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குறள் 429:

எதிரதாக் காக்கும் அறிவினார்க் கில்லை
அதிர வருவதோர் நோய்.

வரப்போவதை முன்னே அறிந்து காத்துக் கொள்ளவல்ல அறிவுடையவர்க்கு, அவர் நடுங்கும் படியாக வரக்கூடிய துன்பம் ஒன்றும் இல்லை.

Thirukural 429:

No terrifying calamity will happen to the wise, who foresee and guard against coming evils.

From the Editor's Desk

Dear Readers

Our sincere thanks to the esteemed readers of CGRF SandBox. The journey so far to provide useful, relevant and updated information to the readers has been exciting. It's now our privilege to bring you the October 2020 issue loaded with articles on contemporary issues ranging from banking, Corporate Laws, IBC and other applicable laws.

"Interest on Interest"

In the context of the economic catastrophe inflicted by Covid-19, moratoriums extended by lenders have come into question on the issue of "interest on interest". Well, the matter is before the Apex Court. Protecting the "interest" of depositors is paramount as articulated by the Governor of RBI. In this context, the Government has set up an expert panel under the chairmanship of former Comptroller and Auditor General of India Mr. Rajiv Mehrishi to weigh the impact of interest waiver on bank loans during the moratorium period. The Government has assured the apex court that it shall come out with a proposal soon. It will be interesting to see how the competing interests of the banks, depositors and borrowers are balanced.

One Time Restructuring (OTR)

Be that as it may, it appears the "OTR" scheme under the RBI Circular dated 6th August 2020 has not yet taken off its heels. The KV Kamath Committee has submitted its report and the suggested parameters of key ratios to be achieved during the restructuring process which will have a two-year window for the eligible corporates. SBI has taken the lead to launch a dedicated portal for personal and business borrowers, clearly specifying the contours for OTR. As there is no interest rate cut and on the contrary, there would be additional interest, it remains to be seen how the OTR gets traction from the borrowers.

Personal Guarantors to Corporate Debtors

Pursuant to the notifying of the provisions relating to insolvency resolution or bankruptcy process in respect of personal guarantors to corporate debtors with effect from 1st Dec. 2019, there is a recent surge in cases being filed by lenders in NCLT / DRT against the personal guarantors. The Delhi High Court has given the personal guarantors some relief by staying the insolvency proceedings initiated under Sec.95 of IBC. The Telangana High Court has recently suspended the MCA notification dated 15th November 2019 which enabled proceedings under IBC against Personal Guarantors to Corporate Debtors. A few interesting things on this subject are being shared with the readers in this issue of SandBox.

Employee dues under IBC

Under IBC, when a resolution plan is approved by the Adjudicating Authority, it shall be binding, inter alia, on all the stakeholders including the Central Government, any State Government or any local authority. Under this context, questions arise on the liabilities towards PF contributions, Gratuity on past service, etc., when a resolution applicant takes over the corporate debtor as a going concern. Similarly when a company goes into liquidation, whether such welfare dues would get preference over other debts is a question which has been addressed by NCLT and NCLAT. The final verdict from Supreme Court is still awaited.

(Image source: website)

Limitation under probe

The law of limitation is age old. The Limitation Act, 1963 has several provisions prescribing different time-lines for various suits, applications, claims, etc. When IBC was enacted in December 2016, the question of limitation did not find a place due to which creditors were able to drag corporates to NCLT even for dues which were pretty old, much older than three years. But insertion of section 238A in IBC made the provisions of Limitation Act applicable to the proceedings or appeal before NCLT/DRT. However, recent judgment by Supreme Court in this context sets the cat among pigeons. Even acknowledgement of debt after declaration as NPA shall not extend the limitation period, in select cases as observed by the apex court. Conflicting orders issued by NCLT, NCLAT are also on record and one has to wait and see how this critical issue, much relevant to the bankers, is settled.

The CGRF Team is thankful for the continuing critical feedback on the contents of SandBox. It is after all, your continued support, which is the driving force for us to serve you better.

CGRF SandBox Team wishes its readers safe "Navaratri" and "Ayudha Pooja" festivals.

Yours truly
S. Rajendran

Personal Guarantors to Corporate Debtors (PG to CD)

S. Rajendran
Insolvency Professional

Bankers are now familiar with the provisions of Insolvency and Bankruptcy Code, 2016 in so far as revival or liquidation of an ailing corporate entity. In this process, the recovery of their dues happens by way of payment from the new investors – the successful resolution applicants – or from liquidation proceeds. However, in many cases, the bankers end up with a huge hair-cut as the resolution plans do not provide for a healthy recovery or the liquidation process does not give any better result. In such cases, what are the remedies to bankers?

Realisation of collateral securities mortgaged by the promoters or third parties was the handy option for the bankers to proceed under SARFAESI Act. Another option was to invoke the personal guarantees from the promoters or any third party. However, in respect of personal guarantees, several issues crop up like details of their personal assets are not known, no action would lie under SARFAESI Act unless mortgage/ pledge was created on the assets belonging to them.

The notification issued by Ministry of Corporate Affairs on 15th Nov. 2019 opened the IBC gates for the creditors to proceed against the personal guarantors to corporate debtors. Rules and Regulations were notified on 20th Nov. 2019 which took effect from 1st Dec. 2019.

Provisions of IBC relating to personal guarantors to corporate debtors

While Part II of IBC dealt with corporate persons' insolvency resolution and liquidation process, Part III contained provisions relating to insolvency resolution and bankruptcy process in respect of individuals and firms. Provisions of Part III were also notified to be applicable to the extent relating to personal guarantors to corporate debtors.

Initiating the insolvency resolution process

An application can be filed under Sec.95 of IBC by any of the creditors to whom an individual has given a personal guarantee in respect of the borrowings or dues of a corporate debtor (CD). A guarantor himself can also file an application under Sec.94. Applications have to be filed with the Adjudicating Authority which can be a National Company Law Tribunal (NCLT) or a Debt Recovery Tribunal (DRT) as the case may be.

Who is the Adjudicating Authority (AA)?

Sec.60(1) of IBC states that the AA in relation to insolvency resolution and liquidation for corporate persons **including corporate debtors and personal guarantors thereof** shall be the NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located.

Further, Sec.60(2) of IBC provides that where a Corporate Insolvency Resolution Process or Liquidation Process of a corporate debtor is pending before a NCLT, an application relating to insolvency resolution or liquidation or bankruptcy process of a corporate guarantor or a personal guarantor of such corporate debtor shall be filed before such NCLT.

By way of further confirmation, Sec.60(3) of IBC lays down that any insolvency resolution process, liquidation or bankruptcy process of a corporate guarantor or personal guarantor of the CD pending before any court or tribunal shall stand transferred to the AA (NCLT or DRT) dealing with the insolvency resolution process or liquidation proceeding of such CD.

Where DRT is the Adjudicating Authority

On a plain reading of section 60(1), it gives an impression that the AA in respect of a personal guarantor for a corporate debtor is NCLT having territorial jurisdiction. However, the definitions given under Rule 3 of IB (Application to Adjudicating Authority for IRP for PG to CD / Bankruptcy Process for PG to CD) Rules, the definition of AA clearly says that for the purpose of Sec.60, NCLT is the AA. In all other cases, DRT having jurisdiction as per Sec.179 will be the AA. Sec.179 of IBC says that the DRT having territorial jurisdiction over the place where the individual debtor (read: personal guarantor) actually and voluntarily resides or carries on business or personally works for gain.

Therefore, it is clear that wherever there is no CIRP or liquidation process pending in respect of a corporate debtor, an application under Sec.94 or 95 of IBC shall lie before the DRT having territorial jurisdiction over the personal guarantor.

Section 10 A of the Code may not affect the proceedings against the Personal Guarantors:

The provision suspending the initiation of corporate insolvency resolution process of a corporate debtor, for any default arising on or after 25th March, 2020 for a period upto 24th December, 2020 will not affect the Bankers to recover dues, owing to the fact that proceedings can still be initiated against personal guarantors.

Threshold Limit:

It is to be noted that while the threshold limit for filing a case against corporate guarantor to corporate debtor has been raised from 1 Lakh to 1 Crore, the threshold limit with respect to personal guarantor to corporate debtor remains at Rs. One Thousand only.

Recent developments on admission of the application

While Mumbai NCLT has admitted applications under Sec.95 of IBC by a creditor against a personal guarantor to

CD, the aggrieved personal guarantors have knocked the doors of High Courts. The Delhi High Court has stayed the admission of the application under Sec.95. State Bank of India's application against Mr. Anil Ambani has been stayed. The issue has now been taken to the Supreme Court. On another appeal before Telangana High Court in respect of a Sec.95 application, the Court has even suspended the MCA notification of 15th Nov. 2019 which provided the gateway for proceeding against the personal guarantors to corporate debtors. The grounds of arguments by the personal guarantors have been that in respect of the same debts of the corporate debtor, recovery action has been taken twice – once against the corporate debtor and also against the personal guarantor. Maintainability of such parallel proceedings has come under the limelight.

Where the roads lead the banks

All said and done, the bankers seem to be tightening the noose around the neck of the PG to CD as their efforts to recover the dues from the CD have failed. Whether the PGs have any resources or not is a moot question. Naming and shaming could lead to recovery at least in some cases, it is believed. The legal test on recovery proceedings against PG to CD has reached an interesting phase and the decision of the apex court will set the matter to rest. Undoubtedly, personal guarantors have been put on notice and going ahead, getting a personal guarantee may not be that easy.

MCA General Circular No. 32/2020-21 dated 28th September, 2020.

The companies are required to file forms related to the creation or modification of charges within the timelines provided in section 77 of the Companies Act, 2013 i.e. a total 120 days of the creation or modification of charge. In case, the company fails to register the charge within the period of thirty days referred to in sub-section (1) of section 77, the charge holder may file the form related to the creation or modification of charges under section 78 of the Act, within the overall timelines for filing of such form under section 77. In the view of the pandemic situation, the Central Government in the exercise of its powers under section 460 read with section 403 of the Act and the Companies (Registration Offices and Fees) Rules 2914 has decided to introduce a Scheme, namely "Scheme for relaxation of time for filing forms related to creation or modification of charges under the Companies Act, 2013" for the purpose of condoning the delay in filing certain forms related to creation/ modification of charges. The period mentioned for this relief was from 31st March 2020 to 30th September 2020 vide Circular 23/2020 dated 17th June 2020. In continuation of this, MCA has decided to extend the scheme till 31st December 2020.

The Great One - Time Rejig

N. Nageswaran
Insolvency Professional

This is a topic, at least for the serious bankers as well as for the arm-chair writers for the financial economics columns everywhere, like the hand sanitizing requirement to keep away from Covid-19 pandemic, is the most parroted one in the recent times. Unfortunately, to say in the words of Mr. Rajnish Kumar, Chairman of SBI, the biggest bank in India, "I don't see that there is a clamour or there is a rush for the restructuring". He also goes on to add that corporates are reluctant to go for the restructuring and if at all the product is opted for, it is by the choice exercised by the corporates in the lower end and by MSME segments. In the retail segment the apathy is more conspicuous and the almost nil efforts by financial institutions in disseminating the details of the schemes to their customers could be the reason for the poor show in this regard. Does the delay in bringing out the guidelines on modalities for restructuring loans to business as well as individual borrowers almost one month later after the announcement by RBI on such a restructuring exercise on 6th August 2020 indicate the poor confidence levels of the financial institutions?

Corporate Debt Restructuring

What is Corporate Debt Restructuring? Mr.Will Kenton, Director, Content Marketing of Investopedia.com defines it as "It is the reorganization of a distressed company's outstanding obligations to restore its liquidity and keep it in business. It is often achieved by way of negotiation between distressed companies and their creditors, such as banks and other financial institutions, but reducing the total amount of debt the company has, and also by decreasing the interest rate it pays while increasing the period of time it has to pay the obligation back."

"Occasionally, some of the company's debt may be forgiven by creditors in exchange for an equity position in the company. Such arrangements, which often are the final opportunity for a distressed company, are preferable to a more complicated and expensive bankruptcy.

Thus, the key components of restructuring the debt of a corporate are:

1. Reorganization of the outstandings with its creditors
2. Restore the liquidity of the company
3. Decrease the interest rate
4. Increase the time to repay
5. Reduce the level of debt if possible
6. Write off the debt in exchange for equity

Of the above, in the present discussion of restructuring of business loans by banks in India, the last two items are a taboo and cannot be discussed as they are also not finding a place in the Reserve Bank of India's circular referred to above.

Also, reducing the interest rate is also not an item in the agenda of any of the commercial banks and financial institutions which are attempting to restructure the debts of a corporate. Though Reserve Bank of India has lowered its Bank rate there is no mechanism to ensure that the banks effectively transmit the reduction in the rate to the borrowers. However, the point of reference is that for the depositors the banks effectively reduce the rate of interest with minimum time lag. Of course, the banks have their own sorrow stories for this indifferent behaviour, rightly so.

Another issue in the entire model of restructuring suggested is the principle that "one size fits all" asked to be followed by the regulators with the scheme formulated by Reserve Bank of India. The commercial banks are not having a leeway, the time at their disposal nor the inclination to discuss in detail with the borrowers the specific nature of financial help they need.

Restoring the liquidity if not attempting to improve it should be another important criteria to be looked into when any loan restructuring is being attempted. In the model of restructuring being discussed not much of attention is being devoted to this. It is left to the business entity to prepare a business plan but the entity definitely lacks the basic data for building their assumptions in the post Covid19 scenario. So in most cases such a business plan will become questionable. How then the restoration of the necessary liquidity can be confirmed which is the basis for the entire restructuring?

Restructuring of Personal Loans

In the matter of restructuring of personal loans, the basic problems of rate of interest, interest during the moratorium availed, additional charges for restructuring the loan etc. remain unanswered.

Additionally, answers to the following questions remain to be found:

1. What will happen if the income of the individual whose loans are restructured undergo a negative change in future?
2. What will happen if the value of the security provided for the personal loan goes down due to changes in economic outlook?
3. Are the loans taken post 1st March 2020 eligible for restructuring if the borrower is affected by Covid? (FAQ of one bank categorically says "No".)
4. The income levels of the borrower is not affected at present but he anticipates that he might get affected. Will he be eligible for the restructuring?
5. Due to the restructuring by which the unpaid interest and the principal during the moratorium gets added to the Principal and after adding the maximum permissible time extension (as this will be restricted in case the borrower attains the age of 77) the new EMI will be calculated. If in case the income limit does not permit such an EMI to be considered, will the borrower be eligible for the restructuring or not?

Conclusion

This leaves no doubt as to why the scheme of restructuring evoked very low response from the financial institutions as well as the borrowers, whether they are corporate or individual. It seems a relook into the entire matter is necessary by all concerned.

Suspension of initiating CIRP proceedings against Corporate Debtor upto 24th December, 2020

The Ministry Of Corporate Affairs vide its Notification dated 24th Sept. 2020 [S.O. 3265(E)] has extended the suspension for initiating any Insolvency Proceedings against the corporate debtor for defaults arising post 25th March, 2020 when the lockdown was induced due to Cover -19 pandemic.

The said suspension was initially for a period of six months with effect from 25th March, 2020, so as to protect those experiencing financial distress on account of the pandemic.

In view of the above, insolvency proceedings cannot be initiated against any borrower for defaults arising on or after March 25, 2020, until such time that the aforementioned suspension continues.

Notice of Invitation to Statutory Auditor to attend AGM of the company - Consequences of not sending the notice

Prof R. Balakrishnan
FCS, Pune

Preamble

An annual general meeting (AGM) is a yearly gathering between the shareholders of a company and its board of directors. By and large, this is the only time that the directors and shareholders will meet once in a year, so it is a chance for the directors to present the company's annual financial statements along with their board report.

The statutory auditor(s) of the company is appointed by the shareholders who audit the financials of a company as representative of the shareholders to look after the interest of the shareholders. By virtue of this appointment and also with reference to the provisions of the Companies Act 2013, the statutory auditor (s) owes a number of duties to the company and its shareholders.

Since the audited financial statements are presented at the annual general meeting and approved by the shareholders, the statutory auditors should be present to attend to any queries / doubts, the shareholders may have. In this context, the crucial question is whether the statutory auditors should be present compulsorily or not.

It is also pertinent to note the following, held in the judgment delivered by the Calcutta High Court in the case of The Deputy Secretary v/s S.N Dasgupta. AIR 1956, Cal 414 as back as in the year 1955

"……..The Companies Act, therefore, provides for the employment of an Auditor who is the servant of the share-holders and whose duty it is to examine the affairs of the company on their behalf at the end of a year and report to them what he has found."……..

We shall look into the provisions of the current Companies Act 2013, in respect of auditors presence in the annual general meeting and other related matters.

1. Notice of General Meeting

Sub-section (3) of section 101 of the Companies Act, 2013 read with Secretarial Standards 2 issued by the Institute of Company Secretaries of India for general meetings, it says that notice shall be given to the following people:-

a) Members,
(Legal representative of deceased member or assignee if an insolvent member)
b) Statutory auditors
c) Secretarial auditors
d) All directors
e) Debenture trustee (if any)

2. Company having its website

The notice of the general meeting of the company should be simultaneously hosted / placed on the website (if any) of the company as provided in Rule 18(3) (ix) of the Companies (Management and Administration) Rules, 2014, and such notice should remain on the website till the date of general meeting.

3. Auditors to attend General Meeting

Section 146 of the Companies Act 2013 is the governing section relating to auditors attendance in general meeting which reads that all notices of, and other communications relating to, any general meeting shall be forwarded to the auditor of the company, and the auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting and shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

3.1. Analysis of section 146 of the Companies Act 2013

If we analyse the section 146, we can easily come to the following conclusions:-

a) All notices of, and other communications relating to, any general meeting should mandatorily be forwarded by the company to its statutory auditor.
b) Auditor is mandatorily required to attend any general meeting either by himself or through his authorised representative, who shall also be qualified to be an auditor.
c) Auditor is, however, may be permitted to be exempted by the company to attend the general meeting.
d) Auditor shall have the right to be heard at such general meeting on any part of the business which concerns him as the auditor.

It may be also noted that general meeting will include annual general meeting as well as extraordinary general meeting or any other general meeting.

The important thing which is to be noted here is that although the statutory auditor has been statutorily mandated to attend all general meetings, the concerned company may exempt him from attending. It is reasonable to interpret that exemption can be sought by the auditors from attending the general

meeting on justified and reasonable grounds and the company can grant the same.

However, in the best interest of corporate governance, the auditors should be present at the general meeting of a company so that he is in a position to answer the queries of the shareholders on the audited financial statements.

4. Observations or comments on financial statements by Auditors

The section 145 of Companies Act 2013, states that qualifications, observations or comments on financial statements or matters which have any adverse effect on the functioning of the company mentioned in the auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

This obviously means, as per the provisions of the Companies Act 2013, the auditor's report is not required to be read in its entirety and only the qualifications, observations or comments on financial transactions or matters which have any adverse effect on the functioning of the company mentioned in the auditor's report is required to be read before the company in general meeting.

(Image source: website)

5. Provisions of Companies Act on Financial Statement, Board's Report, etc.

Sub-section (2) of section 134 of the Companies Act 2013 requires, that the auditors' report shall be attached to every financial statement along with the Board's Report which shall include explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report besides other disclosure requirements.

5.1 Disclosure in Board's Report on Auditor's qualifications

In the Board report, under the heading Auditors and Auditor's report, the companies are required to provide the explanations for the every qualification, adverse remark or observation of the statutory auditors on the annual financial statement for the year ended.

In the case of Auditors' Report which does not contain any qualification, reservation or adverse remark or disclaimer, the company could state that the Auditors' Report have been issued with unmodified opinion on the annual financial results of the Company and the financial statement for the year ended including the relevant notes to the financial statement are self-explanatory and, therefore, does not call for any further comments.

6. In case of default in sending notice to auditors for the general meeting

In terms of provisions of section 146 of the Companies Act 2013, the notice of the general meeting should be forwarded to the statutory auditor of the company.

If a company failed to send its notice to the statutory auditor for any general meeting for a particular year, then the non-compliance occurs.

7. Consequences of not extending invitation to Auditor to attend annual general meeting

The regulators upon inspection i.e., the inspecting officer of the Central Government under section 206(5) of the Companies Act 2013, could notice, during the course of inspection that as per provisions of section 146, the notice of the annual general meeting which should have been forwarded to the statutory auditor has not been sent. Further, upon perusal of minutes of annual general meeting held for the financial year, the inspector could ascertain that neither auditor nor his representative attended the annual general meeting, thereby violated the provisions of section 146. The inspector can also get the same counterchecked with the statutory auditor of the company that the company has not sent any notice asking him to attend the annual general meeting, if they so desire for further confirmation. Even if the inspection does not take place, the regulator can call for the relevant documents from the company and can scrutinize the same if required.

In view of the non-compliance / violation of section 146 of the Companies Act, the inspecting officer would conclude his report stating that necessary penal action may be considered for the same against the company and its defaulting officers.

8. Issue of show cause notice

Thereafter the authority would issue show cause notice to the company as to why legal action under section 147(1) should not be taken against them failing which necessary penal action will be initiated since the company and its officers are in default and have rendered themselves to be punished under

section 147(1) of the Companies Act 2013, for violation of section 146. The regulator would also draw the attention of the company and its defaulting officers to section 441 of the Companies Act 2013, whereunder the offence in question can be compounded by the appropriate authority namely Regional Director / NCLT.

9. Punishment for contravention

As per the provisions of the Companies Act 2013, sub-section (1) of Section 147 states that if a company contravenes the provisions of this section (i.e.146), the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees, or with both.

10. Role of company secretary

In view of the stringent penal provisions of the Companies Act 2013, as seen above, the company secretary who is also a key managerial person, is responsible for ensuring the absolute compliance in respect of the provisions under Companies Act 2013. It is also worth mentioning here that as per Regulation 6 (1), the company secretary in a listed company is termed as the compliance officer who is responsible for taking care of all applicable compliances of the company.

The company secretary who is the principal officer of the company (also known as officer in default) needs to have a compliance management system in place for the secretarial department and work with the check list for each and every item relating to ensuring compliance with the Companies Act provisions read with Secretarial Standard requirements.

11. Action from the company upon receipt of show cause notice

In case of default, upon receipt of show cause notice from the regulator, there is no other option for the company than going for compounding of offences to get over the violation as per the provisions of section 441 of the Companies Act 2013

12. Compounding Application

Since the offence under this section i.e. 146 of the Companies Act 2013 is compoundable under section 441 of the Companies Act, the company may have to resort to filing the compounding application, admitting the offence and with a request to the regulatory authorities to compound the offence and follow the procedure of filing the application, attending the hearing, getting the matter compounded and paying the compounding fees levied and close the issue one and for all.

13. Disclosure of compounding matters in the Board's Report

The extract of annual return which is required to be annexed to the board report pursuant to section 92(3) of the Companies Act, 2013 and Rule 12(1) of the Companies (Management and Administration) Rules, 2014. The details of compounding of offences under the headings "Penalties / Punishment / Compounding of offences is required to be disclosed.

Obviously, the stakeholders of the company who are the recipient of the annual report would know by going through the extract of annual report, the nature of non-compliance committed by the company and the compounding fees paid by the company which would affect image and the reputation of the company in the market place.

Conclusion

The company secretaries being an expert in corporate laws should hold their heads up high by doing an excellent and absolute compliance management system put in place by the company. Since the Board members depend upon the company secretary, he needs to have a thorough knowledge or organizational skill coupled with planning skill with an eye for details along with sound judgment and effective communication skills. He should aim to achieve "nil" non-compliance status by "doing what is right" at all times and ensure that the company moves towards achieving excellence in corporate governance.

MCA General Circular No. 33/2020-21 dated 28th September, 2020.

The Ministry of Corporate Affairs (MCA) had issued the guidelines on 8th April 2020 regarding the conduct of extraordinary general meetings (EGMs) through video conferencing (VC) or other audio visual means (OAVM).

The circular with further clarifications was issued on 13th April 2020. The permission which was originally granted upto 30th June 2020 was till 30th September 2020. In continuation of the above, after the due examination and it has been decided to allow companies to conduct such meetings up to 31st December 2020 on VC and other OAVM.

Resignation by director and notice of intimation to Registrar of Companies (RoC)

Prof R. Balakrishnan
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Introduction

Whenever a company appoints a director on its board, when a change in designation takes place of a director and also upon his cessation, the Companies Act 2013 mandates that an intimation is required to be filed through online in the specified format of e-form DIR-12 at the portal of Ministry of Corporate Affairs by the company. Upon cessation of a director, the company would be required to file DIR-12 form intimating the cessation of the director and the concerned director could also file intimation of his cessation by filing form DIR-11.

1. **Resignation of director**
   Section 168 of the Companies Act 2013 contains provisions relating to the resignation of director from company and sub-section (1) of Section 168 provides that a director may resign from his office by giving a notice in writing to the company. Board shall take note of such notice on its receipt and the resignation takes effect from the date on which notice is received or any other date specified by the director concerned in the notice.

2. **Intimation about resignation to Registrar of Companies (RoC) by the Company**
   The intimation of the resignation of the director need to be given by the company as per the provisions of section 168 of the Companies Act 2014 read with rule 15 of Companies (Appointment and Qualification of Directors) Rules 2014. The company is mandatorily required to intimate the RoC about resignation of director within a period of 30 days from the date of receipt of notice in form DIR-12.

3. **Intimation about resignation to Registrar of Companies (RoC) by the Director**
   The Companies Act 2013 further provides vide proviso to section 168(1) read with rule 16 of Companies (Appointment and Qualification of Directors) Rules, 2014 that the concerned director also could forward a copy of his resignation along with detailed reasons to the Registrar of Companies about his resignation in form DIR-11.

4. **Whether filing the form DIR-11 is mandatory**
   As per the Companies (Amendment) Act, 2017 and the Companies (Appointment and Qualification of Directors) Second Amendment Rules, 2018 filing of DIR-11 is at discretion of director and it is no longer a mandatory requirement effective from 7th March 2018.

5. **DIR-11 form filing by a foreign director**
   Many a times a practical difficulty is faced for filing the form by a foreign director due to many reasons. (For example - directors holding the office of director long time – much before the digital signature had come and the concerned director may not be having their DSC for filing the form could be one such reason)

   A question arises, in such cases whether a foreign director could authorize any of the other existing directors in the company or any other practicing professional, to sign the form DIR-11 on his behalf and file the same.

   In precise, the question is whether a director could authorize any other person on his behalf to sign Form DIR-11 - notice of the resignation to ROC by the director.

6. **Provision of the Act / Rules on DIR-11 form filing**
   If one could refer the proviso to rule 16 of the Companies (Appointment and Qualification of Directors Rules 2014, the answer to this question is found.

   A foreign director could authorize in writing a practicing professional or any other resident director of the company to sign Form DIR-11, and file the same on his behalf intimating the reasons for the resignation. The relevant provisions are below:-

   > *"As per the proviso which is inserted to rule 16 of the Companies (Appointment and Qualification of Directors Rules 2014 by a notification F. No. 01/9/2013-CL.V (Part-II) dated 19th January 2015, by the Ministry of Corporate Affairs, a foreign director in an Indian company resigning from his office may authorize in writing a practicing chartered accountant or cost accountant in practice or company secretary in practice or any other resident director of the company to sign Form DIR-11, and file the same on his behalf intimating the reasons for the resignation."*

Conclusion

We can conclude that a foreign director can authorize a whole time practicing chartered accountant or cost accountant in practice or company secretary or any other resident director of the company to sign Form DIR-11, and file the same on his behalf intimating the reasons for the resignation. The only pre-condition mentioned here is that the form DIR-11 could be filed only after the company having filed the form DIR-12 with the Registrar of Companies.

Private Placement and Preferential Offer

Lakshmi N & E Gunaseelan
(SR Srinivasan & Co. LLP)


Preamble:

Every business requires capital to build and sustain its operations. The seed capital, most of the times, is inadequate particularly during the growth phase. Naturally, the promoters look out for further infusion of equity capital or debt to sustain the growth. The Companies Act, 2013 deals with various situations as to how a corporate, be it a public company or a private company, can raise funds.

Sec.23 of the Act describes the options available to the corporates on issue of various instruments:

Public Company	Private Company
Public Offer Initial Public Offer Further Public Offer Offer for Sale (Sec. 24 to 41)	**Public Offer** Initial Public Offer Further Public Offer Offer for Sale (Sec. 24 to 41) CANNOT MAKE
	A Pvt. Co. cannot make Public Offer
Private Placement of Securities	Private Placement of Securities
Preferential Offer (Sec.62 (1) (c))	Preferential Offer (Sec.62 (1) (c))
Others Right issue (S.62) Bonus issue (S.63) / Sweat equity shares (S.54) (no inflow of funds)	**Others** Right issue (S. 62) Bonus issue (S. 63) / Sweat equity shares (S.54) (no inflow of funds)

A. Options available to a Public Company:

As could be seen from the above description, a public company has more options to raise funds.

Public Offer

The familiar form is to make public offer through prospectus. While Sections 24 to 41 of Companies Act, 2013 deal with the relevant provisions for public offer, some of the important things to be noted are:

a) A public offer is generally for any type of securities like equity shares, convertible preference shares, non-convertible preference shares, debentures etc. and not necessarily for shares, whether convertible or Non-Convertible.

b) However, offer for sale by existing members is only for shares. Sec.28 of the Act read with Rule 8 of Companies (Prospectus and Allotment of Securities) Rules 2014 lays down the provisions relating to offer for sale of shares.

Private placement

The other option available to public companies to raise funds is through private placement. Under this provision, both the public and the private companies may make private placement of securities to a select group of persons "identified" by the Board. Sec.42 of Companies Act read with Rule 14 of Companies (Prospectus and Allotment of Securities) Rules 2014 lays down the provisions relating to private placement of securities. Here again, private placement can be made for all types of securities like shares, debentures and convertible instruments or non-convertible instruments.

Rights issue

The next common way of raising funds is through rights issue. Where a company already having a share capital, proposes to increase its subscribed capital, it shall offer such further shares to the existing equity shareholders in a proportionate basis. A company can also offer such further shares to employees under Employees' Stock Option Scheme (ESOP).

Preferential offer

Further issue of capital can also be made, if it is authorised by a special resolution of the shareholders to the existing shareholders or employees or any other persons subject to complying with the requirements of Sec.62(1)(c)read with Rule 13 of Companies (Share Capital and Debentures) Rules 2014.

Bonus issue

Sec.63 of the Companies Act 2013 deals with issue of fully paid-up bonus shares by companies. However, it may be noted that the issue of bonus shares does not bring any fresh funds into the company while it only capitalise the reserves and surplus of the company. It is

more of rewarding the existing shareholders by way of issuing free shares to them in a proportionate manner.

Sweat equity shares

Sec.54 of the Act read with Rule 8 of Companies (Share Capital and Debentures) Rules 2014 lists the provisions relating to issue of sweat equity shares to the directors or employees of the company. However, if the shares are of a class already listed on a stock exchange, the sweat equity shares should be issued in accordance with the regulations issued by SEBI.

B. Options available to a Private Company:

By virtue of the definition, a private company is prohibited from inviting public to subscribe for any securities of the company. Also, a private company should, by its articles of association, restrict the right to transfer its shares which means that the shares cannot be freely traded. The transfer of shares has to be approved by the board of directors. Usually, the articles of a private company provide for transfer of shares of a private company amongst the existing members.

However, in respect of debt instruments like debentures, even a private company can list the debentures in recognised stock exchanges after issuing them in order to have liquidity of the security. This is permitted only in the case of debt instruments and not for shares.

Apart from the above, a private company can go for private placement of securities, rights issue of shares and preferential offer in the same manner a public company can do. As stated already, the issue of bonus shares and sweat equity shares do not bring funds into the company.

Difference between Private Placement and Preferential Offer:

Sec.42 of Companies Act, 2013 deals with private placement. A private placement can be done for any type of securities. But a preferential offer can be made only in respect of equity shares or any instruments which provide for convertibility into equity shares. Sec.62 (1) (c) of Companies Act, 2013 provide for the preferential offer of shares to any person. Rule 13 of Companies (Share Capital and Debentures) Rules, 2014 deal with "issue of shares on preferential basis".

"Preferential Offer" means an issue of shares or other securities, by a company to any select person or group of persons on a preferential basis and does not include shares or other securities offered through a public issue, rights issue, employee stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities.

Again, *shares or other securities* are defined as equity shares, fully convertible debentures, partly convertible debentures, or any other securities, which would be convertible into or exchanged with equity shares at a later date.

Private Placement vs. Preferential Offer

Private Placement	Preferential Offer
Sec.42, Rule 14 (PAS) Rules	Sec.62 (1) (c), Rule 13 (Sh Cap & Deb.) Rules
A company can issue any instrument or security on a private placement basis. It can be shares, debentures, convertible or non-convertible.	Under these provisions, only equity shares, fully/partly convertible debentures or any other securities which would be convertible into or exchanged with equity shares can be issued. Provided that the non-convertible preference shares can be issued to the existing Equity Shareholders and Employees under ESOP.
Authorisation of Articles is required for both private placement and preferential offer.	
Private Placement cannot be made to more than 50 persons at a time and not more than 200 persons in a financial year excluding Qualified Institutional Buyers (QIBs) and employees.	
Valuation by a registered valuer mandatory for issue of securities except in case of preferential offer by a listed company.	
No public advertisement shall be released and no media, marketing or distribution channels or agents shall be utilised to inform the public at large about such issue.	
Allotment of securities shall be completed within 12 months of passing the Special Resolution. Securities shall be allotted within 60 days from the date of receipt of application money.	
Special Resolution is mandatory for issue of securities under private placement.	Special resolution is mandatory. However, if the securities are issued to existing members, no special resolution is required.
The money received on application shall be kept in a separate bank account. Allotment shall be made within 60 days of receipt of application money. The amount received shall be utilised only for adjustment against allotment of securities or for repayment if the company fails to allot the securities.	
The private placement offer and application shall not carry any right of renunciation.	If the preferential offer is made to existing members, the members have a right to renounce their right to any other person.
If the shares/securities to be issued are of a class already listed, then SEBI Regulations should also be complied with.	
Forms to be Filed: MGT-14 mandatorily to be filed	MGT-14 to be filed only for the cases requiring Special Resolution.
Forms to be filed: PAS-4 (Letter of offer-cum-application) PAS-5(Register of private placements), PAS-3 (Return of allotment)	

Appointment of an Independent Director - Analysis of the Procedure

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Preamble

It is the prerogative of the Board to appoint an independent director (ID) even as it may require approval of the members. The Members have no right to appoint the ID at any of their meetings since it is an exclusive right bestowed on the Board. This is so because section 149(6)(a) of the Companies Act, 2013 stipulates that the Board has to form an opinion on the integrity of the person proposed to be appointed as an ID and that he or she possesses relevant expertise and experience. The fact of formation of opinion, which should be made in the form of a Board Resolution, has also to be included in the explanatory statement attached to the notice as per section 102 as required under Clause IV(3) to Schedule IV of the Act. Therefore, members cannot usurp this power to appoint the ID because it is an exclusive right bestowed by law on the Board and practically it is not possible for the members collectively to form an opinion on the ID as stated above. Also, section 149(6) read with Schedule IV, clause IV(1) has stipulated several conditions to be fulfilled before a person is appointed as an ID, the fulfilment of which is the responsibility of the Board. Therefore, the appointing authority is the Board and not the members. Again, by virtue of the provisions of Section 149(8) read with clause IV& Schedule IV, the appointment of IDs of the company shall be approved at the meeting of the shareholders. The General Meeting, hence, becomes the approving authority.

Procedure to appoint the ID

Normally, the practice is that the Board identifies a person of eminence and considers his appointment as an ID provided he or she fulfils all the conditions stipulated by law. He is then inducted on to the Board as an "additional director" (AD) u/s 161(1) provided the Board has this power enshrined in the Articles of Association (AoA). However, nothing prevents the Company from appointing an ID from the existing team of Non-Executive Directors. The additional director so appointed is also appointed as an ID at the same meeting based on a different resolution, subject, of course, to the approval of the members. It has to be remembered that the AD ceases to hold office at the commencement of the AGM. Following two situations can arise:

Situation 1: The members approve/reject the recommendations of the Board for the appointment of the AD as ID at an EGM held prior to the AGM; and

Situation 2: The members approve/reject the recommendations of the Board for the appointment of the AD as ID at the next AGM where no EGM has been held prior to the AGM. Note that if EGM is held prior to AGM, the approval of members for appointment as ID has to be obtained at the EGM only.

Let us now consider Situation 1. The AD does not cease to hold office up to the date of the EGM but continues to be the AD since as per section 161(1) the AD holds office up to the next AGM or up to last date on which the AGM should have been held. The AGM will follow the EGM at a later point of time when AD will cease to hold office. Therefore, if the members at this EGM approve the appointment of ID as recommended by the Board there will only be a change in designation/ category for the person whose appointment is being approved by the members from AD to ID which fact should be reflected in the e-form DIR 12 being filed. The term of office of the ID commences from the date on which he or she was appointed by the Board as such and will expire on the date up till which he or she is appointed or on the expiry of five years from the date of Board Meeting whichever is earlier.

Let us now consider Situation 2. Assuming that there is no EGM before the AGM the following events will take place:

(i) The AD will cease to hold office at the commencement of AGM;
(ii) If the intention of the Board is to regularise the appointment of the AD as a regular director he/she has to be appointed as a "director" u/s 160(1) (there is no other way to regularise his/her appointment) and the appropriate provisions of section 160(1) have to be followed.
(iii) The appointment stated in (ii) above is generally considered by the AGM as Special Business requiring Ordinary Resolution as an item of business immediately after disposal of the items slated in the Ordinary Business. The AD cannot take part as a director in the proceedings of the AGM till he is appointed as a director u/s 160(1) and further till his/her appointment as an ID is approved by the meeting as he will be considered to be an "interested director" in both cases.
(iv) In case the Board is keen that the AD who has been appointed as ID should take part in the proceedings when the Ordinary Business are be transacted, then the Special Business slated for regularising the appointment of AD and further appointing him/her as ID has to be considered as item 1 and 2 respectively. There is no bar in law if Special Business is considered prior to Ordinary Business. If the Board opts for this course of action the AD

appointed as ID can take part in the proceedings when the Ordinary Business are considered.

Causes of Action:

First : Passage of Board Resolution for appointing a person as AD;
Second: Passage of Board Resolution for appointing the AD as ID;
Third : Re designating AD as ID (in a case coming under Situation 1 above);
Fourth: AD ceasing to hold office at the commencement of AGM (in a case coming under Situation 2 above);
Fifth : The appointment of AD being regularised by appointing him/her as director u/s 160(1) (in a case coming under Situation 2 above); and
Sixth : Appointing the Director already appointed u/s 160(1) as ID not liable to retire by rotation.

The following resolutions have been picked up from the public domain which has been passed by reputed listed and unlisted public companies where flaws have been noticed by the author:

1) *"RESOLVED THAT pursuant to the provisions of Sections 149, 150 and 152 and other applicable provisions, if any, of the Companies Act, 2013, and the Rules made thereunder, read with Schedule IV of the said Act, Ms. _____(DIN : _____), who was appointed as an Additional Director of the Company with effect from _____under Section 161 of the Companies Act, 2013, be and is hereby appointed as an Independent Director of the Company to hold office for a term upto five consecutive years commencing from _____"*

Author's comments:

Badly drafted. The Additional Director will cease to hold office at the AGM. Without regularising the appointment u/s 160(1) to make him/her as a director, this additional director has been straightaway appointed as ID. Resolution is invalid.

2) *"RESOLVED THAT pursuant to the provisions of Sections 149, 150, 152 and any other applicable provisions of the Companies Act, 2013 ("Act") and the Companies (Appointment and Qualification of Directors) Rules, 2014 (including any statutory modification(s) or re-enactment thereof for the time being in force) read with Schedule IV to the Act and Regulation 16(1)(b) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Mr. _____(DIN: _____), Independent Non-Executive Director of the Company who has submitted a declaration that he meets the criteria for independence as provided in Section 149(6) of the Act and who is eligible for appointment, be and is hereby appointed as an Independent Non-Executive Director of the Company, not liable to retire by rotation, to hold office for a term of five consecutive years with effect from _____till the financial year ending on 31st _____"*

(Image source: website)

Author's comment:

From the Explanatory Statement it is understood that the director concerned was appointed as an AD and the appointment is being approved by the members now for being appointed as an ID for the first term. The AD will cease to hold office at the AGM. Without regularising the appointment u/s 160(1) to make him/her as a director, this AD has been straightaway appointed as ID. Resolution is invalid. Nowhere the text of the resolution makes a reference to his/her having been appointed as an AD.

3) *"RESOLVED THAT Mr. _____ (DIN:_____), who was appointed as an Additional Independent Director on the Board of Directors ('Board') of the Company with effect from _____ in terms of Section 161 of the Companies Act, 2013 and who holds office up to the date of this Annual General Meeting, be and is hereby appointed as Independent Director of the Company"*

Author's comment:

It is observed that the some companies have erroneously coined the word "Additional Independent Director". There is no such concept under the Companies Act, 2013. This is misleads the members to give an impression that one more Independent Director is being appointed. Moreover, the AD will cease to hold office at the AGM. Without regularising the appointment u/s 160(1) to make him/her as a director, this additional director has been straightaway appointed as ID. Resolution is invalid.

4) *"RESOLVED THAT Mr. _____ (DIN: _____), who was appointed by the Board of Directors as an Additional Director of the Company with effect from _____and who holds office up to the date of this Annual General Meeting of the Company in terms of Section 161 of the Companies Act, 2013 ("Act") but who is eligible for appointment and has consented to act as a Director of the Company and in respect of whom the Company has received a notice in writing from a Member under Section 160 of the Act proposing his candidature for the office of*

Director of the Company, be and is hereby appointed as Director of the Company"

"RESOLVED FURTHER THAT pursuant to the provisions of Sections 149, 152 and other applicable provisions, if any, of the Act, and the Rules framed there under read with Schedule IV to the Act, as amended from time to time, Mr. _____a non- executive Director of the Company, who meets the criteria for independence as provided in Section 149(6) of the Act and who is eligible for appointment be and is hereby appointed an Independent Director of the Company, not liable to retire by rotation, for a term of five years, commencing with effect from _____ to _____"

Conclusion:

It can be seen from the above resolutions that except for one company (No.4) (though the resolutions could have been drafted in a better manner) the other companies have resorted to passing one single resolution for appointing a director u/s 160(1) and for appointing the same person as Independent Director u/s 149. This practice seems to be prevalent with many other companies. The causes of action are different for both and therefore, the resolution has to be split into two even as they can be passed under one business item since there is a nexus between the two. *The fundamental question would be if a member has to vote differently for the additional director to be appointed u/s 160(1) and differently for him to be appointed as an Independent Director under section 149, how would he/she vote if a single resolution is put in front of him.*

There seems to be a tendency of resorting to "copy-paste" by Company Secretaries of some companies just because such resolutions, though erroneous, have been passed by leading companies some of which are in the top100 listed companies. The companies may be reputed and leading but the Company Secretary who has drafted the resolution may be inexperienced. Therefore, for a good professional Company Secretary the yardstick should not be the resolutions which are published by leading and reputed companies just because these companies may be enjoying a pride of place in the corporate world for some good reasons, but he or she has to apply his/her mind as to what is legally acceptable.

The author wishes that the Quality Review Board of ICSI should go into the details of resolutions passed by such companies and take appropriate measures to lead the Company Secretaries of these companies on the right course. A few aspects with reference to contract with independent director will be covered in the next issue.

IBC and applicability of Limitation Act

N. Nageswaran
Insolvency Professional

One of the never ending controversies on applicability of Limitation Act to IBC cases got a new lease of life with the Hon'ble Supreme Court's ruling in the ***Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd*** case. The following are some of the points to recapitulate from the discussions on the subject and the remedial measures that were prescribed:

Does the Code provide an opportunity for those who did not exercise their right to remedy within the period prescribed by the Limitation Act, 1963?

This question was answered by the Insolvency Law Committee in 2018 when it recommended the introduction of the required provisions that the Limitations Act 1963 will be applicable to the Code also. The Committee's report read as under:

"28.3 Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of creditor's remedy."

As a result, a new Section 238A (under the famous Sec 238 of the Code which was supposed to be giving the supremacy to the Code against all other laws) was added on 6th June 2018. Both the sections read as:

Sec 238 " The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

Sec 238A "The provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

The above decision, instead of settling created further dust in the form whether Sec 238A is prospective or retrospective.

Again the apex court had to intervene through their judgement in ***B.K Educational Services Private Limited***

v. Parag Gupta and Associates that the provisions of Sec 238A are in the form an explanatory statement only and hence will have a retrospective effect.

Though the apex court made clear that when an application is filed under Sec 7 or 9 of IB Code, Article 137 of the Limitation Act, 1963 will be applicable, both NCLTs and NCLAT have been invoking the provisions Article 62 of the Limitation Act 1963 which provides that the period of limitation would be 12 years if the financial creditor is holding a mortgage of immovable properties as security for the liability of the corporate debtor. Extending the same view in the matter of ***"Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd***. the NCLAT again held that the application filed by the financial creditor under section 7 of the Code on 21.03.2018 for the default committed on 08.07.2011 is maintainable because the period of limitation with regards to the mortgaged property is 12 (Twelve) years. The matter went to the Supreme Court.

It is interesting to note that the Apex Court while disposing the matter made it almost as a compendium of the ratios brought out in the following cases decided by them and has come out with an order that should seal the discussions on the applicability of Limitation Act 1963 in the matters of IB Code.

1. B.K. Educational Services Pvt. Ltd. v. Paras Gupta & Associates
2. Innoventive Industries Ltd. v. ICICI Bank
3. K. Sashidhar v. Indian Overseas Bank
4. Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. & Anr
5. Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Ltd. & Anr
6. Sagar Sharma & Anr. v.Phoenix Arc Pvt. Ltd. & Anr
7. Jignesh Shah and Anr. v. Union of India and Anr.
8. Swiss Ribbons Private Limited and Anr. v. Union of India and Ors
9. M/s. Mahabir Cold Storage v. CIT, Patna
10. N.Balakrishnan v. Krishnamurthy
11. Arcelor Mittal India (P) Ltd. v. Satish Kumar Gupta & Ors

The Apex Court's verdict is brought out, in their words, as under in para 38 of the judgement:

"The discussion foregoing leads to the inescapable conclusion that the application made by the respondent No. 2 under Section 7 of the Code in the month of March 2018, seeking initiation of CIRP in respect of the corporate debtor with specific assertion of the date of default as 08.07.2011, is clearly barred by limitation for having been filed much later than the period of three years from the date of default as stated in the application. The NCLT having not examined the question of limitation; the NCLAT having decided the question of limitation on entirely irrelevant considerations; and the attempt on the part of the respondents to save the limitation with reference to the principles of acknowledgment having been found unsustainable, the impugned orders deserve to be set aside and the application filed by the respondent No.2 deserves to be rejected as being barred by limitation."

(Respondent No 2 in the matter is the Financial Creditor - JM Financial Assets Reconstruction Company Pvt. Ltd)

However, the Apex Court took care to also pronounce that their observations in this judgment are relevant only in regard to the issue determined that the application under Section 7 of the Code is barred by limitation and not beyond. In other words, nothing in this judgment shall have bearing on any other proceedings like the petition under Section 19 of the RDDBFI Act of 1993 which was pending before DRT against the corporate debtor and all such matters shall be dealt with on its own merits and in accordance with law.

It is important to note that throughout the order the Hon'ble Supreme Court kept repeating that the proceedings under the Code initiated against the corporate debtor should not be allowed to fall into model for recovery of dues and that resolution of the enterprise is the crux and should be maintained as such. By allowing any freedom to extend the permission to initiate action, the Court was clear, the action to initiate resolution only gets extended which is detrimental to the process of resolution itself.

(Image source: website)

However, the author thinks that the following queries are still not answered:

1. The provisions of Sec 18 of Limitation Act, 1963 are applicable relating to filings under IB Code?

   The Hon'ble Supreme Court has made the following observation in the case on hand: "In other words, even if Section 18 of the Limitation Act and principles thereof were applicable, the same would not apply to

the application under consideration in the present case, looking to the very averment regarding default therein and for want of any other averment in regard to acknowledgement.

Does that mean that the applicability will be decided on a case by case basis?

2. The provisions of Sec 5 of Limitation Act, 1963 are applicable relating to filings under IB Code?

   Since the applicability of the above section has not been denied in B.K. Educational Services case and since the ratios expressed in that case have been quoted elaborately and also in the absence of no negative reference, the above question is answered in affirmative.

3. What happens to the eligibility of other claims submitted to IRP/RP after commencement of CIRP getting admitted which are prior to the date of declaration of NPA but are within the period of 3 years?

4. What happens if the Financial Creditor who is not in possession of a valid instrument / loan document as on the date of his declaration of the account as NPA? For example, a case is admitted on 10th October 2020 under Sec 7 of IBC wherein the date of declaration of the account as NPA is 10th Dec 2017. What happens if in this case the last revival letter for the loans which have been declared as NPA are dated 10th August 2017? Clearly, as per the base documents on which the claim can be made have fallen outside the period of 3 years.

Thus, though it looked as if the conundrum of the applicability of Law of Limitation to IBC cases has been ended, the reality seems to be different still.

PS 1:

NCLAT while hearing the case of ***Yogeshkumar Jashwantlal Thakkar Suspended Director v Indian Overseas Bank*** the Appellate Authority confirmed that in view of the fact that ingredients of Section 18 of the Limitation Act, 1963 are quite applicable both for "Suit" and "Application" and the debit confirmation letters in the instance case were duly acknowledged in accordance with Law. The account was declared as NPA on 01.01.2016. A revival letter has been obtained on 02.09.2016 and the balance confirmation is obtained on 31.3.2017. Based on all these documents, NCLAT upheld the order of NCLT admitting the Financial Creditor's application which was filed on 01.04.2019 though the date of NPA was mentioned in the same application as 01.01.2016. While passing this order, NCLAT has stated that in the matter of ***Babulal Vardharji Gurjar v Veer Gurjar Aluminium Industries Pvt Ltd*** referring that the Apex Court had mentioned in their judgement that the financial creditor had not produced proper documents to take advantage of the clauses in Section 18 of the Limitation Act.

PS 2:

The question whether the reflection of debt in a balance sheet can be considered as an acknowledgement of debt as per of Section 18 of Limitation Act, 1963 has been raised in the matter of ***V.Padmakumar Vs Stressed Assets Stabilisation Fund (SASF) and Anr*** before NCLAT. The three member bench of NCLAT was of the view that the acknowledgement should be voluntary and cannot be given under compulsion of law or with the threat of any penalty/punishment and that the preparation of Balance Sheet is one such required by the Companies Act. Now that this matter has been referred to a five member bench of NCLAT and in case they confirm the judgement of the three member bench, a lot of further queries will arise.

MCA General Circular No. 30, 31/2020-21 dated 28th September, 2020.

The Ministry of Corporate Affairs (MCA) has introduced the "Companies Fresh Start Scheme, 2020" and"LLP Settlement Scheme, 2020" on 30th March 2020. The scheme provides an opportunity for both the companies and LLPs to make good any filing-related defaults, irrespective of the duration of default, and make a fresh start as a fully compliant entity. Apart from giving longer timelines for corporates to comply with various filing requirements under the Companies Act 2013, it significantly reduces the related financial burden on them, especially for those with long-standing defaults, thereby giving them an opportunity to make a "fresh start". The scheme is operative from 1st April 2020, ending on 30th September 2020. In continuation of this, MCA has issued circulars on 28th September 2020 to extend the aforesaid scheme till 31st December 2020.

Provisions of IBC and Employees Welfare Measures Legislations

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Insolvency Professional

Are the so called employee welfare legislations such as ESI, Bonus, PF, Gratuity etc. are at cross roads and are not going to protect them when the organisations in which they were working go through the rigmorale of take overs by a resolution plan or Liquidation under the provisions of IBC What does it otherwise indicate when it is pronounced by NCLAT in the matter of Mr. Saran Godiwala vs Mr. Apalla Siva Kumar, staying the orders of NCLT which asked the Liquidator to make provisions for payment of the dues to the employees as per the eligibility under the above said employee welfare legislations. NCLAT ordered that the liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate. Of course the matter has reached the apex court which has thankfully stayed the operation of the orders of NCLAT detailed hereunder.

The brief facts of the case are as follows:

Originally, the Adjudicating Authority, NCLT, Hyderabad had directed the Liquidator to pay the Gratuity to the employees when the Liquidator contended that the liability to pay Gratuity to the employees does not arise since the Corporate Debtor didn't have separate funds for payment of gratuity. The Adjudicating Authority further directed the Liquidator to make sufficient provision for payment of Gratuity rejecting the contention of the Liquidator that payment of Gratuity cannot be treated as part of Liquidation Estate. By the above order, the Adjudicating Authority accepted the contention that as per the requirement of the payment of Gratuity Act, 1972 and Section 36(4) (a) (iii) of the Code, the charge will remain in force, against the assets of the Corporate Debtor', until the gratuity dues have been paid off, before making any payment, to any entity falling under waterfall mechanism, devised under Section 53 of the Code. The I&B Code gives statutory priority to the amount payable to the employees on account of gratuity, over other debts of the Corporate Debtor'.

During the course of its adjudication on the matter on appeal by the Liquidator the NCLAT observed that In a case, where no fund is created by a company, in violation of the Statutory provision of the Sec 4 of the Payment of Gratuity Act, 1972, then in that situation also, the Liquidator cannot be directed to make the payment of gratuity to the employees because the Liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate. When that being the situation the lower courts verdict that the Liquidator should arrange to pay the gratuity demands of the employees was set aside.

The provisions of Section 53 of the Code which compels that the liquidator is needed to look into past dues upto 24 months prior to the liquidation commencement was also quoted and the gratuity dues of the employees related to the period exceeding this back period need to be considered.

The above position with reference to a matter where the corporate debtor is into liquidation. What is the position of the payment of dues of the so called welfare measures when a Resolution Plan approved by the Adjudicating Authority is being implemented? The following are the scenarios that arise when a Resolution Applicant gets on board:

1. Resolution plan proposes to terminate the services of employees/workmen
2. Resolution plan proposes to continue the services of the employees/ workmen
3. Employees resign during the period between commencement of insolvency resolution process upto the date of approval of the plan by AA
4. Employees resign during the implementation period of resolution plan

1. Resolution plan proposes to terminate the services of employees/workmen

The very fact that the resolution plan provides for termination of all employees, leaves no iota of doubt that the employees are eligible to receive benefit claims. In the matter of *State Bank of India vs. Calyx Chemicals and Pharmaceuticals Limited* it was ruled by NCLT Mumbai that where the resolution plan itself provides for termination of employment, the employee/workmen shall be eligible to receive their benefit under the plan itself when the resolution plan is being implemented.

But the question arises as to what should be done if the employees had not put up a claim of their welfare dues such as PF, Gratuity, etc. to the resolution professional as on the date of commencement of insolvency resolution process?

Also now that in the distribution of the resolution plan amount the clauses of Section 53 of the Code is applicable, will the lookback period of 24 months for workmen and 12 months for employees need to be considered?

Further, since the claims of the workmen/employee are to be treated on par with that of the operational creditors, would they be paid in full or on par with the other operational creditors who are being paid on pro-rata basis?

Considering that the rampant default in contribution by employers towards the welfare dues of the

employees - it is important to understand the consequences of such default upon the incoming resolution applicant in the case under IBC.

Here, Section 17B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 makes it clear that ***the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme…"***

However, the proviso to section 17B provides that the liability of the transferee shall be limited to the value of assets taken over. Going by such provision, it may be presumed that since under provisions of IBC the corporate debtor is taken over in totality, a harmonious interpretation of the Code and EPF Act would imply that the resolution applicant shall be liable to make good the default in contributions by the Corporate Debtor. Though it is a fact that an Information Memorandum is collated about the corporate debtor which is placed in the hands of every prospective resolution applicant, the mere absence of details of such default in contribution of statutory dues under the welfare legislations cannot be held as a reason for any resolution applicant not to provide for such dues in their resolution plan. The Information Memorandum, which declares that the details of the corporate debtor have been given on an as-is-where-is basis, the collation of data by the prospective resolution applicant should also supplement the details thereof.

The Hon'ble Supreme Court in *McLeod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri and Others* (2014) also recognised the resolution applicant's liability to make good the defaults by the old employer, and as such secured the employees from wrong-doings of the employer.

Hence, the author is of the view that the laws in place also have an anti-washout sentiment which must be upheld under the Code, so as to reap optimum benefits from the existing legal framework.

2. **Resolution plan proposes to continue the services of the employees/ workmen**

This looks to be as very normal scenario in which the undernoted issues arise.

a) The tenure of service of the employee shall be counted from the (original) date of joining the corporate debtor or from the date of approval of resolution plan?

b) What happens if the employee had not submitted a claim to the Resolution Professional as on the date of commencement of Insolvency Resolution Process?

c) As in the distribution of the resolution plan amount the clauses of Section 53 of the Code is also being considered, will the lookback period of 24 months for workmen and 12 months for employees need to be considered?

However the response to all the above issues clearly rests with what human resources policy the resolution applicant under his management wishes to practice. Having decided to keep the employees, now it becomes how the new management is going to put to use the important resource – the manpower available. However, he has to follow the principles of all applicable laws.

3. **Employees resign during the period between commencement of insolvency resolution process upto the date of approval of the plan by AA**

This depends upon whether the Resolution Professional had kept the corporate debtor as a going concern and if so was it with the entire or pruned down staff strength. The payment under welfare dues for which the employees will be eligible will be calculated till the date of cessation irrespective of the fact whether or not the employees had given a claim as on the insolvency commencement date. There is no role for resolution applicant in this scenario.

(Image source: website)

4. **Employees resign post approval of the Resolution Plan by AA during the implementation period of resolution plan**

The dues to the above class of employees will be dependent on the decision which the Resolution Applicant had taken – whether to keep them continuing in employment under their management or to relieve them. All applicable laws should be complied with.

Overall, in the matter of revival of a corporate debtor with an AA approved resolution in place it is clear that the resolution applicant cannot take a stand that just because a resolution plan absolves past dues and liabilities, amounts payable under the welfare schemes to the employees can be taken as washed out. Applicability of Sec 238 of the Code is doubtful in such matters.

A parallel may be drawn with schemes of arrangement, merger etc. under the Companies Act, 2013, under which absorption of employees of the transferor by the transferee is a common practice, wherein the tenure of employment of such employees is calculated w.e.f. their association with the transferor company in the first instance. Drawing analogy, resolution plans, which are essentially nothing but arrangements, must also imbibe the same principle.

Furthermore, section 25FF of the Industrial Disputes Act, 1947, a labour law in India with significance, provides that in case of transfer of business, employees are deemed as automatically transferred if:

- the services were uninterrupted;
- the new employment terms are not less favourable; and
- the previous employment term is recognised for the purposes of calculating severance pay on termination of employment.

However, it is not clear whether it is necessary that the resolution applicant need to take the consent of the employees as laid down by the Hon'ble Supreme Court in Sunil Kr. Ghosh v. K. Ram Chandran (2011).

Again, in Bombay Garage Ltd. v. Industrial Tribunal (1953) the Hon'ble High Court of Bombay held that "an employer cannot deprive his employees of the benefits that have accrued to them by reason of past services merely by transferring his business to another person or to another limited company."

Hence, it is established that rightful claims of workmen/ employees cannot be washed-out.

Conclusion:

The rulings and discussions as above, lead us to the following observations –

i. the employees of the corporate debtor are entitled to the welfare benefits in the case of resolution as well as in liquidation;

ii. where plan provides for continuance of employment, the employees must be given the option/ right to opt out of such continued employment; and

iii. in case of continued employment, the employee shall be entitled to welfare claims in accordance with tenure of employment.;

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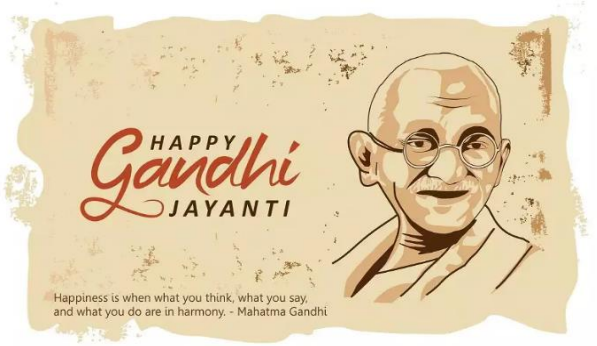

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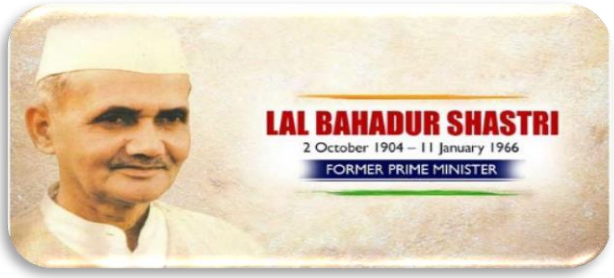

"Discipline and united action are the real source of strength for the nation."

- Lal Bahadur Shastri

Court Orders

R.V. Yajura
Advocate

Union of India
Vs.
Association of Unified Telecom Service Providers of India Etc. (01.09.2020) (SC)

A decision was made in the proceedings conducted by the Hon'ble Supreme Court of India in dispute between the telecom and the government in the issue concerning AGR (Adjusted Gross Revenue). It may be noted that AGR is a fee-sharing mechanism between the government and telecom companies who migrated from the 'fixed license fee' model to a 'revenue-sharing fee' model in 1999. In doing so, telecom had to share a percentage of their AGR with the government.

The main issue being the definition of AGR as per the License Agreement between Govt. and Telecoms, which according to Department of Telecom (DOT's) is that AGR includes all revenues of Telecom Companies, while the Telecom companies contended that AGR should only include revenue from core services and not ancillary income/ non-core services.

On 24.10.2019, the Supreme Court interpreted that the definition of AGR which resulted in including DoT's point of view, by setting aside the decision of the Telecom Disputes Settlement and Appellate Tribunal.

Subsequently the Review Plea filed by the Telecoms were dismissed and in Feb. 2020 the Hon'ble SC initiated suo motto contempt proceedings against a desk officer and show cause notice to the managing directors of Telecoms. It was later dropped in proceedings of the captioned matter after accepting unconditional apology.

In the proceedings in the captioned matter, the following three questions were for consideration by the Hon'ble SC

1) Whether spectrum can be subjected to proceedings under the IBC?

On the issue of sale of the spectrum by telecom companies facing insolvency proceedings was left to be decided by the Hon'ble NCLT as issues involved are whether the dues under the licence can be said to be operational dues, whether deferred/default payment instalment/s of spectrum acquisition cost can be termed to be operational dues besides AGR dues, Whether as per the revenue sharing regime and the provisions of the Indian Telegraph Act, 1885, the dues can be said to be operational dues and whether natural resource would be available to use without payment of requisite dues.

2) In the case of sharing, how the payment is to be made by the Telecom Service Provider (for short, 'TSP')?

On the above issue the Hon'ble Bench observed that only part of the spectrum of the licensee has been shared with the case of some of TSPs., which has been approved by the DoT under the Sharing Guidelines, 2015, and there is no provision for the liability of the past dues on the shared operator. That the Liability of such operator of the AGR, would only be to the extent it has used the said spectrum. Shared operator TSPs. Cannot be saddled with the liability to pay the past dues of AGR of licensee that have shared the spectrum with the original licensees.

3) In the case of trading, how the liability of the seller and buyer is to be determined?

The Hon'ble Bench directed purchasers who are not seller or buyer, to pay the dues to the extent they are liable under the Spectrum Trading Guidelines. Further directed DoT to complete the assessment in such cases of trade and raise demand if it has not been raised and to examine the correctness of self-assessment and raise demand, if necessary, after due verification. If there is a necessity of a demand notice to be issued, let DoT raise the demand within six weeks from the date of the Judgement. Time period provided to settle the dues.

(Image source: website)

On the issue of extension of time to be granted to the Telecoms to clear the outstanding AGR dues, the Hon'ble SC was not inclined to accede to the request of the Centre for a staggered payment over a twenty year period. Instead, granted a ten-year period, directing the Telecoms to deposit 10% of the amount each year over a period of ten years. The Hon'ble Court also warned that failure of payments would attract contempt proceeding.

In view of the above the Appeal was disposed of.

Karad Urban Cooperative Bank Ltd.
Vs.
Swapnil Bhingardevay and Others.
(04.09.2020)
(SC)

Analyzing the viability and feasibility of a Resolution Plan is the commercial decision of CoC.

A Resolution Plan was approved by Hon'ble NCLT against which the Promoter/Suspended Director went on an appeal contending that the Resolution Plan suffers from feasibility and viability.

The Hon'ble NCLAT had allowed the appeal and remanded the matter back to the adjudicating authority, with a direction to send back the Resolution Plan to the CoC.

Therefore an Appeal was filed in Hon'ble Supreme Court by the Financial Creditor and the Resolution Professional challenging an order passed by the Hon'ble NCLAT stated above.

The Hon'ble SC in view of principles laid down in the decisions such as in K. Sashidhar case and Essar Steel India Ltd. case, held that "if all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and the CoC has taken a conscious decision to approve the Resolution Plan, then the Adjudicating Authority will have to switch over to the hands off mode."

Further on a detailed analysis of the grounds on which NCLAT had set aside the NCLT order, SC observed that the grounds were legally and factually untenable.

Thus the said Appeal was allowed setting aside the order of Hon'ble NCLAT and restoring the order of Hon'ble NCLT.

Sagufa Ahmed & Ors.
Vs.
Upper Assam Plywood Products Pvt. Ltd. & Ors. (02.09.2020)
(NCLAT)

'Debt' is converted into "Capital" cannot be termed as 'Financial Debt' and the Appellant cannot be described as 'Financial Creditor'.

The Appellant- Mrs. Rita Kapur, has filed this Appeal under Sec. 61 read with Sec 7 of IBC, 2016 against the rejection order of Hon'ble NCLT in terms of Sec. 7 of the Code.

The Loan provided by the Appellant was converted into equity. Although it was contended by the Appellant that the loan has been converted into equity, against the terms and conditions of 'Loan Agreement' between the parties, it was brought out by the Respondents that pursuant to 'Amended Agreement' between all the parties all the 'Investors' numbering 40(forty) have become either designated partner or general partner. The Appellant also pointed out several other irregularities in such conversion and also the functioning of the Corporate Debtor.

However, the Hon'ble NCLAT in view of provisions of the Code particularly with respect definition for "Financial Creditor" and "Financial Debt" observed that - "it is latently & patently clear that once the 'Debt' is converted into "Capital" it cannot be termed as 'Financial Debt' and the Appellant cannot be described as 'Financial Creditor'".

Thus dismissed the Appeal. However, liberty was granted to the Appellant to approach appropriate forum for seeking necessary relief(s) for redressal of grievances, of course, in accordance with Law.

India Power Corporation Ltd.
Vs.
Meenakshi Energy Ltd and Others
And
Debasish Som (Ex-Independent Director)
Vs.
Meenakshi Energy Ltd and Others
(10.09.2020)
(NCLAT)

Invocation of the pledge and transfer of shares to the trustee by the Financial Creditor (FC) does not make him lose his status as a FC to file an application U/S 7.

Meenakshi Energy Ltd., the CD had availed term loan and working capital facilities from time to time from a consortium of lenders including SBI and its Associate Banks (FC) and for security of the loan, the CD pledged its shares held by India Power Corporation Ltd (IPCL), the Appellant.

Subsequently, the CD defaulted payments and the Account of the CD was classified Non-Performing Asset since 2017 by the FC. The CD was unable to pay off the debts pursuant to the demand/ recall of the FC. Therefore, the FC filed an Application under Section 7 of IBC, for initiating CIRP and the same was allowed by the Hon'ble NCLT, against which the Appellants IPCL (Shareholder) and Debasish Som (Independent Ex-Director) of the CD, filed Appeals under Section 61 of IBC, 2016.

The Appellants contended on various grounds, one of which was that the amount claimed by the FC was secured by pledge of valuable security in the form of shares of the CD and that the shares of the CD have already been invoked and transferred by the FC to the Demat Account of the Trustee (SBI CAP Trustee). That, in pursuance to the invoking and transfer to the Trustee,

the FC became owner of 95.2% shares and that the entire debt of CD stood discharged.

It was observed by the Hon'ble NCLAT that although shares were invoked and transferred in dematerialised form in the DP Account of Trustee it does not mean that the FC became the beneficial owner of the shares and it loses the status as a Financial Creditor. Further, held that even after invocation of the pledged shares, the financial creditor can maintain the Application u/s 7 of IBC, 2016.

Thus the order of Hon'ble NCLT was upheld by NCLAT.

Yogeshkumar Jashwantlal Thakkar
(Suspended Director)
Vs.
Indian Overseas Bank
(14.09.2020) (NCLAT)

The date of default gets extended if valid documents exist to show the 'Acknowledgement of Debt' as per Limitation Act.

Appellant/Suspended Director of the Corporate Debtor (CD) filed Appeal, being aggrieved against the order passed by the Hon'ble NCLT admitting Sec. 7 Application of the 'I&B' Code filed by the FC, challenging the validity, propriety and legality of the Order. The Appellants contended that the Application was barred by Limitation under the IBC, 2016 as the Balance confirmation dated 02.09.2016 and Revival Letter 31.03.2017 are only 'acknowledgement of debt', relied by the FC. And that in view of the judgement of Hon'ble Supreme Court in 'Babulal Vardharji Gurjar' V. 'Veer Gurjar Aluminium Industries Pvt. Ltd. and Anr.' (Civil Appeal no. 6357 of 2019 - decided on 14.08.2020) and submits that an 'Acknowledgement' cannot revive default in insolvency proceedings under IBC regime and can only revive limitation for 'cause of action'. The Hon'ble NCLAT viewed that per contra to the said Judgement, the various confirmation letters relied by the FC are legally valid and binding documents between the inter se parties and the same cannot be repudiated on one pretext or other and concluded that the date of default i.e 01.01.2016 gets extended by the debit confirmation letters secured by FC, as the same come under 'acknowledgement of debt'. Also in line with various other Judgements, such 'Acknowledgement of Debt' was made before the expiration of the limitation period, calculated from the date of default i.e. 01.01.2016. The Hon'ble NCLAT also observed that, in view of the fact that ingredients of Section 18 of the Limitation Act, 1963 are quite applicable both for 'Suit' and 'Application' and the debit confirmation letters in the instant case were duly acknowledged in accordance with Law laid down.

Thus dismissed the Appeal and upheld the order of the Hon'ble NCLT admitting CIRP.

Naresh Kumar Sharma
Ex-Management of the Shekhar Resorts Ltd. & Ors.
Vs.
Shekhar Resorts Ltd.,
Through Mr. Vikram Kumar, IRP & Ors.
(14.09.2020) (NCLAT)

The Code does not provide that the value given by the Resolution Applicant should match the fair value or the liquidation value, thus the approval of Resolution Plan by the Committee of Creditors (CoC) need not depend on the valuation of the Corporate Debtor (CD) as it is a Commercial decision of the CoC

An Appeal was filed by the suspended Board of Directors of the Corporate Debtor (CD) assailing order of Hon'ble NCLT wherein a Resolution Plan submitted by NCJ Infrastructure Pvt. Ltd. was approved. The primary objection raised was the Resolution Plan offering Rs.143 Crores whereas the actual value of the properties of CD according to the appellant was at Rs.490 Crores.

In view of various Judgements, it is a settled law that the approval of Resolution Plan is a business decision taken by the Committee of Creditors with requisite majority based on their commercial wisdom and the same is non-justiciable. Also, the Code does not provide that the value given by the Resolution Applicant should match the fair value or the Liquidation Value. On this basis and on the entirety of the case, the Appellate Tribunal found no merit in the case and dismissed the same.

Shailesh Chawla & Anr.
Vs.
Vinod Kumar Mahajan, RP & Ors.
(23.09.2020) (NCLAT)

'Independent Directors' /'Non-Executive Directors' also come under the purview of Sec 19 of the Code i.e., provide necessary information, assistance and cooperation to the Resolution Professional conducted in conducting the CIRP of the CD.

An Application filed by the Resolution Professional (RP) under Section 19(2) of the IBC seeking necessary directions from the 'Adjudicating Authority' in respect of the former Directors of the Company to furnish all the requisite 'Books', 'Financial Data', 'Information', 'Returns' and the Assets to the RP was allowed by the Hon'ble NCLT. An appeal was filed by the former Directors contending that Independent Directors would not come under the purview of Sec. 19 as the 'Independent Directors' / 'Non-Executive Directors' other than promoter or key managerial personnel shall be held liable only for such acts of commission(s) or omission(s) in relation to

any actions of the company, which is within its knowledge and could be attributed to him through Board processes as under the Companies Act.

The Hon'ble NCLAT observed that such defence is available to the 'Independent Directors' only under the Companies Act, 2013 and not under IBC. Further observed that, the 'Independent Directors' are part of 'Board of Directors' and have similar duties and responsibilities as other directors and are an integral part of the 'Board' and, therefore, their duties and functions should be read in conjunction with statutory provision mentioned in Section 166 of the Companies Act, 2013 which speaks of 'Duties of Directors' and not in isolation for independent directors.

Also, since Section 19 of the Code, latently and patently imposes an obligation on the personnel and promoters of the 'Corporate Debtor' (CD) to extend all assistance and cooperation which the RP will require in running / managing the affairs of the CD, the personnel of CD are duty bound to cooperate and provide information. Thus it was observed that the contentions raised by the Appellants were untenable because although they may be Independent Directors, they come under the purview of Sec. 19 of IBC, 2016.

Thus, the Appeal was dismissed and Order of Hon'ble NCLT was allowed.

Bank of India & Anr.
Vs.
Coastal Oil Gas Infrastructure Pvt. Ltd.
(23.09.2020) (NCLAT)

The Application for initiating CIRP should not be rejected by selectively considering the documents on record as the applicability of Limitation is mixed question of law and facts.

An Application under section 7 filed by the FC was rejected by the Hon'ble NCLT on the ground that the Application was barred by Limitation and was filed after more than 3 years after the default. Challenging the order, the Financial Creditor (FC) preferred an Appeal.

The FC contended that the notice of recall dated 7th Dec. 2017 was issued, demanding the payment of the total over dues within a period of 15 days from the date of notice of recall. Thus the payment for Quarter ending Dec. 2017 to Sept. 2025 will become due and payable and come under default on 22nd Dec., 2017 i.e. on the expiry of 15 days from the date of default notice which was served upon the Corporate Debtor for recalling the loans. Thus the default cannot occur before the amount becomes due and payable as per the Second Amendment Agreement. Also, on entering into the Second Amendment Agreement on 31st Mar., 2015 the earlier Agreement shall be subsumed with the Amended Agreement and all the prior defaults shall become irrelevant and the date of default shall be decided as per the Second Amendment Agreement dated 31st Mar., 2015.

Considering the facts of the case and documents on records as a whole, the Hon'ble NCLAT held that the Application was filed within the limitation period. Further observed that in case of any discrepancy found in the Application relating to the date of default being wrongly pleaded by the Financial Creditors as contended by the Corporate Debtor, the Adjudicating Authority may ask the FC to rectify the same.

It was also pointed out by the Hon'ble NCLAT that the Limitation is a mixed question of law and facts therefore, unless it becomes apparent from the reading of the Company Petition that the same is barred by Limitation the Petition should not be rejected by selectively considering the documents on record.

Bishal Jaiswal
Vs.
Asset Reconstruction (25.09.2020)
(NCLAT)

An entry made in the Company's Balance Sheet amounts to an acknowledgement of debt under Section 18 of the Limitation Act, 1963 is a settled law.

Hon'ble Three-Member Bench of the NCLAT while hearing the arguments in the captioned matter, a Judgment rendered by Five Hon'ble Members of the NCLAT in the Case of V. Padamakumar Vs.Stressed Assets Stabilisation (12.03.2020) was cited before the Hon'ble Bench. In V. Padamakumar case, it was held that reflection of debt in the Balance Sheet cannot amount to an acknowledgement for Section 18 of the Limitation Act, 1963. The Hon'ble Bench was of the view that the Acknowledgement should be voluntary and cannot be given under compulsion of law or with the threat of any penalty/punishment and that the preparation of Balance Sheet is one such, required by the Companies Act.

However, there is consistent view of the Hon'ble Supreme Court and High Court of Allahabad, Calcutta, Delhi, Karnataka, Kerala and Telangana that the entries in the Balance Sheet of the Company be treated as an acknowledgement of debt for the purpose of Section 18 of Limitation Act, 1963. In the captioned matter, the Hon'ble Bench noted that the majority view in V. Padmakumar's Case is just contrary to settled law.

Therefore, the Hon'ble Bench while considering the arguments of the captioned case, felt it was proper to refer V. Padmakumar's Case for reconsideration by a Five Member Bench. Hence a revised decision in V.Padmakumar Case is awaited.

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With every issue we are upgrading our knowledge. KBC/KYC in the eyes of Thiruvalluvar thought process awesome. Thanks for sharing.

Ms. Divya Ramu, Senior Financial Executive

Good and relevant content. Nice presentation! I liked KYC/KYB – Thiruvalluvar, very much.

Mr. S. Kalyanaraman, President & Director, TTK Pharma Ltd.

Thank you. The CGRF SandBox Issue (Volume 1 Issue 5) makes excellent reading.

Mr. Sudhakar Kudva, NOCL

Beautiful great information. Kudos to you and your team.

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Very informative. Thanks for sharing

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Very detailed and informative articles.

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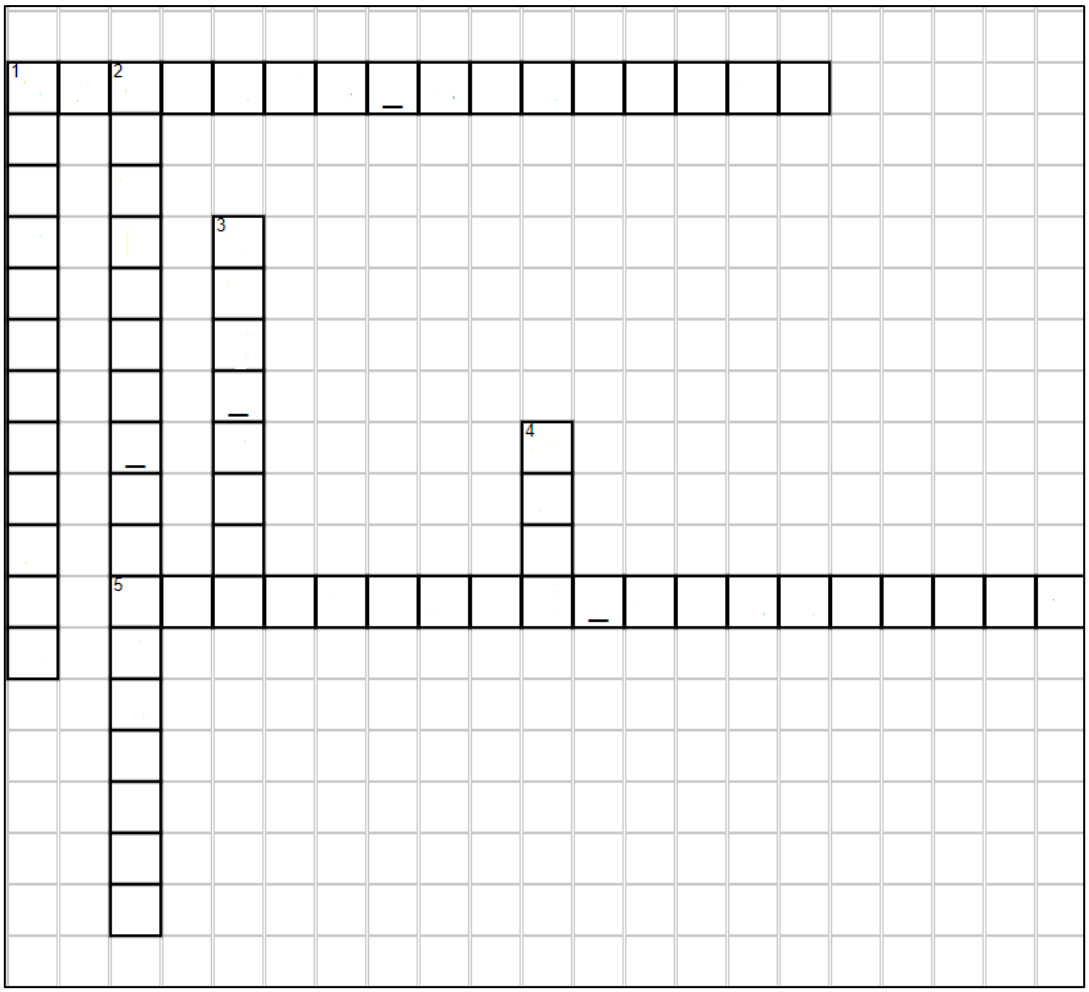
Very Useful. Thanks!!!

Mr. Sundaresan, Edelweiss

Quite Informative.

Mr. Sumit Duggal, PWC

SHARPEN YOUR MIND – CROSS WORD



Across

1. A Creditor in favour of whom security interest is created
5. A corporate person who is the surety in a contract of guarantee to a corporate debtor

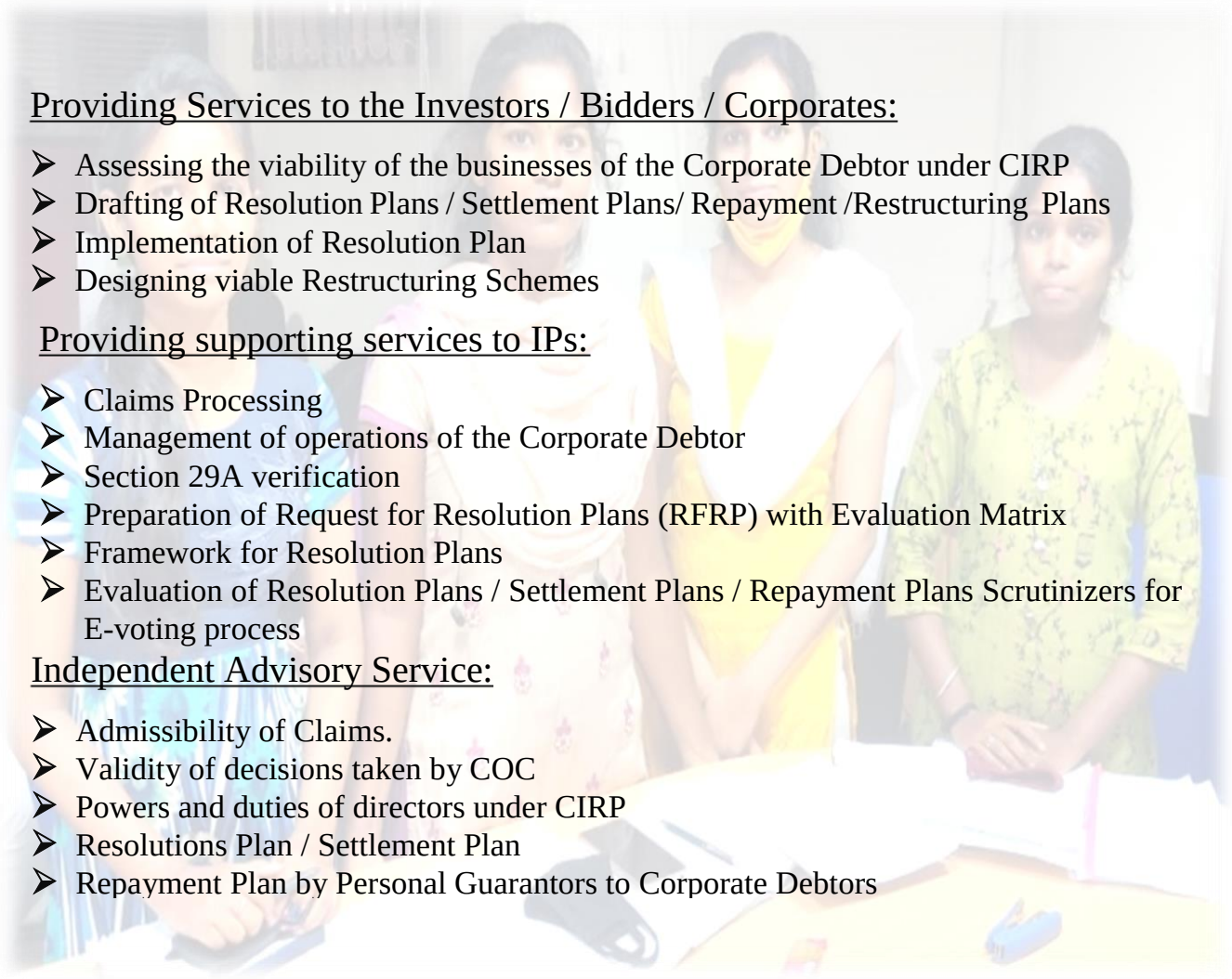
Down

1. Approving authority for appointment of independent directors
2. Professional being an expert in corporate Laws
3. Suspension on IBC proceeding due to covid-19 can be for a maximum period of _____
4. Section 29A (c and h) of IBC shall not apply to the resolution applicant in respect of CIRP for these type of companies

ANSWERS

1. Secured Creditors (A); Shareholders (D) 2. Company Secretary 3. One year 4. MSME 5. Corporate Guarantor

Our Services



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- Drafting of Resolution Plans / Settlement Plans/ Repayment /Restructuring Plans
- Implementation of Resolution Plan
- Designing viable Restructuring Schemes

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- Claims Processing
- Management of operations of the Corporate Debtor
- Section 29A verification
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- Framework for Resolution Plans
- Evaluation of Resolution Plans / Settlement Plans / Repayment Plans Scrutinizers for E-voting process

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