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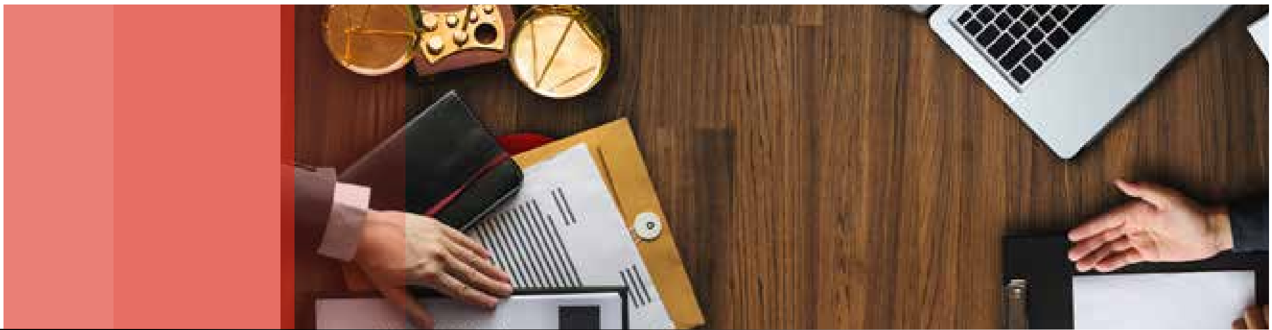

The Power of Writs: Protecting Rights under the Indian Constitution and Companies Act 2013

Introduction:

India is the largest democracy of the world, and at the foundation of this largest democracy, lies the world's longest written Constitution. Along with the federal democratic system, the Constitution of India also lies at the bedrock of Indian judiciary. All the laws formed and implemented in the jurisdiction of India, gain their basis and powers from the Constitution of India.

The Constitution of India provides for multiple fundamental and legal rights to its citizens and makes provisions for the protection of such rights by the judiciary. In this article we shall explore the protection offered to the fundamental and legal rights through Writ petitions. Also, we shall try to deliberate, with the help of judicial pronouncements, upon some situations in the context of Companies Act 2013 where in the companies or their directors can take shelter of Writ petitions to protect their legal rights.

Meaning of Writs:

Despite using the term 'Writ,' the Constitution of India (Constitution) does not define the same. In ancient times, Writs referred to the letters in the name of king or states issued by the court of justice which ordered the receiver to do or abstain from doing something. Even today, the basic concept of Writ remains the same. The Cambridge dictionary defines a Writ as, "*a legal document from a court which orders someone to do something or to not do something:" whereas, the blacks law dictionary defines Writ as, "court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act." and Law lexicon defines Writ as, "written command, precept, or formal order issued by a court, directing or enjoining the person or persons to whom it is addressed to do or refrain from doing some act specified therein."*

From these definitions, it is adequately clear that a Writ is a court order asking the receiver of the order to do or abstain from doing something. As per the Honorable Haryana High Court judgment in the matter of Satwati Deswal v. State, the application for issuing a Writ can be made and court can issue a writ only when there is no alternate remedy available for ensuring justice. One more point worth noting in case of Writs is that Writs can be issued only for preservation of fundamental or legal rights.

Legal provisions relating to Writs:

As mentioned earlier, the concept of Writs originates from the Constitution. There are two articles in the constitution which provide for the issue of Writs. They are article 32 under part III of the Constitution and Article 226 under part VI of the Constitution. Part III of the Constitution provides for fundamental rights of citizens and at some places, of all persons. The Article 32 of part III of Constitution protects these fundamental rights by allowing the Supreme Court of India to issue five types of Writs to protect the fundamental rights. In fact, clause three of the Article 32 grants power to the Parliament of India to allow any other court to issue Writs in the interest of justice.

Further, Part VI of the Constitution contains provisions for the functioning of the State governments. It establishes a parliamentary system of government, and the judicial system at the state level. Article 226 of part VI empowers the high courts, that is, state level judiciary to issue writs for protection of rights conferred by parts III and IV of the constitution. The high courts are even empowered to issue appropriate writs against the governments under its jurisdiction to ensure justice. Also, the clause three of the article provides that the High Court must listen to the Writ petition within 15 days if it says that any order has been passed against the petitioner without giving him an opportunity of being heard.

Types of Writs and Meaning:

As per Article 32 and Article 226, both Supreme Court and High Court have power to issue Writs. Supreme Court has power to issue writ against infringement of fundamental rights under Constitution, whereas High Courts can issue writs to avoid violation of other legal rights granted by the constitution. both the Courts are authorized by the constitution to issue following five types of writs depending upon the complaint received by the Court.

- Writ of Habeas Corpus
- Writ of Mandamus
- Writ of Prohibition
- Writ of Certiorari and
- Writ of Quo-Warranto

Let us understand all of them one by one.

Writ of Habeas Corpus:

Habeas Corpus means, 'to have the body of'. This Writ is issued to protect the fundamental right to individual liberty. If any person is detained illegally or without following proper process, then such detained person himself or through his family member can file a petition before court praying for writ of habeas corpus. Even a stranger can file this Writ in public interest. Issuance of writ of habeas corpus by court means that, the authority who has arrested the person has to present that arrested person before the court. The two most important conditions that must be kept in mind while applying for Writ of Habeas Corpus are that the applicant should be in the custody in some other person or authority, and the authority must not have followed the proper process while arresting the applicant. For example, if in case, police arrest any individual without filing a FIR, then such person is unlawfully arrested and hence he can file application for issue of writ of habeas corpus.

Writ of Mandamus:

The literal meaning of Mandamus is 'we command.' This Writ is applied for when any public official or public body or corporation or lower court or tribunal or even the government failed to perform its duty or has refused to perform the same. As a result of the issue of Writ of Mandamus by the court, the authority in question must perform the said duty.

The important points about which the petitioner should be mindful while applying for Writ of mandamus are that, there must be an infringement of legally recognized right of the petitioner, the petitioner must be able to prove that a mandatory duty was owed to him and the authority did not perform the same, and most importantly that there must be no alternate remedy available. For example, Writ of Mandamus can be applied for if, the police officer refuses to register a valid FIR or any government official refuses to provide any service which he was supposed to provide.

Writ of Prohibition:

The literal meaning of Prohibition is 'to forbid.' This Writ is issued by the High Court or the Supreme Court when the lower court exceeds its jurisdiction or un pursue a jurisdiction which is not possessed by it. This Writ can be issued against a judicial or a quasi-judicial body only. The points worth noting while applying for writ of prohibition are that this Writ can be applied for only when the lower court has overstepped its jurisdiction or has violated any law. If in the case the lower Court has issued an order which is partly in its jurisdiction and is partly outside the jurisdiction, then the writ will be issued only against that part of order which is outside the jurisdiction. For example, this Writ can be applied for if, National Company Law Tribunal (NCLT) admits any petition regarding the determination of legal title of shares which is a Civil matter and is outside the jurisdiction of NCLT.

Writ of Certiorari:

The literal meaning of Certiorari is 'to be certified' or 'to be informed.' This type of Writ is issued by the Court when it intends to quash the transfer of case or order passed by the subordinate Court. This Writ is issued, when the court observes excess of jurisdiction or lack of jurisdiction or error of law. In such a situation, this Writ is issued as a corrective action.
This Writ can be applied for by the applicant in case of overstepping, abuse or absence of jurisdiction, or violation of principles of natural justice or any error of law. For example, this Writ can be applied where any case regarding which the district Court does not have jurisdiction is heard by it and order is passed. In such a case, the High Court can quash such an order by passing the Writ of Certiorari.

Writ of Quo-Warranto:

Literal meaning of Quo-Warranto is 'by what authority or warrant.' This Writ is applied for if an incompetent person wrongfully occupies any public office. If this Writ is issued by the Court, then the legality of any person's claim to any office is enquired. However, the pre-condition for making application for issue of Writ of **Quo-Warranto is that this Writ can be filed against usurpation of public office only.** Further, some more conditions for filing Writ petition for this Writ are that, the office in question should be created by constitution or any other law in force, the duties expected to be performed by such office should be classified as public duties, and most importantly the petition against any person can be filed only when he is in the possession of the office and uses it. For example, the Writ of **Quo-Warranto can be filed against the Registrar of Companies if he holds such office of ROC without possessing the required qualification to hold the same.**

Writ petitions under Companies Act 2013:

As mentioned in the beginning of the article all the laws in force in the country gain their powers from the Constitution and the rights granted by such laws are also protected by the constitution. The same rule is applicable to the Companies act 2013 (the Act) as well. Therefore, in case of violation of any right provided under the Act and absence of any other remedy in that regard, Writ petitions can be filed before Honorable High Court or Supreme Court by the aggrieved parties including the directors of the companies, shareholders, workers, creditors, and other stake holders. We shall hereinafter see some situations wherein Writs can be filed with respect to provisions of the Act.

(A) Challenging the constitutional validity of sections of the Act:

If at any point in time, it is observed that, any section of the Act is violating any fundamental right granted by the Constitution of any specific individual, then the aggrieved party can file a writ petition before supreme court challenging the constitutional validity of that section. In such a case, applicant prays that since the section of the Act infringes a right granted by the constitution, it is not constitutionally valid. However, a point worth noting in this case is that, since the fundamental rights are protected by the supreme court, the writ petition challenging the constitutional validity of any section can be filed before supreme court only, under article 32 of the constitution.

An example of this situation can be seen in a Supreme Court order in the matter of [i]Moser Baer Karamchari Union through President MaheshChand Sharma ...Appellant(s) Versus Union of India andOrs. ...Respondent(s). in this case the constitutional validity of section 327(7) of the Act was challenged and an application was made for issuing a writ of mandamus exempting the workers from waterfall mechanism under section 53 of Insolvency and Bankruptcy Code. The honorable Supreme Court admitted the writ petition and considered the case based on facts and merits. However, after hearing the arguments the Court held that the sections in question are not in violation of article 21 of the constitution and hence are constitutionally valid.

(B) Removal of disqualification of directors under section 164 of the Act:

As per section 164 of the Act, the directors of the company can be disqualified from Acting as directors for certain non-compliances by the companies, like non-filing of annual returns or non-repayment of deposits etc. The directors' ones disqualified, generally remain disqualified for 5 years and cannot function as director of any company other then defaulting company in this period. In year 2020 ministry of corporate affairs had come up with one time settlement scheme under which the directors could make good the default and remove their disqualification, but it was a one-time scheme and was closed after the end of specified period. Apart from this, there is no other remedy under the Act. the directors may file a writ petition before high court for ordering the quashing of their disqualification.

This situation was seen in a Madras High Court order dated 9th October 2020 in the matter of [ii]Meethelaveetil Kaitheri ... vs Union of India. In this case a writ petition asking for removal of disqualification was filed stating that the disqualification was given effect without giving a proper show cause notice and that deactivation of DIN was not required under section 164 and still it was done. The honorable Madras High Court admitted the petition and heard the parties. After considering all submissions and documents, the Court agreed that disqualification cannot take place without giving show cause notice and deactivation of DIN was not as per section 164 and hence disqualification was removed, **and DINs of the directors were activated.**

(C) Writ due to absence of remedy:

If any person is aggrieved due to any provision of the Act and he has no remedy under the Act, then in such a case the aggrieved person can file a writ petition before high court and the court after ensuring that there is no other remedy available, shall admit his petition. One such situation was seen in a Bombay High Court judgment dated 9th February 2024 in the matter of [iii]Rajiv Sharma verses Registrar of Companies Mumbai. In this case, the director Rajiv Sharma had resigned from the company and the company had also accepted the resignation. However, form for intimating the resignation could not be filed and as a result ROC records were not updated.

The director himself filed form DIR-11 to intimate ROC about resignation, but ROC did not accept the same due to non-compliances on the part of company. Therefore, in absence of any remedy, the director filed a writ petition praying for writ of mandamus ordering the ROC to accept his resignation. The honorable Bombay High Court after analyzing all the facts and circumstances, agreed with the director and ordered the ROC to take the resignation on record and take separate action against company for non-compliances.

(D) Appeal against order of regional director:

Under the sections of the Act the Regional Director (RD) has powers to issue orders, for example, approval for removal of auditor, appeal against adjudication order passed by ROC etc. however, there is no provision for filing appeal against order passed by RD. Therefore, in such a situation, the company may file a Writ petition praying for quashing of RD order. One such situation wherein RD order was challenged was seen in Madhya Pradesh High Court order dated 17th August 2022 in the matter of [iv]MPCG MOBILE PRIVATE LIMITED verses Union of India. In this case, company had made application to RD for removal of statutory auditor of the company. But the RD passed order refusing the removal without considering the facts of the case. Hence the writ petition was filed before Madhya Pradesh High Court. The Honorable High Court, after considering all the facts and circumstances held that, order was passed without considering all the relevant facts and was also without proper reasoning. Hence the matter was remitted back to RD for fresh herring. In the second case of similar nature, in the matter of [v]M/s. Technova Tapes private limited v/s Regional Director, ('RD') had ordered the company to change its name as per section 22 of Companies Act 1956. The company filed a Writ petition before Karnataka High Court stating that the order is passed by RD without properly interpreting section 22 and prayed for reversal of RD's order. The Honorable High Court, after hearing the arguments, reversed the RD's order.

Conclusion:

In conclusion, considering the complex legal environment, it is highly essential for all the citizens to know about our constitution and the rights and duties bestowed by it on us. The right to file Writ petition is one such right granted by Constitution to the Citizens of India to ensure justice and protection of other rights granted by Constitution. Companies incorporated in India can file Writ through its directors and the directors and other stakeholders can also file the writs in their own name in the best interest of the company. In this way, justice is ensured to artificial persons as well.

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Ms. Rutuja Umadikar – Research Associate – rutujaumadikar@mmjc.in

[i] https://indiankanoon.org/doc/94292477/
[ii] https://indiankanoon.org/doc/174783821/
[iii] https://ibclaw.in/rajiv-sharma-vs-registrar-of-companies-mumbai-and-ors-bombay-high-court/
[iv] https://indiankanoon.org/doc/14153601/
[v] https://indiankanoon.org/doc/129778377/

Restriction on transferability of shares – How far reasonable?

Introduction:

Section 44 of the Companies Act 2013 ('the Act') states that, the shares of the company are movable property and are transferable in the manner provided in the Articles of Association ('AOA') of the company. These words '*transferable in the manner provided in the articles of the company*,' are of very much importance especially in case of a private company as one of the basic features of a private company is the restriction on free transferability of shares. Pursuant to the definition provided under section 2(68) of the Act private company is allowed to restrict transferability of its shares by adding clauses in AOA. The law, however, places no limit on the power of a private company as to the nature and extent restrictions which a company's articles may place on the right of transfer[i]. Table F, which is the model AOA for a private company, is also silent in this regard. Hence there is no legal barrier with respect to nature of restriction that AOA can impose on transfer of shares. This restriction can be of any nature.

In this article, we shall deliberate upon this power of AOA to restrict the transfer of shares of a private company. Also we would see if company can by passing a resolution mandate a shareholder to sell shares at a particular time to a particular person?

Clause restricting transferability of shares:

If AOA of a private company has added a clause in AOA that on passing of special resolution by members, shares of one shareholder should be transferred to some other person as the mentioned in the resolution, then whether the said shareholder will have to transfer the shares mandatorily?

Memorandum of association and AOA when registered bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member[ii]. So once a shareholder has subscribed to shares of company he has also agreed to the terms mentioned in the AOA of the company. So, if a company has added a clause in AOA of the company stating that shares of one shareholder should be transferred to some other person as the company specifies in the resolution passed in this regard then this clause is binding on the shareholder and he is bound to transfer shares of the company. The Act nowhere restricts having similar clauses. Now let us see if this would be valid in terms of merchantile law (viz. the Sale of Goods Act, 1930)

Restriction on transfer of shares in the context of Sale of Goods Act, 1930:

Principle of 'Nemo dat quad non habet': Principle relating to transfer of goods

'Nemo dat quad non habet' commonly known as Nemo Dat Rule is a Latin phrase that means, "no one can transfer a thing which they do not possess." This principle states that, person who does not have proper ownership of any goods, cannot transfer the said goods to anyone else. This principle is enshrined in section 27 to 30 of sale of goods act, 1930. Section 2(7) of Sale of Goods Act, 1930 states "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. As 'Shares' are considered as goods as per sale of goods act the 'Nemo Dat Rule' applies to shares also. So in case of Shares only shareholder can transfer shares as he is in possession and ownership of goods.

Therefore, looking at this rule one can argue that, since the company does not have proper title to shares of the shareholder, it seems company cannot by passing resolution, mandate the shareholder to sell the same. But there are exceptions to 'Nemo Dat Rule'.

For this we will have to refer to section 27 of the Sale of Goods Act, 1930 again. Section 27 states that 'Nemo dat rule' does not apply if the original holder of goods has not denied through his conduct, the authority of the seller to sell the goods[iii]. As discussed above, the AOA of the company is a contract between the shareholder and the company. Therefore, by subscribing/purchasing the shares of the company, all the clauses of AOA are accepted by the shareholder and are also binding upon him. As this provision relating to sale of shares of one shareholder by passing special resolution by other shareholders is enshrined in the AOA, the single shareholder has consented to it and thereby has given authority to sell his shares in accordance with this clause of AOA. So under mercantile laws and companies act there seems to be no challenge in having similar clauses in articles of association

Reasonableness of clause relating to restriction on transfer of shares:

It needs to be understood that even if private companies are permitted to restrict transfer of shares through their AOA but the restrictions imposed thereon shall be reasonable. Restriction on transferability should not be oppressive to minority. Rights of majority and minority shareholders was discussed in famous case of FOSS V. HARBOTTLE. It states that the decision of the majority is binding upon the minority and even the courts do not interfere in majority's decision. Therefore, as per this rule, the special resolution passed by the majority shareholders will be binding on the single shareholder whose shares are to be transferred.

Although the decision of the majority shareholders is binding on minority shareholders, there is an exception to Foss V. Harbottle rule. If the decision taken by majority is not in favour of minority or is ultra vires the AOA or memorandum of association, then in that case, FOSS V. HARBOTTLE rule does not apply. Therefore, care must be taken that such a special resolution must be passed only when there is a strong and valid reason to transfer the shares. Also, a proper opportunity of being heard must be given to the concern shareholder before passing such resolution. If this care is taken then, FOSS V. HARBOTTLE rule will apply, and the resolution might be considered as valid.

Procedural challenges pursuant to restrictions on transfer of shares.

Depositories Act, 1996 mandates depository to register the transfer only when he receives intimation from depository participant through a delivery instruction slip[iv]. In such situation a question arises is, "if the shareholder himself is not transferring the shares, then who shall sign the delivery instruction slip and how shall the transfer be registered"?

In the matter of ***Madhava Ramachandra Kamath v Canara Banking Corp. Ltd (1941) 11 Comp Cas 78 (Mad): AIR 1941 Mad 354.*** In this case it was held that, *"Such provisions will constitute a contract between the company and its shareholder and be binding on both. The articles may provide in order to enforce such provisions that the shareholder when called upon to compulsorily transfer his shares, shall be deemed to have executed an instrument of transfer if it is executed by a person authorised by the company in this behalf in pursuance of the articles; otherwise, it would be ultra vires section 108 of the Act."*

On perusing this extract of the judgment, it is clear that if the delivery instruction slip is signed by the authorised person of the company, then in this particular situation, it will be deemed to have been signed by the shareholder in question and the transfer will be registered.

Conclusion:

Restrictions on transferability of shares by private company needs to be reasonable, should not be arbitrary and should not be used as a tool for oppression of minority. Also it seems that it would valid to have a clause in the AOA of the private company which would allow the majority shareholders to transfer shares of one shareholder by passing a special resolution or any other restriction on transferability of shares. The clause should provide for certain specific situations where in this clause may be invoked and most essentially, an opportunity of being heard must be given to shareholder whose shares are proposed to be sold through such resolution, before passing the resolution.

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Ms. Rutuja Umadikar – Research Associate – rutujaumadikar@mmjc.in

Mr. Vallabh M Joshi – Senior Manager – vallabhjoshi@mmjc.in

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[i] *Crawley & Co. (1889) 42 Ch D 209*
[iiii] Section 10(1) of companies act 2013.
[iii] Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell:
[iv] Section 7 of depository act, 1996

Deciphering Stamp Duty: Analyzing the Supreme Court's Verdict on Share Capital Augmentation

Introduction:

When it comes to interpretating the law and resolving any confusion related to legal provision, the court's judgement play a crucial role., The judiciary's fundamental duty is to interpret the law to ensure justice. Consequently, court judgments serve as the most authoritative interpretations of legal principles. Landmark judgments set by courts are considered precedents and are followed when adhering to the law. In the context of the Supreme Court of India, its judgments are regarded as the paramount interpretations of the law and carry the same binding force as legislation.

In this article, we delve into a notable judgment delivered by the honourable Supreme Court of India on April 5, 2024. The Court analysed Article 10 of Schedule 1 of the Bombay Stamp Act, 1958, in conjunction with Sections 31(2) and 97 of the Companies Act, 1956. The objective was to determine the stamp duty payable by a company following an increase in its authorized share capital.

Facts of the case:

- Company: National Organic Chemical Industries
- Initial Authorized Capital: Rs. 36 Crores
- Increase in 1992: Authorized capital raised to Rs. 600 Crores (Stamp duty paid: Rs. 1.2 Crores)
- Amendment in 1994: Maharashtra government inserted a maximum cap of Rs. 25 Lakhs on stamp duty for share capital increases. At that time, the relevant provision stated:

Description of Instrument	***Proper Stamp Duty***
Articles of Association of a Company (where the Company has no share capital or nominal share capital or increased share capital)	*One thousand rupees for every rupees 5,00,000 or part thereof*

- In 1994, the Maharashtra state government amended the Stamp Act to introduce a maximum cap of Rs. 25 Lakhs on stamp duty payable by companies upon an increase in share capital. The amendment read as follows:
  "In exercise of the powers conferred by clause (a) of Section 9 of the Bombay Stamp Act, 1958, the Government of Maharashtra, having satisfied that it is necessary to do so in the public interest, hereby reduces, with effect from the 1st August, 1994, the maximum duty chargeable on Articles of Association of a Company under Article 10 of Schedule-I to the said Act, to Rs. Twenty Five Lakhs."
- Further Amendment in 1995: Company increased capital to Rs. 1200 Crores (Stamp duty paid: Rs. 25 Lakhs)
- However, the company realized that this payment was inadvertent because the maximum stamp duty of Rs. 25 Lakhs payable on Articles of Association had already been paid by

them in 1992. Consequently, the company sought a refund of the stamp duty from the Deputy Superintendent of Stamps, Maharashtra.

The honourable High Court ruled in favour of the company, ordering the refund of the duty along with interest. However, the State of Maharashtra challenged this decision before the Supreme Court.

State of Maharashtra's Argument:

- Section 14A of the Bombay Stamp Act stipulates that any material modification to an instrument necessitates fresh payment of stamp duty.
- The state contended that each increase in share capital constitutes a new taxing event, even if the stamp duty had already exceeded the maximum cap.
- Further emphasized that the stamp duty exceeding the cap was paid before the amendment that introduced the limit, and therefore, the amendment should not have retrospective effect.

Company's Counterargument:

- The company asserted that Form-5, which serves to notify the Registrar of Companies (ROC) about the increase in share capital, is not an instrument as per the Bombay Stamp Act.
- Furthermore, the company argued that an increase in share capital does not qualify as a material modification to the instrument.
- The company cited a precedent from the Allahabad High Court in the case of New Egerton Woollen Mills, In re, 1899 SCC OnLine All 22. The Allahabad High Court had addressed a similar question regarding stamp duty payable on a document that altered Articles of Association.

Looking at these arguments, the Court formed 2 questions of law. They are as follows:

1. whether the notice sent to the Registrar in Form No.5 is an "instrument" as defined under Section 2(l) of Bombay Stamp Act? And

2. whether the maximum cap on stamp duty is applicable every time there is an increase in the share capital or it is a one-time measure.

Supreme Court's Decision:

- The honourable Supreme Court concurred with the Allahabad High Court's ruling.
- According to the Supreme Court, Form No. 5 serves as a prescribed method for sending notice of an increase in share capital or members to the Registrar within 30 days of passing such a resolution.
- The Registrar then records the increase in share capital or members and carries out necessary alterations in the articles.
- Stamp duty is affixed to Form No. 5 for practical convenience because a company cannot independently carry out alterations and record share capital changes in its Articles of Association.

- Ultimately, it is the articles themselves that qualify as an "instrument" within the meaning of Section 2(l) of the Stamp Act, and they are specifically mentioned in Article 10 of Schedule-I of the Stamp Act

- The Bombay Stamp Act is a fiscal statute and must be construed strictly. The court analyzed Article 10 and its placement in the schedule. Column 1 describes the instrument on which stamp duty is levied. Column 2 prescribes the stamp duty payable.

- Three situations are described in Column 1: *"where the company has no share capital or nominal share capital or increased share capital" . The effect of adding "increased share capital" is that stamp duty will be charged on subsequent increases in the authorised share capital, subject to the maximum cap.*

- *In other words, the ceiling of Rs. 25 lakhs in Column 2 is applicable on Articles of Association and the increased share capital therein, not on every increase individually. In case stamp duty equivalent to or more than the cap has already been paid, no further stamp duty can be levied."*

As a result, the court in its order upheld the order of the lower court and ordered the state government to refund the stamp duty mistakenly paid by the company.

Position as on date:

As of the present date, the Supreme Court has provided clarity regarding the payment of stamp duty on increases in share capital. Although the case in question pertains to events from 1992 and 1994, it remains relevant today.

In 2015, the Bombay Stamp Act underwent an amendment through the Bombay Stamp Amendment Act 2015. This amendment introduced the term "increase" into Column 2 of Article 10 in Schedule I of the original Act. Consequently, the provision now stipulates that stamp duty should be paid on articles of association at a rate of 0.2% or a maximum of 50 lakhs for each individual increase in share capital1.

This legal development ensures greater clarity and consistency in the application of stamp duty provisions for companies undergoing changes in their authorized capital.

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Ms. Rutuja Umadikar – Research Associate – rutujaumadikar@mmjc.in

Ms. Vrushali Bhave– Senior Manager – vrushalibhave@mmjc.in

The case within the CIRP that illustrates the contrast between raising funds through debt instruments and raising capital through the issuance of shares!

In the matter of M/s EPC Constructions India Limited through its Liquidator Mr. Abhijit Guhathakurtha (Petitioner/ Financial Creditor) v/s M/s Matix Fertiliser and Chemicals Limited (Respondent/ Corporate Debtor) at National Company Law Tribunal at the Kolkata Bench dated 26 July 2023.

Facts of the case:

- M/s. EPC Constructions India Limited, the Petitioner and Financial Creditor (EPC/FC), infused an amount of Rs. 250,00,00,000 (Rupees Two Hundred and Fifty Crores) as sub-debt into the capital of M/s. Matix Fertiliser and Chemicals Limited, the Corporate Debtor (Matix/CD). In exchange for this infusion, 25,00,00,000 (Twenty-Five crore) Cumulatively Redeemable Preference Shares (CRPS) were issued to EPC with a face value of Rs. 10 (Rupees Ten) each. These shares carry a cumulative dividend of 8% every year, payable at par after 3 (three) years.

- The EPC filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) to initiate a Corporate Insolvency Resolution Process (CIRP) against the CD due to default in redemption and payment of Rs. 310 Crore (Rupees Three Hundred and Ten Crore Only). This amount became due and payable upon the maturity of 25 Crore CRPS with a face value of Rs. 250 crores since 26 August, 2018. Additionally, it includes dividends on the Rs. 250 Crore principal amount at a rate of 8% per annum until the entire amount is realized.

- The EPC submitted that the liability of Rs. 310 Crore arose pursuant to a contract dated 29 July 2010 (as amended from time to time). For each year that the CRPS remained unpaid, an interest of Rs. 20 Crore was added. Therefore, the claim of Rs. 310 Crore represented the sum of three years' unpaid dividends along with the principal amount of Rs. 250 Crore. According to the terms, this amount would continue to accrue until the CRPS were redeemed.

- Further, after the CRPS became due and payable, EPC through then RP issued a letter to CD, inter alia, calling upon CD to plan for redemption on the due date and arranged for remittance of redemption proceeds, including dividend, aggregating to Rs. 310 Crore.

- In response, the CD admitted liability for the CRPS redemption proceeds but requested an adjustment of this liability against its purported claim submitted in the CRPS of the FC. After adjusting the redemption proceeds of Rs. 310 Crore against the submitted claim, the CD asserted that the dues towards CRPS would become NIL. The CD did not dispute, in any manner whatsoever, that the redemption proceeds were not due and payable; rather, the liability was categorically admitted.

  A demand notice was issued to the CD claiming an amount of Rs. 632.71 Crore. This amount comprised Rs. 310 Crore, representing the redemption amount due on the maturity of the CRPS, and Rs. 322.71 Crore, representing outstanding receivables for services rendered by EPC.

- The CD disputed the amounts on the grounds of vulnerable economic conditions and non-completion of the assigned tasks.

- Due to the CD's default in payment of the redemption amount of CRPS, EPC filed a petition under Section 7 of the IBC seeking to initiate Corporate Insolvency Resolution Process (CIRP) against the CD.

Arguments of the Petitioner – EPC:

- The amount due from CD to EPC falls within the definition of debt as defined under Section 3(11) of the IBC. The issuance of 25 Crore Preference Shares by the CD against a portion of the outstanding receivables, amounting to Rs. 250 Crore, due to be paid to EPC under the Subject Contracts, constituted an infusion by EPC into the CD, akin to a loan, with redemption due after 3 years. Therefore, the aforementioned debt was undisputedly classified as a financial debt under Section 5(8)(f) of the IBC.

- It was argued that the said financial debt was an admitted liability in the books of account of the CD as recent as the Financial Year 2020-21. Therefore, the non-payment of the aforementioned financial debt, which had become due and payable, amounted to default as defined under Section 3(12) of the IBC.

- While the CRPS dues of Rs. 310 Crore were never disputed by the CD, the remaining balance amount of Rs. 322.72 Crore, which continued to remain outstanding, was neither acknowledged nor paid by the CD. In a high-handed and potentially fraudulent manner, the CD refused to acknowledge the liability towards the balance amount, and astonishingly, this balance was miraculously wiped off from the books of accounts. This action caused significant losses not only to the Applicant but also to all stakeholders of EPC/FC, which was under liquidation.

- Reliance was placed on the following judgements:
    - *Preference shares are a 'financial debt' having 'commercial effect of borrowing' in terms of Sec. 5(8)(f) of the IBC - HDFC Ventures Trustee Company Limited v. Kakade Estate Developers Private Limited.*
    - *IBC is a complete code - Judgments passed in the context of Companies Act, 2013 or 1956 cannot be relied upon to infer the purport, meaning and ambit of provisions contained in the Code - Moser Baer Karamchari Union v. Union of India and Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta and Ors*
    - *Balance sheets and financial statement are mandatory to be filed by a company, and therefore, the entries made therein qua admission and liability of debt ought to be considered - Juxtaposed to the arguments that statutory provisions of Companies Act should not be looked into, the following decisions were referred to - Asset Reconstruction Company (India) Limited v. Bishal Jaiswal and Ors.,*

- It was argued that the petition u/s 7 of IBC was maintainable at the instance of a preference shareholder and FC fall under 'financial debt'.

- The argument put forth by the CD, stating that once debt is converted into shares, it leads to the extinguishment of debt and loses its character, is contrary to law and inapplicable in the case of redeemable preference shares. Unlike equity shares, redeemable preference shares are liable to be redeemed or repaid.

- To counter the contention of the CD that it has no obligation to redeem preference shares because it hasn't made any profit or declared dividends, and thus redemption of CRPS is barred by Section 55 of the Companies Act, 2013 (the Act) – it was highlighted that the Section 55 of the Act merely outlines the manner in which preference shares can be redeemed, namely, out of the profits of the company or out of the proceeds of a fresh issue of shares made specifically for the purpose of such redemption. It does not absolve the CD from its obligation to redeem preference shares.

- The contention of the CD that CRPS was in the nature of investment, and hence, not a 'financial debt' is a position contrary to the IBC.

Arguments of the Respondent - CD:

- There was never any financial debt advanced by the EOC to them. The transaction between the parties was a contract under which the EPC was obligated to construct a green field fertiliser complex and handover the same to the respondent after completing installation, commissioning and issue final acceptance certificate. Therefore, the receivables of the CPC if any, from the respondent, at the highest, would be an Operational Debt under the IBC.

- The argument posited against the allegation made by the EPC, asserting that the respondent failed to redeem the CRPS on the maturity date, thereby constituting a default in payment of financial debt, is fundamentally flawed. Section 55 of the Act explicitly states that preference shares can only be redeemed by a company utilizing profits available for dividend distribution or from fresh equity raised specifically for the purpose of redeeming the preference shares. At the pertinent time, they neither recorded profits nor raised fresh equity for redemption purposes. Consequently, there existed no obligation on them to redeem the CRPS issued to the EPC. Without such an obligation, the EPC cannot reasonably claim that the respondent was in default.

- The respondent vide letter dated 7 December, 2018 categorically denied any liability to redeem the CRPS since the respondent has not earned any profit in immediately preceding and the current financial year, rather, it had accumulated losses of Rs. 589.46 Crore.

- Reliance was placed on the following judgements:
    - *Once a Debt is converted into shares, it leads to extinguishment of liability and loses the character of Debt - It is a settled position of law that once a debt has been converted into shares, it irrevocably loses all characters of debt*
        - *Commissioner of Income Tax-V v. Rathi Graphics Technologies Limited*
        - *Canara bank v. IBRCL Limited*
        - *Anup Jhunjhunwala v. Adea Powerquips Private Limited*
        - *Karnataka State Financial Corporation v. Namasthe Exports Private Limited*
    - *A Preference Shareholder is not a creditor or financial creditor of a Company*
        - *Radha Exports v. KP*
        - *Aditya Prakash Entertainment Private Limited v. Magikwand Media Private limited*
        - *Lalchand Surana v. M/s Hyderabad Vanaspathu Ltd.*
        - *State Bank of India v. Alstom Power Boiler Ltd*
        - *Hindustan Gas & Industries Ltd. v. Commissioner of Income Tax*
    - *There was no obligation to redeem preference shares when the company has not made any profit and dividend had not been declared.*
        - *Roop Kumar v. Mohan Thedani*

        - *Rajasthan State Industrial Development & Investment Corpn. v. Diamon & Gem Development Corpn. Ltd*
    - *Accounting Standards and entries in the balance sheet cannot override the contract between the parties - Union of India v. Assn. of Unified telecom Service Providers of India and other judgements*
    - *I&B Code, is a complete code in itself - Innoventive Industries Ltd. vs. ICICI Bank*

- It was highlighted that the Preference Shareholder is also a Shareholder - The preference shareholder has all the rights of an equity shareholder and in addition thereto has certain preferential rights to share in the profits available for dividend and for return of capital in priority to that of an equity shareholder. Preference Shares' are not defined, or described or discussed in the IBC which itself will demonstrate that a claim based on non-redemption of 'Preference Shares' cannot form the basis of a claim under Section 7 of IBC.

- It was also highlighted that there is no absolute entitlement to redeem a preference share. This is primarily due to the fact that any redemption of preference shares outside the provisions outlined in Section 55 of the Act would constitute preferential treatment to shareholders over the company's creditors, thus violating the law. This contravention includes the stipulations of the waterfall mechanism under Section 53 of the IBC, which expressly prohibits such preferential actions. When paid out of profits, the lenders/ financial creditors are not affected, which highlights that CRPS is not a debt.

- It was further contended that the amount claimed represents an investment rather than a debt, despite exhibiting the commercial characteristics of borrowing. The assertion is that the EPC's claim does not qualify as a debt, let alone a financial debt.

- The classification of CRPS as a financial liability in the respondent's balance sheet, done to adhere to the classification norms of Ind AS, does not automatically equate to the liability under CRPS being considered a financial debt under the IBC. Hence, relying on the respondent's balance sheets to argue the existence of a financial debt is misguided and legally incorrect.

Held:

- After analysing in detail whether a preference share is an instrument having the commercial effect of borrowing and after examining the definition of equity and preference share capital u/s 43 of the Act - it was observed that a preference shareholder has a preferential right to -
    - A share in the profits of the company that are available for dividend; and
    - Return of capital of the company in priority to equity shareholders in the event of the company's liquidation.

- The NCLT also examined Sections 2(55) and 47 of the Act - which defines voting rights of preference and equity shareholders and observed that:
    - Both equity and preference shareholders are members of a company and therefore the Petitioner who was issued 25,00,00,000 (twenty-five crore) CRPS too is a member of the Corporate Debtor;
    - Preference shareholders are also entitled to enjoy voting rights in every resolution placed before the company.

- The NCLT noted that a preference shareholder cannot step into the shoes of a creditor and examining the Section 55 of the Act which defines the issue and redemption of preference shares and observed that:
    - Preference shares can only be redeemed out of (a) the profits of the company which would otherwise be available for dividend; or (b) the proceeds of a fresh issue of shares made for the purpose of such redemption;
    - Preference shareholders cannot be paid unless the company fully discharges its debt obligations;
    - Thus, non-redemption of preference shares does not result in preference shareholders becoming creditors or the carrying value of preference shares and dividends becoming a debt.

- CRPS are in the nature of an investment and not a debt unless it becomes redeemable, as it is not obligatory for a company to pay dividend to preference shareholders since dividend is usually a part of the profit that the company shares with its shareholders. Thus, unless the company earns profits, no dividend is payable against CRPS.

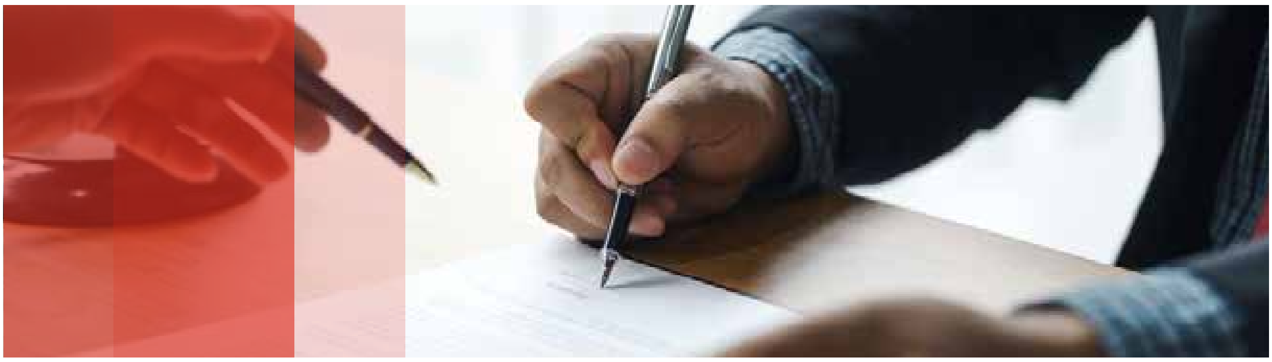
- NCLT also examined Sections 3(11) and (12) of the IBC which defines debt and default respectively, and accordingly observed that if payment against CRPS is not due, no liability can arise; and the necessary corollary would be that unless CRPS is payable, non-payment against CRPS cannot be termed as a default.

- Further, NCLT also observed that a perusal of the Balance Sheet of the CD for 2018-19 and 2020-21 manifests losses incurred by the CD. As such, since dividend is not payable out of losses and unless the CRPS becomes redeemable, it cannot be termed as a debt, much less a financial debt, which is the *sine qua non* for a petition u/s 7 of the IBC to be maintainable.

- The NCLT summarized the fundamental difference between raising of capital through debt instruments and *via* issuance of shares. The decision is a classic example of the doctrine of literal interpretation while construing statutes. Section 55 of the Act squarely covers the position that preference shares can only be redeemed out of the profits of the company available for dividend or through issuance of fresh shares. This decision removes the ambiguity surrounding the issue concerning treatment of preference shareholders, and conclusively holds that non-redemption of preference shares does not result in preference shareholders becoming creditors.

- NCLT dismissed the petition filed u/s 7 of the IBC on the ground of maintainability.

Ms. Esha Tandon – Assistant Manager – eshatandon@mmjc.in
Ms. Aartii Ahuja Jewani – Partner – artiahuja@mmjc.in



Disclosure under SEBI LODR of fines and penalties levied – Making it relevant

Introduction:

Securities and Exchange Board of India ('SEBI') had issued a consultation paper[i] dt: November 12, 2022 wherein it was proposed inter-alia to add a provision mandating disclosures to stock exchanges of penalties levied on listed companies. This proposal was discussed and approved in the SEBI board meeting dt: March 29, 2023 and SEBI vide its amendment notification dt: June 15, 2023 amended Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ['SEBI LODR'] and added Point 20 under Schedule III Part A, Para A. Pursuant to notification of this amendment it is observed that listed companies have been disclosing penalties levied on listed companies by any authority howsoever miniscule it may be as disclosure of penalties is now a deemed material event. This article highlights challenges that may arise due to these disclosures and impact these disclosures may have on investors.

Background:

Point 20 under Schedule III Part A, Para A reads as follows:

20. <u>Action(s) taken or orders passed</u> by <u>any</u> regulatory, statutory, enforcement authority or judicial body against the listed entity or its directors, key managerial personnel, senior management, promoter, or subsidiary, in relation to the listed entity, in respect of the following:
(a) suspension;
(b) <u>imposition of fine or penalty;</u>
(c) settlement of proceedings;
(d) debarment;
(e) disqualification;
(f) closure of operations;
(g) sanctions imposed;
(h) warning or caution; or
(i) any other similar action(s) by whatever name called;
along with the following details pertaining to the actions(s) initiated, taken or orders passed:

- *i. name of the authority;*
- *ii. nature and details of the action(s) taken, initiated or order(s) passed;*
- *iii. date of receipt of direction or order, including any ad-interim or interim orders, or any other communication from the authority;*
- *iv. details of the violation(s)/contravention(s) committed or alleged to be committed;*
- *v. impact on financial, operation or other activities of the listed entity, quantifiable in monetary terms to the extent possible.*

This point clearly states that penalty levied by any authority on any of the above-mentioned entities shall be disclosed. The terms regulatory authority, statutory authority, enforcement authority, or judicial body are not defined anywhere. Hence the meaning of these terms would have to be taken as per dictionary.

While highlighting the need for amendment to SEBI LODR it was stated that, "*In the recent years, SEBI has been receiving <u>many complaints / references regarding inadequate / inaccurate / misleading / delayed disclosures</u> made by the listed entities. Listed entities from their end have also expressed that <u>uniformity</u> in the <u>guidance</u> to the listed entities is required <u>for determining materiality of events or information</u>…Needless to emphasize here is that timely dissemination of information would help in reducing information asymmetry.*"

We perused some sample disclosures given to stock exchanges by listed entities informing penalties levied. On perusal of these disclosure, it was observed that listed companies are disclosing all penalties levied by any authority as specified under point 20. It is also observed that penalties levied for non-compliance with certain contractual or licensing norms viz. improper documentation with respect to onboarding of clients, non-filing of certain forms etc. are being disclosed. Further penalties levied against listed companies for non-compliance with business-related laws by any branch or shop belonging to the company are also being disclosed. Below is analysis of some random disclosures made to stock exchanges by listed companies regarding disclosure of penalties levied. This data ranges from August 2023 till date:

Sl. No	Particulars	No. of companies	Min. penalties being levied
1	Listed companies being penalized for violation of LODR	Six	Penalties levied with minimum amount being Rs 5000/- approx.
2	Listed companies being penalized for violation of RBI rules and regulations	Three	Penalty levied with minimum amount being Rs 1500 approx.
3	Listed companies being penalized for violation of foreign rules and regulations	Two	Penalty levied with minimum amount being US $50 approx.
4	Listed companies being penalized for violation under various taxation laws	Seven	Tax demand being made with minimum amount being Rs 850,000 approx.
5	Listed companies being penalized for violation of other laws and regulations	Two	With minimum amount of penalty being as Rs 5000/-

As it is seen above listed companies are disclosing miniscule penalties to stock exchanges. It also needs to be understood that continuous disclosure of such penalties would burden the shareholders with information which may not be so relevant considering the net worth of listed companies. Also, there is a possibility that relevant and important information disclosed to stock exchange would be missed or would get suppressed in these disclosures of miniscule penalties. Further it also needs to be noted that disclosure of these penalties is also disclosed in the context of unlisted subsidiary companies pursuant to regulation 30(9) of SEBI LODR.

Repeated levying of penalties :

Repeated penalties being levied against listed companies speak about the compliance management systems of company. The intent of bringing the provision of disclosure of penalties is to allow investors to be aware of violations and nature of violations being done by listed companies. These would include penalties which are substantial in nature or regulatory action that may cause disruption of operations or consequences in the nature of debarment has occurred, cancellation of license or patents etc.

But what if these penalties are disclosed to stock exchanges cumulatively at the end of every quarter? This would give investors a comprehensive list of penalties levied on a listed company in a quarter and would also help to achieve the intent of bringing this provision. Disclosure of list of penalties levied on quarterly or periodic basis to stock exchanges would help investors focus on information that is relevant, will not mislead investors with miniscule information and would reduce compliance burden on companies.

Conclusion:

Relevance of disclosures have been highlighted by Securities Appellate Tribunal under various orders. Hon'ble SAT in the matter of Coimbatore Flavors & Fragrances Ltd. vs SEBI (Appeal No. 209 of 2014 order dated August 11, 2014)[ii], has held that "*Undoubtedly, the purpose of these disclosures is to bring about more transparency in the affairs of the companies. True and timely disclosures by a company or its promoters are very essential from two angles. Firstly, investors can take a more informed decision to invest or not to invest in a particular scrip secondly; the Regulator can properly monitor the transactions in the capital market to effectively regulate the same.*"

Further in the matter of Appeal No. 66 of 2003 - Milan Mahendra Securities Pvt. Ltd. vs. SEBI[iii]– the Hon'ble SAT, vide its order dated April 15, 2005, held that, "*the purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market.*"

Disclosures to stock exchanges act as a crucial factor in evaluating listed companies. It is necessary to ensure that disclosure to stock exchanges is made of in a manner in which it helps investors to take decisions.

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https://www.taxmann.com/research/company-and-sebi/top-story/105010000000023835/disclosure-under-sebi-lodr-of-fines-and-penalties-levied-%E2%80%93-making-it-relevant-experts-opinion

Mr. Vallabh M Joshi – Senior Manager – vallabhjoshi@mmjc.in

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Upholding Corporate Integrity: The Evolution of Independent Directors' Accountability:

In a recent regulatory development, the Securities and Exchange Board of India (SEBI) introduced an amendment aimed at bolstering corporate governance by enhancing the accountability of independent directors (IDs). This crucial change mandates that when an independent director resigns, they must provide a resignation letter explicitly stating the reasons for the exit, with a stipulation that there should be no other reason beyond what is mentioned in the letter.

The fundamental concept behind the appointment of Independent Directors (IDs) is to introduce a vital balance into decision-making processes within companies. Central to this notion is the idea that IDs bring an unbiased view and a commitment to ethical standards. Moreover, it is imperative that IDs are not merely passive participants in boardroom discussions but active contributors whose voices are valued and heard. This necessitates a culture where IDs feel empowered to express their viewpoints, raise concerns, and articulate their expectations regarding governance, transparency, and ethical conduct. Having said this the amendment now mandates that independent directors must provide explicit reasons for their resignation in the letter.

The rationale behind this amendment was to address a recurring issue where independent directors would resign citing reasons such as "personal commitments," raising suspicion and concerns about compliance. Resignation of IDs without accurate reasons left the regulators guessing reasons for the same. The watchdog has now compelled independent directors to specify reasons for their resignation, thereby bringing to light critical issues.

The market's watchdog in the past has gone blazing guns at independent directors by levying penalties ranging from monetary to debarment in capital markets for failure in exercising due diligence. Some popular names include Jai Mata Glass Limited, Securekloud Technologies Limited, Sanwaria Consumers Limited.

Instead of providing generic reasons IDs now obligated to delve deeper into the underlying issues prompting their departure. By shedding light on specific concerns such as non-compliance with regulatory requirements, questionable transactions, inadequate disclosures, or governance lapses, independent directors are shedding light on issues that may have previously gone unnoticed or ignored.

This evolving landscape of mandating reasons in resignation letters from independent directors become more exhaustive than ever before aids in inspection, inquiry, and investigation to regulators. Parallelly these letters serve as crucial defense mechanisms for IDs, providing a comprehensive account of their departure reasons and asserting that these reasons are exhaustive. In the event of investigations or inquiries, such letters act as a shield, offering immunity to IDs by documenting their rationale transparently. These'd safeguard IDs who meticulously detail their reasons will be exonerated from liability.

A notable outcome of this amendment is the proactive role assumed by independent directors in safeguarding shareholder interests and upholding corporate integrity. Recent cases, including the Zee case, exemplify how independent directors, upon resigning, have cited concerns such as unjustified related-party transactions (RPTs) which were not at arm's length, dubious valuations, or lack of satisfactory responses from management, prompting SEBI to initiate investigations that may eventually uncover instances. Another classic example was PTC Financial Services Ltd where independent directors resigned sighting corporate governance lapses.

The impact of this regulatory intervention has been overwhelmingly positive. It has not only facilitated timely regulatory interventions to protect shareholder interests but has also instilled confidence in the efficacy of corporate governance mechanisms.

Having said this to my mind it is the test of ID's wisdom as to when they rely on trust and when they take a call to dig deeper to inspect and accordingly decide upon further action and if need be, put forth a detailed resignation.

The significance of this regulatory change extends beyond mere procedural compliance; it signifies a paradigm shift towards proactiveness. By requiring them to disclose specific reasons for resignation and encouraging them to escalate governance concerns to regulatory authorities, it has fostered a culture of accountability and integrity within boardrooms.

In another notable stride towards reinforcing corporate stewardship, independent directors are now mandated to provide a comprehensive account of their resignation history from board positions within the preceding three years. This requirement underscores the heightened scrutiny surrounding ID appointments and emphasizes the profound responsibility and accountability associated with such roles. No longer can resignations be discreetly executed without repercussions; instead, IDs must meticulously consider their suitability for board positions, fully cognizant that their past resignations will be subject to thorough examination. This directive serves as a clear indication that IDs must approach their positions with utmost seriousness and diligence, recognizing the significant impact of their decisions on organizational governance and integrity.

The amendment mandating clear resignation disclosures by independent directors marks a significant milestone in strengthening corporate governance practices in India. It emphasizes the critical role of independent directors as custodians of corporate integrity and ensures that governance lapses are promptly addressed, ultimately fostering investor confidence and market integrity.

This article is published in Economic Times. The link to the same is as follows: -

https://m.economictimes.com/markets/stocks/news/upholding-corporate-integrity-the-evolution-of-independent-directors-accountability/articleshow/108346434.cms

Mr. Makarand Joshi – Partner – makarandjoshi@mmjc.in

ESG Integration in Startups: Navigating Sustainable Paths in Emerging Markets.

Introduction:

In the dynamic landscape of emerging markets, startups are increasingly recognizing the intrinsic value and untapped potential embedded in Environmental, Social, and Governance (ESG) principles. Far from being viewed merely as a regulatory compliance or a philanthropic endeavour, ESG integration in startups is emerging as a strategic opportunity, a pathway to sustainable growth, and a means to address the evolving expectations of stakeholders. In this era of heightened global consciousness, startups are navigating the uncharted territories of ESG not just as a responsibility but as an avenue to innovate, differentiate themselves, and contribute meaningfully to societal and environmental well-being. This paradigm shift signifies a departure from conventional business models, as startups leverage ESG as a compass for responsible decision-making, resilience against uncertainties, and a holistic approach to value creation. This comprehensive integration is not just an ethical imperative but a strategic imperative, positioning startups as conscientious contributors to the emerging narrative of responsible and sustainable entrepreneurship.

Environmental Stewardship:

Startups in India are leveraging innovation to address environmental challenges. For instance, **Carbon Clean Solutions**[i], a startup based in Chennai, has developed breakthrough technologies for carbon capture, aiding industries in reducing their carbon footprint. By providing scalable and cost-effective solutions, such startups contribute to environmental sustainability while supporting industrial growth.

Social Impact Initiatives:

Startups are increasingly recognizing the importance of social impact in their operations. **Karkinos**[ii], a leading Healthtech startup in India, has embraced a unique approach to fight cancer which remains one of the major challenges. The managed healthcare platform has built a comprehensive network of oncologists, medical experts, healthcare providers and skilled researchers, connecting patients with the nearest cancer care providers so that the former need not travel long distances for treatment. This commitment reflects a growing trend among startups to integrate social responsibility into their business models, contributing to community development.

Inclusive Business Models:

Emerging markets often grapple with issues of inclusivity. Startups like **Maithri Aquatech**[iii], which focuses on utilizing atmospheric water generation principles to produce pure and drinkable water from air without depending on groundwater or surface water sources, exemplify the integration of inclusive business models. By leveraging technology for social good, these startups contribute to social inclusion and bridge gaps in accessibility.

Indian startups such as **Ubreathe Life**[iv] a bio tech startup that develops plant-based air purifiers that combine natural air purifying capabilities with modern tech. This commitment enhances trust among stakeholders and aligns with the broader principles of ESG.

Sustainable Agriculture and Food Security:

With agriculture being a cornerstone of many emerging markets, startups are actively contributing to sustainable farming practices. **MeraPashu 360**[v], a dairytech platform in India, built an app for dairy farmers to buy and sell cattle online, besides ensuring animal nutrition, veterinary services, and health advisory to keep the bovine population healthy thereby optimizing the fresh produce, reducing wastage, and promoting sustainable agriculture.

Renewable Energy Solutions:

Startups in emerging markets are playing a crucial role in advancing renewable energy solutions. **GPS Renewables**[vi], based in India, focuses on biomethanation technology to solve the organic waste management challenge, accelerate the substitution of fossil fuel with bioenergy and mitigate climate change thereby contributing to both environmental conservation and energy access.

The Global Scenes

Coopérative Sahel Vert: Clean energy and organic fertiliser through biodigesters in Burkina Faso[vii]

Coopérative Sahel Vert is at the forefront of advocating sustainable solutions in rural areas through the establishment and maintenance of biodigesters. These innovative structures facilitate the generation and utilization of clean biogas and organic fertilizers, representing a holistic approach to environmental stewardship. Beyond their ecological benefits, these biodigesters play a pivotal role in empowering local communities economically. The surplus agricultural produce and organic fertilizers produced find a market, providing an additional income stream for the communities involved. Cooperative Sahel Vert's initiatives not only contribute to a greener environment but also foster socio-economic development in the rural landscape.

TECO^2: Affordable, durable school benches from plastic waste in Burkina Faso[viii]

TECO^2 pioneers a transformative initiative by introducing school benches crafted from recycled plastic and locally sourced waste materials. This innovative approach not only addresses the critical issue of deforestation but also actively combats environmental pollution. By repurposing discarded materials into durable and sustainable benches, TECO^2 not only contributes to the preservation of vital ecosystems but also offers a tangible solution to the global challenge of plastic waste. This thoughtful initiative underscores TECO^2's commitment to environmental conservation while simultaneously promoting responsible and eco-friendly practices within local communities.

Startups are spearheading a significant shift in the business narrative, transcending the conventional pursuit of mere profitability to adopt a more holistic approach. These innovative ventures are increasingly committed to crafting products that align with Environmental, Social, and Governance goals, thereby contributing to a sustainable and responsible future. This paradigm extends beyond geographical boundaries, with startups worldwide recognizing the pivotal role they play in addressing societal challenges. The global startup ecosystem is undergoing a transformation where success is not solely defined by financial gains but also by the positive impact on the environment and society. This collective shift towards ESG-friendly products underscores a universal understanding among startups that their endeavours can be both profitable and purpose-driven, fostering a new era of conscientious entrepreneurship on a global scale.

Conclusion:

Startups in emerging markets across the globe are becoming instrumental forces in the global shift towards ESG integration. By weaving environmental, social, and governance considerations into the fabric of their operations, these startups are not only addressing local challenges but also contributing to the global discourse on sustainability. As these innovative ventures continue to flourish, they exemplify how the spirit of entrepreneurship can be a powerful catalyst for positive change, fostering a sustainable and inclusive future for emerging markets and the world at large. The integration of ESG principles is not merely a trend for startups; it is a testament to their commitment to creating value that extends beyond profits, resonating with the evolving expectations of investors, consumers, and the broader global community.

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https://taxguru.in/corporate-law/esg-integration-startups-navigating-sustainable-paths-emerging-markets.html

Ms. Hasti Vora – Research Associate - hastivora@mmjc.in

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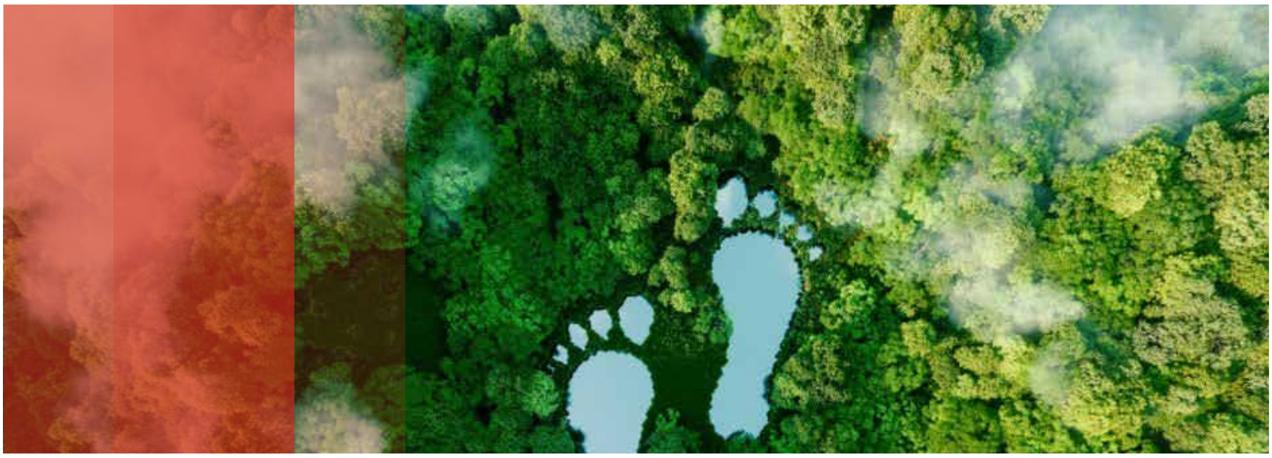

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Maximizing the impact through effective Annual Action Planning

Introduction:

Companies Act, 2013 ["the Act"] mandates companies falling under a specific threshold to spend in every financial year as part of its Corporate Social Responsibility ["CSR"] obligation under certain activities which are identified under Schedule VII of the Act.

Activities specified under Schedule VII of the Act are of very crucial importance and are included in the list of activities with the purpose that it is an opportunity for corporates to contribute meaningfully and cause greater impact to society.

For this to happen it is essential that CSR is viewed by corporates as not just an obligation but an inherent responsibility which they have towards the society in which they operate.

Any activity to be implemented successfully requires detailed planning from the start. It cannot so happen that the end means is achieved just by deciding on a particular activity.

In the case of CSR as well it is important that corporates understand the end means of undertaking CSR activity. Compliance with the mandate of the Act is just one aspect but creating maximum impact through CSR activities should be the main objective of all corporates.

One of the crucial aspects which can help corporates effectively implement its CSR activities is comprehensive drafting of its Annual Action Plans for the financial year.

Lack of importance to preparation of effective and detailed Annual Action Plan leads to a situation where maximum spendings are witnessed in the last quarter in an unplanned manner. This results in companies not being able to spend the entire obligation in the financial year and thereby are required to transfer the unspent amount to designated Schedule VII funds defeating the purpose of creating the impact in the identified areas which the company otherwise would have achieved by spending in a planned manner.

This last-minute rush to spend the CSR funds highlights the need for a substantial shift in the approach of the corporates. An effective remedy to this issue lies in meticulous planning through a well-structured Annual Action Plan right from the onset of the financial year.

Components of the Annual Action Plan:

- **The Why, Where, What, When, How & Need context in framing of Annual Action Plan:**
  [i.e. Why CSR is to be done, where it needs to be done[i] ,What in CSR, When it should be done, How it should be done & Is there a need to do the particular CSR activity]

  An essential aspect to be kept in mind while drafting the Annual Action Plan for any particular financial year is giving of importance to the "**need factor**" of undertaking the particular CSR activity. Corporates which have a clear vision with respect to the desired objective of undertaking any CSR activity are always placed in a better position to analyze the level of impact which it desires to achieve via its CSR projects and activities.

Thus, before undertaking a particular activity, it becomes essential that sufficient stakeholders of the target areas are engaged and comprehensive surveys and analysis is done to address the actual needs of the community involved.

Once the rationale behind the "Why" aspect of the particular CSR activity is understood in depth. Then the remaining aspects of "What", "When" & "How" can be taken care of with ease.

- **Flexibility & Authority to act must be included:**

Proviso to Rule 5 (2) of the Companies [Corporate Social Responsibility Policy] Rules, 2014 specifically provides an authority to the Board of Directors of the Company to alter the Annual Action Plan at any time during the financial year by recording reasonable justification to that effect.

The Proviso to Rule 5 (2) can be read as follows:
Provided that Board may alter such plan at any time during the financial year, as per the recommendation of its CSR Committee, based on the reasonable justification to that effect.

Recognising CSR as an evolving plan, it is essential to allow flexibility and empower key decision makers to adapt strategies as per evolving needs. Assigning of authority to competent individuals facilitates swift decision making thereby enhancing the responsiveness of the overall CSR Annual Action Plan.

Therefore, it is advisable that the CSR Annual Action Plan must be inclusive of such authority which would enable the implementation in such a way which would derive the maximum impact to the targeted community.

- **Balance between long term visions and immediate needs:**

The Annual Action Plan must strike a balance in allocation of the overall CSR budget of the Company in such a manner that 70 to 80 % of the total Budget of each year is towards the long-term vision of the entity in the area identified under Schedule VII. The balance funds shall be towards the meeting of the immediate urgent needs of the community or target area identified.

Allocating the majority of the Budget towards the long-term vision of the entity while reserving a portion for immediate needs shall enable the corporate entity to achieve a harmonious balance for achieving maximum impact.

If a corporate has a long-term vision for its social endeavors set on the basis of a 5-to-10-year roadmap for the future, then developing Annual Action Plans becomes a small part of the overall framework which is then very easy for the company to establish and set. The reason being that it already has in place the vision set for the next ten years.

- **Execution and Implementation Methodology:**

Sub rule (5) & (6) of the Companies [Corporate Social Responsibility Policy] Rules, 2014 place a statutory responsibility on the Board of the Company to monitor and satisfy itself that whether the funds so allocated or disbursed for spending are properly utilized and is actually spent as it was listed out under the Annual Action Plan for the purpose for which it was allocated.

The text of the said provisions of sub rule (5) & (6) of Rule 4 can be read as under:

*(5) The Board of a company **shall satisfy itself** that the funds so disbursed have been **utilised for the purposes and in the manner as approved by it** and the Chief Financial Officer or the person responsible for financial management shall certify to the effect.*

*(6) In case of ongoing project, the Board of a Company **shall monitor the implementation of the project with reference to the approved timelines and year-wise allocation** and shall be competent to make modifications, if any, for smooth implementation of the project within the overall permissible time period.*

Keeping in mind the same the Annual Action Plan must chalk out certain systems and methodologies which would enable the concerned authorised persons to review and monitor from time to time the activities or the spendings undertaken.

This becomes even more important when the company is adopting an indirect route for the purpose of its CSR obligations, i.e. the company is not directly undertaking the activity but is fulfilling its CSR obligations through an implementation agency.

Conclusion:

To maximise CSR impact, companies must adopt strategic planning and long-term vision. The commitment to societal welfare shouldn't be viewed merely as an obligation but as a proactive endeavour to create a positive and enduring impact.

Effective CSR Annual Action Plan is not just a document it is a roadmap to achieve the long-term impact in identified areas in the society. By prioritizing need assessments, shifting from last minute compliance to proactive planning and infusing the 'Why' behind every initiative it can be ensured by companies that the CSR activities undertaken shall achieve the maximum impact on the actual needs of the society.

Annexure 1

For the F.Y 2021-22, it was seen that a total of Rs 26, 210. 95 Cr was spent PAN India as part of CSR obligation by a total of 20,840 companies across India.

When the spendings across States and Union territories was analysed a imbalance can be observed, the state of Maharashtra alone witnessed more than 20% spending out of the total spending. Also, Maharashtra along with Karnataka, Gujarat, Delhi & Tamil Nadu together accounted for approximately 36% of the spending.

In contrast the North eastern states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Tripura and Sikkim accounted for only approximately 2 to 3% of the total spending.

https://www.csr.gov.in/content/csr/global/master/home/home.html

Selecting the target areas where spending is actually needed becomes one of the important factors while framing the Annual Action Plan. Ministry's data as above gives a guidance where most of the spending is concentrated and where there is extreme deficit in spending.

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https://www.taxmann.com/research/company-and-sebi/top-story/105010000000023568/maximizing-the-impact-through-effective-annual-action-planning-experts-opinion

Mr. Shravan Pai – Management Trainee!

Mr. Vallabh M Joshi – Senior Manager – vallabhjoshi@mmjc.in

[i] Refer Annexure 1