# CORPORATE LAWS

# Case Law Update

CS Makarand Joshi

## 1. Companies Act, 2013

***Mr. N. Gunasekar (Petitioner) and M/s Global Finsol Private Limited Anr.(1st Respondent/ GFPL), NCLT Bengaluru Bench dated 17th June, 2020***

**Facts of the case**

- Petitioner's son and Son in law (3rd respondent) started the business operations under name TEAM LIFE CARE, a regd. partnership firm in 2003.
- Said partnership was converted into a Limited Company under name Team Life Care Company India Limited which was converted into Private Company and name of the Company was changed to Global Finsol Private Limited
- Main object of the GFPL is to undertake the whole of the business, goodwill, assets and liabilities of the firm TEAM LIFE CARE for which company was established alongwith the conduct of business in the field of insurance soliciting and procuring and other incidental business in 2006
- Petitioner is one of the shareholder holding 20.5% equity shares and originally a Life Time Director as per article 15(2) of Articles of Association of the GFPL
- Petitioner was removed as being director of GFPL
- Petition filed u/s 241, 242 and 244 of the Companies Act, 2013 against respondent seeking an order declaring the resolution passed in the EGM removing petitioner from being a director of the GFPL

**Arguments on behalf of petitioner**

- The business was the brain child of petitioner's son. The administration of GFPL was entrusted on the petitioner and 2nd and 3rd respondent who are also directors in GFPL
- Petitioners son is alone entitled to inherit all petitioner's shareholding in the company
- 4th Respondent which is owned by 2nd and 3rd respondent also became shareholder (50% of shares) of the GFPL
- 2nd and 3rd respondent proposed setting up of more branches across the

country and in this regard **suggested to avail loan from banks and financial institutions** so as to enable to reap and bring in more profits and financial returns. This suggestion was all an eyewash and a misrepresentation made with an intention to upsurp the monies of GFPL.

- **By making misrepresentation, the sign of petitioner, his son and his friend was taken as guarantor instead as witnesses for the loan obtained. GFPL obtained loan of ₹ 13 crore from 5th and 6th respondent.**
- **Petitioner was denied access to meetings citing old age by 2nd and 3rd respondent.**
- GFPL started committing default in repayment of loan, therefore 5th and 6th respondent initiated proceedings before the Debt Recovery Tribunal in 2015.
- 2nd and 3rd respondent stated that there were no funds in GFPL to repay loan. **GFPL was mismanaged by 2nd and 3rd respondent as they started diverting the funds to either their personal accounts or to the companies in which they are directors and shareholders**.
- In addition to siphoning off of funds, they also **started to side line the petitioner from the entire operations and management.**
- Petitioner raised serious objections to the above conduct of 2nd and 3rd respondent. Though the petitioner is director, 2nd and 3rd respondent started acting in a high handed manner **taking law into their own hands and started passing resolution without the knowledge of concurrence of the petitioner on the board of the GFPL**.
- The above administration of the company by the 2nd and 3rd respondent is an **act of fraud played upon the investors, bankers, shareholders and the customers of the company.**
- GFPL issued a notice to hold EGM for removal of petitioner from the directorship of the company. 2nd and 3rd respondent **started taking advantage of their majority of shareholding. Therefore the petitioner filed suit before city civil court Bengaluru.**
- **The petitioner was removed from being the director of the GFPL despite the objections being raised by petitioner** stating postponement of meeting and fact that there was no proper notice on a request given by 4th respondent. The said removal was neither intimated to petitioner.
- **As per** Article 15(2) of AOA states that director has been authorised and empowered to be the director for life and further office shall not be liable to termination by retirement, by rotation and 1st director shall be director of the company till he voluntarily resigns from the directorship. Therefore **removing the petitioner only confirms high handed attitude of 2nd and 3rd respondent in mismanaging company and oppressing the minority shareholder i.e. petitioner.**
- Due to nefarious acts of mismanagement by 2nd and 3rd respondent, petitioner has also landed up in huge income tax liabilities as the monies were transferred to petitioner account and later withdrawn by 2nd and 3rd respondent.

**Arguments on behalf of Respondent**

- Petitioner has made **vague allegations of oppression and mismanagement** against the respondent making only disconnected statement without providing full details

- As **civil suit** instituted by petitioner before Hon'ble city civil and session judge at Bangalore, concerning issue of removal is **still pending for disposal as on date of petition. Therefore, this petition has to be seized off this tribunal**.

- Several **reliefs sought** in the petition are **beyond jurisdiction of this tribunal** and cannot be granted as interim or final prayers

- **Alleged acts** of oppression and mismanagement have occurred during the years 2011 to 2013 or even backwards and hence, **barred by time**.

- Pointed out that the **present petition made only after his ouster as a director from the board of first respondent company.**

- The business was brainchild of 2nd respondent, who continues to be MD of the entity to the present day.

- At the time of incorporation other partner in the business was petitioner's son who was later removed from administration of the business.

- Petitioner's son was neither director nor shareholder in the business. Business was solely run by 2nd respondent and brought petitioner's son as director solely on familial consideration

- In 2011, the 4th respondent (which holds 50% in GFPL) company had engaged petitioner as a general agent under registered deed who requires to manage the affairs of the company property which involves a general supervision of immovable assets and was required to submit details on monthly basis.

- When such details were not forthcoming, it appeared that the **petitioner was not acting in good faith, the 4th respondent terminated the agency arrangement.**

- The 1st, 3rd, 4th respondent had also filed criminal complaint and filed various suits which are pending before court.

- GFPL also received a letter from I.T. Dept. stating that GFPL was hereby directed to pay sums that are due or may become due to petitioner directly to the Dept.

- **Owing to repeated instances of fraud, pendency of criminal cases as well as non co-operation of the petitioner, the petitioner was sought to be removed from his position as director by way of EGM.**

- **The 4th respondent duly served notice u/s 169 read with sec. 115 of Co.'s Act, 2013 of their intention to move resolution seeking removal.** Also forwarded notice of board meeting to petitioner which was later postponed for want of quorum and same also intimated to petitioner by way of letter.

- At the start of meeting, a letter was received from petitioner's advocate seeking leave from meeting citing ill health. **The petitioner had not nominated any proxy despite of notice**

**regarding meeting served to him well in advance**.

- It was further submitted that, there is **no bar on removal of permanent director of company. Support has been taken from the case decided by the Hon'ble HC of Delhi in *Tarlok Chand Khanna and another vs. Raj Kumar Kapoor and others reported at ILR (1982) I Delhi 156*.**

**Issues for Consideration by tribunal**

- Whether the petitioner has come to the tribunal with clean hands by disclosing complete material facts of the issue in question so as to seek equitable relief provided u/s 241, 242 and 244 of the Companies Act, 2013.
- Whether the petitioner being appointed as Lifetime Director of the company can be removed as per law.
- Whether due procedure was followed by the company in removing the petitioner from position of director of the company.
- Whether he is entitled for any relief.

**Held**

- Petitioner has **not brought all material facts before this tribunal** like pendency of criminal cases filed by respondents against the petitioner.
- Petitioner admittedly had filed several civil and criminal cases against directors and company.
- As per Law, being substantial shareholder and director has fiduciary duties towards company and stakeholders and **he cannot himself be litigant, unless he was arbitrarily not permitted to get involved in the affairs of company by removing him even from the position of director by the use of brute majority by other directors and shareholders.**
- **Allegations** of mis-representation, fraud etc. made by petitioner are **totally unsubstantiated**.
- Though petitioner was well aware that Civil Court/Criminal Court do not have jurisdiction over company matters, petitioner had approached those court. **He has now approached the Tribunal on being unsuccessful in the mentioned courts.**
- The petitioner has **not come to the tribunal with clean hands** to seek equitable relief(s) from the tribunal.
- As regards the contention of petitioner that he is **permanent director and cannot be removed, it is settled law[1] that he can be removed by duly following the extant provisions of AOA and Company Law**.
- It is seen that the **requirement of section 169 and 115 have been duly met by the respondents**.
- Petitioner did not issue any confirmation of attendance till the date of the EGM, the petitioner failed to issue a written representation providing the reason as to why he should not be removed from the Directorship as provided u/s 169(4) of the Companies Act, 2013.

1. ***Tarlok Chand Khanna and another vs. Raj Kumar Kapoor and others reported at ILR (1982) I Delhi 156***.

- It is further seen that the petitioner through his advocate submitted a letter requesting for adjournment of the EGM only at the commencement of the EGM on 21.11.2015 on health ground but without substantiating the same. He could have sent a proxy, but could not have prevented a meeting.

- On a perusal of records, it is seen that the 3 members representing 79.50% of the paid up capital of the GFPL were present at the meeting and that after considering the letter seeking adjournment of meeting, the members unanimously voted for removal of petitioner from directorship, **the meeting was concluded as per law and relevant Form DIR-12 was filed by MCA**.

- We found that GFPL has acted in accordance with the provisions of the Co.'s Act, 2013. **In fact it is the petitioner who has again lost the opportunity provided to him under the Act to safeguard his interest by not attending board meeting and not making any written representation before the commencement of EGM and then by remaining absent at EGM.**

- **Thus, the procedure followed by GFPL cannot be found fault with and hence, no case is made for any interference by this tribunal. Hence petition is liable to be dismissed.**

## 2. SEBI

**Ruling of Adjudicating Officer – Securities and Exchange Board of India ('SEBI')**

**Name of the Case**
In the matter of Insider Trading in the scrip of Indiabulls Real Estate Limited ("IBREL")

**Facts of the case**

1. On June 22, 2017 IBREL informed Bombay Stock Exchange ('BSE') at 12:15 PM and National Stock Exchange ('NSE') on 12:17 PM regarding the sale of its 3.3 Crore shares by its promoter entity **IBREL IBL Scheme Trust ("Trust")** of which IBREL was the sole beneficiary. Post this announcement on June 22, 2017, price of the scrip fell from ₹ 204.70 at 12:15:06 to ₹ 192.00 on the same day, thereby registering a fall of 6.20%. As compared to previous day closing price, price of IBREL shares fell by 9.80% on NSE and 9.76% on BSE which was a significant fall. Thus, the announcement made by IBREL on June 22, 2017 with respect to sale of shares of the IBREL by Trust was considered to have materially impacted price of the shares and hence was considered to be a Price Sensitive Information (**"PSI"**) in terms of Regulation 2(1)(n) of SEBI (Prohibition of Insider Trading) Regulations, 2015 [**"SEBI PIT"**]. This Trust was a part of Promoter and Promoter Group as at quarter ended March 2017. The Trust was holding 4.25 Crore shares (8.88%) of IBREL as at the quarter ended March 2017.

2. This PSI came into existence on June 8, 2017 when meeting of Operations Committee was held to authorise to dispose of 4.25 Crore equity shares of IBREL in one or more tranches at such time(s) and at such price(s) as may be considered appropriate by the Trustees of the Trust. This PSI remained unpublished till June 22, 2017. The period of Unpublished Price Sensitive Information ('UPSI') is taken to be the period from June 8, 2017 to June 22, 2017 ['UPSI Period']

3. On investigation SEBI observed that Mr. Anil Mittal (**"Noticee"**) who was Chief Financial Officer ("CFO") of IBREL at that point of time had traded during the UPSI period. Noticee had sold 10,000 shares of IBREL on June 12, 2017. It was also found that Noticee had also attended the meeting of operations committee as 'invitee' on June 8, 2017. Noticee was CFO of the IBREL for a continuous period of more than six months prior to the commencement of the UPSI so he was considered as a connected person and Insider as per Regulation 2(e)(i) of SEBI PIT.

**Charges levied**

Violation of Regulation 4(1) SEBI PIT read with section 12A (d) and (e) of the Securities and Exchange Board of India Act, 1992.

**Arguments made by Noticee**

1. Sale of Shares by Trust is not UPSI.

2. Even if there was any UPSI it came into existence on June 15, 2017 when the Trust applied for pre-clearance of trade under Insider Trading Code of IBREL.

3. Decision to sell 10,000 shares was not motivated by UPSI. Shares were sold to generate liquidity. Sale of shares done on June 12, 2017 was pre-planned in May 2017.

4. Shares sold were those shares that were received by Noticee on exercise of ESOP.

5. Pre-clearance from the compliance officer of IBREL was obtained before selling the shares.

**Arguments made by SEBI**

1. With respect to first argument SEBI stated that definition of UPSI talks about likelihood of materially affecting the price of the securities, as the criteria to determine UPSI, and not the actual materiality itself. Decision to sell 4.25 Crore shares of IBREL by the Trust will be taken by a reasonable investor to likely have material effect on shares of IBREL. SEBI further stated that the price of IBREL shares fell by 9.80% on NSE and 9.76% on BSE after public announcement on June 22, 2017 which is a significant fall. Thus the June 22, 2017 announcement with respect to sale of shares of IBREL materially impacted the price of IBREL shares and hence is considered to be UPSI as per Regulation 2(1)(n) of SEBI PIT.

2. With respect to second argument SEBI submitted that the decision to sale of shares by Trust and requisite authorisation for undertaking such sale was decided during Operations Committee meeting held on June 8, 2017 which was attended by Noticee. As per Regulation 2(1)(n)(iv) of SEBI PIT *"disposal of the whole or substantial part of the undertaking"* in a company is considered as PSI. Sale of 6.8% shares of IBREL got concluded within a span of 14 days i.e. June 8, 2017-June 22, 2017. This clearly indicates that information of all material events which constituted the said act of sale of shares by the Trust was material price sensitive information. All such events which materially formed part of the said act of sale of shares right from the decision taken by the Operations Committee to selling of such shares till the authorisation provided to the Trust in this regard and finally the sale of shares by the Trust, in totality constituted a continuous chain of

concrete actions which could have had material impact on the price of shares of IBREL. Therefore, anyone in possession of material information about any such part would have reasonably known/understood the possible impact of such action on the price of the shares of IBREL. So, it is clear that the knowledge about the outcome of the meeting of the Operations Committee held on June 8, 2017, was in fact PSI. As this UPSI was not made public till June 22, 2017 Noticee was considered to be in possession of UPSI as he knew decision of operations committee to sell shares of IBREL held by Trust.

3. With respect to third argument SEBI stated that as per Regulation 4(1) of SEBI (PIT) it is clear that a trade conducted by an insider while being in possession of an UPSI shall be presumed to be 'motivated' by the knowledge of such UPSI and thereby in violation of the said Regulation. Also explanatory note to Regulation 4(1) states that the reasons for which the trades were conducted or the purposes to which the insider has applied the proceeds of such trades are not intended to be relevant for determining whether a person has violated the regulation. So the reasons provided by Noticee for trading done by him are irrelevant. SEBI further stated that the only way to rebut the presumption of the violation of Regulation 4(1) is by establishing that any of the circumstances stipulated under the proviso (i), (ii) or (iii) to Regulation 4 existed for the insider to trade while being in possession of UPSI. SEBI further stated that none of the reasons given in proviso to Regulation 4(1) are applicable for the impugned transaction. Hence it is held that argument of the Noticee is irrelevant.

4. With respect to fourth argument SEBI stated that it has vide its Guidance note dt: August 24, 2015 has stated that, *"Exercise of ESOP will not be considered as trade. However, other provisions of the Regulations shall apply to the sale of shares so acquired"*. It is thus clear that sale of shares received through exercise of ESOP does not have exception from general rule under Regulation 4(1). Thus the Noticees' submission that the shares sold were received through ESOP is not valid defence.

5. With respect to argument that Noticee had taken pre-clearance dt: June 12, 2017 SEBI stated that Noticee was well aware of UPSI since June 8, 2017. SEBI further stated that Noticee did not dispute his presence at the meeting dt: June 8, 2017 wherein authority was given to the Trust to dispose of shares. This makes it clear that even at the time of signing of undertaking in his application for taking pre-clearance Noticee was well aware of UPSI. This makes the undertaking factually incorrect and can be considered as misrepresentation made before Compliance Officer of IBREL. SEBI further stated that Clause 6 of the Code of Conduct specified under Schedule B read with Regulation 9(1) and (2) of SEBI PIT states that, *"No designated person shall apply for pre-clearance of any proposed trade if such designated person is in possession of unpublished price sensitive information, **even if the trading window is not closed**"*. Hence

pre-clearance received is not valid and Noticee cannot defend his action on the basis of pre-clearance.

**Held**

Penalty of ₹ 10,00,000 under Section 15G(i) of the SEBI Act, for his violation of Regulation 4(1) of SEBI PIT.

## 3. IBC

***Mr. Mukesh Kumar Aggarwal – Director of the B.K Educational Services Private Limited (Appellant) vs. Mr. Anurag Gupta - Director of the B.K Educational Services Private Limited (Respondent) – in the order dated 8 June 2020 passed by the National Company Law Appellate Tribunal, (NCLAT) New Delhi***

**Facts of the Case**

- The Respondent viz., Mr. Anurag Gupta – Director of B.K Educational Services Private Limited (Corporate Debtor) had given loan to the company amounting to ₹ 20,46,500/- as the company was in deep financial trouble in pursuance of the resolution passed by the company in the meeting of Board of Directors dated 1 September 2015.
- The Corporate Debtor was required to pay funds to Greater Noida Industrial Development Authority (GNIDA) so as to continue the construction of the school building.
- In such a situation, the Corporate Debtor was compelled to take unsecured loans at the interest rate of 12% from Shareholders, Directors as well as relatives/related parties. The loan was meant to clear the overdue amount of GNIDA and to continue construction of school building
- The board also decided that amount of loans obtained would be returned after receiving loans from the Financial Institutions by 30 June 2016
- The said amount was not paid back and thus the Respondent filed the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC)
- National Company Law Tribunal (NCLT) admitted the application and initiated Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor
- Aggrieved by the order, Mr. Mukesh Kumar Aggarwal - Director of the Corporate Debtor filed an appeal with NCLAT.

**Arguments of the Appellant**

- The appellant contends that the amount claimed in default is not a financial debt within the meaning of Section 5(8)(f) of the IBC. The NCLT had erred in treating the amount claimed by the respondent as a financial debt.
- The NCLT has failed to consider the following points:
- that the amounts were conveniently paid at a time when the respondent was in complete control of the affairs of the Corporate Debtor
- that the purported board resolution dated 1 September 2015, which allegedly authorised the board to secure loans from the respondent is a forged and fabricated document
- that the respondent had entered into a binding MoU dated 27 January 2016, where under the shares of the

Corporate Debtor were transferred to the present shareholders as security for the repayment of ₹ 20.5 crores

- The MoU is a conclusive record of all the repayment obligations inter-se the parties and the corporate debtor neither owes any amount to the respondent nor has defaulted in any manner in any repayment obligations

**Arguments of the Respondent**

- The NCLT admitted the application u/s 7 of the IBC the alleged debt as financial debt based on the judgment of this Tribunal in case of ***Shailesh Sangani vs. Joel Cardoso and others*** and noted that the Promoter/Shareholder/Director of the Company could also be its Creditor.
- The respondent as Director had a status different than that of the Creditor and accordingly invoked the provision of the IBC as one of the Creditors of the Corporate Debtor, and the amount claimed is a "financial debt" within the meaning of the Code.
- Further, contended that the bank statements reveal that the transactions had been made in favor of GNIDA on behalf of the Corporate debtor, pursuant to the Resolution Plan passed by the Board of Directors in its meeting dated 1 September 2015
- The copies of the balance sheets filed for the years ending 2015, 2016 and 2017 depict the borrowings from Directors, Shareholders and related parties under the heading "Short Term Borrowings" to the tune of ₹ 9 crore
- The record is sufficient to show that the amount as claimed is "due and payable", which was disbursed to GNIDA on behalf of the corporate debtor and based on these facts the NCLT had admitted the petition.

**Held**

- The Respondent had advanced various sums to the corporate debtor to ease its liquidity crunch, thereby improving its economic prospects and to save the allotments by making direct payment to the GNIDA for the plot allotted in the name of corporate debtor
- Also noted that pursuant to Shailesh Sanganiv (supra), monies advanced by a Director to improve the financial health of the Company would have the commercial effect of borrowing even if no interest was claimed on the same
- Thus, amount deposited by the respondent in the account of GNIDA to save the corporate debtor on account of financial crunch and to save the allotment made in the name of Corporate Debtor falls within the ambit of "financial debt". Admittedly, the amount had not been paid back and there was a default.
- NCLAT upheld the order of NCLT and admitted the application for initiation of CIRP. Therefore, the said Appeal was dismissed.