



# Mysuru Chapter e-Magazine

June 2021  
206<sup>th</sup> Edition

#### Vision

"To be a global leader in promoting good corporate governance"

#### Motto

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***Knowledge Series by CS Dr CHANDRATRE on the topic of "Managerial Remuneration".  
Topics Covered in this edition: Remuneration to certain category of Directors -Part II***



## From the Desk of Chairman

**CS Vijaya Rao**

*Chairperson  
Mysuru Chapter*

**Dear Professional colleagues,**

Hope all of you are safe and healthy! Happy PCS Day to all practicing Company Secretaries

Today being a PCS day, we should be proud of ourselves. This was the day in 1988 The Institute of Company Secretaries of India celebrated 'PCS Day' to commemorate, a historic day when the company secretaries in practice were accorded recognition for certifying the annual returns under the erstwhile Companies Act, 1956. Since then, Company Secretaries have been recognized in many areas. FEMA, Labour Law, GST, NCLT matters, Economic Laws, IBC and many more. Also, they are recognized in many services like management services, SEBI Act, and Certification under different laws. Opportunities are just expanding. And the most recent one is now PCS are recognized by SEBI to conduct due diligence under the SEBI (Delisting of Equity Shares) Regulations 2021 under Regulations 10 and 21. How we make use of all these is up to the individual. As said "Opportunity missed is a regret in the future". MOU signed between ICSI and ICSA allows eligible members to get the applicable countries membership by taking only few exams. So as years go by CS members are getting recognized globally.

As *William Arthur Ward* once said, "**Opportunities are like sunrises. If you wait too long, you miss them.**" - So let us make the best out of what is available and what is there in the future.

In the meantime, as many places are opening after being in lockdown, let us all stay safe and follow the guidelines issued by the government and by the frontline warriors in this pandemic. Let us all get vaccinated and stay safe.

Thanking you,



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Company Secretaries of India**  
**भारतीय कम्पनी सचिव संस्थान**  
**IN PURSUIT OF PROFESSIONAL EXCELLENCE**  
Statutory body under an Act of Parliament  
(Under the jurisdiction of Ministry of Corporate Affairs)

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## Chapter Activities

### CAREER AWARENESS PROGRAM

Chapter organized 6 online Career Awareness Program during the month of May 2021. The details are as follows.

S No.	Date	College Name	Speaker	No of Students
1	11.05.2021	Maharani's Women's Commerce & Management College - M.Com, Mysuru	CS Veerash Mysore Jagadish, M C Member - CCGRT, CoE & Mysuru Chapter N. Dhanabal, Chapter In charge	90
2	18.05.2021	JSS Women's College, Chamarajanagar - B.Com & BBA - 3 <sup>rd</sup> year	CS Phani Datta D N, Secretary- Mysuru Chapter N. Dhanabal, Chapter In charge	100
3	19.05.2021	JSS Women's College, Chamarajanagar - B.Com & BBA - 2 <sup>nd</sup> year	CS Harsha A, Vice Chairperson- Mysuru Chapter N. Dhanabal, Chapter In charge	100
4	20.05.2021	JSS Women's College, Chamarajanagar - B.Com & BBA - 1 <sup>st</sup> year	CS Harsha A, Vice Chairperson- Mysuru Chapter N. Dhanabal, Chapter In charge	100
5	20.05.2021	Teresian College, Mysuru	CS Keerthana Gopal, PCS, Mysuru	100
6	25.05.2021	Maharani's Women's Commerce & Management College - MBA, Mysuru	CS Ajay Madaiah B B., PCS, Mysuru N. Dhanabal, Chapter In charge	100



## STUDENTS STUDY CIRCLE MEETING

Chapter organized 2 online Student's study circle meeting during the month of May 2021. The details are as follows.

S No	Date	Topic	Speaker	No of Students
1	17.05.2021	Students Study Circle Meeting - Insider Trading	Ms. Mathruka B M, Professional Student	25
2	26.05.2021	Students Study Circle Meeting - FEMA	CS Skandan Jain, Advocate, Mysuru	35

## WEBINAR

Mysuru Chapter organized 2 webinars for Member & Students during the month of May 2021. The details are as follows.

S No	Date	Topic	Speaker	No of Students
1	14.05.2021	Relaxations Under Companies Act 2013 & Recent Amendments	CS Divesh Goyal, PCS, New Delhi	28
2	22.05.2021	Amendments to Schedule III of Companies Act, 2013 and related aspects	CA Ananth Prasad B R, Partner - Guru & Jana CA Prasanna Kumar Udupa, Captain - Guru & Jana	40

## OTHER PROGRAMS

S No	Date	Topic	Speaker	No of Students
1	16.05.2021	Toast Masters Club - Demo Session	Ms. Kavitha M Prakash, Toastmaster	25
2	27.05.2021	Special Lecture on CSR for Maharani's Women's Commerce & Management College	CS Veerash Mysore Jagadish, M C Member - CCGRT, CoE & Mysuru Chapter	100



## Over a Cup of Coffee With...



**Dr. (h.c) Advocate Mamta Binani**  
(B.com,FCS) & Insolvency Professional



Concept & Compilation:

**CS Pracheta M**

Practicing Company Secretary

**CS Dr Shobha Sridhar**

Practicing Company Secretary

**CS Pracheta:** *Our Star CS for this edition of E Magazine is past president CS Dr Mamta Binani. She is an inspiration to all of us, especially women professionals. We welcome ma'am for the interview we are thankful to her for making time out of her busy schedule and joining us for this interview.*

**CS Mamta Binani:** I thank the Mysore chapter and all the members of the team. I am deeply touched by the great initiative. I am sure the energy that comes to all of us not from the body alone specially people like you, me and so many others grappling with our schedules - I think the energy that comes more from within is of passion which gives you the fire in your belly than the physical energy that may have been stored somewhere. So I know how much it takes to come out with such tasks and how much dedication and self-motivation that you need to keep on continuing.

**CS. Pracheta:** *Going back in your memory lane, what made you to join this profession of CS. Please share with us how has this journey of CS and as a CS been overall?*

**CS Mamta Binani** I will be honest here. Just like governance comes from within, if you say something correct, you should not be thinking what the repercussion will be. I actually did not plan too well when I joined CS. Lot of my friends were doing it and I also joined, and you know at the time we had no proper guidance. I was quite studious. I used to always tell mom that people say to study, and you always tell me to not study! I was that kind of a person who always used to like 'drink my book'. When I joined CS, I realized it is something which is very appealing. Every day, I used to attend this oral tuition schemes. I could not take off my eyes from the books. I remember to study materials these were jewels which even lot of other professionals actually used. I felt that CS is something which is letting me know about the economy, about the economic laws. I felt that even if I don't become a CS, I'll become a better human being. Earnings were not important as being from a Marwari community, earnings if at all happens it will happen as a byproduct.

**CS. Pracheta:** *Once you cleared your CS did go for an employment or you started your own practice?*

**CS Mamta Binani:** Initially for training itself I joined an extremely good company. That was something which God had really been blessing me with and I joined Dolphin Laboratories Limited, a company which was just coming out with a public issue, and I got huge exposure. Madam Savitri Parikh was my first mentor and everybody in India knows her. I have been fortunate to have been trained by her. I was an All-India Topper and offer letters used to come for job opportunities etc somehow never attracted me and my spouse, my better half, he is also a professional from IIM Calcutta was surprised that I was not taking up the offers. I always told him that I want to start my own practice and I started practice from day one. My COP number is 2598 which means so few practicing CS were there at that time.

“The will to win, the desire to succeed, the urge to reach your full potential... these are the keys that will unlock the door to personal excellence”. Confucius

**CS. Shobha:** *You were the second lady president of our prestigious institute. What according to you enabled you to reach such great heights?*

**CS Mamta Binani** Very humbled by your question but honestly speaking, the almighty has been extremely kind. He picks up a few people & places them where they can serve others. When I look back, I just know about one thing about myself is I'm quite a sturdy person. I do not leave anything in between unless I really want to leave it. If I want to leave it, I just leave it & do not look back. This entire journey of president ship I really enjoyed I must say, and it was quite a lot of work; I used to sleep hardly for 3 hours I think not more than that. I used to be in office very early. I mostly stayed at the Headquarters sacrificing my right to visit various chapters as I felt that if I am in the headquarters, I'll be able to coordinate with the policy changes... So, this whole presidency just happened. I think I was so focused on my journey of reaching that mountain hill and I enjoyed the climb.

If anyone should get the credit of whatever you see me today it is actually my husband Sumit - my best half and one or two of my friends who just stood rock solid with me whatever I do and did. I never left any stone unturned as far as my efforts are concerned, balancing everything and taking care of practice, looking after children. What I'm trying to say from this interview is also that it's not so difficult if people like us & so many others across the country are able to make it in spite of being in a family mode. Today children are born with a kind of support in the sense that nobody today questions girl child as to why you want to work, why you want to go outside the house, why after marriage you still want to work. We had to face those questions. The person who stood by me was my husband. I did not know my potential, but he knew my potential. But having said all of it I must say that whosoever can do whatever for you but it is you only who has to rise up. You have to stand up. You have to take the call beyond the call of the duty to rise & show the world that you are capable; nobody is going to pat your back more than twice. You have to show that it's the family which is going to rise up then you see a lot of people working & walking together with you.

**CS. Pracheta:** *You are a great Orator. So how did this journey begin? Is it inborn or is it possible for somewhere to develop this skill?*

**CS Mamta Binani** I was always good at Hindi & English. In school, I had taken drama as extracurricular activities. I think that drama sessions may have helped me to develop some of it but that would not have been much. I had lost this stage fear due to drama sessions. Also, I love to read. I believe that even if you're able to retain 1% you are able to speak better. Another important thing is, I grab the opportunity to speak any time. I think I may have given more than 800 or



900 sessions till today if not more. Every time I take this pressure on to me for presentations. I may not be ready, I may need to burn my midnight oil as you need to prepare a lot. I think you know that pressure just helped me to grow because that is the time when you really go back to your books & search Google as to what is a right word that you can use. Even today you know sometimes when I get the time to read the newspaper I kind of read loud sometimes because I think it actually helps me to retain one or 2 words. I note down the meanings and try to use these words in my presentations. Then people compliment you that you speak well & this increases the confidence. Anyone can imbibe these skills. Leaders are not born, leaders can be developed.

**CS. Shobha:** *From what I just heard I think you like to take challenges. It is quite interesting as you are also speaking about the challenges what nowadays women or young girls feel so my next question is about gender equality & women empowerment. Do you feel women face multiple additional challenges as compared to men in their pursuit of professional growth or career? Did you face any special challenge in your career? What is your advice for women who want to be a successful professional?*

**CS Mamta Binani** You asked me a question which is actually very close to my heart, thank you. You may not get an answer which is something which you may be expecting from me so pardon me for that. I must seek an apology if anything hurt anyone, but I just wanted to say that it's very important that as mothers we are the ones who are creating responsible citizens, who are giving responsible citizens to this mother earth. I somewhere feel that we should start imbibing those values in a child which will help them to understand that each stage of life has to be lived. Today in our society we are seeing an undercurrent where girls and of course even the boys do not want to get married before the age of 35-40. They feel the need to get settled. Even the girls are responsible because we started having lot of demands from their counterparts that he has to have big car, housing, has to have a government job or non-government jobs. The point I'm driving home is I think flashy life versus a meaningful life is something which we move to inculcate in a child from very beginning. Value systems is something which needs to be taught to them, maybe small little things even thank you, calling names properly, be respectful etc. I will tell you the small little things make an impact on professional life. Do you think that it just comes suddenly by going to school and just being there hanging around with your friends? No, it comes from your family because that is where the child is kind of free without any form. Point that I'm trying to make is that there is always a tomorrow. In your life there's a concept of plug in and plug out, you know if at that point in time of your life one has to plug in to that family affair you should do it & plug out from the rest. I have always felt that children, especially girls are averse to anything else apart from a career and then they burnout themselves very fast. In life one has also to be a relay racer. You have to pass on the baton for some time to the family. If you talk to me about equality I will talk about equity. Our best part is our laws are so very conducive. Why is it that SEBI thinks that companies should have women directors? Look at the governance in panchayat level you have some seats marked for women. The point is our children have become too focused. It is good to be focused but at the same time the surroundings cannot be ignored. Values may not show up, but the lack of values will show up immediately. When a situation comes act with sound resolve. You should not react immediately think and then speak up. This is the most responsible thing that God has given us if this can be used properly.

**CS. Pracheta:** *You are a busy professional, so I really want to know how you manage your life you are an independent director on several boards you are an advocate now practicing and insolvency professional you are a speaker at various forums and to add on the roles you play in the family ... how do you manage all this? Any tips for work life balance.*

**CS Mamta Binani** I think God has given me the ability to manufacture time (laughs). Everybody has 24 hrs and so do I. I think I have learnt this art of probably really manufacturing time for myself just because I don't kind of waste my time I don't watch movies really. I don't go shopping, I don't have a very big friend circle I don't ever get into gossiping, I don't have any phone calls apart from my mom, sister and my daughter now that she is in Australia. I am not fascinated by anything else except the books that I always keep reading - Companies Act, Insolvency, newspapers. I love to learn all the time I always feel so un-satiated and thirsty for knowledge. There is so much to learn yet. There are pearls spread everywhere. Of late, I have started watching a serial on the insistence of my mother-in-law and there also I strive to pick life lessons; I don't watch it for entertainment but for education. I can make time for the people who require me be it social service or something like that. I like to get time for exercise for mentoring myself apart from doing everything else; I love to do all the kitchen work and handle all that and adopted multi-tasking skill. I have learnt the art to focus my eyes and ears. I am a very quick reader - in one minute or one and a half can read a letter. I am not having work life balance, but I am a person who will just balance and whatever I do, I leave everything aside and will be in that moment - be it a family event or otherwise.

**CS. Shobha:** *You have seen our profession grow. What is it that you look forward in the younger generation? What is your message to all those youngsters / students who are willing to join the profession wanting to join the profession and who are already there in our profession?*

**CS Mamta Binani;** I want them to be independent, but I also want them to be interdependent- it is a wide statement. We cannot exist alone. We need to mingle with a society this teaches us independence, to take calculated calls, take responsible decisions - best possible decision which enables you to get a wider picture objectively. Of late, education has somewhere given young generation lot of opportunities to earn money very quickly- by age of 20/21. This mostly distances them from their families and when they want to come back to the family around 40/42/45 the vacuum created is so much that it is very difficult for them to comeback. We have also become too self-centered - as a professional not be able to go a long way. Profession is of course earning for you. The youth today are in a very palpable stage, and they have to make very important decisions in their life. These kinds of sessions should be enabled to help them understand that profession will not run away. Timely things in life are also extremely important. Every step in your life which is sometimes thought to be extremely difficult only makes you better -even in your profession those experiences help you do so much better if you are doing from the forefront. I want to tell everyone - One always be on your toes only when you don't want to -like if you're on a holiday, don't be. Second, twice, thrice or 4 times people may take you for granted and for fifth time if they take you for granted, it is your weakness, If you showcase your weakness, the world is waiting to misuse that weakness. You should stand up for your rights. Third whatever has been written in our scriptures there are phases of life, I think they should be followed like Gruhastashram, Vaanprastha etc. One should be extra careful when you're doing anything in public specially also with regards to your body language because as a woman I think we carry a lot of unspoken things so we should be very careful. It's how you are projecting yourself. You should take care of your image because half of your job will be done by your image. As a girl or as a woman who is just stepping into the

profession from day one be very conscious as to the kind of image that you're projecting. Finally, always remember that it's tough people only who help you to become tough because when there are tough people in your life you want go an extra mile to prove yourself and that is the time you work on yourself. Thank those people who have been negative about you, not being very friendly with you. Just thank them because they are the one who have contributed hugely to your success.

The message I want to leave you all is that

***We, men & women, are the wheels of vehicle of life and have to work together. It is never Men vs. Women.***

***Thank you so much.***

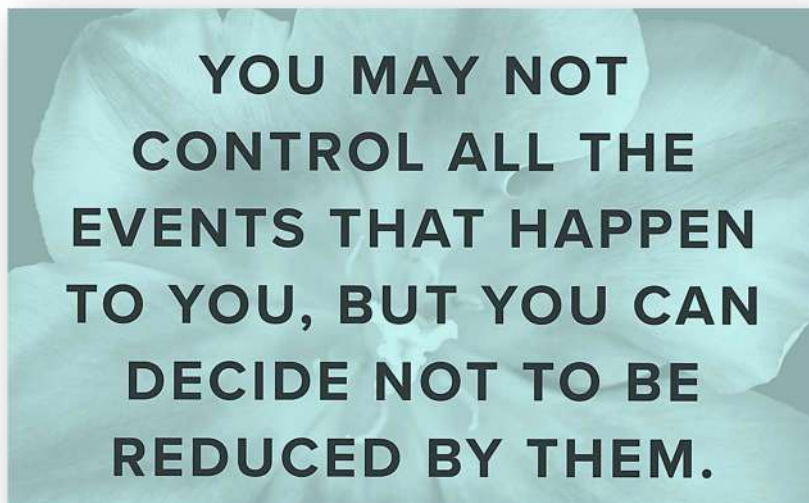
Thank you so much Ma'am. It has been a really enriching talk. It has not only been a professional learning but also it's a life lesson. We got so understand about so many values which you spoke about and also valuable suggestions and guidance.

We are sure all of our readers and also all those who will be watching the video will be inspired by whatever you have said. The main intention of the initiative is to give our readers and viewers are that excellence is what all of us strive for and nobody has reached there without hard work and perseverance. Those who are at the top have reached there by facing challenges and overcoming them.

***'Don't downgrade your dreams to fit your realities but upgrade your faith to match your destiny.'***

***For Complete interview please click below link***

***<http://bit.ly/interviewwithMamtabinani>***



# The Law relating to Remuneration of Directors under the Companies Act 2013 as amended up to 18 March 2021



**CS Dr Chandratre**

*Practicing company secretary*

*Email id: krchandratre@gmail.com*

The Law relating to Remuneration of Directors under the Companies Act 2013 as amended up to 18 March 2021 is analyzed and commented by renowned Senior Scholar CS Dr Chandratre for our readers. He gives an in-depth coverage on the topic in great detail. For the convenience of digital reading, the commentary is divided into six parts. Let's have this knowledge feast over six editions commencing from this edition. Below is the index to have quick reference.

Edition	Topic Covered	Brief Content
205 - Part I	Managerial Remuneration- Introduction	<ul style="list-style-type: none"> <li>a. Introduction</li> <li>b. Definition of Remuneration</li> <li>c. Over-all limits on remuneration</li> <li>d. Sub-limits of remuneration</li> </ul> <p>Please refer to the previous edition for this topic using the link given below: <a href="http://bit.ly/Edition205">http://bit.ly/Edition205</a></p>
206 - Part II	Remuneration to certain category of Directors	<ul style="list-style-type: none"> <li>a. Remuneration payable to Non-Executive Directors</li> <li>b. Remuneration to Non-executive Directors when Company has loss or inadequate.</li> <li>c. Fixed periodical payments to Non-Executive Directors</li> <li>d. Remuneration to Independent Directors in case of loss</li> <li>e. Consequence of default of loans</li> </ul>
207 - Part III	Remuneration to MD and WTD	<ul style="list-style-type: none"> <li>a. Sitting fees</li> <li>b. Remuneration to MD, WTD and Manager when a Company has loss or inadequate profits</li> <li>c. Conditions to be complied with</li> </ul>
208 - Part IV	Remuneration to MD and WTD continued	<ul style="list-style-type: none"> <li>a. Remuneration to MD, WTD and Manager- From two companies</li> <li>b. Recovery of excess remuneration</li> <li>c. Remuneration to Professional MD/WTD/Manager</li> <li>d. Remuneration for professional service</li> </ul>
209 - Part V	Meaning of Professional and profession	<ul style="list-style-type: none"> <li>a. Remuneration for professional service continued- Meaning of 'profession' and 'professional'.</li> <li>b. Supportive judgements</li> </ul>
210 - Part VI	Applicability to Private Companies	<ul style="list-style-type: none"> <li>a. Applicability of Section 196 and 197 to Private Companies</li> <li>b. SEBI (LODR), 2015 on Managerial Remuneration</li> </ul>

## Part II

### REMUNERATION OF NON-EXECUTIVE DIRECTORS

Non-executive directors of a company can be paid remuneration (besides sitting fees) in terms of clause (ii) of the second proviso to subsection (1) of section 197, which provides that except with the approval of the company in general meeting by a special resolution the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed, –

- (A) one per cent of the net profits of the company if there is a managing or whole-time director or manager.
- (B) three per cent of the net profits in any other case.

The Companies (Amendment) Act 2017 inserted the words by a special resolution in the second proviso to subsection (1). Thus, the approval of the members for payment of remuneration to a managing director/whole-time director/manager in excess of 3% or 1% under the second proviso, must be by a special resolution.

It should be noted that, as against the requirement of a special resolution under the second proviso, as stated above, payment remuneration in excess of 11% would require authorization from the shareholders by an ordinary resolution.

Remuneration to non-executive directors, within or in excess of limit of 3% or 1% may be paid either by way of commission or on monthly basis.

The Companies (Amendment) Act 2017 has inserted the following proviso after the second proviso to subsection (1):

"Provided also that, where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting."

The requirement under this proviso will have to be complied with by the company before starting payment of remuneration in excess of 3% or 1% to its non-executive directors.

The words 'except with the approval of the company in general meeting ... shall not' clearly indicate that firstly payment of remuneration to the non-executive directors (meaning directors other than managing and whole-time directors) upto 1% or 3% of net profits will not require approval of the members in general meeting and, secondly with the approval of the members of the company in general meeting, a company may pay remuneration to its non-executive directors in excess of 1% or 3% of the net profits. But this will be subject to the overall limit of 11%.

However, as per subsection (4) of section 197, the remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, in any of the modes stated below: –

- by the articles of the company,
- by an ordinary resolution or,
- if the articles so require, by a special resolution.

#### 1. REMUNERATION TO NON-EXECUTIVE DIRECTORS WHEN THE COMPANY HAS LOSS OR INADEQUATE PROFITS

From the provision in clause (ii) of the second proviso to section 197(1), it would appear that no remuneration by way of commission can be paid to any non-executive director (except sitting fees) in any financial year unless the company has profit in that financial year. But the amendments to section 197(3) by the Companies (Amendment) Act 2020 and in Schedule V by a notification issued on 18 March 2021 has changed this age-old hypothesis and it is now possible to pay remuneration to non-executive directors in the absence or inadequacy of profits in any financial year. This is discussed in heading 6 below.

**Subsection (3) of section 197 reads as follows:**

“Notwithstanding anything contained in sub-sections (1) and (2), but subject to the provisions of Schedule V, if, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including any managing or whole-time director or manager, or any other non-executive director, including an independent director by way of remuneration any sum exclusive of any fees payable to directors under sub-section (5) hereunder except in accordance with the provisions of Schedule V.”

The italicized words were inserted by the Companies (Amendment) Act 2020. The impact of this small amendment is quite large.

Since its enactment, the scheme of the Companies Act 1956 with regard to directors’ remuneration has all along been to disallow non-executive directors of a public limited companies to draw any remuneration from the company except fees for board meetings attended by them because non-executive directors’ remuneration has always been linked with profits which was popularly called ‘profit-linked commission’. , and only executive directors were allowed to draw remuneration being remuneration payable in the financial years when the company has a loss or inadequate profits.

This policy continued to hold ground even under the Companies Act 2013 until the passing of the Companies (Amendment) Act 2020. Pursuant to this amendment on 18 March 2021 the MCA issued a notification [No. S. O. 1256(E)] amending Part II of Schedule V (see amended Schedule V in Annexure II below).

What is the impact of these amendments? These amendments have significantly changed the policy concerning remuneration of non-executive directors (including independent directors).

- Firstly, henceforth public companies can pay remuneration to their non-executive directors even in the financial year of loss or inadequate profits, subject to the limits specified in the third column of the Table in Para (A) in Section II of Part II of Schedule V;
- Secondly, payment of remuneration in such a financial year will be permissible regardless of the percentage limits specified in section 197(1).
- Thirdly, non-executive directors functioning in professional capacity may be paid remuneration as per Para (B) in Section II of Part II of Schedule V;
- Payment of remuneration under Para (A) or Para (B) will require shareholders’ approval by special resolution and the explanatory statement annexed to the notice of the general meeting must set out information specified in Clause (iv) of the second proviso below Para (B) in Section II.



2. For more discussion, refer to discussion on Remuneration to Managing Director or Whole time Director or Manager when a Company has Loss or Inadequate Profits in upcoming 207th edition.

### 3. FIXED PERIODICAL PAYMENT TO NON-EXECUTIVE DIRECTORS

Under clause (ii) of the second proviso to section 197(1), as amended by Companies (Amendment) Act 2017, non-executive directors may be paid remuneration (either by way of commission on net profits or otherwise), without the members' approval, within the limit of 1% or 3% (as applicable to the company) and with the members' approval by special resolution in excess of the said limit, and this will enable companies to pay their non-executive directors' remuneration on monthly, quarterly or half-yearly basis.

In fact, subsection (6) explicitly provides that a director or manager may be paid remuneration either by way of a monthly/quarterly/half-yearly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other.

It is thus clear that non-executive directors can be paid remuneration either by way of commission after the end of a financial year on the basis of net profit computed in accordance with section 198 or by way of quarterly/half-yearly remuneration or partly by one way and partly by another way. For example, a company may pay a fixed monthly remuneration and pay more in lump-sum after the amount of net profit is available, but the total remuneration paid must be within the limit of 1% or 3% as applicable.

If a company wants to make payment to its non-executive directors (either all of them or some or one of them) at a fixed amount, it can do so and so long as remuneration to all non-executive directors (excluding sitting fees) in a financial year is within the 1% or 3% limit, only Board approval would suffice for such periodical payment, but if the total remuneration to all non-executive directors (including the fixed periodical payment to one or more directors) exceeds that limit, shareholders' approval by special resolution will be necessary. Such approval can be taken post facto and need not be a prior approval. But if the shareholders reject the resolution, the excess remuneration paid will be recovered, unless the recovery is waived (as discussed below).

### 4. CAN INDEPENDENT DIRECTORS BE PAID REMUNERATION WHEN COMPANY HAS LOSS?

Subsection (9) of section 149 of the Act provides as follows:

“Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.”

The expression 'profit related commission' is not defined, but it means commission based on or calculated on profits, which is the same as covered by clause (ii) of the second proviso to section 197(2), namely—

- (A) one per cent of the net profits of the company, if there is a managing or whole-time director or manager;
- (B) three per cent of the net profits in any other case.

The above provision of section 149 is “subject to the provisions of sections 197 and 198”. This means that an independent director may be paid remuneration in accordance with the provisions of section 197.

As noted earlier (see headings 5 and 6 above), according to clause (ii) of the second proviso to section 197(1), except with the approval of the company in general meeting by a special resolution, a company may pay remuneration to its non-executive directors up to-

- A. one per cent of the net profits of the company, if the company has a managing or whole-time director or manager;
- B. three per cent of the net profits, if the has no managing or whole-time director or manager.

Although the remuneration is linked to net profits in terms of percentage limits, unlike section 309 of the Companies Act 1956, this provision uses the word ‘remuneration’ and not ‘commission’.

According to subsection (6) of section 197, a director (including non-executive director and independent director) may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other.

Thus, subsection (6) allows payment of remuneration monthly as well as a percentage of net profit. If the company chooses to pay monthly remuneration, then calculation as a percentage of net profit is not required but the limit specified in clause (ii) of the proviso to subsection (1) will apply.

Where in any financial year a company has loss, it cannot pay remuneration calculated at one percent (or three percent) of net profit, because there is no net profit.

But, as will be seen later in this write up, according to subsection (9), if any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without approval required under this section, he shall refund such sums to the company, within two years or such lesser period as may be allowed by the company, and until such sum is refunded, hold it in trust for the company; and according to subsection (10), the company shall not waive the recovery of any sum refundable to it under sub-section (9) unless approved by the company by special resolution within two years from the date the sum becomes refundable.

Thus, a company may pay remuneration in the financial year of loss, to non-executive directors (including independent directors) if it is approved by the shareholders by a special resolution and such resolution also waives the recovery of the remuneration paid/to be paid.

For more discussion, refer to discussion on Remuneration to Managing Director or Whole time Director or Manager when a Company has Loss or Inadequate Profits in upcoming 207th edition.

## **5. CONSEQUENCE OF DEFAULT IN REPAYMENT OF LOAN, ETC**

As per the third proviso to section 197(1), where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting.

This proviso is applicable to both the provisos to subsection (1). Therefore, a company must comply with this proviso whenever it proposes an ordinary resolution under the first proviso or a special resolution under the second proviso.

...to be continued

## Employment Related Disputes in India – Emerging Trends



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One of the most common types of employee disputes is based on discrimination. ... For example, an employer may refuse to hire, fire, demote, change work hours, reassign, decrease pay or take some other action that adversely affects the employee's conditions of employment.

Other types of disputes are related to Right to a safe workplace, free of dangerous conditions, toxic substances, and other potential safety hazards; Right to be free from retaliation for filing a claim or complaint against an employer (these are sometimes called "whistle-blower" rights); and Right to fair wages for work performed

Section 2(K) of the Industrial Dispute Act, 1947 defines "industrial dispute" means any dispute or difference between employers and employees or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment.

Tension in the workplace can be a result of multiple factors. Such as job dissatisfaction, cultural differences, personal aspirations, and many more.

The principal sources of law and regulations relating to employment relationships in India are the Constitution of India, labour statutes, judicial precedence and collective and individual agreements. There are as many as 165 labour laws, including nearly 50 central (federal) laws. Most of the employment laws are applicable to employees in the worker category (blue-collar employees) and specifically deals with the applicability of statutes to workers, although some aspects relating to the non-worker category of employees have also been covered.

The government on India to facilitate ease of doing business have now drafted 4 important labour codes like "The code on social security, The code of wages, The industrial Relations Code and The code of occupational safety, Health and Working conditions Code" which will replace the existing complex labour laws in this country.

A worker is defined under the Industrial Disputes Act 1947 as a person who is employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, excluding a person who is in a managerial capacity or a vice president, manager, CEO etc. who we normally call the “White Collar Employee”

Disputes may arise in a factory with workmen or in an office with “White collar Employees”.

This article, discusses the situations where such disputes may arise between white collar employers and employees at various stages of their relationship which can be classified as

1. Pre-employment,
2. During employment
3. Post-Employment

### **1. Pre-Employment**

Many companies have a preemployment screening policy, with an objective of gaining a degree of certainty that the potential employee does not have a criminal record involving dishonesty, or breach of trust involving his/her fiduciary or official capacity, or has not misused his/her official or fiduciary position to engage in a wrongful act including money laundering, fraud, corruption etc. Such a screening policy may raise concerns of violation of the right to privacy of the persons being subjected to such screening, The Nine Judge Bench of the Supreme Court in Justice K.S Puttaswamy (Retd.) v. Union of India and Ors. recently held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution. The judgment has defined nine different kinds of privacy and one of them includes Informational Privacy.

Therefore, employers usually get the following declaration signed as a pre-employment contract or make sure that these clauses are added in the employment contract.

“You hereby consent to the conduct of background and/or reference checks (including academic and professional records, employment history, criminal records, verification of address, etc.), and agree that this Agreement is entirely conditional upon any background and/or reference check returning results satisfactory to the Company, and upon the Company having no issue with any disclosures you make or have made about criminal charges or convictions. If the Company, at its sole discretion, is not entirely satisfied with the result of any background and/or reference check, the Company may withdraw this offer of employment any time prior to the Commencement Date. It is further clarified that if the employment has already commenced under this Agreement by the time the background and/or reference checks are completed, the Company has the right to, at its sole discretion, terminate the Agreement immediately, without notice, if the results yielded are not satisfactory”.

Apart from the above, the following scenario may also give rise to pre-hire employment disputes: -

- a. When the employer withdraws employment offer prior to the employee’s joining.
- b. When the employee’s background check results are unsatisfactory, or the employee provides disclosures or misrepresents to the prospective employer.

### **2. During Employment**

Misconduct or indiscipline of an employee, insider trading, indulging in criminal activities, under-performance, breach of the terms of the employment contract or HR policies/code of conduct etc., are few of the contentious issues which may ultimately lead to a dispute.

Some disputes occur due to a simple misunderstanding or disagreement. While other disputes can arise from a much deeper underlying issue, such as conflict in personality, political views, religious beliefs, and more. If left unresolved, these conflicts can escalate to more serious matters in the form of bullying, harassment, and violent behaviour.

Some of the common forms of workplace conflict:

1. Most personality clashes are the result of a clash in perception towards person's character, motives, or behaviour.
2. Style of leadership with bullying or harassment.
3. Political, cultural, and religious views
4. Pay dispute.

Disputes on employee agreements may be broadly two kinds on restrictive covenants in the agreement and in operation during the term of employment which are non-compete and non-disclosure of confidential information.

If the employee is in breach of a non-compete restriction, prohibiting him/her from engaging in any kind of business or activity which is similar to the company's business, or making a mandate to not disclose or misuse confidential information or trade secret passed on to the employee, during the course of his/her employment then such breaches would inevitably lead to a potential dispute.

In cases where the employee voluntarily resigns or retires from employment, it is unlikely to happen that there will occur a dispute (unless there are elements of a breach being committed by the employee). In contrast, termination of employment by the employer often leads to a stand-off between an employee and employer.

Termination of employment due to misconduct, breach of the employment agreement including violation of restrictive covenants therein, is often escalated and settled through resort to courts. An important factor to be considered in a dispute relating to termination of employment by the employer is whether the employee being so terminated enjoys statutory protection of employment such as a "workman" as defined in the Industrial Disputes Act, 1947 ("IDA") and/or protection under the state-specific labour laws such as the Shops and Establishments Act.

### **Post Termination of Employment**

The covenants restraining employees from joining competitors after the cessation of employment are often found in modern day employment contracts. Restrictions in this category may also prevent a former employee from starting a competing business or advising a family member or relative who is in a similar line of business.

A breach of post termination clauses often forces the employer to seek advice on the legal recourse available to it. Indian courts however prioritize the protection of rights of an employee seeking employment over protecting the interests of the employer seeking to protect itself from competition.

In view of the Constitution of India and the provisions of the Indian Contract Act, 1872, ("Contract Act") courts have generally held that the right to livelihood of the employees must prevail over the interest of the employer, in spite of an existing agreement between the employer and the employee.

Section 27 of the Indian Contract Act-1872 provides that "Every agreement by which anyone is restrained from exercising a lawful profession or trade or business of any kind, is to that extent void" there are however exceptions to this rule, like , One who sells goodwill of a business with a buyer to refrain from carrying on a similar business within specified local limits so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein provided that such limits appear to the court reasonable, regard being had to the nature of business.

In the case of 'Niranjan Shankar Golikari Vs the Century Spinning and Manufacturing Company Ltd.', the Hon'ble Supreme Court observed that- "restraints or negative covenants in the appointment or contracts may be valid if they are reasonable".

Further in V.F.S. global services Pvt. Ltd Vs Mr. Suprit Roy, 2008(2) Bom CR 446, the Bombay High court established the principle that a restraint on the use of trade secrets during or after the cessation of employment does not tantamount to a "restraint on trade" under section 27 of the Act and therefore can be enforceable under certain circumstances.

Like these there are several other judgments of various High courts which have laid down certain tests or guidelines to check the validity and legality of imposition of restrictions on such noncompeting agreements. It shows that Indian courts may in certain circumstances enforce confidentiality agreements intended to protect an employer's proprietary rights.

It is therefore recommended that the below clauses is incorporated in all employee agreements

"It is agreed by the Employee that he shall not, either on his own or by or through any Person including but not limited to any director, shareholder, officer, investor, joint venture partner, affiliate, manager, employee, representative, advisor or consultant engage in or establish or develop or promote or start or conduct or do any business similar to that of the Employer or similar to or in any way competitive with the business of any of the employer's companies or subsidiary or group companies in and around the whole of Karnataka Region for a period of 5 (Five) years from the date of his resignation or termination of employment and it is only fair on the part of the employer's since the Employee has extensive knowledge of the product and have well established connections in the industry in which the employer operates.

In case the Employee is found to have been violating this Clause above, he shall be liable to pay a penalty to the Employer as compensation.

In the event that any of the above restriction(s) shall be found to be void by the courts, but would be valid if some part thereof was deleted or the scope, period or area of application were reduced, the above restriction shall apply with the deletion of such words or such reduction of scope, period or area of application as may be required to make the restrictions contained above valid and effective and such revised covenants together with the remaining covenants shall continue to bind the employee.

The Employee shall, without the prior written consent of a duly authorized officer of the Employer, directly or indirectly solicit, hire or otherwise retain as an employee, consultant, independent contractor or otherwise any current or former employee of the Employer (company) or its Affiliates, subsidiaries, associates, from the date of his resignation or termination of employment for a period of twelve (12) months".



In the time of cutthroat competition and high employee turnover rate, the employers usually try to protect their trade secrets and in order to compete in the market, make their employees sign contracts/agreements which restrain their employees on various counts from disclosing the trade secrets or from working with the competitors. These agreements must be drafted in such a way that they do not hamper the growth of the employee as well as secure the interests of the employer.



## Legitimate Entities to Loan u/s 185



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### SHORT SUMMARY:

In this Research editorial, the author begins by referring the provisions of Section 185 of Companies Amendment Act, 2017 (Loan to Directors and entities in which directors are interested). The main focus of this research editorial on “Which are the entities to whom Company can give Loan/ Guarantee/ Security etc” under Section 185 of Companies Act, 2013 after amendment by Companies Amendment Act, 2017 .

### Background

Section 185 of Companies Act, 2013 corresponds to section 295 of the Companies Act, 1956, section 86D of the Indian Companies Act, 1913 and section 190 of the English Companies Act, 1948. It has been made effective from 12-9-2013

### Provision as per Companies Amendment Act, 2017:

Section 185 of Companies Act, 2013 has been completely substituted by New Section 185 under Companies Amendment Act, 2017 (CA, 2017 got president assent on 3rd January, 2018). Due to Complete substitution there are many changes occurs in practical use of this Section.

### A. What is Term ‘LOAN’:

Section 2 of Companies Act, 2013, does not define “loan”. A loan is defined by the Oxford English Dictionary as “ a thing lent; something the use of which is allowed for a time, on the understanding that it shall be returned or an equivalent given, a sum of money lent on these conditions and usually with interest

The Supreme Court in the case of Shree Ram Mills Ltd v. Commissioner of Excess Profit Tax, MANU/SC/0054/1954;

**B. PROVISION OF SECTION 185 AS PER COMPANIES ACT, 2013:** Same can be read in depth on the below mentioned link:

<http://www.csdiveshgoyal.info/2015/11/loan-to-director-185-b-ackround-this.html>

**C. Provision as per Companies Amemdment Act, 2017:**

Section 185 of Companies Amendment Act, 185 Divided into 3 (three) Parts:

- **Subsection 1:** This Subsection states about “Ristricted Entites” to give Loan, provide Security or Guarantee under Companies Act, 2013. This Subsection includes only “Individuals” and “Firms”.
- **Subsection 2:** This Subsection states about “loan to Private Company / Body Corporate” by following compliances.
- **Subsection 3:** This Subsection states about “entities Loan/ Guarantee/ Securities to whom allowed” without complying with the conditions of Subsection 2.

**NOTE:** It can be opine that entities which are not covered under above 3 situations are free to Give Loan/ Guarantee /Securities without any default / compliance of Section 185.

**Language of Section 185:**

**(1) No Company (Private & Public)**

- Directly or Indirectly
- Advanced any loan, including Book Debt
- Or any Guarantee or provide any security in connection with any loan taken by

**Following Persons**

- I. Any director of Company, or
- II. Any director of a Company which is its Holding Company, or
- III. Any partner of Director of lender company, or
- IV. Any relative of Directors of Lender Company, or
- V. Any firm in which any of Director of Lending Company is Director, or
- VI. Any firm in which any relative of Director of lending Company is Director.

**Points to be kept in Mind while Complying according to this Section**

- a) This Subsection applicable on Public Limited as well as Private Limited Company (whether small, OPC, Start ups etc.)
- b) Guarantee or Security in respect of only ‘Loan’ is covered.
- c) Only individuals/ firms are covered in sub section 1.
- d) Companies / body corporates are not covered in above sub section

**(2) Following loan can be given by company to Any Person with whom directors are interested after fulfilling the Conditions mentioned below:**

- Advance any loan, including loan represented by a book debt

- Give any guarantee in connection with any loan taken
- Provide any security in connection with any loan taken

**Any Person:**

- Any Private Company of which any such Director is a Director or member;
- Body Corporate in which 25% or more voting power rests with one or more directors;
- Body Corporate whose Board accustomed to act on directions of BOD or Directors of lending company

**Conditions:**

- Special Resolution passed by the Company in General Meeting.
- The loans are utilized by the borrowing company for its principal business activities.

**Points to be Kept in Mind while Complying according to this Section**

- If borrower is a Private Limited Company having common directors/ members then by using this sub section loan can be given.
- Body Corporate includes LLPs, therefore as per, point (ii) of any person L/G/S can be given to LLP also. [Condition 25% or more voting power vested with one or more director of lender Company together].

**3) Restrictions of Sub Section (1) and (2) shall not be applicable on following transactions:**

**i. Clause (a): Loan to Managing Director & Whole Time Director:**

There are two ways to give Loan to Managing and Whole Time Director only.

- Loan can be given to a Managing or Whole-Time Director as a part of the condition of their service.

**Conditions:** Conditions should be available for all the employees of the Company.

- Loan can be given to a Managing or Whole-Time Director pursuant to any Scheme.

**Conditions:** Scheme should be approved by Shareholders by passing of Special Resolution.

**ii. Ordinary Course of Business:** a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three year, five year or ten year Government security closest to the tenor of the loan; or

**iii. Wholly owned Subsidiary:** Any loan made by a Holding Company to its Wholly own Subsidiary Company or any guarantee given or security provided by a Holding Company in respect of any loan made to its wholly own subsidiary Company Give any guarantee in connection with any loan taken

**iv. Subsidiary:** Any guarantee given or security provided by a Holding Company in respect of Loan made by any Bank or financial institution to its subsidiary Company.

**Conditions:**

In case of Guarantee on behalf of Subsidiary loan made under this clause utilized by the subsidiary company for its principal business activity only.

**Food for Thought:**

- i. Clause (a) : Whether loan to “Manager” whether condition to its services or scheme shall be exempt from the restriction / compliances u/s 185.
- ii. Clause (b): Whether all the Loan/ Guarantee /Security given under ordinary course of business are exempted u/s 185.

**LIST OF PERMISSIBLE LOAN/ GUARANTEE/ SECURITIES UNDER SECTION 185**

As per provisions of Section 185 a Company can give Loan / Guarantee / Security to following below mentioned Persons/ Entities after complying with provisiosn of Section 186.

**Note:**

All Companies have to keep in mind i.e. “No Company can give Loan/ Guarantee / Security without complying with the provision of Section 186 of CA, 2013”. In other words ‘It is mandatory for each and every company to comply with the provision of Section 186 while giving any L/G/S.

**A. List of Restricted Person:**

*A Company can't give Loan/ Guarantee/ Security to following below mentioned person:*

**I. Not Allowed**

- i. Any director of Company, or
- ii. Any director of a Company which is its Holding Company, or
- iii. Any partner of Director of lender company, or
- iv. Any relative of Directors of Lender Company, or
- v. Any firm in which any of Director of Lending Company is Director, or
- vi. Any firm in which any relative of Director of lending Company is Director

**II. Not Allowed if fails to pass special resolution:**

- i. Any Private Company of which any such Director is a Director or member;
- ii. Body Corporate in which 25% or more voting power rests with one or more directors;
- iii. Body Corporate whose Board accustomed to act on directions of BOD or Directors of lending company

**B. List of Permissible Person:**

**III. Allowed if, Special Resolution Passed:**

- i. Any Private Company of which any such Director is a Director or member;
- ii. Body Corporate in which 25% or more voting power rests with one or more directors;
- iii. Body Corporate whose Board accustomed to act on directions of BOD or Directors of lending company

**Note:**

Loan to above mentioned entities are allowed after fulfilling below mentioned both conditions:

- i. Special Resolution passed by the Company in General Meeting.
- ii. The loans are utilized by the borrowing company for its principal business activities.

IV. Allowed without falling u/s 185(1) and (2):

- i. Loan to Managing Director or Whole Time Director.
- ii. L/G/S under ordinary course of business.
- iii. L/G/ S to wholly owned subsidiary Company
- iv. Loan to Subsidiary Company.

**Note:**

Loan to above mentioned entities are allowed after fulfilling condition mentioned above.

**V. Allowed without falling u/s 185:**

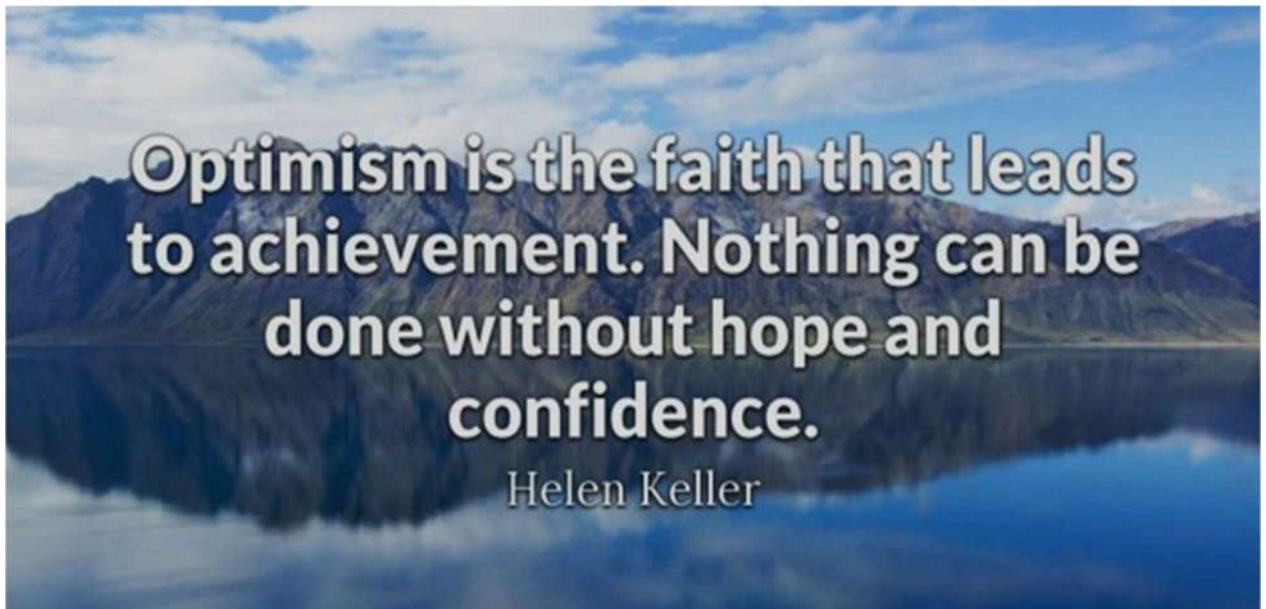
- i. Loan to any Public Company (having common Director/ Shareholder or not).
- ii. Private Company fulfilling all 3 conditions mentioned in Exemption Notification dated: 05th June, 2015.
- iii. Guarantee / Security provided for the purpose other than loan taken by other entity.
- iv. Loan to Holding Company (subject to condition that holding Company doesn't have common directors)
- v. Loan to Subsidiary Companies (subject to condition that subsidiary Company doesn't have common directors)

**Note:**

Above mentioned entities do not fall u/s 185, therefore Company can give Loan/ Guarantee/ Securities to above mentioned entities freely without any restriction / compliance of Section 185.

(Author - CS Divesh Goyal, GOYAL DIVESH & ASSOCIATES Company Secretary in Practice from Delhi and can be contacted at [csdiveshgoyal@gmail.com](mailto:csdiveshgoyal@gmail.com)). Disclaimer: The entire contents of this document have been prepared on the basis of relevant provisions and as per the information existing at the time of the preparation. Although care has been taken to ensure the accuracy, completeness and reliability of the information provided, I assume no responsibility therefore. Users of this information are expected to refer to the relevant existing provisions of applicable Laws. The user of the information agrees that the information is not a professional advice and is subject to change without notice. I assume no responsibility for the consequences of use of such information. IN NO EVENT SHALL I BE LIABLE FOR ANY DIRECT,

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## The Perspective

Earlier, companies incorporated in India could list their debt securities on international exchanges (Masala Bonds) but their equity share capital could be listed abroad only through the American Depository Receipt / Global Depository Receipt route. Direct listing of the equity share capital of companies incorporated in India was not permitted on foreign exchanges and vice versa.

Considering the evolution and internationalization of the capital markets, and to facilitate companies incorporated in India to directly list their equity share capital abroad and vice versa, the Securities and Exchange Board of India (“SEBI”), the capital markets regulator of India, constituted a high-level committee comprising of members of SEBI, top financial institutions, and law firms of India on June 12, 2018. The committee submitted its report in December 2018 (“SEBI Report”) where it strongly recommended for direct listing. The issue of allowing Indian companies to access foreign capital markets was always a topic of discussion in the Indian industry and regulatory circles. So, it was no surprise when the lockdown prompted the Finance Minister to take proactive measures to open another liquidity tap for the Indian corporates through overseas listing.

Until now, the companies that raised funds from public investors on overseas exchanges were considered as listed companies in India as well, and subject to stringent rules and regulations mandated by the Securities and Exchange Board of India (SEBI). From now, companies listed abroad would not be considered as public companies in India and hence, would not need to comply with the norms for listed companies. With the change in rules, an Indian company that lists overseas would only need to comply with the regulations for public companies within that particular jurisdiction. The move is also expected Indian companies to register in other markets such as London, Singapore for raising capital and going global. They can very well do so while remaining purely an Indian entity.

## The companies (amendment) act, 2020 (“act”) - overseas direct listing:

The Government, on 17 March 2020, introduced the Companies (Amendment) Bill, 2020 in the Lok Sabha, which, among a series of changes to the Companies Act, 2013, includes provisions that provide for Indian companies to list securities directly on overseas stock exchanges. The proposed amendment is enabling in nature.

- The Act provided for amendment in Section 23, Companies Act, 2013 which provides for ‘Public Offer and Private Placement’ whereby the following sub-clause was added:
- “(3) Such class of public companies may issue such class of securities for the purposes of listing on permitted stock exchanges in permissible foreign jurisdictions or such other jurisdictions, as may be prescribed.

- (4) The Central Government may, by notification, exempt any class or classes of public companies referred to in sub-section (3) from any of the provisions of this Chapter, Chapter IV, section 89, section 90 or section 127 and a copy of every such notification shall, as soon as may be after it is issued, be laid before both Houses of Parliament.”

### **Permissible Foreign Jurisdiction:**

Section 23 (3) (inserted through amendment) under the Act states that public companies may issue such class of securities to be listed on permitted stock exchanges in ‘permissible foreign jurisdiction’. The term ‘permissible foreign jurisdiction’, as per the SEBI Report, may include a jurisdiction which has treaty obligations to share information and cooperate with Indian authorities in the event of any investigation. It was recommended that Permissible Jurisdiction should be defined to mean a jurisdiction:

- that is a member of the Board of International Organization of Securities Commissions (“IOSCO”), and whose securities market regulator is either a signatory to the IOSCO’s multilateral memorandum of understanding or is a signatory to a bilateral memorandum of understanding with SEBI for information sharing arrangements; and
- that is a member of the Financial Action Task Force (“FATF”); and
- that is not identified in the public statement of the FATF as:
- a jurisdiction having strategic anti-money laundering or combating the financing of terrorism deficiencies to which countermeasures apply; or
- a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies;
- any other jurisdiction notified by Central Government in consultation with SEBI and / or other regulatory authorities, following an overall review and evaluation of such jurisdiction’s capital markets regulations.

The conditions under which companies will be allowed to list directly on foreign exchanges will be based on meeting certain thresholds including average profit over the past three years, paid-up share capital, securities premium and the value of intangible and tangible assets of the company,

### **Benefits of Direct Listing**

This Amendment would enable to companies to raise money through direct listing hence improving the ease of doing business in India. The Act facilitates for issuing securities in permissible foreign jurisdictions which will offer the following benefits to the eligible companies :

- **Alternate source of capital:** Companies incorporated in India can benefit from accessing capital markets outside of their country of incorporation leading to reduction in the cost of capital. The cost of capital in India is still higher vis-à-vis that for a foreign corporate thereby putting the Indian company at a disadvantage in the global marketplace. Raising capital through cross-border listing helps to attain more financial stability and generate a huge volume of capital.
- **Attract higher valuations:** The markets hit by COVID-19, and the upcoming start-ups will benefit extremely from the overseas listing. The companies would get access to a larger pool of capital. This will facilitate the Indian companies to compete with foreign entities and attract higher valuations.

- **Diversified Investor Base:** The diversified investor base will increase the demand for the securities of the companies and help broadening and diversifying the pool of investors that can acquire and trade the company's shares.
- **Other strategic benefits:** Additionally, companies incorporated in India may also derive other strategic benefits from listing on a foreign stock exchange, increase in their brand awareness and visibility, and by gaining a currency of exchange with which to pursue their international expansion plans.

## Conclusion

Though direct listing is expected to benefit all companies looking to raise capital but want to test waters in more mature and stable markets abroad, it is likely to be lapped by start-ups and companies in the technology space which are always looking at raising the capital from the market. Is it the right time for Indian companies to access foreign capital markets? The answer is not very straightforward. The global economy overall has taken a severe hit because of the pandemic. The 'great lockdown' as they are calling it, has seriously affected developed economies like the US and the Euro zone. Will all Indian companies who wish to list their shares abroad get the best of both worlds? Will it result in best value unlocking? The answer is, may be.



## HELP YOURSELF

*Food for Thought*



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## Think and Grow Rich

-by Napoleon Hill

After reading this title 'Think and Grow Rich,' if you're wondering why I chose this for a community of corporate professionals for whom their career or path chosen is already rewarding or promising, please hear me out. This book and many other books on money like, the Rich Dad and Poor Dad by Robert Kiyosaki, when observed, we find out one most remarkable point to be noted- these books guide us that one of the most fundamental steps in earning well or having a successful life is to work on our personality, our thoughts and actions.

So, this book treasures some of the greatest life lessons for one to mold oneself into a wonderful person and money and success will simply come one's way. This is one of the most celebrated self-help books and has been a bestseller for over 70 years!

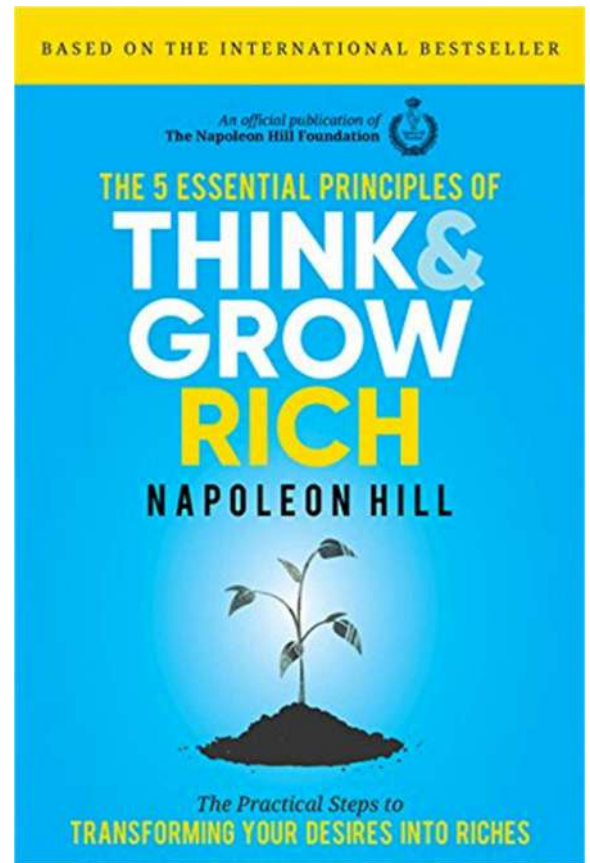
Written in the early 1900s, the anecdotes shared in the book are still relevant at these times. The book also has some wonderful quotes and even poetry that carry immense meaning and can remain etched in your memory.

As the articles under this column aim to only give you a trailer of the book to make you interested in picking it up and reading it by yourself, I'd like to share here only a few powerful ideas from the book.

The author shares an anecdote titled 'Desire Outwits Mother Nature' which is about how his son was born without any physical sign of ears and therefore did not have hearing ability. Yet, the author challenged the opinion of doctors that his son would be unable to hear and speak all his life and with the author's strong desire and relentless steps taken by him to help his son develop the ability to hear turned fruitful. His son, Blaire, later worked for other people and kids who had difficulty in speech and hearing and became instrumental in developing a device that worked as a hearing aid. The author pens his life learning from this as follows- "If Mother Nature bends to the will of desire, is it logical that mere men can defeat a burning desire?" This also reminds us of the most famous and euphoric quote by Paulo Coelho in his book 'The Alchemist'- "And when you truly want something, all the universe conspires in helping you to achieve it."

There are many short lessons in the form of stories and anecdotes in the book which are must-reads. Let me share a small part of one interesting poem from this book, it is quite rare that self-help books have poems in them. This also serves as a nice way to remember these lines so that we implement them more than often. The paragraph of the poem is as follows:

*Life's battles don't always go  
To the stronger or faster man,  
But soon or late the man who wins  
Is the man WHO THINKS HE CAN!*





## BIOTECH

Hi ever one, Hope all of you are healthy and safe.

When we think of Nature we think of green lands, forest, rivers green mountains and etc. and when we think about technology we think about metals, electricity, wires, batteries etc. But there is branch in technology which is integrated with Nature and Biology that is Biotech.

Bio tech is a special branch of science that deals with the biology with the help of tech, but we might say what the significance of Biotech is?



Let's take food for example. In the recent study according to 2019 report, there are about 737.35 crores of people all around the world. Existing resources like water, food and land are not enough to address the basic needs of human beings. More than 4.6 billion hectares of forest is converted into agricultural land, do you know just to grow one kilogram of rice we need more than 5000 liters of water, just in India around 103 million tons of rice is consumed in 2019-20, just think of how much land and water resources require, another source of food was fishing but that is also not enough compared to the rapidly increasing population, few factors like overfishing, fishing of endangered species results unbalanced ocean ecosystem. Biotechnology helps in these fields. Biotechnology can a compelling way to bring the environment into balance.

Biotechnology helps to get more yield even in small agricultural land by using minimum amount of water, developing hybrid crops which can withstand the climate change and which can reduce the usage of pesticides, crops which can be grown in any season and on any land, using some simple organic manures, and many more. Which helps in maintaining the healthy ecosystem without harming the nature.

There is another very powerful and effective ways of using biotechnology is using living organisms to clean oceans and reduce toxic waste. Due to the research and recent developments researchers have developed genetically coded living organisms which can purify water without effecting other living organisms in water, reduce toxic wastes and other harmful materials weather on land or in water, breaking down non soluble materials which fastens decomposition and many more.

There are continuous research and development on biofuel, which can be the future of the transportation, energy generation. Just to give an example, United states and Brazil have recently extracted ethanol from corn and sugarcane which is an additive to automotive gasoline, Ethanol is an alcohol fuel which provides high quality, high octane for exceptional engine performance and reduced emissions. Bio diesel can be created from algae and other plant sources which are considered as a renewable sources unlike fossil fuels such as petroleum, coal and natural gas.

The Implications and effect of biotech is far more than mentioned. There are still more fields yet to be discovered and explored in the field of biotechnology *“where nature and humans can thrive together with harmony”*.



**CS MINERVA**  
*The Student's Corner*



**CS Lalit Rajput**  
Practicing Company Secretary  
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## “Cyber Laws :- Digital Safeguard against Internet Frauds”

Cyber Laws refers to the term used to describe the legal issues related to use of communications technology, particularly "cyberspace", i.e. the Internet. Cyber Laws Provides legal recognition to electronic documents and a framework to support e-filing and e-commerce transactions and also provides a legal framework to mitigate, check cybercrimes. These laws are formed by keeping several issues into consideration such as our society, morals, computer ethics, etc.

Cyber law provides legal protections to people using the internet including both businesses and regular citizens and applied to the internet and internet-related technologies only.

- **Importance of Cyber Laws:**

In this global Era, Information Technology is changing rapidly and gaining popularity in most of our aspects of lives. We are very much dependent upon technology and technical tools. Computer, Laptops, Mobile Phones, and Internet Facilities plays an important role in today's global era, but that also includes the people involving in the commission of crimes using internet and technology. Due to the anonymous nature of the Internet, it is possible to engage into a variety of



criminal activities with impunity and people with intelligence, have been grossly misusing this aspect of the Internet to perpetuate criminal activities in cyberspace. Hence, we need Specific Laws to cater these activities and Therefore Cyber Laws (commonly known as Information Technology Act) was notified.

"The Cyber Laws in India has paved the way for electronic commerce and electronic governance in the country by ensuring maximum connectivity and minimum cyber security risks. Also, enhancing the scope and expanding the use of digital mediums," says Advocate Krishna Mohan K Menon.

- **Governing Law(s) in India:**

Cyber Laws in India prevent any crime done using technology. Cyber laws in India are not a separate legal framework. It's a combination of Contract, Intellectual property, Data protection, and privacy laws. The Indian cyber laws are primarily governed by the Information Technology Act (IT Act), penned down back in 2000 as amended from time to time and rules and regulations thereof. IT Act, 2000 addresses the gamut of new-age crimes. Computer technology, mobile devices, software, and the internet are both medium and target of such crimes.

- **Types of Cyber Crimes in India:**

- **Identity theft** - When personal information of a person is stolen with the purpose of using their financial resources or to take a loan or credit card in their name then such a crime is known as Identity theft.
- **Cyber terrorism** - When a threat of extortion or any kind of harm is being subjected towards a person, organization, group or state, it is known as the crime of Cyber Terrorism. Generally, it includes the well-planned attack strategies on the Government and corporate computer system.
- **Cyber bullying** - When a teenager or adolescent harasses, defames, or intimidates someone with the use of the internet, phone, chat rooms, instant messaging or any other social network then the person is said to be committing the crime of Cyberbullying. When the same crime is done by adults it is known as Cyberstalking.
- **Hacking** - The most common cybercrime is Hacking. In this crime, the person gets access to other people's computers and passwords to use it for their own wrongful gain.
- **Copyright** - With the massive surge in internet users, when the data/ information is distributed on all platforms, copyrighting your work aids you to restrict the use of your work. Any use of your copyrighted without your permission is a punishable offence.
- **Trade Secrets** - Internet organization spends a lot of their time and money in developing softwares, applications, and tools and rely on Cyber Laws to protect their data and trade secrets against theft; doing which is a punishable offence.
- **Harassment and Stalking** - Harassment and stalking are prohibited over internet platforms as well. Cyber laws protect the victims and prosecute the offender against this offence.

- **Objectives of Cyber Laws (Information Technology Act, 2000):**

- To provide legal recognition for all e-transactions
- To give legal recognition to digital signatures as a valid signature to accept agreements online
- To give legal recognition to keeping accounting books in electronic form by bankers as well as other organizations



- Protection of online privacy and stopping cyber crimes
- To build capabilities to prevent and respond to cyber threats.
- To safeguard information and information infrastructure in cyberspace.

- **Advantages of Cyber Laws**

Cyber law is extremely important for organizations that are vulnerable because of their ineffective cyber security system.

- Secured E-Commerce Infrastructure for online businesses.
- Digitally sign your contracts/ papers
- Introduced new businesses for Certifying Authorities
- Proficient use of E-Forms as prescribed
- Secured websites with Digital Certificates
- Meticulous monitoring on the web traffics
- Electronic Transactions safeguarded
- Emails are a legal form of communication and are approved in the court of law

- **Compliance Audit under Cyber Laws:**

In this present global era, Audits are not only associated with verification of any financial transaction. Now the meaning of audit has been expanded to include corporate law, cyber law, and other legal compliances of the company. The cyber compliance audit is the first step in protecting sensitive and confidential information as it includes a thorough analysis of e-contracts document and other company data.

Types of Audit	Reasons for Audits
1. Mobile Application Security Audit	Mobile phones are increasingly used to surf the Internet, store private information, access corporate network /confidential company information. With lots of features smart phones now become an attractive target for Malware, Phishing attacks and much more specially crafted cyber-attacks.
2. Web Application Security Audit	Web App Security audit helps the enterprises to improve their security at every level of the life cycle i.e. in the design phase, implementation phase or even when the software is running in the production environment.
3. Network Security Audit	Network Security audit is categorized into two vital areas of information. The first area is the static data which would cover the system definitions, protocols used to communicate, password rules,

	firewall definitions etc. whereas the second category looks into the activities, events that have taken place which would cover areas such as database access, file transfers, sharing, system log on etc. are some of the times that will be looked into the network audit.
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- **How to Prevent Cyber Crime?**

As we all know that “prevention is always better than cure”. Though cyber laws in India provide protection from cybercrime and legal aid but still we can take preventive measures to defeat cyber crimes. Some of them are given below:

- **Using of Anti-virus:** trusted not free downloaded / pirated.
- **Use strong passwords:** Don't repeat your passwords on different sites, and change your passwords regularly. Make them complex. A password management application can help you to keep your passwords locked down.
- **Keep your software updated:** This is especially important with your operating systems and internet security software. Cybercriminals frequently use known exploits, or flaws, in your software to gain access to your system. Patching those exploits and flaws can make it less likely that you'll become a cybercrime target.
- **Downloads on the mobile phone** - Download everything on the mobile phone from a trustworthy source only.
- **Rating and feedback** - Always check for the seller's rating and feedback of customers for the seller. Be sure that you are checking current feedbacks. Also, beware of feedbacks that are 100% seller favoring or have an entry on the same date.
- **Personal Information Request** - Everyone must have received a call or mail. In which, the person on the other side asks for personal information. This includes your card CVV or an mail containing an attachment, which requires you to click on embedded links. Be sure to never respond to such emails or calls.
- **Keep up to date on major security breaches:** If you do business with a merchant or have an account on a website that's been impacted by a security breach, find out what information the hackers accessed and change your password immediately.
- **Be Social-Media Savvy:** Make sure your social networking profiles (e.g. Facebook, Twitter, YouTube, MSN, etc.) are set to private. Be careful what information you post online. Once it is on the Internet, it is there forever!
- **Secure your wireless network:** Wi-Fi (wireless) networks are vulnerable to intrusion if they are not properly secured. Review and modify default settings. Avoid conducting financial or corporate transactions on Public networks.

- **Cyber security assessment framework**

Cyber security Framework has been adopted for use across a wide variety of industries because of its comprehensive nature and sound guidance. It is much needed things for the Corporate to conduct an assessment and the same will vary with organizational size, complexity, and industry type. This will helps to address immediate and future security priorities.

The framework addresses five important aspects of cyber security including: identify, detect, protect, respond, and recover.

- **Cyber security assessment framework in Brief**

1. Involve people with the necessary experience and skills along with appropriate depth of technical skills and knowledge of the current risk environment.
2. Evaluate the full cyber security framework, rather than cherry pick items.
3. Understand the current state against framework characteristics, where the organization is going, and the minimum expected cyber security practices across the industry or business sector.
4. It is not intended to be an exhaustive analysis requiring extensive testing. Rather, the initial assessment should drive additional risk-based cyber security deep dive reviews.

**Conclusion:**

In the present world which is more tech-savvy, the words cyber law and cybercrimes have also become more sophisticated. As the nature of the internet is anonymous it is easy to commit cybercrimes. Therefore the Information Technology Act, 2000 or also known as the Indian Cyber Act or the Internet Law came to force in India. It is important for anyone using the internet to be aware of the cyber laws to avoid penalty or punishment under these laws. Strict cyber laws are the need of this global era where technology is growing at rapid speed.

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## BRAINY BITS...



**CS Madhur N Agrawal**

B.com, LLB, ACS Registered Valuer

Email id: madhurna@gmail.com

XYZ LLP are business consultants. They have only few clients to their portfolio, and they are all foreigners. Their turnover from these foreign entities starting April 2021 till June 15, 2021, is ₹55,00,000/-. As per XYZ LLP since no GST is payable on export of services they don't need to get registered for GST. Please guide them if they can claim exemption from GST registration or they have to have register for the GST. *Please send your answers to, [enewsletter.icsimysore@gmail.com](mailto:enewsletter.icsimysore@gmail.com) along with your name, qualification, and designation and a passport size picture. Name of the person with most appropriate answer with reasoning, shall be published in the next edition of eMagazine*



## Opinion to Last Month's Brainy Bits

XYZ Pvt Ltd during this corona pandemic started free oxygen refilling in oxygen cylinder. For this they have purchased used machines from a sick industrial unit. Please let XYZ Pvt Ltd know if their activities for free oxygen refilling and used machine purchase will fall under the valid CSR expenses category.

Yes, the activity of XYZ Pvt Ltd for free oxygen cylinder shall fall under CSR.





# Regulatory Updates



Compiled by:

**Matruka B M**

Professional Student  
Mysore

## Companies Act, 2013

### Updates on Circulars

The MCA, in continuation to the General Circular No. 10/2020 dated 23.03.2020, has further clarified that spending of CSR funds for 'creating health infrastructure for COVID care', 'establishment of medical oxygen generation and storage plants', 'manufacturing and supply of Oxygen concentrators, ventilators, cylinders and other medical equipment for countering COVID-19' or similar such activities are eligible CSR activities under item nos. (i) and (xii) of Schedule VII of the Companies Act, 2013 relating to promotion of health care, including preventive health care, and, disaster management respectively.

### General Circular No. 09/2021

If a Company has contributed any amount to 'PM CARES Fund' on 31.03.2020, which is over and above the minimum amount as prescribed under section 135(5) of the Companies Act, 2013 ("Act") for FY 2019-20, and such excess amount or part thereof is offset against the requirement to spend under section 135(5) for FY 2020-21 in terms of the appeal, then the same shall not be viewed as a violation subject to the conditions that:

- the amount offset as such shall have factored the unspent CSR amount for previous financial years, if any;
- the Chief Financial Officer shall certify that the contribution to "PM CARES Fund" was indeed made on 31st March 2020 in pursuance of the appeal and the same shall also be so certified by the statutory auditor of the company; and
- the details of such contribution shall be disclosed separately in the Annual Report on CSR as well as in the Board's Report for FY 2020-21 in terms of section 134 (3) (o) of the Act.

### Circular 20052021





## Delhi Diaries



**Vikram Hegde**, Advocate  
Advocate on Record  
Supreme court of India  
Co- Founder, VH Law Chambers  
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# Role Clarity for the Resolution Professional and the Committee of Creditors - Kalpraj Dharamshi v. Kotak Investment Advisors Ltd.

With the extensive debates surrounding the rights of the parties to insolvency resolution under the Insolvency and Bankruptcy Code, our focus has perhaps shifted away from another important aspect, i.e., the role of the Resolution Professional and the Committee of Creditors. The Supreme Court recently examined this at some length in Kalpraj Dharamshi v. Kotak Investment Advisors.

The origins of the insolvency proceedings in this case are interesting in the sense that the initiation of CIRP against the Corporate Debtor, was sought by neither a financial creditor nor an operational creditor but rather by itself, i.e., by way of an application under Section 10 of the IBC.

This kick started the CIRP which went along in the normal course and Expression of Interest was invited for resolution plans from interested applicants and after multiple extensions, received some bids with resolution plans in the prescribed format, including by the first respondent Kotak Investment Advisors Ltd. (KIAL), on 13.01.2019, and thereafter another bid by the Appellants Kalpraj and another on 27.01.2019. The latter resolution plan was objected to by KIAL on the ground that it was submitted subsequent to the prescribed time limit.

Thereafter, both KIAL and Kalpraj submitted revised plans. In the next meeting of the CoC, the resolution plan by Kalpraj came to be approved. The said approval by the COC came to be accepted by the NCLT in an application under Section 31 of the IBC and the objections of KIAL to the same were rejected.

KIAL, after a failed attempt to challenge the order of the NCLT by way of a Writ Petition in Bombay High Court, filed appeals before the NCLAT seeking to set aside the NCLT order. The NCLAT held that the procedure adopted by the Resolution Professional was incorrect and set aside the order of NCLT and also directed the COC to take a decision afresh, within a period of ten days considering only the resolution plans submitted within the prescribed date.

Appeals were filed before the Supreme Court against the said order of the NCLAT.

The Appellants before the Supreme Court relied upon the well established position of law that the Commercial wisdom of the Committee of Creditors cannot be questioned by the adjudicating authority as laid down in Committee of Creditors of Essar Steel v. Satish Kumar Gupta (2019) SCC Online SC 1478.

The Counsel for the Appellants also pointed out that both resolution applicants had been given a chance to submit revised plans and it was those revised plans which were under consideration. Further, the successful resolution applicant had expended about Rs. 300 Crores in the period between the approval of the resolution plan and the NCALT order which was under challenge before the Supreme Court in furtherance of restructuring the corporate debtor.

It was also contended that the action of KIAL in submitting a revised plan, without protest or demur, indicated its acquiescence to the procedure followed and having accepted the process, it could not be permitted to challenge the process once it had become unsuccessful in its bid.

The resolution professional would argue that he had acted bona fide to maximise the value to the company.

Per contra, the respondent would argue that KIAL had in fact raised an objection and it is only thereafter that they had submitted the revised plan for consideration of the COC.

The Respondent reiterated its contention that the Resolution Professional had not followed the prescribed procedure.

The Court upon considering the arguments, held that mere submission of the revised resolution plan did not amount to acquiescence as KIAL was not in an equal bargaining position with the COC and factually, had raised an objection.

However, on the question of material irregularities of the Resolution Professional, the Court noted that all the activities of the Resolution Professional have the stamp of approval of the Committee of Creditors and the commercial wisdom of the latter is to be given a wide berth.

On the said reasoning, the Supreme Court held that the NCLAT had acted in excess of its jurisdiction.







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भारतीय कम्पनी सचिव संस्थान

IN PURSUIT OF PROFESSIONAL EXCELLENCE  
Statutory body under an Act of Parliament  
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Fee

All India  
Company law

# Quiz 2021

for CS Students



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1<sup>st</sup> Prize Rs. 50,000/-

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### PROFESSIONAL

1<sup>st</sup> Prize Rs. 50,000/-

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#### Preliminary Round:

25<sup>th</sup> June, 2021

#### Semi-Final Round:

23<sup>rd</sup> July, 2021

#### Final Round:

To be informed separately

#### Registration Open:

3<sup>rd</sup> May, 2021

#### Registration Close:

15<sup>th</sup>, June 2021  
at 5 PM

#### Eligibility:

All students of the Institute having a valid registration number as on the date of registration for competition, shall be eligible to participate in the competition.

CS Nagendra D. Rao  
President, The ICSI

CS Devendra V. Deshpande  
Vice-President, The ICSI

For Registration : <https://g25.tcsion.com/EFForms/configuredHtml/1677/62659/application.html>



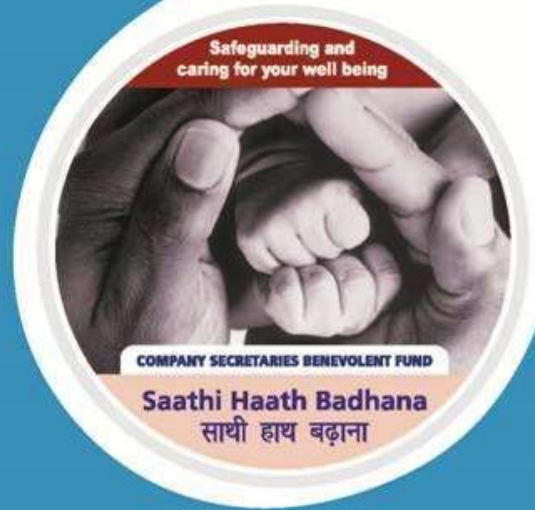
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IN PURSUIT OF PROFESSIONAL EXCELLENCE  
Statutory body under an Act of Parliament  
(Under the jurisdiction of Ministry of Corporate Affairs)

**CSBF**

**COMPANY SECRETARIES  
BENEVOLENT FUND**



## What exactly is CSBF?

The Company Secretaries Benevolent Fund (CSBF) is a Society registered under the Societies Registration Act, 1860 and is recognized under Section 12A of the Income Tax Act, 1961.

The CSBF was established in the year 1976 by the ICSI, for creating a security umbrella for the Company Secretaries and/or their dependent family members in distress.

The amount of ₹ 7,50,000 (in the case of death of a member under the age of 60 years) has been increased to ₹ 10,00,000

The subscription amount is being increased from ₹ 10,000 to ₹ 12,500 soon

### Is it the right time to enrol in CSBF?

CSBF is the protection you and your family need to survive the many ups and downs in life, be it a serious illness or a road accident which derails your plans for the future.

### Is it a requirement?

Yes, as your dependents need the protection. Your dependents be it your parents, your spouse, or your children will have to bear the brunt of paying off your home/education personal loans and even for managing day-to-day expenses without your contribution.

If you do not want to leave behind such a situation in your absence, enrol in CSBF today.

## Advantages of enrolling into CSBF

1

To ensure that your immediate family has some financial support in the event of your unfortunate demise

2

To finance your children's education and other needs

3

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4

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