors and the importance of independent directors. At last, the paper will give out some solutions regarding these issues of corporate governance.

## LITERATURE REVIEW

As per Mousa F. Al Manaseer - the Board of Directors are the foundations of a company. They play an important role to ensure internal control that the company regulates.<sup>2</sup> (2012) Baysinger and Butler (1985), tried to highlight the impact of an independent director on board. According to them when more outsiders are included on the board of the company. The authors attempted to highlight the significance of having independent representation on company boards.<sup>3</sup>

## CASE BACKGROUND

The case began in 2008, with several intertwined facts. Deepak Kochhar (Chanda Kochhar's Husband) and Venugopal Dhoot (Videocon group chairman) incorporated NuPower Renewables Pvt. Ltd. (NRPL). Venugopal Dhoot and Deepak Kochhar both owned an equal

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<sup>1</sup> Gurbir Singh, ICICI-Videocon loan case: Adopt 'best practices' Chanda Kochhar, and quit' (*The New Indian Express*, 8 April 2022) <<https://www.newindianexpress.com/business/2018/may/19/icici-videocon-loan-case-adopt-best-practices-chanda-kochhar-and-quit-1816868.html>> accessed 23 July 2022

<sup>2</sup> Mousa F. Manaseer , Riyad Mohamad, Mohamad A, 'The impact of corporate governance on the performance of Jordian Banks' (2012) *European Journal of Scientific Research*

<sup>3</sup> Barry D. Baysinger & Henry N. Butler, 'Corporate Governance and the Board of Directors: Performance Effects of Changes in Board Composition' (1985) 1 (1) *J. Law Econ. Organ.*

101<<https://www.jstor.org/stable/764908?seq=1>> accessed 23 July 2022

share in the corporation. Venugopal Dhoot resigned as a director of NRPL in January 2009 and sold his shares to Deepak Kochhar.

Venugopal Dhoot and Vasant Kakade were appointed as directors of Supreme Energy in 2009. Mr. Dhoot received some NRPL shares in exchange for an Rs. 64 crore loan from Supreme Energy in 2010.<sup>4</sup> Supreme Energy received 94 % shareholding in NRPL. Deepak Kochhar only owned the remaining 4 % shareholding of NRPL. In 2011 Venugopal Dhoot sold his entire shareholding in Supreme Energy to his business partner Mahesh Chandra Punglia. Mahesh Chandra transferred his shareholding to Pinnacle Energy, a trust managed by Deepak Kochhar. The entire transaction value was 9 lakhs.<sup>5</sup> The transfer of Pinnacle Energy to Deepak Kochhar took place just six months after Chanda Kochhar who was CEO of the ICICI bank at that time, sanctioned a loan of 3250 Crore to Videocon Group. Till 2017 there was no issue but when the bank declared Videocon's account as a non-performing asset and Rs. 2810 crore (86% of the loan granted in 2012) as unpaid, many issues started to arise.<sup>6</sup> The two major issues that came forward were the *Non - disclosure of Conflict of Interest* by Chanda Kochhar in the loan transaction granted to the Videocon group and the *Inefficacy Board of Directors* of the ICICI Bank.

## NON-DISCLOSURE OF CONFLICT OF INTEREST

The primary issue of this case was regarding the non - disclosure of the conflict of interest of Chanda Kochhar. The term "interest" refers to personal interest rather than official or other interest. However, it is not restricted to financial interests and may occur as a result of fiduciary obligations or a close relationship.<sup>7</sup> It is also important to note that simply disclosing an interest is insufficient. The nature of the concern or interest must also be disclosed. This will

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<sup>4</sup> *ICICI Bank v Chanda Kochhar* (202) Interim Application No. 1014/2022

<sup>5</sup> 'Case Digest - Series 4' (ICSI, 23 September 2020)

<<https://www.icsi.edu/media/webmodules/CaseDigestSeries4.pdf>> accessed 23 July 2022

<sup>6</sup> *Ibid*

<sup>7</sup> *Mukkattukara Catholic Company Ltd v M V. Thomas* AIR 1997 Ker 51

adequately reveal when a director's personal interests clash with his fiduciary obligation as a director, as well as protect the company from such conflicts.<sup>8</sup>

Section 184 of the Companies Act 2013<sup>9</sup> deals with the disclosure of the Interest of the director. The purpose of Section 184 is to raise the directors' attention to any conflict of interest or obligation that any of their co-workers on the Board may have. The provisions are based on the principle that a director is not permitted to deal on behalf of the company with himself and is not permitted to enter into contracts in which he has a personal interest that conflicts, or may conflict, with the interests of those whom he is obligated to protect under the fiduciary duty.<sup>10</sup>

According to Section 184 (1) of the Companies Act of 2013,<sup>11</sup> a director must declare the nature of his concern or interest in any company, bodies corporate, firms, or other association of individuals (including shareholding interest) at -

- the very first Board Meeting of his directorship,
- first Board meeting of every financial year and
- in case his interest changes after disclosing, then the first Board Meeting after that.

Also, as per Companies' Rule 9 (meeting of Board and its Powers) 2014 Rules every director is required to give notice in writing in Form MBP 1. Additionally, the director who gave the notice must ensure that after giving the notice the same need to be disclosed at the next meeting.<sup>12</sup>

Section 184 (2)<sup>13</sup> deals with Specific disclosure by the Directors. Specific disclosure here means disclosure in regard to a specific transaction with which the company is dealing. As per this section if a director in any way whether directly or indirectly is interested in a contract or

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<sup>8</sup> *Turnbull v West Riding Athletics Club Leeds Ltd.* [1894] WN4

<sup>9</sup> Companies Act 2013, s 184

<sup>10</sup> Sushil Kumar Antal, Disclosure of Interest by Director under Companies Act, 2013' (*Taxguru*, 7 April 2022) <<https://taxguru.in/company-law/disclosure-interest-director-companies-act-2013.html>> accessed 23 July 2022

<sup>11</sup> Companies Act 2013, s 184(1)

<sup>12</sup> Companies Rule 2014, r 9

<sup>13</sup> Companies Act 2013, s 184

arrangement which the company has entered or is to be entered must disclose his interest during which the agreement or transaction is being addressed. The director also needs to disclose his interest if he becomes interested later in the board meeting. He is not, however, permitted to attend or vote at the board meeting. This ensures that the director cannot influence and sway the board's decision-making process in his favour.

In 2016 Chanda Kochhar was investigated by India's revenue and law enforcement after a whistle-blower accused her. The accusation was regarding her conflict of interest with the Videocon group and misuse of her position as the bank's MD and CEO. The whistle-blower urged an investigation into the transactions involving ICICI Bank, Deepak Kochhar, and the promoter of Videocon Group. The compliance officer called Chanda Kochhar, regarding the situation for which she gave the details briefly to the board. She stated that all transactions and share transfers between her husband and Venugopal (NRPL, Supreme Energy, and Pinnacle Energy) were legal and that she didn't inform the board about the matter because it occurred almost two years ago, and that Deepak Kochhar had received no monetary benefit from the loans that were granted to Videocon Group.

As mentioned above a disclosure need to be made in the immediate Board Meeting after a director becomes interested in a contract that the company is entering, or which has been entered. In this case section 184 of the Companies Act, 2013 was completely contravened as firstly when she became the Director of the bank, she should have disclosed her concern in the board meeting where the discussion about the loan was being made. Secondly, even if she was not aware at the time when the loan was being sanctioned that her husband's dealing with Venugopal Dhoot may concern her and there might be an issue of conflict of interest. She could have disclosed the same when she became aware of the situation in any of the board meetings that were held in the Financial Year 2012-2016.

The right thing she could have done was to disclose her husband's dealing with Venugopal and should have let the Board decide on the transaction with the Videocon group. It should also be noted that Chanda Kochhar was part of every panel which discussed the granting of a

loan to the Videocon group<sup>14</sup> which is a clear violation of section 184 (2) of the Companies Act, 2013, as it would have influenced the decision-making power of the board of directors. But when the loan was being sanctioned Chanda Kochhar didn't disclose about her husband's dealing with Venugopal Dhoot and the loan passed by ICICI bank somehow ended with Deepak Kochhar. Thus, Chanda Kochhar was indirectly interested or concerned with the said transaction. The Central Bureau of Investigation (CBI) launched an investigation in 2018 to look into charges made against Deepak Kochhar, Chanda Kochhar, and others. Rajiv Kochhar, Deepak Kochhar's brother, was also summoned by the CBI. The CBI claims that Rajiv Kochhar's company, Avista Advisory, received loans from the bank at the same time. Avista was tasked by their clients to restructure foreign currency-denominated debt transactions totaling approximately US\$1.7 billion.<sup>15</sup>

Enforcement Director later filed a case under the Prevention of Money Laundering Act.

## **FIDUCIARY DUTIES OF BOARD OF DIRECTORS**

The director has a fiduciary duty to operate honestly and should not abuse his or her position in any way. If a Director who has entire control of the affairs company must remember that they are not free to compromise the company's interests, which they are obligated to safeguard.<sup>16</sup> Section 166 of the Companies Act, 2013<sup>17</sup> deals with the duties of the directors. This section discussed the norms and principles that a director must adhere to individually when carrying out his duties as a director. A director must act in good faith to promote the company's objectives, for the benefit of the company as a whole, and in the best interests of the company's shareholders, according to Section 166(2) of the Companies Act, 2013.<sup>18</sup> Also according to Section 166 (4), a director should not get involved in a situation in which he may have a direct or indirect interest that conflicts, or potential conflicts, with the company's

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<sup>14</sup> Chanda Kochhar was on panel that cleared Videocon loan: ICICI Bank chairman MK Sharma' (*The Indian Express*, 6 April 2022) <<https://indianexpress.com/article/express-exclusive/chanda-kochhar-was-on-panel-that-cleared-videocon-loan-icici-bank-chairman-mk-sharma-5116781/>> accessed 23 July 2022

<sup>15</sup> *Ibid*

<sup>16</sup> *Cook v Deeks* [1916] UKPC 10

<sup>17</sup> Companies Act 2013, s 166

<sup>18</sup> Companies Act 2013, s 166(2)

interest.<sup>19</sup> This section 166 of the Companies Act, 2013 was flagrantly violated in this case as not only did Chanda Kochhar fail to work with Due diligence but also did not work for the best interest of the Bank. She also got herself involved in a situation where there was a conflict of Interest and misused her position as the CEO and MD and attained undue gain from transactions. In addition to the duties mentioned in Section 166 of the Company Act, there are some duties a Board of directors must adhere to while following the norms of Section 166 individually.

### **BOARD OF DIRECTORS AS A WHOLE**

Apart from commercial and financial issues, the Boards of directors have to also deal with problems and concerns connected to ethics and corporate governance. The Board of Directors is a vital component for making and implementing corporate governance practices by making key decisions about the company's long-term corporate strategy and bringing and monitoring effective board leadership. The board of directors oversees and monitors management on behalf of the shareholders. Shareholders put their money into a company that is run by the management, who exercise powers granted to them by the board of directors. As a result, management reports to the company's board of directors, while the latter reports to the shareholders and is directly accountable to them. Directors have a fiduciary connection with the corporation, which is defined as a relationship of good faith and trust.<sup>20</sup> The main purpose of the Board of Directors is to ensure the company's success and to work in the best interests of the shareholders. These duties are a legal obligation that can't be waived in any way. The board must ensure that management adheres to the fundamental principles of ethics, openness, and disclosure. It is not uncommon for managers to be tempted by deals that will profit them.<sup>21</sup>

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<sup>19</sup> Companies Act 2013, s 166 (4)

<sup>20</sup> Meghna Kudligi, *Fiduciary Duties of a Director* (*Taxguru*, 3rd April 2022) <<https://taxguru.in/company-law/fiduciary-duties-director.html>> accessed 23 July 2022

<sup>21</sup>D. N. Ghosh, 'Corporate Governance and Boardroom Politics' (2000) 35 (46) *Economic and Political Weekly*, 14 <<http://www.jstor.org/stable/4409950>> accessed 23 July 2022

To deal with these types of Corporate Governance issues the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, has also laid out some rules that the Board of Directors need to such as-

- To monitor and control potential conflicts of interest among management, board members, and shareholders, such as misappropriation of corporate assets and abuse in related party transactions.<sup>22</sup>
- The board of directors must uphold high ethical standards and consider the interests of all stakeholders.<sup>23</sup>
- On corporate matters, the board of directors must make objective, impartial decisions.<sup>24</sup>

## **ROLE OF INDEPENDENT DIRECTORS**

Independent directors have been entrusted with the critical responsibility of denouncing unethical and fraudulent behaviour, as well as keeping an eye on management and promoters' unjust enrichment in the company. The importance of an Independent Director in corporate governance as a preventative measure against fraud and mismanagement has increased in response to the increased focus on ethics and corporate governance within companies. The directors are chosen by the shareholders to oversee the company's general operations and maximize its wealth. The Independent Director is expected to act in the best interests of the company if the general interests of the shareholders and the board of directors contrast. The first and most important benefit that an independent board of directors may provide to a corporation is that internal procedures can be managed, and mismanagement or fraud that is being perpetrated by the company (management) can be brought to the attention of the company's shareholders and the public. They have to make rational decisions on company matters while keeping the company's and shareholders' best interests in mind. According to Patelli and Prencipe, "Outside directors in general and independent directors in particular, should be more effective monitors than are insiders whose interests may be at odds with

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<sup>22</sup> SEBI(LODR) Regulation 2015, Chp II Reg 4(f) (ii)(6)

<sup>23</sup> SEBI(LODR) Regulation 2015, Chp II Reg 4(f) (iii)(6)

<sup>24</sup> SEBI(LODR) Regulation 2015, Chp II Reg 4(f) (iii)(7)

outside shareholders.”<sup>25</sup> Independent directors have an interest in promoting shareholder interests and being effective.<sup>26</sup> This was however not the role the Independent directors played in the ICICI bank case. Despite the fact that the independent director was given authority in board meetings to examine, monitor, and report on management's performance, they failed to make rational and independent decisions that were in the best interests of the bank as well as a shareholder.

## THE INEPT BOARD

The second issue of the case was regarding the inefficacy of the Board Of directors. The Board of Directors must ensure that management adheres to the fundamental principles of ethics, openness, and disclosure. It is not uncommon for managers to be tempted by deals that will profit them.<sup>27</sup> From making key decisions about the company's long-term corporate strategy to bringing effective board leadership to tackle the company's operations at all levels, and monitoring its performance fairly and transparently, the Board of Directors is an essential component for formulating and implementing corporate governance practices.

In 2016, after the whistle-blower wrote a complaint to Prime Minister Narendra Modi and Finance Minister Arun Jaitley regarding the misconduct by Chanda Kochhar. The Board of ICICI bank conducted an internal investigation and concluded that it had complete confidence in the bank's MD and CEO, Chanda Kochhar and that there is no issue of any quid pro quo, nepotism, or conflict of interest as has been suggested in numerous rumours. The board also advised people not to be misled by rumours that were being propagated to discredit the bank and its senior executives. Only later, when the Board was no longer able to defend Chanda Kochhar, it launched an independent investigation led by a former Supreme Court judge B N Srikrishna allegations of code of conduct and conflict of interest. According to the report's

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<sup>25</sup> Lorenzo Patelli & Annalise Prencipe, 'The Relationship between Voluntary Disclosure and Independent Directors in the Presence of a Dominant Shareholder' (*Research Gate*, 2 April 2022)

<[https://www.researchgate.net/publication/24080194\\_The\\_Relationship\\_between\\_Voluntary\\_Disclosure\\_and\\_Independent\\_Directors\\_in\\_the\\_Presence\\_of\\_a\\_Dominant\\_Shareholder](https://www.researchgate.net/publication/24080194_The_Relationship_between_Voluntary_Disclosure_and_Independent_Directors_in_the_Presence_of_a_Dominant_Shareholder)> accessed 23 July 2022

<sup>26</sup> Jayati Sarkar, 'Board Independence & Corporate Governance in India: Recent Trends & Challenges Ahead' (2009) 44 (4) *Indian Journal of Industrial Relations*, 576–92 <http://www.jstor.org/stable/27768232>> accessed 23 July 2022

<sup>27</sup> D. N. Ghosh (n 21)

findings, Chanda Kochhar had breached ICICI Bank's conflict of interest policy and failed in her fiduciary responsibilities. Her services were eventually terminated when the investigation report deemed her guilty.<sup>28</sup> The transactions in question occurred many years ago yet were not discovered until much later. The Board might have been able to sweep the issue under the rug if the media coverage had not been so unrelenting. The board here clearly failed to put first the interest of the Bank and its Shareholders. The board's answer was deceptive, confusing, contradictory, and unwavering in their support for their CEO. A bank is charged with maintaining the trust and its shareholder thinks it adheres to the letter of the law. As soon as the bank was made aware of the problem, it may have acted immediately to protect its reputation and stakeholders' interests. Nonetheless, nearly two years later, its disappointing comments imply that the bank was caught off guard.

## CRITIQUE

Often transactions, where the interest of directors is present, are treated as Related Party Transactions. Section 188 of the Companies act, 2013 deals with Related Party Transaction. An examination of the facts reveals that Chanda Kochhar misused her position, in sanctioning the loan to the Videocon Group and kept her interest above the interest of the company. But can the transaction between ICICI Bank and Videocon group come under the ambit of a related party transaction? The definition of a related party transaction is provided in Section 2 (76) of the Companies Act, 2013<sup>29</sup> and as per the definition this transaction between Chanda Kochhar and Videocon Group was not a related party transaction as Chanda Kochhar was neither a director<sup>30</sup> nor key managerial<sup>31</sup> in Videocon group nor had a direct or family contact with Venugopal. Also, the loan was sanctioned to Videocon Group where the Kochhars had no shareholding.<sup>32</sup> Additionally, Chanda Kochhar was not a member of the Videocon group<sup>33</sup>, nor

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<sup>28</sup> 'Chanda Kochhar case: This is big benefit for ICICI Bank from Srikrishna panel report' (*ZEE Business*, 31 January 2019) <<https://www.zeebiz.com/india/news-chanda-kochhar-case-this-is-big-benefit-for-icici-bank-from-srikrishna-panel-report-83170>> accessed 23 July 2022

<sup>29</sup> Companies Act 2013, s 2(76)

<sup>30</sup> Companies Act 2013, s 2(76) (i)

<sup>31</sup> Companies Act 2013, s 2(76) (ii)

<sup>32</sup> Companies Act 2013, s 2(76) (iii)

<sup>33</sup> Companies Act 2013, s 2(76) (iv)

did she own any stocks of the group.<sup>34</sup> But there is a definition provided in Section 2 (76) (vii)<sup>35</sup>, which refers to any person on whose advice a director is accustomed to act, under which this case could be placed. This section corresponds to the concept of a shadow director.<sup>36</sup> For this section to be applicable it must be proved that the director did not use his judgment or discretion in such transactions. The *Securities And Exchange Board Of India* (SEBI) has also ruled out that a company's founder, who is also its largest shareholder, might be deemed someone on whose orders a director is used to acting. Furthermore, where a person placed entire trust and confidence in another, and the latter had complete knowledge of the former's financial affairs, the former was accustomed to acting in the latter's direction.<sup>37</sup> This implies that a high criterion is required to analyze if a person is accustomed to acting under another's direction. In the present case, such a criterion is unlikely to be met as it would be a very wide assumption to suggest Chanda Kochhar was accustomed to acting according to Venugopal Dhoot's instructions while the loan was being granted. Therefore, the transaction between ICICI Bank and Videocon Group cannot be a related party transaction.

## CONCLUSION

Corporate governance is one of the most critical differentiators in business, and it is derived from an organization's culture, policies, and ethics, particularly those of the individuals in charge, as well as how it interacts with diverse stakeholders. While regulatory authorities in India have taken major steps to improve corporate governance, shareholders are still vulnerable to bad corporate governance. Nepotism, favouritism, conflict of interest, quid pro quo, transparency, and other issues must be addressed in the corporate governance policy. Additionally, the lawmakers should respect the fundamental rationale, behind the law which is being evaluated. There are some flaws in the Act such as the transaction where the relations of the parties were indirect. These types of transactions can manage to slip through the cracks of the Act's provisions. Such transactions, too, should be placed within the umbrella of a related party to force the Director to declare any form of the relationship ahead of time so

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<sup>34</sup> Companies Act 2013, s 2(76) (v)

<sup>35</sup> Companies Act 2013, s 2(76) (vii)

<sup>36</sup> Companies Act 2013, s 2(59)

<sup>37</sup> *Krishna Kumar Birla v Rajendra Singh Lodha and Ors.* (2008) 4 SCC 300

that the board and shareholders can scrutinize them before engaging in any agreements or contracts.