
ROLE OF SHADOW DIRECTORS

Samraddhi Mutha, B.COM. L.LB. (Hons.), Renaissance Law College, Indore

ABSTRACT

The goal of the paper is to examine the function of shadow directors as puppet masters who manipulate a company's board of directors, as well as how crucial it is to identify these individuals. Shadow directors refer to those who exercise a great deal of influence over the business affairs of the company's management. Consideration is given to the criteria for the determination of such directorships laid out in various decisions. It discusses the various personalities who can fall under the meaning of "Shadow director".

It also intends to raise awareness of the issue of shadow directors, who profit from their absence from legitimate board appointments and abdicate their duties. The obligations of shadow directors are also covered in the report, along with potential liabilities for breaking those duties. In various case laws, it is apparent that the duties of shadow directors are equivalent to de jure directors and could be held liable for breaching the same. It discusses the nature of their duties as fiduciary with respect to the company and the possible consequences that such puppet masters could face for their defaults. The article also highlights the importance of their role and its impact on the various stakeholders of the company. The Indian Company Law, which deals with such directors as "officers" under various provisions, is also taken into account. The present company law of the land has not directly included this concept which makes it difficult to fix liability for such directors.

The author has attempted to summarise the main criteria for identifying such directors, their duties, the significance of their position, and the requirement for more specific rules to deal with such directors. The purpose of the paper is to put forward the various aspects dealing with the role of Shadow Directors in a descriptive manner.

INTRODUCTION

Chief Justice Marshall has defined the term 'company' as "a corporation being an artificial, invisible, intangible, existing only in contemplation of the law. Being a mere creation of law, it possesses only the properties which the Charter of its creation confers upon it, either expressly or as incidental to its very existence."¹ The definition explains a company as an artificial person having a separate legal entity and a common seal distinct from its stakeholders. In simple terms, it is a form of business organization that helps people forms a voluntary association so as to carry on trade and earn profit. In Indian Company law, it is defined under Section 2(20) of the Companies Act, 2013 as '**company** means a company incorporated under this Act or under any previous company law'. Being an artificial person, it cannot act on its own and hence requires management to act on its behalf, consisting of a natural person.² It depends upon natural persons to act on its behalf and to achieve the various objectives mentioned in its Memorandum of Associations.

The Board of Directors is a part of such management, which is defined under Section 2(10) of the act as 'the "Board of Directors" or "Board", in relation to a company, means the collective body of the directors of the company'. It is an agency of directors who make decisions for the company, forming the key managerial body. It is considered the supreme executive body managing the affairs of the company. Directors are the individuals who have a say in the decision-making of the company, Lord Cranworth has observed that "The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting".³ They share a fiduciary relationship with the shareholders of the company. They are like the trustees of the company.⁴ The board represents the company and plays a pivotal role in its dealings and success.

¹ What is a Company?- Definition, Characteristics and Latest Case Laws; Taxmann; Available at: <https://www.taxmann.com/post/blog/what-is-a-company-definition-characteristics-and-latest-case-laws/#:~:text=Chief%20Justice%20Marshall,its%20very%20existence.%E2%80%9D>

² <https://www.taxmann.com/post/blog/what-is-a-company-definition-characteristics-and-latest-case-laws/>

³ *Aberdeen Rly. Co. v. Blaikie Bros.*, (1854) 1 Macq. 461 ,available at <https://www.casemine.com/judgement/uk/5a8ff8dd60d03e7f57eceaef>

⁴ Usha, L, A study on company law reforms in India with reference to management and administration of the company, 20 October 2015, Shodhganga, Available at https://shodhganga.inflibnet.ac.in/bitstream/10603/54271/11/11_chapter%203.pdf

The Companies Act, 2013 defines Director under Section 2(34) as "a director appointed to the Board of a company'. Because they play such an important role, they have great responsibilities as well as liabilities in case of non-fulfillment of their duties or non-compliance with the law. The Board is responsible for the shareholders of the company.

Since a company acts through its board, it has to work in accordance with the laws. But to avoid such regulations and to act without being liable, the one controlling the major dealings of the company or having substantial influence over the decisions of the board is called a shadow director. Let us understand this concept in a detailed manner.

SHADOW DIRECTOR

The law generally considers a person who is not a member of the board to be a shadow director when he acts as a controller without an actual appointment as director. They have huge and effective control over the affairs of the management of the company. They are those influential parties who, without holding any position on the board, direct and instruct the board to act in the manner they want. They have REAL INFLUENCE over the company.⁵ The first formal reference to a 'shadow director' in English law was in the Companies (Particulars as to Directors) Act 1917, which extended the term 'director' to include 'any person in accordance with whose directions or instructions the directors of a company are accustomed to act'.⁶ Although it didn't use the term 'SHADOW DIRECTOR' but a clear reference was made. With the passage of time, more and more statutes from various countries extended the meaning of the term "director" to include shadow directors as well.

The board of directors is subject to liabilities for non-compliance with the law, so to avoid the various compliances and escape the liabilities; such persons don't take part in the board but influence its functioning. In simple terms, a shadow director means one who is not formally appointed by the board and on whose instructions the board performs.⁷ In many cases, the judges have described them as figures who "lurk in the shadows", as "puppet masters", or as those in control of the "cat's paw".⁸ To make such directors act for the benefit of stakeholders

⁵ Secretary of State for Trade and Industry v Deverell [2001] Ch. 340 per Morritt LJ at [33] on page 353

⁶ Section 3 of the Companies (Particulars as to Directors) Act 1917

⁷ Shadow Director: Who are They and What are Their Duty? Available at <https://fareezlaw.com/company/shadow-director-who-are-they-and-what-are-their-duty/>

⁸ By Simon Whitney; titled 'Duties owed by shadow directors: closing in on the puppet masters?' Published at: 'Journal of Business Law. ISSN 0021-9460' available at: <http://eprints.lse.ac.uk/66225/> Available in LSE Research Online: April 2016

of the company, the focus of the law framers is to take them in the preview of the law. Under Indian law, the term “shadow director” is not expressly mentioned but can be included in the definition of the term “officer” in Section 2(59) of the Companies Act 2013, which states that ‘officer includes any director, manager, key managerial personnel, or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act’.⁹

DETERMINATION OF SHADOW DIRECTORSHIP

The determination of whether a person is a shadow director or not isn’t an easy task. Their identification depends on their influence over the functioning of the board. Under their direction, the de jure directors act.¹⁰ Their identification becomes crucial to understanding the reasons behind the misconduct of the company and establishing the liability of the actual defaulters. It becomes more relevant in cases of insolvency and bankruptcy of the company. Although the company has an identity separate from its stakeholders, in various situations where there is some misuse of the company’s resources or name by its management, the corporate veil is lifted, and its directors and other managerial personnel become liable and penalised by the relevant authority.¹¹ The part of the definition under Section 2(59) of ‘officer’ concerning the shadow director can be understood in three parts:

- Shadow director can be **any person**;
- He gives **directions and instructions** to the board or any one or more directors;
- And under such directions, the board of directors or any director is **accustomed to act**.

Since there are no express provisions dealing with shadow directors in our country, the cases decided by the court prove to be of great help.

There are several rulings in which the concept of a "shadow director" is dealt with. In the earlier case, the term was interpreted narrowly, but a more flexible approach is now being taken by courts. In the case of **Penisular Fibre Industries Sdn Bhd v. Tan Yoke Chin**¹², the court

⁹ Section 2(59) of Companies Act 2013 available at <https://www.indiacode.nic.in>

¹⁰ SM Shanmugam & Siew Hui Yi; Shadow Director - The Puppet Master(2021) ; available at <https://www.lexology.com/library/detail.aspx?g=ba080671-1123-4326-aeca-a42cdd323b9c>

¹¹ Mitchell, "Lifting the Corporate Veil in the English Courts: an empirical study." (1999) 3 *CfLR* 15.

¹² [2013] 1 LNS 119

observed that to determine if a person is a shadow director of a company, the facts of each case would have to be examined on their own.

In **Re a Company (No 005009 of 1987) ex parte Copp**¹³ the bank of the company made a report that was followed by the company, and many steps were taken by the company and its directors to implement the recommendations that were contained in the bank's report. The company's liquidators claimed the bank was a shadow director of the company.

Knox J. held that the liquidator's allegation that the bank was a shadow director was not obviously unsustainable. His judgement contributed little to the understanding of shadow directorships. But this case was among the first to deal with such directors.¹⁴

In **Kuwait Asia Bank E.C. v National Mutual Life Nominees Ltd**¹⁵, an appeal to the Privy Council from the New Zealand Court of Appeal was sent. The issue relevant to Shadow director was whether the two persons nominated by the bank in a company as directors acting under the bank's advice made the bank a shadow director.

Lord Lowry, while delivering the opinion of the Judicial Committee, stated that:

"The only remedies of the plaintiff were against company for breach of contract and the directors of the Company. House and August were directors but the bank was not a director. The bank never accepted or assumed any duty of care towards the plaintiff. In the absence of fraud or bad faith on the part of the bank, no liability attached to the bank for any instructions or advice given by the bank to House and August. Of course, it was in the interests of the bank to give good advice and to supervise that House and August conscientiously and competently performed their duties, both under the trust deed and as directors of the Company."¹⁶

This statement suggests that **all** the directors of the company had to be accustomed to act on the bank's directions or instructions to make it a shadow director.¹⁷

¹³[1989] BCLC 13

¹⁴ Hobson, Michael D. (1998) "The Law of Shadow Directorships," *Bond Law Review*: Vol. 10: Iss. 2, Article 4. Available at: <http://epublications.bond.edu.au/blr/vol10/iss2/4>

¹⁵ [1991] 1 A C 187.

¹⁶ [1991] 1 AC 187 at 223-224.

¹⁷ Hobson, Michael D. (1998) "The Law of Shadow Directorships," *Bond Law Review*: Vol. 10: Iss. 2, Article 4. Available at: <http://epublications.bond.edu.au/blr/vol10/iss2/4>

In **Re Unisoft Group Ltd [1994] BCC 766**, the issue was whether a person could be a shadow director while instructing only a minority of a company's board of directors. Harman J. commented that "the shadow director must be the puppet master controlling the actions of the board. The directors must be the 'cat's-paw' of the shadow directors. They must act on the directions or instructions of the shadow director as a regular practice."

It was further said that "in a case with a multi-member board, the whole of the board, or at least a governing majority of it are accustomed to act on the directions of an outsider. The last requirement is **act** refers not a single act but done over a period of time and as a regular course of conduct."¹⁸

From this judgement, three factors that help in the identification of shadow directors can be inferred:

- The outsider must have influence over the board.
- The governing majority of the board is under his control.
- The act must be done in his direction on a regular basis.

In **Re Hydrodan (Corby) Ltd [1994] 2 BCLC 180** The liquidator of Hydrodan alleged that Eagle Trust Company was the holding company and its directors were guilty of wrongful trading on the basis that they were shadow directors or *de facto* directors of Hydrodan. They contended that if Eagle Trust was a shadow director, then all of its directors were "ipso facto" shadow directors. It was observed that the Board played a subservient role and had no independent judgement of its own.

Millett J. clarified that a shadow director does not purport to be a director; "he lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself."

To establish that a defendant is a shadow director, Millett J. said it is necessary to allege and prove that:

- The directors of the company are validly appointed;
- The defendant directed those directors to act for the company;

¹⁸ Re Unisoft Group Ltd [1994] BCC 766 available at <https://swarb.co.uk/re-unisoft-group-limited-no-3-chd-1994/>

- They were accustomed so to act; and
- The directors acted in accordance with such directions.¹⁹

He stated: "What is needed is, first, a board of directors claiming and purporting to act as such, and secondly, a pattern of behaviour in which the board did not employ any discretion or judgement of its own, but acted in accordance with the directions of others".²⁰

In the case of **Secretary of State v. Deverell [2001] Ch 340**, the definition of a shadow director is widened. Secretary of State for Trade and Industry v. Deverell lowered the standard required for someone to be found to be a shadow director of a company. ²¹ Morritt LJ said: "The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities".²²

The main guidelines laid out by the Court of Appeal in this act are:

- The influence must be *Real* and need not extend to all the affairs of the company.
- It does not include those who are acting in a professional capacity, i.e., non-professional advice is to be considered.
- Also, the concepts of "direction" and "instruction" do not exclude the concept of "advice" for all three share the common feature of "guidance".
- The term direction and instructions need not be mandatorily followed by the board. It is unnecessary to establish that a shadow director dominates the De Jure directors, casting them into a subservient role. This proposition is different from the one laid down in the Hydrodan case.
- According to the statutory definition, directors must be "accustomed to act" "in accordance with" the "directions or instructions" of a shadow director. As per Morritt LJ, such terms suggest that the surrender of discretion by the board is not necessary and

¹⁹ Neil Jamieson and Kelly Hughes (2012) ; 'The identification of shadow directors under English law: what guidance might Buzzle provide?'; Butterworths Journal of International Banking and Financial Law; available at https://www.clydeco.com/clyde/media/fileslibrary/Publications/2012/JIBFL_27_06_13_Jamieson.pdf

²⁰ Re Hydrodan (Corby) Ltd [1994] 2 BCLC 180

²¹ Barber, Matthew, Boxing Shadows: Secretary of State for Trade and Industry V Deverell and Limits on the Definition of Shadow Directors (June 27, 2011). Available at

SSRN: <https://ssrn.com/abstract=1873168> or <http://dx.doi.org/10.2139/ssrn.1873168>

²² Secretary of State v Deverell [2001] Ch 340

that a lesser level of influence is sufficient. Therefore, the term ‘puppet master’ expresses more than what is required by the statute.

From the above cases, it can be clearly understood that the approach for holding a person responsible as a shadow director differs from case to case and is an arduous task as well.

WHO CAN BE A SHADOW DIRECTOR?

After understanding the criteria for determination of shadow directorship, the next point of discussion is who can be a shadow director. In India, under Section 149 of the Companies Act, 2013, it is mandatory for every company to have a board consisting of individuals.

It is clearly understood from this section that the Board of Directors must include a natural person and not any artificial person or a body corporate as a director. But when it comes to a shadow director, he can be anyone, as he is not formally appointed to the Board. Such directorship arises through the influence over the company, which is exercised by any person whether natural or not, as seen in various case laws.

In the case of **Standard Chartered Bank of Australia Ltd v Antico**²³ it was held that another company having a shareholding of 42% indirectly and control over the management and financial decisions of the company makes it a director of the insolvent company under the Australian Company Code.

A company can depend upon creditors or lenders for its financial requirements. In such situations, it becomes important to determine the role of such lenders as well. Sometimes Banks involve themselves in the management of a company which exposes them to the liabilities as directors of the company. A bank cannot be held as a shadow director if it functions within the limits of the agreements made with the company as a lender, it can even recommend consultants to advise on various strategies. Also, the person appointed cannot be held as a shadow director merely because of such a recommendation but the actual appointment should be done by the borrower of his own volition.²⁴

In the case of **American Express International Banking Corporation v Hurley**²⁵ it was

²³ (1995) 18 ACSR 1

²⁴ James O'Donovan; Banks as shadow directors; (1995) 25 VUWLR; available at <http://www.nzlii.org/nz/journals/VUWLawRw/1995/29.pdf>

²⁵ [1985] 3 All ER 564

observed that the bank should not give any directions or instructions to the consultant to avoid any suggestion of an agency relationship between the consultant and the bank.

If a lender is found to be in an agency relationship with a consultant, he or she can be held responsible as a shadow director.

In various cases, it can be seen that a person acting in his professional capacity cannot be considered a shadow director. In **Re Tasbian**²⁶ a chartered accountant who was engaged as an external consultant devised a workout plan himself, required company cheques to be countersigned by him, and started some major management decisions, particularly the transfer of the company's workforce to a shelf company and rehiring those employees for tax savings. The English Court of Appeal held him as a shadow director.

While dealing with shadow directorship, a question that comes into consideration is whether a shadow director is one from within the organization or can only be some external person. The answer to such a question is that a shadow director may be independent of or form a part of the internal management structure of the company as decided in the case of **Secretary of State Vs. Deverell**²⁷ where one of the defendants was involved in the internal management structure of the company.

From the above cases, it can be clearly understood that any person can be a shadow director depending upon the real influence that he has over the functioning of the organization.

IMPORTANCE OF DETERMINATION OF SHADOW DIRECTORSHIP

After discussing the identification criteria and various cases regarding the determination of such directors, the next important question that comes to our mind is the need for such determination. The Board of a company plays a huge role in its functioning. All the directors are in a fiduciary relationship and can be held responsible for the consequences of the decisions taken by them. But this is not the same with de facto or shadow directors.

They significantly influence the activities of the company without being a part of its Board officially and have no liabilities similar to that of a De jure director, as it is complex to fix their

²⁶ [1991] BCC 436

²⁷ [2001]

status as a Shadow director.

They have no formal agency, but their influence creates a hidden agency that leads the company and hence they should be liable as a De jure Director. They have major control over the decision-making of the company. Their role is important, especially when the company becomes insolvent or in cases of raising loans or funds from creditors or in management of the company's Capital and financial decisions etc., which could affect the company's management activities, reputation, and returns to various stakeholders. He can control the company in various ways:²⁸

- Exercise possession or use of the right of all assets or their significant share.
- The right of decisive influence on staffing, voting, appointment and removal of personnel, etc.
- The direct or indirect ownership in the company.
- Controlling transactions that determine the conditions of the economic activities and financial position of the company.
- Influencing the financial decisions relating to investments, taking loans, etc.
- Representing the company to various outsiders which influences their decision makings.
- The right to provide binding instructions to carry out the management functions.

Hence, the role of a Shadow director is huge in the company's decision making and it becomes important to determine their status and fix their liabilities.

DUTIES OF SHADOW DIRECTOR

One of the main characteristics of a company is its *own* legal entity separate from its directors and shareholders. This concept of separate legal personality and limited liability is well established in the English case of **Salmond v Salmond & co ltd.**²⁹ which benefitted the economic growth of the company as a form of business organization. The concept of corporate

²⁸ Oleksandra Viacheslavivna Kolohoida; The Concept of Shadow Directors' Liability under the United Kingdom and Ukrainian Legislation; Journal: Recht der Osteuropäischen Staaten; ReOS 03/16
www.ReOS.uni-goettingen.de

²⁹ [1897] AC 22

personality has given privileges to its management to take risks for the benefit of the company without bearing any liabilities personally. However, such privileges need to be balanced.

Directors are not liable in their personal capacity as long as they are working on the directions of the board. Though, they have some duties towards the company. They are in a relation of trust with the company and have various obligations towards it. They have to fulfill the responsibilities assigned to them. The Companies Act, 2013, which is the primary legislation governing companies in India, imposes certain duties and responsibilities on directors of companies. Section 166 of the act describes those duties, which include the duty to:

- (1) Act in accordance with the articles of the company.
- (2) Act in good faith in order to promote the objectives of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, and the community, and for protecting the environment.
- (3) Exercise his duties with due and reasonable care, skill, and diligence and exercise independent judgment.
- (4) Not to have a direct or indirect interest that conflicts, or may conflict, with the interest of the company.
- (5) Not to achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates.
- (6) Not to assign his office.

In case of breach of any such duties, a director is liable to face the consequences of his actions. He can also be penalized by the courts in such cases. His formal appointment fixes his liability easily, but a shadow director, as is not formally appointed, cannot be held responsible for such duties despite having a greater influence. A shadow director is deemed to be the director of the company and hence should be held responsible for his acts and should have the same duties as a formally appointed director. He should comply with the company's constitution and any laws applicable to the company and must act in the best interest of the company's shareholders. He also owes a duty to the company's creditors if the company becomes insolvent. It has been recognized by courts in various case laws that a shadow director and a de jure director are equal

in terms of their responsibilities towards the company.³⁰ Earlier, the Courts were reluctant to impose fiduciary duties on shadow directors on the basis that they did not assume responsibility for the company's affairs.

In the case of **Ultraframe (UK) Ltd v Fielding [2005]**³¹, the issue raised was whether a shadow director owes fiduciary duties to the company. The court while dealing with the issue held that as the indirect influence exerted by a shadow director didn't deal directly with the company's assets and hence would not be enough to impose fiduciary duties upon him.

It was also observed in this case that it is his duty to declare all his interest in any contract entered or to be entered by the company at the board meetings and also disclose interests in shares or debentures of the company. The Law places restrictions on property-related and financial transactions between the company and the shadow director, or any person related to him.

The case of **Vivendi SA Centenary Holdings Iii Ltd v Richards & Ors**³² has brought clarity to the issue of shadow directors' duties and obligations. In this case, the Court concluded that Ultraframe had understated the extent to which fiduciary duties are owed by shadow directors and found that the de jure director who has violated his fiduciary duties was acting under the directions of the Shadow director and found that the shadow director has been violating the fiduciary duty to act in the best interests of both the company and its creditors.

The Court in this case found that a shadow director owes fiduciary duties to the company and its creditors, at least for the directions and instructions given to the directors which he wanted them to act upon, as by doing so he is assuming responsibility.

So, a shadow director has duties, the breach of which leads to serious consequences, such as:

- The liability to contribute to the company's assets following the company's insolvency;
- Criminal sanctions for violations of directors' duties;
- Disqualification from being a director leading to the company's insolvency;

³⁰ Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia [1998], John v Price Waterhouse (unreported, 11 April 2001).

³¹ EWHC 1638 (Ch).

³² EWHC 3006 (Ch) (09 October 2013)

- Personal liability for violations of directors' duties.

SHADOW DIRECTORSHIP AND INDIAN LAW

Corporate law is the body of law administrating businesses, various forms of organizations, companies, persons, and their rights, conduct, and relations. In India, the major portion of law dealing with a company, i.e. from its formation to its closure, is the **Companies Act of 2013**. The Act was passed for the first time in 1956 by the parliament of India, which was amended from time to time. The Act of 2013 came to force on the 1st of April, 2014, replacing the Act of 1956. This act provides for the formation, registration, Functioning, appointment, remuneration, and removal of key managerial personnel, the procedure for winding up, penalties, and various other aspects of the companies formed in India. The act provides various definitions as well.

But the term 'Shadow director' is not specifically defined in the current Act or in any previous company law. The **J.J. Irani Committee** in its Expert Committee report on Company Law³³ under the Chairmanship of Dr. Jamshed J. Irani, dated 31st May 2005, has referred to "Shadow Directors" in clause 36.1. The Report suggested a legal framework that allows the attribution by recognizing the presence of a shadow director under whose directions the Board is accustomed to act. It also recommended that the law should be made to discourage Shadow Directorship and advocated for a framework that requires disclosure of the director's background, education, as well as relationships with managers and shareholders.³⁴

But no provisions have been made about such directors in the Companies Act of 2013.

Such directors fall under the definition 'Officer' which is given in **Section 2 (59)** of the act as "officer includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the director is or are accustomed to act." A similar definition was given under Section 2(30) of the Companies Act of 1956.

Some provisions under the Companies Act, 1956 which deal with this concept are:

³³ Expert Committee Report on company law, Available at: www.mca.gov.in

³⁴ AMITAVA BANERJEE; Shadow Directors - Myth or Reality; 17 January 2013, Available at: <https://www.caclubindia.com/articles/shadow-directors-myth-or-reality-16347.asp>

- **Section 7** which dealt with the interpretation of a person in accordance with whose directions or instructions the Board of directors of a company is accustomed to act, which clearly excluded those advising in a professional capacity.
- **Section 303(1) explanation (1)**, of the Companies Act, 1956, wherein details of any person in accordance with whose orders or instructions the Board of a company usually acts is required to be entered the Register of Directors.
- **Section 307(10)(a)**, of the Companies Act, 1956, wherein details of shareholdings by Directors need to be maintained including holdings by any such persons in accordance with whose orders or instructions the Board of Directors of a company is accustomed to act.

The Companies Act, 2013, deals with such Directors under various provisions. Some of these are:

- **Section 2(60)(v)** wherein, the meaning of ‘**officer who is in default**’ includes “any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity”. A similar definition was given under Section 5(e) of the 1956 Act.

The officer in default refers to a person who violates any provisions of the act and can be held liable for penalty or punishment with imprisonment or a fine. The language of the section clarifies that those acting in a professional capacity are an exception to such liability.

- **Section 219 (c)** which empowers the inspectors to investigate into affairs of any company whose Board is usually acting in accordance with the instructions or orders of any Directors of the company under investigation.
- **Section 336** which deals with the Offences by officers of companies in liquidation includes such person on whose directions the board of directors acts in the definition of officer for the purpose of this section. Similar references are given under section 339 also.

The **Accounting Standard 18** which deals with the related party relationships also recognizes the concept as the meaning of key managerial personnel also includes those persons in

accordance with whose directions or instructions the Board of directors of the company is accustomed to act.³⁵

In India, no specific provisions in law are made to Shadow directors directly accountable. They are being dealt with as officers and it is the court that decides their status and liabilities. Due to the lack of Indian precedents on this topic, the courts of India refer to precedents from English Law and other countries' jurisprudence.

Also, as no specific legal framework is available, it becomes difficult to identify shadow directors and fix their accountability, which has become an advantage for them to take benefit of their influence and dodge the liabilities easily.

CONCLUSION

The law in India has no specific provisions relating to Shadow Directors and the identification of such directors is clearly a challenging task. They play a serious role in the company's decision-making process. The identification of such directors is important to keep a check on the activities of such persons and to prevent them from escaping their obligations as such. Shadow directors have a clear influence over the Board and should have the same liabilities as de jure directors. A shadow director will be determined by examining the nature of the person's involvement, influence, and control over corporate conduct and policy and the facts of the case. From the various precedents, certain criteria to determine the status of any person as a shadow director that can be inferred are:

- A continuous pattern of the board acting in accordance with the directions of the shadow director should be present. A single compliance with orders cannot make any person a puppet master.
- Decisive and not only an advisory role: This parameter covers all those people who have a decision-making role in the affairs of the company except those acting in a professional capacity.
- Intention: The intention of the shadow director to control the members of the board must be visible.

³⁵ Accounting Standard 18 ; available at www.mca.gov.in

- Majority to follow—the compliance with the orders of the Shadow Directors by the Board of Directors.

The shadow directors play a significant part in the board's decisions in various matters of the company, from basic management activities to major decisions. Though they are not formally appointed, they have similar fiduciary duties towards the company as de jure directors. As the role of a shadow director revolves around the decision-making of the company, a proper law is required to keep a check on such directors in order to protect the various stakeholders of the company.