

eMagazine

Oppression & Mismanagement Special



We wish all our readers

*A very Happy &
Prosperous Diwali*

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Vision

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

Motto

सत्यं वद। धर्मं चर। इष्टार्थे धेह त्वाग्रे अनेकेषु धेह इव

Mission

"To develop high calibre professionals facilitating good corporate governance"



Chairman
Mysore Chapter

Dear Professional Colleagues,

I am happy to meet and greet you all through the E-magazine. I hope you all had a wonderful celebration of the festival of lights with family and friends. The month of October 2018 was very productive as many career awareness and Investor programs were conducted for both under graduate and Post graduate students. This month we were successful in our efforts to reach out to colleges and universities outside Mysore city and create awareness to students about CS profession.

In the month of November 2018, we intend to conduct a two-day credit hour program for our members with topics focusing on Companies (Amendment) Ordinance, 2018, IBC and GST annual audit etc., and we are expecting members to actively participate.

I would like to wish the best of luck to our students who will be writing their exams in the month of December 2018.

Thank You

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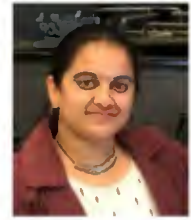
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Oppression and Mismanagement The Indian Scenario

A company's existence is independent of its members. All the affairs of the company are managed by the management. Democratic decisions are made in accordance with the majority decision and hence, the corporate world has adopted this majority rule in decision making process and management of the companies. Statutory provisions in this regard have been provided under the Companies Act, 1956 ("CA 1956"), which is replaced by the Companies Act, 2013 ("CA 2013"). CA 2013 provides for provisions relating to oppression and mismanagement under Sections 241-246. Section 241 provides that an application for relief can be made to the Tribunal in case of oppression and mismanagement. Section 244(1) provides for the right to apply to Tribunal under Section 241, wherein the minority limit is same as that mentioned in CA 1956.

FOSS V HARBOTTLE RULE

As per this rule, a shareholder cannot bring action relating to the internal disputes between the shareholders.

The rule has two components:

- ❖ A company is a separate legal entity from its shareholders. In general any loss caused to the company must be recovered by the company and not by its shareholders, based on the diminution in the value of their shares or the loss of anticipated dividends.
- ❖ The need for exceptions to this principle to avoid oppression. Shareholders are permitted to recover loss caused to the company by way of what is termed a derivative action. In certain circumstances it also permits recovery of the shareholder's own loss.

EXCEPTIONS

- Ultra vires and illegality: If directors/Majority shareholders of a company do not use their controlling powers over actions which would be ultra vires the company or illegal.

- Actions requiring a special majority:
To further briefly examine a few provisions of CA 1956 vis-à-vis the provisions of CA 2013:
 1. Provision of Section 397 and 398 of CA 1956 are combined in Section 241 of CA 2013 and accordingly applications for relief in cases of oppression, mismanagement etc. will have to be directed to the Tribunal.
 2. While the powers of the Tribunal under CA 1956 on application under Section 397 or 398 and Section 404 were limited, CA 2013 granted additional powers to the Tribunal including to:
 - (a) restrictions on the transfer or allotment of the shares of the company;
 - (b) removal of the managing director, manager or any of the directors of the company;
 - (c) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;
 - (d) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company;
 - (e) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct; and
 - (f) imposition of costs as may be deemed fit by the Tribunal.
 3. The requirement of establishing existence of 'just and equitable' circumstances to waive any and all requirements of the section pertaining to the meeting the minimum minority limits and providing 'security' while allowing such an

application are excluded from the Companies Act, 2013.

4. Further, by way of Section 245, CA 2013 has introduced the concept of class action which was non-existent in CA 1956.

OPPRESSIVE ACTS

The following acts constitute oppression:

- Company's conduct is against the principles of fair dealing
- Imposition of new and risky objects which are being opposed by the other faction of the shareholders
- Depriving a member of his membership
- Exercise of undue/harsh burden on a member
- Acts of the company are against the provisions of the law

ACTS OF MISMANAGEMENT

The following acts constitute mismanagement:

- Differences between the directors
- Serving of the office by the director after the expiration of the term
- Neglect/ breach of duty by the director
- Improper appointment of the director
- Group in power intends to defraud

LEGAL REMEDY

Section 241 provides the right to any member of the company to apply to Tribunal for relief in case of:-

- (i) Oppression: where the affairs of the company are being conducted in a manner prejudicial to the public interest or oppressive to member or prejudicial to the company's interests. [Section 241 (1A)];
- (ii) Mismanagement: if it is established that the affairs of the company are being conducted in a manner prejudicial to the company or public interests or by reason of change of the control of the company [Section 241 (1B)]

RELIEF

Under the provisions of Section 242 (2), the Tribunal may allow relief to the complaining shareholders in case of oppression or mismanagement, some of which include:

- Regulation of the company's future affairs;
- Direction to purchase the company's shares by other members;
- Restriction on transfer of allotment;

- Termination, setting aside, modification of any agreement between the company and its management;
- Termination, setting aside, modification of any agreement between the company and any third person;
- Setting aside of any transaction of transfer, delivery, payment, execution, etc.;
- Removal of any member of the management;
- Recovery of undue gains made by the management;
- Appointment of the members of the management;
- Imposition of costs.

CASE LAW

McDonald's Case: NCLT Decision on Oppression

Mr Bakshi was the Managing Director of Connaught Plaza Restaurants Private Limited ("CPRL"). CPRL was incorporated in furtherance of a Joint Venture Agreement ("JVA") between Mr. Bakshi and MIPL in 1995; and both parties have a 50:50 share in the said company. The JVA was entered into for setting up franchises of McDonalds in North India and getting all the prerequisite approvals and running the business in North India. In due course, a dispute arose out of the JVA, and Mr. Bakshi approached the NCLT alleging acts of oppression and mismanagement against him by MIPL. The NCLT decision dated 13 July 2017 granted clarity on such allegations by confirming oppression, reinstating Mr. Bakshi as the Managing Director and appointing Justice G.S. Singhvi to act as an Administrator in the company, with the right to vote in Board Meetings.

NCLT's Decision

The NCLT held in favour of Mr. Bakshi . In summary:-

1. JVA had been incorporated into the AoA, as the AoA included all supplementary agreements and modifications made to the JVA and also directly refers the JVA (For example in cases of appointment of the Managing Director under Article 35 of the AoA).
2. While Clause 7(e) of the JVA specified the conditions that needed to be met for the reappointment of the Director, the NCLT found that despite the Note stating reasons to not re-appoint Mr. Bakshi he was financially awarded and appreciated by MIPL, showing that the conditions of Clause 7(e) were redundant in the present dispute. Further, the NCLT relied on the Audit Reports of the CPRL and found the

allegations of diversion of funds and debts false. The NCLT held that such actions in culmination are indicative of oppression under Section 397,398 and 402 of the Companies Act, 1956 and are based on extraneous consideration, to acquire Mr. Bakshi's shares.

3. The NCLT also specified that such allegations were made solely to remove Mr. Bakshi as the Managing Director and exercise a call option to

purchase his shares. Hence, the NCLT reinstated Mr. Bakshi as the Managing Director and also appointed Justice Sighvi as an Administrator with a right to vote in Board meetings by specifying that under Section 402 of the Companies Act, 1956, the Tribunal can pass orders for the regulation of the company's conduct of affairs.

References:

www.livemint.com; www.economictimes.com; www.mondaq.com ; www.indiancorporlaw.in; The Companies Act 2013

Chapter Activities

1. INVESTOR AWARENESS PROGRAM

Chapter conducted 03 Investor Awareness Program during the month of October 2018. The details are as follows.

S No.	Date	College Name	No. of Participants
1	04.10.2018	Genius First Grade College, Mysore	99
2	05.10.2018	Cresta First Grade College, Mysore	81
3	26.10.2018	P E S Engineering College, Mandya	89





An overview of The Prevention of Corruption Act

The Prevention of Corruption Act, 1988 (the 'Act') was enacted to prevent corruption in Government departments and to prosecute and punish public servants involved in corrupt practices. The Act saw very limited success and due to recent increase in the number of corruption related investigations against the public servants and banker, the Prevention of Corruption (Amendment) Act, 2018 (the 'Amendment' Act)¹ was implemented. The Amendment Act has extended the coverage of offences and included bribery by commercial organizations and their officers.

Highlights of the Amendment Act

- ❖ **Inclusion of definition of 'Undue Advantage'**
As per the Amendment Act any public servant who accepts or attempts to accept from any person, any 'undue advantage'², either for himself or for any other person, in lieu of performance of a public duty, shall be punishable with imprisonment for a minimum term of 3 (three) years and maximum of 7 (seven) years.
- ❖ **Persons offering or giving bribe to public servants are held liable**
The Section 8 of the Amendment Act punishes any person who gives or promises to give an 'undue advantage' to another for inducing or rewarding a public servant for improper performance of a public duty. The bribe-giver shall be punishable with imprisonment for a term which may extend to 7 (seven) years or/and with fine. Erstwhile in the Act the bribe-givers could only be punished for abetment of bribery and not for any stand-alone crime, with this amendment, giving a bribe, irrespective of whether such bribe is accepted or not, has been made a crime.
- ❖ **Offence relating to bribing a public servant by a Commercial Organisation³**
Commercial Organisation and any person associated with the Commercial Organisation will be held liable, if gives or promises to give any undue advantage to a public servant with an intent to obtain or retain business or an advantage in the conduct of business.
- ❖ **Attachment and Forfeiture of Property**
The Amendment Act has provided for application of the Prevention of Money Laundering Act, 2002 and the Criminal Law Amendment Ordinance, 1944 for attachment and administration of property procured by means of an offence.
- ❖ **Inclusion of timeframe to complete the trail**
The Amendment Act prescribes a time frame of 2 (two) months to complete the trail. However, the time period can be extended by 6 (six) months by recording the reasons in writing to a maximum period of 4 (four) years in aggregate.
- ❖ **Enhancement of Punishment**
The Amendment Act has enhanced the minimum imprisonment term of 6 (six) months to 3 (three) years, and from a maximum of 5 (five) years to 7 (seven) years, with or without fine.

Conclusion

The amendments are in line with the United Nations Convention against Corruption (UNCAC). With these amendments, India joins the league of 23 countries that have implemented a compliance regime to tackle corruption. The Amendment Act expand the coverage of offences and specifically cover bribery by commercial organizations and their officers.

¹ Effective July 26, 2018

² Section 2 (d)- Undue Advantage means any gratification other than legal remuneration. The word 'gratification' is not limited to pecuniary gratifications or to gratifications estimable in money. Further, the expression 'legal remuneration' is not restricted to remuneration paid to a public servant, but includes all remuneration which he is permitted by the Government or the Organisation, which he serves, to receive.

³ Commercial Organisation means a body or partnership firm incorporated in India and carrying on business in India or outside India, but also a body or partnership firm incorporated or formed outside India but carrying on business in India.



CS MINERVA

The Student's Corner

Commentary on Appointment of Directors to be Voted Individually – Series-12

Provisions: Section 162 of the Companies Act, 2013 ('the Act'):

- 1) At a general meeting of a company, a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be moved unless a proposal to move such a motion has first been agreed to, at the meeting, without any vote being cast against it.
- 2) A resolution moved in contravention of sub-section (1) shall be void, whether or not any objection was taken when it was moved.
- 3) A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

Commentary

1. **Purpose:** Purpose of this provision is to provide power to the shareholders to reject any person and accept another as a director. It will be successful only when a separate resolution is proposed for each director appointment instead of en block resolution.
2. **Applicability:** Applicable to all Companies excluding the following class of companies:
 - i. Private Company which has not committed a default in filing its financial statements and annual return with the Registrar (vide exemption notification dated 05/06/2015 read with exemption notification dated 13/06/2017);
 - ii. Following class of Government Company:

- a. Government Company in which **the entire paid up share capital** is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments
- b. A subsidiary of a Government company, referred to in (a) above, in which the **entire paid up share capital** is held by that Government company.

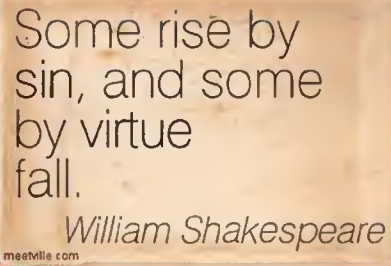
And which has not committed a default in filing its financial statements and annual return with the Registrar. (vide exemption notification dated 05/06/2015 read with exemption notification dated 13/06/2017); However, if government is not holding entire paid up share capital, this provision is applicable.

- iii. Specified IFSC Public Company (vide exemption notification dated 04/01/2017)

3. **Mandatory** This provision is applicable only when appointment is made at the General Meeting. However, this provision is not applicable when directors are appointed at the Board Meeting.
4. **Meaning of the term 'motion for the appointment'** Proposal made for approval or proposal made for nominating a person is treated as motion for the appointment.
5. **Exceptions** Two or more persons may be appointed in a single resolution as follows:

- i. pass **unanimous resolution (i.e., with 100% consent)** for authorizing two or more directors by a single resolution; and
 - ii. Thereafter pass a resolution appointing two or more directors in a single resolution.
- 6. Contravention & its impact**
- i. Resolution moved/passed in Contravention is void. Such resolution cannot be ratifiable later on or voidable at the option of the Company.
 - ii. This violation cannot be punishable under Section 450 of the Act (general penalty Provision).
 - iii. Acts done by such directors shall not be invalidated by virtue of provision of Sec.176 of the Act.
 - iv. When appointment made under this section is void, vacancy created thereby cannot be filled up by virtue of provisions relating to automatic re-appointment of retiring director as provided under Section 152(7) of the Act.

Living Room...



Some Rise by Sin, And Some by Virtue Fall

This line from Shakespeare's Measure for measure surprisingly left me wondering how true it is even after almost 5 centuries since it was written. We have all been through this phase witnessing the rise and growth of evil and the fall of the righteous and upright. "When will the wicked be punished?" has been the question that has crossed many of our minds, it hurts when our "being good" fetches us no good but trouble and pain. How often we all have wished judgment be served on the wicked and sinful like a Panchatantra story and the "Good" is rewarded but unfortunately life is not what we think it is. What may seem apparently successful

and "rising" to the naked eye may not be what it seems like, for we all know the pasture on the other side is always greener. The some who fall by virtue will have the strength to stand and re build the fallen pieces. The "fallen virtuous" will never become weary and frail, can never shy away from defeat and most of all will be persistent in rebuilding. Sin does not sustain longer and success with sin will wilt away like the sun hit dew. So the virtuous neither find solace in rise nor intimidated by fall, they simply follow the rule when the going gets tough, the tough gets going



GST: Advance Rulings – Part 1

Advance Ruling means the determination of a question of law or question of fact with respect to duty or tax payable in relation to an activity which is proposed to be undertaken, by the applicant. Chapter XVII of the Central Goods and Service Tax Act, 2017 (equivalent provisions also provided in the State Goods & Services Tax Acts) deals with the said aspects. Relevant provisions spread over 12 sections i.e. Section 95 to 106. Applicable Rules on Advance Ruling has been provided in Chapter XII of Central Goods and Services Tax (CGST) Rules, 2017. Rule 103 to 107A deals with procedural aspects such as Appointment of Members, Application to the Authority, manner to move Appellate Authority, etc. Section 95(a) of the Central GST Act, defined the term 'Advance Ruling' as a decision provided by the Authority or the Appellate Authority to an applicant on matters or on questions specified in sub-section (2) of Section 97 or sub-Section (1) of Section 100, in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the applicant. *With this, a new Series will try to cover certain key 'Advance Rulings'.*

Advance Rulings Reported in this Part -

1. M/s. Shree Construction (AAR – Maharashtra)
2. M/s. RFE Solar Private Limited (AAR – Rajasthan)
3. M/s. Jain Engineering Private Limited (AAR – Rajasthan)
4. M/s. Sapthagiri Hospitality Private Limited (AAR-Gujarat)
5. Sri. Ashok Kumar Basu (AAR – West Bengal)

1. **Works contract service by sub-contractor** - M/s. Shree Construction Order No. GST - ARA – 09/2018-19/B-65 (AAR – Maharashtra) Dated 11.06.2018

In the given case the applicant, a sub-contractor, has raised the question of applicable tax rates for providing works contract services by way of construction, erection etc to the main contractor with respect to original contract works to Indian Railways. The Authority for Advance Ruling, Maharashtra, by relying on Notification No. 11/2017 Central Tax (Rate), dated 28.06.2017 and clause (119) of Section 2 of the Central Goods and Services Tax Act, 2017, allowed the applicant or sub-contractor for concessional rate of GST at the rate of 12%.

2. **Classification of contract for the erection, procurement and commission of solar power plant and applicable Tax Liability** - M/s. RFE Solar Private Limited Order No. Raj /AAR/ 2018-19/08 (AAR – Rajasthan) Dated 01.07.2018

Since the 'Turnkey EPC Contract including civil works, procurement of goods, erection and commissioning are not covered under supply of 'Solar Power EPC Contract under Entry 234 of Schedule 1 of the Notification No. 1/2017 – Integrated Tax (Rate) and Entry 234 of Schedule 1 of the Notification 1/2017 – Central Tax (Rate) both dated 28.06.2017 and Entry 234 of Schedule 1 of the Notification 1/2017 – State Tax (Rate), dated 29.06.2017, the Authority for Advance Ruling, Rajasthan, held as 'Works Contracts' under Section 2(119) of the Central GST Act, 2017 and taxable at 18%.

3. **Supplier of Service and location of works contractor** - M/s. Jain Engineering Private Limited Order No. Raj/AAR/2018-19/07 (AAR – Rajasthan) 20.07.2018

Since Section 22 of the Central Goods and Services Tax Act, 2017 mandates a supplier of service to register at location from where he makes taxable supplies or is supplying taxable services if his aggregate turnover exceeds the prescribed limit in a financial year and Section 2(15) of the Integrated Goods and Services Tax Act, 2017 provides location of the works contractor shall remain to be State where his principal business is registered, the Authority for Advance Ruling, Rajasthan, ruled to get registered in the State where proposed works contract to be executed even though the supplier is registered in his home State.

4. Hotel in a non-processing zone of SEZ and supplies to clients located in SEZ - M/s. Sapthagiri Hospitality Private Limited Order No. Guj/GAAR/Ruling/2018/14 (AAR-Gujarat) Dated 30.07.2018

In the instant case, the Authority for Advance Ruling, Gujarat, by relying on sub-section (1) of Section 16 of the Integrated Goods and Services Tax Act, 2017, supply of services by a Hotel in non-processing zone of SEZ to the clients located in SEZ held as 'Zero -Rated Supplies', hence not liable for tax. Also held the supply of

services from a non-processing zone of SEZ to the clients located outside the territory of SEZ as taxable under sub-section (1) of Section 5 of the Integrated Goods and Services Tax Act, 2017.

5. Supply of printed examination question papers to educational institutions and eligibility Input Tax - Sri. Ashok Kumar Basu Order No. 18/WBAAR/2018-19/19 (AAR - West Bengal) 28.09.2018

The Authority for Advance Ruling, West Bengal, held as the stated service as 'exempt' under Central Goods and Service Tax Act, 2017 by relying on Notification No. 12/2017-C.T. (Rate) Dated 28.06.2017. Since an exempt supply, the applicant would not allow claiming the Input Tax Credit of the GST paid on the inputs used for provisioning the service of printing question papers provided to educational intuitions.

To be continued....



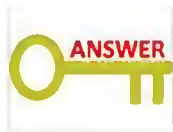


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M/s ABC & Co., have registered under GST as a normal tax payer in the state of Karnataka. M/s ABC & Co., are in to providing Service to their customers in the area of Power solutions. On enquiry made by a customer, M/s ABC & Co., have to move the goods [Testing Equipment worth Rs.8,50,000/-] to Tamil Nadu for the testing purpose at customer site and has to bring back such goods post service completion. M/s ABC & Co., charge Rs.30,000/- to their customer for the above testing activity. Explain whether EWB has to be prepared for movement of such goods

Please send your opinion to, newsletter.icsimysore@gmail.com



Opinion To Last Month's Brainy Bits

Query

M/s ABC Ltd., has bought goods from M/s. PVC Ltd., for Rs.20,00,000/- applicable GST@28%. The consignment has been received by M/s ABC Ltd., during the month of March 2018. During the Inspection process, 10% of the goods are found defective and during Production process another 20% of the total goods received found defective.

Advise whether M/s ABC Ltd., should raise a Tax Invoice under GST law for sending back the goods to M/s PVC Ltd.,

Facts to consider

- M/s PVC Ltd., (hereinafter referred as supplier) has supplied goods to M/s ABC Ltd., (hereinafter referred as recipient) on the strength of a Tax Invoice. However, recipient has a choice to either accept or reject the goods supplied to him for the quality reason
- Recipient has received the goods during March 2018. Out of total goods received 30% were found to be defective [10% at Inspection stage and 20% AT PRODUCTION stage]
- Goods received by the recipient were received to the extent of 70% during March

2018 and balance were rejected for quality reasons

- Recipient either has a choice to accept the goods and send back the defective goods to the supplier or reject the whole lot of the goods received
- In the presence scenario let us assume that recipient has accepted the goods to the extent of good quality and send back the defective goods to the supplier

Relevant Provision

Section 2(67): Inward Supply

Section 2(83): Outward supply

Section 7: Scope of Supply

Section 31: Tax Invoice, Credit and Debit Notes

Section 34: Credit and Debit Note

Rule 55: Transportation of Goods without issue of Tax Invoice

Conclusion

Supplier has supplied the goods and the same were accepted to the extent of good quantity by the recipient and the balances were rejected by the recipient. Recipient doesn't own the goods unless they are used in their further supply. Accordingly, there shall be an inward supply of goods made at the recipient end when goods are received and supplier shall take back the unproductive supply owing to quality issue.



Web Yatra



Feeling sleepy during the day? You're not alone. Insufficient sleep is a common and fast-growing problem most of the people today. There are many factors that influences ones sleep. May it be work pressure, irregular food habits, smoking, drinks etc... Sleep not only feels good but it's vital for our overall health. Science has shown us that sleep allows your brain to do some basic housecleaning. While you sleep, your brain takes out the trash and carefully puts away your memories. Enough sleep also keeps the rest of your body running in tiptop shape, helping you to burn fat and rejuvenate tissue. In fact, sleep is an important daily medicine for your brain and body.

With the advancement of technology, today we have many gadgets that help to get a good night sleep. There are various apps that play soothing sounds, tools that makes one's sleep easier. Further there are various websites and blogs that offer really good advices and tips for a better sleep. One of such website is sleepjunkies.com. (<https://sleepjunkies.com>)

This website offers various blogs from experts on various topics like health aspects of sleep, science behind it, how to structure a bedroom for better sleep, sleeping tips etc... Not only that the website also publishes various interviews, feature articles, product reviews, and news.

The website has a separate section for food and diet, which explores various dieting habits and its impact on sleep. The tech and gadgets section deals with various sleep assisting gadgets that are available in the market today and their usefulness and the impact on the sleep and health. It also has a separate section for kids sleeping habits. They have also a video library which contains various documentaries on sleeping habits.

Sleepjunkies.com features a unique section for dreaming where there are blogs on what dreams mean, its impact on the daily life etc... It also has various TED talk videos in the relevant fields.

The mission statement of the website says, "Our mission is to educate, raise awareness and let people know that sleep is not "a criminal waste of time", it's a life-giving, life-changing activity, one that makes you fitter, stronger, smarter, happier and healthier."

The benefits of sleep are extensive and can make a difference in your quality of life, as well as the length of your life. Therefore, it is vital to place a priority on getting ample, consistent sleep.

Words Worth Million

"Try not to become a person of success, but rather try to become a person of value."

- Albert Einstein



Delhi Diaries 8

Solved cases of Supreme Court and NCLAT

Interpretation of Section 29A of the Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 has been referred to as a magic bullet to solve the problem of Non Performing Assets (NPAs) in India and is supposed to be a bold step towards resolving bad debts. A fair resolution of a company under liquidation which pertains to a going concern should ensure that the business does not pass into hands which directly or indirectly are also parties with a history of defaults. To this end, provisions have been introduced in the IBC to ensure that such a problem does not arise.

Section 29A of the IBC, introduced *vide* the Insolvency and Bankruptcy Code (Amendment) Act, 2017, notified on 18th January, 2018 provides as follows:

“29A. A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

- (a) is an undischarged insolvent;
- (b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
- (c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor;

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

- (d) has been convicted for any offence punishable with imprisonment for two years or more;
- (e) is disqualified to act as a director under the Companies Act, 2013;
- (f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;
- (g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;
- (h) has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code;
- (i) has been subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or
- (j) has a connected person not eligible under clauses (a) to (i)”

Thus it is evident that it is a fairly comprehensive set of criteria which is laid down to determine the eligibility of persons or entities.



However, in *Arcelormittal India Private Limited v. Satish Kumar Gupta and Ors.* the Supreme Court had occasion to consider the contours of this provision and its applicability. The controversy in that case arose from the liquidation proceedings of one of the major steel producers in the country, namely Essar Steel India Limited initiated by the State Bank of India and Standard Chartered Bank for unpaid dues of about Rupees Forty Five Thousand Crores. The Respondent before the Supreme Court Mr. Satish Kumar Gupta was appointed the Interim Resolution Professional. He published an advertisement seeking expression of interest from potential resolution applicants. Two of the applications received in response to this advertisement were from Arcelor Mittal India Private Limited, and Numetal Limited.

Arcelor Mittal India Private Limited is part of a global conglomerate which is the world's largest steel producer. One of the group companies of Arcelor Mittal, being ArcelorMittal Netherlands B.V. was one of the promoter of a company called Uttam Galva Steels Limited having a share holding of 29.5% in Uttam Galva. Uttam Galva's account had been classified as NPA by Canara Bank for more than a year and hence the Resolution Professional termed Arcelor Mittal to be ineligible.

Numetal, incorporated only 7 days prior to the submission of Expression of Interest, was held through many companies and trusts, ultimately by one Rewant Ruia who is none other than the son of Ravi Ruia, the promoter of the company under liquidation. Deeming Rewant Ruia to be acting in concert with Ravi Ruia, the Resolution Professional also held Numetal to be ineligible.

Upon application to the NCLT, the NCLT refused to substitute its view upon the discretion of the Resolution Professional in the absence of any patent illegality or arbitrariness.

The NCLT went on to hold that the relevant control for determining the connected persons in Section 29A could be either Positive Control or Negative Control, as would be available to a 29.5% shareholder.

Though Arcelor Mittal attempted to deflect such taint by arranging for the sale of its shares in Uttam Galva at a nominal price a day prior to the submission of the expression of interest, the NCLT did not permit such deflection.

The Supreme Court also upheld the finding of NCLT that for the reasons mentioned above, the parties would normally be ineligible to bid for resolution of the company. However, the Supreme Court recognized that the parties had the option of paying the requisite sums of money to clear the debts they were respectively facing and thereafter they were at liberty to bid. Though such opportunity to bid was to be available only prior to the submission of bids, in this case, in view of the fact that the law on Section 29A was being laid down for the first time, the Court permitted the applicants one last opportunity to clear the debts. The dues of Arcelor Mittal's connected company being substantially lower it presented a good opportunity for them.

This column has already examined the effect of the June 2018 amendment to the IBC on two different aspects, and in both instances the Court has found that the amendment was clarificatory in nature and hence was applicable retrospectively. However, this case sees a departure from the rule to the extent that the provision is not being applied retrospectively though even this provision is clarificatory in nature. It remains to be seen what course of action will be adopted if other cases arise where bidders are held ineligible by Resolution Professionals in other cases after the amendment but prior to this decision.

News Room

Express News



- NBFCs meet commitment on roll overs: SBI Chairman Rajnish Kumar
- Digital disruption to add 1.4 million new IT jobs in India by 2027
- RBI, govt set to ease out differences ahead of key board meeting

GST forces FMCG majors to reach out to Bharat directly

As wholesalers largely failed to meet GST norms, companies were in a fix. According to industry veterans like Sunil Duggal, chief executive of Dabur, the hazard led many to look beyond third-party distribution and take the leap to cover unattended markets directly.

RBI cancels registration of 65 NBFCs

The Reserve Bank of India (RBI) today cancelled certificate of registration of 65 NBFCs through two separate notifications for unspecified reasons. Most of these NBFCs are in Delhi, while a few of them are in Uttar Pradesh and Haryana. While only one each are from Ahmedabad and Coimbatore.

Paytm enters wholesale business to compete with Amazon, Flipkart

Paytm wholesale business's objective is to "carry on the business of buying, selling, reselling, importing, exporting - of goods and luxury brands on a wholesale and B2B basis."

Binny Bansal has lifetime right to stay on Flipkart board, won't be easy for Walmart to push him out

Unlike the other co-founder Sachin Bansal who cashed out his stake, Binny Bansal has made his intentions clear by indicating he will hold on to minority stake in the company.

After Binny Bansal's sudden exit as CEO of Flipkart, a company he co-founded with Sachin Bansal in 2007, the recently altered Articles Of Association of the company has come to his rescue to secure his position in the board.

Jet Airways stock closes 24.52% higher amid reports Tata Group likely to acquire the carrier

The stock has been gaining for the last three days and risen 26.87% in the period. The small cap stock opened with a gain of 4.46% at 269.25 on the BSE. The stock has lost 61.12% during the last one year and fallen 67.68% since the beginning of this year





Regulatory Updates

Companies Act, 2013

Updates on Amended Rules

MCA has amended Companies (Registered Valuers and Valuation) Rules, 2017 which is to be known as Companies (Registered Valuers and Valuation) Third Amendment Rules, 2018.

In the rule 11 of Companies (Registered Valuers and Valuation) Rules, 2017, for the figures, letters and word “30th September, 2018” occurring at both the places, the figures, letters and word “31st January, 2019” shall be substituted

Companies (Registered Valuers and Valuation) Third Amendment Rules, 2018, dated 25th September 2018.

MCA has amended Companies (Registered Valuers and Valuation) Rules, 2017 which is to be known as Companies (Registered Valuers and Valuation) Fourth Amendment Rules, 2018.

In the amended rules detail list of eligibility, qualification and experience required for registering as valuer has been given. The list covers different assets such as plant and machinery, Land and Building and securities or financial assets.

Companies (Registered Valuers and Valuation) Third Amendment Rules, 2018, Dated ,13th November, 2018.

MCA has introduced National Financial Reporting Authority Rules, 2018.

Following classes of companies are covered under the rule.

Functions of the authority are listed below.

1. The Authority shall protect the public interest and the interests of investors, creditors and other stake holders.
2. Authority shall maintain details of particulars of auditors appointed in the companies and bodies corporate specified in rule 3;
3. The Authority shall recommend accounting standards and auditing standards for approval by the Central Government;
4. The Authority shall monitor and enforce compliance with accounting standards and auditing standards;
5. The Authority shall oversee the quality of service of the professions associated with ensuring compliance with such standards and suggest measures for improvement in the quality of service,
6. The Authority shall promote awareness in relation to the compliance of accounting standards

and auditing standards. 7. The Authority shall co-operate with national and international organisations of independent audit regulators in establishing and overseeing adherence to accounting standards and auditing standards;

8. It shall perform such other functions and duties as may be necessary or incidental to the aforesaid functions and duties.

The Authority has also been given the power to undertake suo motu investigation into any matter of professional or other misconduct, after recording reasons in writing for this purpose.

National Financial Reporting Authority Rules, 2018.13th November, 2018.

Notifications

MCA has established office of the Registrar of Companies cum Official Liquidator at Dehradun, having territorial jurisdiction in the whole State of Uttarakhand for discharging the functions of the Registrar of Companies under the various provisions of the Companies Act, 2013.

S.O. 5458(E), Dated 26th October, 2018.

MCA has established office of the Registrar of Companies at Vijayawada, having territorial jurisdiction in the whole State of Andhra Pradesh for discharging the functions of the Registrar of Companies under the various provisions.

S.O. 5457(E), Dated 26th October, 2018.

MCA has issued THE COMPANIES (AMENDMENT) ORDINANCE, 2018 to amend the Companies Act, 2013.

Following sections are amended.

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|------------------|-----------------|
| 1. Section 2(41) | 12. Section 102 |
| 2. Section 12 | 13. Section 105 |
| 3. Section 14 | 14. Section 117 |
| 4. Section 77 | 15. Section 121 |
| 5. Section 86 | 16. Section 137 |
| 6. Section 90 | 17. Section 140 |
| 7. Section 164 | 18. Section 157 |
| 8. Section 197 | 19. Section 159 |
| 9. Section 248 | 20. Section 165 |
| 10. Section 87 | 21. Section 203 |
| | 22. Section 238 |
| | 23. Section 441 |
| | 24. Section 447 |
| | 25. Section 454 |

S.O. 1864 (E) dated, 02nd November 2018.