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Ensuring Official Acknowledgement for Registered Office Address Compliance.

Introduction:

In the realm of corporate governance, adhering to statutory regulations is paramount. One such regulation, Rule 12(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014, underscores the significance of keeping directorial particulars up-to-date. This rule mandates that individuals holding a Director Identification Number (DIN) must promptly intimate any changes in their details to the Central Government. While this rule is crucial, a recent adjudication order by the Registrar of Companies, Dadra & Nagar Haveli, has shed light on an intriguing question: What happens when a director's registered permanent address is temporarily inaccessible due to various reasons?

Rule 12(1) Explained

Rule 12 (1) of the **Companies [Appointment and Qualification of Directors] Rules, 2014** ['Directors Rules'] states that," *(1)Every individual who has been allotted a Director Identification Number under these rules shall, in the event of any change in his particulars as stated in* ***Form DIR-3*** *intimate such change(s) to the Central Government within a period of thirty days of such change(s) in* ***Form DIR-6*****".** This provision casts a responsibility on the director holding valid DIN to intimate change in the particulars as stated in DIR-3 to central government within a period of 30 days from the date of such change. While submitting for DIR 3 director is required to mention his permanent address and also mention whether the permanent address and present residential address is same. The question that arises is whether the director shall always be residing or be available at the permanent address mentioned form DIR 3? Suppose due to exigency or due to some personal commitments director had to shift his residence or if a director is on a vacation would it mean that director is not residing at the permanent residence?

Background:

In a recent adjudication order passed by Registrar of Companies, Dadra & Nagar Haveli ['ROC'] penalties were imposed upon two directors for their failure to update change in their permanent addresses by filing form DIR-6. Let us understand this case by delving deep into the facts of the case to get a comprehensive understanding of the matter.

Brief Facts of the case:

In this case, ROC had issued two inspection notices dated 29th March, 2019 & 14th May, 2019 under section 206 of the Companies Act, 2013 to the said two directors respectively. These two inspection notices were returned undelivered stating remarks as "Left". Both these notices issued by ROC were sent through postal authorities on the addresses recorded with MCA of such directors. When the notices returned undelivered, ROC alleged that directors had not updated their permanent address with MCA by filing DIR-6 pursuant to Rule 12 (1) of the Directors Rules are not complied with by the said director. The return of the notice from the ROC indicated that there was no person available to receive or acknowledge official communications at the address maintained in ROC records.

Submissions made by the director's representatives:

Directors through their authorized representatives submitted before the ROC that sometimes for the sake of convenience the said directors would temporarily shift at their son's residence for a few days and it might have happened that at that time the notice was issued and returned undelivered, but the said directors never left the registered address permanently. Also, there might be some technical mistake on the part of the postal authorities which resulted in the notices returning undelivered. Directors further submitted that during the covid period the directors had permanently shifted to the son's residence and for this permanent shift in address the directors had filed the E Form DIR 6 dated 25th August,2020.

ROC penalizes the directors:

ROC considered the submissions made by the directors. But ROC held that there was a non-compliance as there was no one present at the permanent address provided by the directors in DIR-3 when they temporarily moved to their son's residence for convenience. The non-compliance observed in the said matter invoked the penalty provisions outlined under section 159 of the Companies Act, 2013. However, considering the circumstances of the case and since it was the said directors first time violation, ROC exercised its discretion and levied a penalty of Rs 5000 each on both the directors.

Conclusion:

The significance of E form DIR 6 cannot be undermined as it is the mechanism through which individuals holding a DIN must diligently report any alterations in their directorial particulars as and when such changes occur.

Furthermore, it underscores the importance of ensuring that even in cases where director who is the DIN holder is temporarily unavailable at their registered address, provisions must be made to guarantee that any communications from regulatory authorities are duly acknowledged and do not result in their return. A robust approach to DIN KYC [Know Your Customer] emerges as the most effective means to consistently assess an update registered address and other particulars in the registrar's records, thus promoting compliance and transparency within the corporate governance framework.

This is published in Taxguru. The link to the same is as follows: -

https://taxguru.in/company-law/ensuring-official-acknowledgement-registered-office-address-compliance.html

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From CSR (Corporate Social Responsibility) to BSR (Beneficiary Social Responsibility): Beneficiaries – the driving force behind the success of CSR

Companies and Government join forces, like a dynamic duo, to create a positive change through Corporate Social Responsibility (CSR) interventions. We often witness the efforts made by companies and the Government to provide infrastructure and support to the people. These initiatives, whether under CSR interventions or otherwise, aim to uplift communities and improve lives. In the realm of CSR and Government-driven infrastructure projects, much attention is rightly focused on the organizations and entities responsible for initiating and funding these ventures.

Companies have a heart for social impact and a desire to give back to the communities that support them. Similarly, the Government plays a crucial role in fostering a better society by allocating resources and implementing policies that address societal needs. However, it is equally important to recognize the reciprocal responsibility that beneficiaries of such initiatives bear. While corporations and Governments play a pivotal role in providing infrastructure for the public good, beneficiaries have a significant role to play in ensuring the sustainability and effectiveness of these developments.

In this article, let's flip the script and explore the often-overlooked side of the coin – the responsibility of beneficiaries in maximizing the impact of CSR interventions.

Infrastructure projects, whether it's the construction of roads, schools, healthcare facilities, or community centres, are designed to enhance the quality of life for citizens. As beneficiaries, it is crucial for us to recognize and fulfil our responsibilities to ensure these initiatives deliver their intended benefits in the long run.

1. **Gratitude and Appreciation:**

   First and foremost, beneficiaries should express gratitude for the opportunities and resources bestowed upon them. Recognizing the efforts made by Corporates and the Government can foster a sense of appreciation and acknowledgement. Whether it's through a simple thank you or actively participating in community events, beneficiaries can show their gratitude by valuing the support they receive.

2. **Active engagement:**

   Active engagement in community development initiatives is vital. Beneficiaries have a unique perspective and understanding of the challenges and needs of their community. By actively participating in community meetings, providing feedback, and suggesting ideas for improvement, beneficiaries can help shape the direction of these initiatives and ensure they address the specific needs of the community. This engagement can help in identifying areas for improvement and ensure that the infrastructure aligns with the evolving needs of the community. Actively participating and engaging with the benefits can involve taking advantage of educational programs, vocational training, or healthcare services. By participating, beneficiaries not only enhance their own skills and knowledge but also contribute to the success of the initiatives.

3. **Preservation and maintenance:**

   Another primary responsibility of beneficiaries is to preserve and maintain the essence and quality of the infrastructure provided. Roads, for example, can only remain safe and efficient if users refrain from littering, damaging road signs, or engaging in reckless driving. Similarly, beneficiaries of public parks must take care to keep these spaces clean and free from vandalism.

4. **Responsible utilisation:**

   Beneficiaries must use the infrastructure provided responsibly. For instance, in the case of educational institutions, students and teachers should strive to make the most of the resources and opportunities offered. Whether it's water, electricity, or any other resource provided, using them judiciously and avoiding wastage is not only beneficial for the environment but also helps to ensure that these resources can be sustained for the long term. it is crucial for beneficiaries to take ownership of the infrastructure and resources made available to them. Whether it's a school, a healthcare facility, or any other form of infrastructure, treating it with respect and care is essential. By maintaining cleanliness, following proper maintenance protocols, and reporting any issues, beneficiaries can ensure that these facilities remain functional and beneficial for everyone in the community.

5. **Advocacy and Accountability:**

   Beneficiaries also have a responsibility to hold both Corporations and Governments accountable for the infrastructure provided. This can involve advocating for necessary improvements, addressing issues of corruption or mismanagement, and ensuring that the infrastructure is accessible to all members of the community.

Fulfilling these responsibilities as beneficiaries of the CSR intervention offers several advantages such as:

- **Sustainability:** Active participation in preservation and responsible use ensures that infrastructure remains functional for generations to come.

- **Efficiency:** By using infrastructure resources responsibly, beneficiaries maximize the return on the investments made by corporations and governments.

- **Community Development:** Engaging with the community and advocating for improvements can lead to more tailored infrastructure solutions that better meet the needs of the population.

- **Environmental Stewardship:** Promoting sustainability helps protect the environment and contributes to a healthier, more sustainable future.

Conclusion:

While corporations and Governments bear significant responsibility for providing essential infrastructure, beneficiaries must not overlook their role in ensuring the success and sustainability of these initiatives. Their responsibility extends beyond simply receiving benefits. Just as the moon illuminates the night sky, beneficiaries have the power to shine a light on the impact of CSR interventions. Their active participation, gratitude, and utilization of resources are like the stars that twinkle and guide us towards a better future. By embracing their role in the process, beneficiaries become not just recipients, but agents of change, amplifying the impact of CSR initiatives. It is through this reciprocal responsibility that infrastructure projects can truly fulfil their intended purpose and benefit society at large.

The link to the same is as follows: -
https://taxguru.in/corporate-law/csr-bsr-beneficiaries-driving-force-behind-success-csr.html

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SEBI Circular on Board Nomination Rights to unitholders of Infrastructure Investment Trusts.

Introduction:

SEBI had brought a Consultation Paper titled Consultation paper on Special Rights and Role of Sponsor in REITs and InvITs on May 16, 2023 ['CP 2023'] proposing to introduce the concept of 'nomination rights for unitholders. On receipt of public comments CP 2023 was taken up for discussion in SEBI board meeting on June 28, 2023. SEBI board at this meeting approved the proposal of nomination rights for unitholders.

Further Securities and Exchange Board of India vide its amendment notification Securities and Exchange Board of India (Infrastructure Investment Trust) (Second Amendment) Regulations, 2023 dt: August 18, 2023 amended Securities and Exchange Board of India (Infrastructure Investment Trust) Regulations, 2014 ['InvIT Regulations'] to incorporate the concept of nomination by unitholders.

SEBI has now vided its circular dated September 11, 2023 ['InvIT circular'] has inter-alia prescribed the manner of the nomination process which includes the process of nomination and eligibility criteria for the nominating unitholders as well as for the proposed appointee. InvIT circular has become effective from September 11, 2023, itself.

InvIT circular provides for as to who shall be eligible unitholders, eligibility criteria for nomination of unitholder nominee director, formulation of policy in relation to the qualifications and appointment criteria and evaluation parameters for unit holder director, timeline and process (first nomination after issuance of this circular and subsequent nomination on annual basis), withdrawal/change of nomination, vacation/removal of Unitholder Nominee Director and amendment to be made to trust deed and investment management agreement.

Immediate Actionable:

1. Formulation of Policy: The Board of Directors of Investment Manager are required to formulate and adopt a policy providing for qualifications, criteria for appointment, and evaluation parameters of individuals nominated for nominee director.

2. Website compliance: This policy shall also be made available on the website of the InvIT.

3. (1) Appointment process and timeline to be adhered to:

    a) The Investment Manager ['IM'] shall send a written intimation to all the unitholders within ten days from the end of September 30, 2023, requesting them to inform IM if they wish to exercise the right to nominate the Director.
    b) Thereafter, eligible unitholder(s) who wish to exercise this right shall inform the IM through a written notice within ten days of receipt of the intimation from the Investment Manager.
    c) The eligibility of a unitholder nominee director shall be confirmed by the IM, based on the evaluation done by the Nomination and Remuneration Committee ("NRC")

and/or the board of directors of the IM in line with the policy formulated in this regard, within ten (10) days of receipt of notice from eligible unitholder(s).

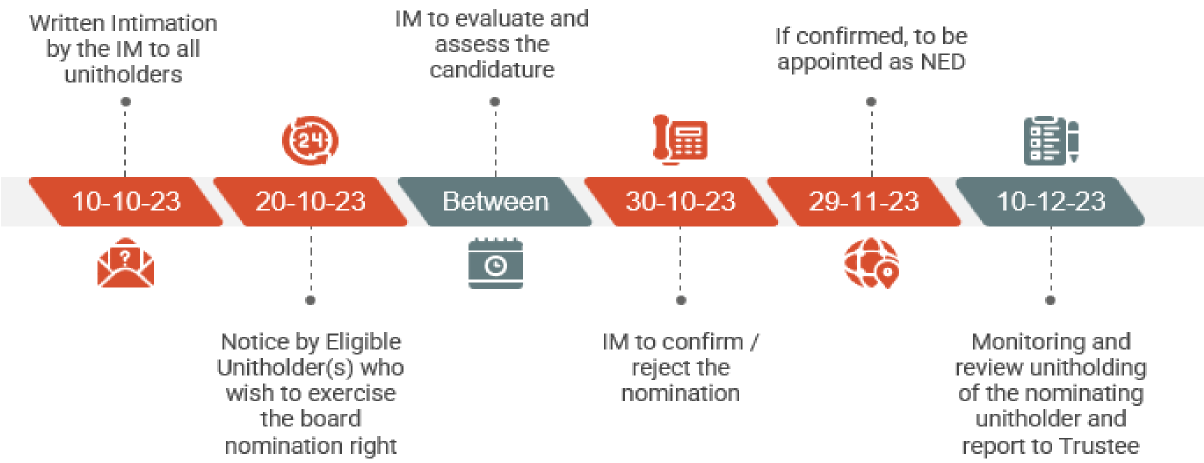
d) Once the eligibility of a unitholder nominee director is confirmed, the IM shall take necessary steps to complete the appointment of such director on the board of directors within thirty days from the date of such confirmation. The IM shall ensure that the appointment of the unitholder nominee director is following the requirements with respect to the composition of the board of directors under the InvIT Regulations and other applicable laws.

e) In case, the unitholder exercises the above right, the compliance with respect to the composition of IM needs to be checked as per InvIT Regulations. As per Regulation 4(2)€(v), the IM should have not less than half of its directors in case of a company or members of the governing board in case of an LLP as independent, therefore while appointing the nominee directors on the board of IM, the need for appointment of independent directors to be checked upon, on case-to-case basis. However, timeline for appointment of independent directors is not mentioned.

f) Further, if the candidate proposed is not eligible or not found suitable based on the evaluation done by the NRC and/or the board of directors of the IM in line with the policy formulated in this regard, the reasons shall be recorded in writing and shall be communicated by the IM to the eligible unitholder(s)within ten (10) days of receipt of notice from eligible unitholder(s). In such case, the eligible unitholder(s) may submit another candidate within a period of ten (10) days from the receipt of such communication from the IM.

3. <u>(2) Reporting and monitoring:</u> The IM shall within ten days from the end of each calendar month, review whether the eligible unitholder(s) who have exercised the board nomination right, continue to have/hold the required number of units of InvIT and make a report of the same which shall be submitted to the Trustee of InvIT.

For simplicity, below chart can be referred for process of appointment with timeline:



4. <u>Amendment to the Trust Deed and Investment Management Agreement:</u> In view of the Securities and Exchange Board of India (Infrastructure Investment Trusts) (Second Amendment) Regulations, 2023 notified on August 18, 2023, the trust deed and investment management agreement shall stand amended or be deemed to incorporate provisions to provide board nomination rights to eligible unitholder(s) in the manner specified in this circular. Further, the trustee and IM shall ensure that the trust deed and the Investment Management Agreement to provide for right to the eligible unitholder(s) of nomination and appointment of unitholder nominee director on the board of directors of IM.

Conclusion

Introduction of fit and proper criteria for potential board members is a welcome step in maintaining the integrity of board discussions. It ensures that the drive for inclusivity doesn't undermine the quality of deliberations in board meetings.

This circular is coming from the background where SEBI welcomes the special rights pertaining to the representation on the Board of Investment Manager, however, it is also noteworthy that there are the instances wherein other special rights are given to certain unitholders, InvITs shall critically review continuation of such practices/structure.

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Advancing ESG Transformation through NBFCs: The Power of Finance and Technology

Introduction

In an era marked by pressing environmental and social challenges, the concept of Environmental, Social, and Governance (ESG) has evolved from being a mere buzzword to a global imperative. The need for sustainability, equity, and responsible governance is more apparent than ever. While ESG represents a call to action for the universe, its realization requires a strategic synergy between finance, technology, and government policies. One amongst the significant contributors is the NBFCs falling under the BFSI umbrella.

The NBFC Landscape

Non-Banking Financial Companies (NBFCs) have emerged as a vital cog in the wheel of economic growth and development in India. In recent years, they have also played a pivotal role in contributing to Environmental, Social, and Governance (ESG) objectives. Before delving into the role of NBFCs in ESG, let's take a brief look at their significance in the Indian financial ecosystem. NBFCs are financial institutions that provide a wide array of banking services, such as loans and advances, acquisition of shares, stocks, and bonds, but do not hold a banking license. Their flexibility and innovative approach have made them indispensable in fulfilling the credit needs of various sectors.

NBFCs and ESG: A Symbiotic Relationship

1. **Financing ESG Initiatives:** One of the primary ways NBFCs contribute to ESG is by financing environmentally friendly projects. Whether it's funding renewable energy ventures, supporting clean transportation initiatives, or investing in eco-friendly infrastructure, NBFCs are instrumental in channelling capital to ESG-focused projects.

   According to a report by the KPMG NBFCs have contributed significantly to various sectors, with investments amounting to over thousands of crores in the past five years. NBFCs have significantly contributed more than 10% to GDP as per March 2021[1].

2. **Tech-Driven Efficiency:** The marriage of technology and finance is undeniable in the modern financial landscape. NBFCs, being nimble and adaptable, have embraced technology to enhance efficiency and ensure that ESG projects receive the funding they require promptly.

   Data from a study by PwC shows that 80% of NBFCs have integrated advanced data analytics and artificial intelligence into their risk assessment processes, enabling them to make more informed decisions when financing ESG projects[2].

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[1] https://assets.kpmg.com/content/dam/kpmg/in/pdf/2022/11/role-of-nbfcs-and-hfcs-in-driving-sustainable-gdp-growth-in-india.pdf

[2] https://www.pwc.in/assets/pdfs/consulting/financial-services/fintech/publications/next-gen-microfinance-the-role-of-digital-technology.pdf

3. **Government and Regulatory Support:** Just as NBFCs have benefited from advancements in technology, government and regulatory bodies have recognized the pivotal role they play in driving ESG initiatives. The Reserve Bank of India (RBI) and the government have introduced various incentives and policies to foster ESG investments through NBFCs.

   RBI's 'Priority Sector Lending' framework now inter-alia includes specific provisions[3] for lending for projects relating to renewable energy, with NBFCs being encouraged to allocate a percentage of their lending portfolios to such projects.

4. **Parallel to Infrastructure Growth:** Much like the housing and infrastructure sectors witnessed rapid expansion due to the infusion of finance and incentivizing schemes, ESG projects require similar support. Just as NBFCs played a key role in the growth of these sectors, they are poised to become the backbone of ESG financing.

The supply of finance to a priority sector has the transformative power to catalyze substantial change. It acts as the lifeblood, infusing essential capital into sectors that are pivotal for a nation's economic development. This financial infusion can kickstart new projects, accelerate existing initiatives, and create a ripple effect throughout the supply chain. It not only fosters economic growth by generating employment and boosting productivity but also addresses critical challenges such as infrastructure development, healthcare access, and education. By prioritizing sectors with strategic importance, governments and financial institutions can shape the trajectory of a nation's progress, fostering innovation, resilience, and sustainable development. In essence, the supply of finance to a priority sector serves as the cornerstone upon which societal and economic advancement is built.

The Role of Finance:

The supply of finance to priority sectors has the potential to trigger substantial change. Finance acts as the lifeblood of economic growth, channelling capital into sectors that are pivotal for a nation's development. Consider the housing sector, which has witnessed remarkable growth in the last two decades. Accessible finance options have made homeownership a reality for many. Similarly, ESG initiatives require substantial capital infusion for research, testing, and scaling of environmentally friendly solutions. Investment and finance industries, including Non-Banking Financial Companies (NBFCs), play a pivotal role in providing the necessary financial support. Incentivized by government policies, they can facilitate the development and deployment of ESG solutions, ultimately driving up ESG rankings.

The Technology Advantage:

Technology and engineering are the key enablers of ESG transformation. Technological innovation allows us to track, measure, and enhance our progress toward ESG goals. Take, for instance, the rapid development of Covid vaccines, a testament to the power of technology and finance subsidized by government initiatives. Just as technology accelerated vaccine creation, it can drive advancements in renewable energy, waste management, and more. However, technological solutions require research, testing, and scaling, which demand significant capital.

Government and Policy Alignment:

To propagate ESG, government policies must align with the goals of sustainability and responsible governance. Policies that incentivize technology and finance companies to invest in ESG initiatives

[3] https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11959&Mode=0#Renewable_Energy

are crucial. Subsidies, tax exemptions, and partnerships with universities can encourage innovation and research in ESG-focused projects. Just as governments have historically supported various industries with schemes and incentives, they should prioritize ESG if they genuinely mean to drive change.

The Global Landscape:

Several countries have already recognized the importance of ESG and have taken steps to incentivize ESG compliance. Initiatives range from tax benefits for renewable energy projects to regulations requiring ESG reporting. For instance, the European Union has introduced comprehensive sustainable finance regulations, while the United States offers tax incentives for clean energy initiatives.

The Path Forward:

If ESG is a genuine priority for governments, the financial sector, technology companies, and universities must be incentivized to lead the way. Governments can provide financial incentives, support research, and create partnerships to foster ESG innovation. Universities and professors can be encouraged through benefits like incubation hubs and patent support. The focus should extend beyond traditional ESG sectors like solar and waste management to find comprehensive solutions that address global challenges.

As the world prioritizes sustainability and ESG principles, NBFCs have stepped up to the plate, assuming a pivotal role in financing projects that align with these values. Their agility, tech-driven approach, and support from the government and regulatory authorities make them ideal partners in the quest for a more sustainable future.

Just as finance played a significant role in propelling the housing and infrastructure sectors to new heights, it is imperative that similar support is extended to ESG initiatives. The collaboration between NBFCs, technology, and government initiatives is set to be the catalyst that propels India toward a more sustainable and environmentally conscious future, making ESG a top priority for the universe.

Conclusion

The Banking, Financial Services, and Insurance (BFSI) segment, coupled with technology and engineering, can play a transformative role in advancing ESG culture in India and globally. If incentivized and supported by aligned policies, they can drive impactful change. ESG is not just about publishing reports; it's about nurturing solutions, scaling them, and making them accessible to the world. Just as governments have historically supported industries, they must genuinely support ESG initiatives if they intend to achieve sustainable progress. It's time for a collective effort to turn ESG into a tangible reality.

In this era of pressing environmental and social challenges, ESG (Environmental, Social, and Governance) considerations have emerged as the need of the hour. To truly address these global imperatives, governments should take proactive measures to incentivize and prioritize ESG compliance among businesses. This involves not only providing financial incentives for ESG-focused initiatives but also fostering an environment conducive to technological innovation. By channelling resources, finance, and support toward ESG, governments can pave the way for the world to achieve collective goals of sustainability, equity, and responsible governance. Technology plays a pivotal role as the enabler, allowing us to track, measure, and enhance our progress toward these objectives. Embracing ESG, incentivizing its adoption, and investing in technology are the essential steps on the roadmap toward a more harmonious and sustainable future for the entire universe.

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https://www.taxmann.com/research/company-and-sebi/top-story/105010000000023337/advancing-esg-transformation-through-nbfcs-the-power-of-finance-and-technology-experts-opinion

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Judicial Perspectives on Shareholder Democracy in Corporate Decisions

Introduction

In the intricate web of global financial markets, one principle that stands as a beacon of corporate governance is 'Shareholder Democracy'. In this structure, shareholders bear ultimate controlling authority over the corporation, as they are the owners and may exercise control within their economic rights. Although shareholders own the corporation, they generally take a passive interest in managing the day-to-day operations of the company[1]. This idea has changed the way companies are governed. In a time when people are demanding more transparency, responsibility, and ethics from businesses, Shareholder Democracy has become important. It's not just a theory; it's a practical force that has reshaped how companies operate. This concept, though not with the name 'Shareholder Democracy', finds validation in the companies' act but is protected and advocated by the judiciary. In this article, we shall try to elaborate upon the view taken by the courts and tribunals while respecting shareholder democracy, especially in cases of corporate actions like mergers or capital reduction etc.

Shareholder democracy in case of scheme of arrangement.

Capital reduction as per section 66 of Companies Act, 2013 ['the Act'] and approval of scheme of arrangement as per section 230 to 232 of the Act which talks about the scheme of arrangement with creditors or members mandates shareholder approval by way of special resolution. Further, in the case of companies who have listed their designated securities it would be necessary to take approval of majority of public shareholders in certain cases pursuant to SEBI Circular dt: June 20, 2023[2]

Precedents on upholding of shareholder democracy.

Hon'ble Supreme Court of India laid down guiding principles in a landmark judgment in the matter of 'Miheer H. Mafatlal Vs. Mafatlal Industries Ltd[3] while sanctioning of amalgamation. These principles have been followed while granting approvals to the various schemes of arrangement.

Facts of the case.

In Miheer H. Mafatlal Vs. Mafatlal Industries Ltd a scheme of amalgamation was proposed of two public limited companies viz., Mafatlal Fine Spinning and Manufacturing Company Ltd ('MFL/Transferor company') and Mafatlal Industries Ltd ('MIL/Transferee company'). The scheme of amalgamation of MFL with MIL was before the Hon'able High Court of Gujarat for approval under section 391 of the Companies Act 1956. This scheme had been approved by the shareholders of the Transferee company by an overwhelming majority of 95%. Mr. Miheer Mafatlal, Director of Transferor company and 5% shareholder of Transferee ('Appellant'). The Appellant did not raise any objections against the scheme of amalgamation of MFL with MIL when

[1] https://en.wikipedia.org/wiki/Shareholder_democracy

[2] https://www.sebi.gov.in/legal/master-circulars/jun-2023/master-circular-on-scheme-of-arrangement_72839.html

[3] MIHEER H. MAFATLAL Vs.: MAFATLAL INDUSTRIES LTD. Supreme court judgment dated 11/09/1996 JT 1996 (8) 205

it got approved in the general meeting of MFL. The Appellant then filed the petition objecting to the scheme of amalgamation of MFL with MIL before the Hon'able High Court of Gujarat. The Appellant inter-alia contended that, the proposed scheme of amalgamation was oppressive to the minority shareholders of MIL and the exchange ratio in which the shares of Transferor company were exchanged for the shares of Transferee company was also unfair. These contentions of the Appellant were not considered by Hon'able High Court of Gujarat and the scheme of amalgamation was approved. Aggrieved by the decision of Hon'able High Court of Gujarat an appeal was filed before Hon'able Supreme Court of India by the Appellant.

Hon'able Supreme Court dismissing the petition filed by Appellant vide its order dt: September 11, 1996 held as follows:

"However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinize the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved this aspect.

The nature of compromise or arrangement between the company and the creditors and members must be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that must be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties.

The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently, the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket has to see that both the teams play them according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire."

Analysis

Hon'ble Supreme Court clearly slated out a valid principle that it is outside the jurisdiction and expertise of the judiciary to sit in judgement on the commercial viability of any scheme. Such judgment should be left to the understanding and experience of the members and creditors who have approved the scheme with the requisite majority. Once such a scheme is approved by the members, the court has no reason to reject such a scheme, unless it suffers from any legal infirmity or is not in the public interest.

Status of shareholder democracy in the eyes of tribunals.

Principle laid down by Hon'able Supreme Court in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd remains valid till today. In a recent case[4] National Company Law Tribunal ['NCLAT'] set aside decision of National Company Law Tribunal ['NCLT'] in line with principles quoted by Hon'ble Supreme Court in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd. This was a case of capital reduction before NCLT, Ahmedabad. NCLAT in this case, adhering to the principle of shareholder democracy approved the scheme of capital reduction, which was earlier rejected by the NCLT, Ahmedabad. NCLT, Ahmedabad dissenting to the scheme of capital reduction stated as follows, "*In view of negative net worth as per Books, and negative Book value per share, this Adjudicating Authority is of the considered view that the proposed capital reduction by way of return of capital to its shareholders is not in the overall interest of the Company and its stakeholders*." Aggrieved by the decision of Hon'ble NCLT, Ahmedabad an appeal was preferred by Precious Energy Services Ltd with NCLAT, Delhi.

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[4] Precious Energy Services Ltd. vs Regional Director, North-Western Region dt:

NCLAT, Delhi setting aside judgment of Hon'ble NCLT, Ahmedabad held as follows, "*It is seen from the record that the Reduction of the Share Capital was approved by the Shareholders of the Appellant Company unanimously by way of a Special Resolution with the objective of reducing the overall weighted average cost of Capital and improving the earnings per share. Having regard to the fact that the Appellant had deposed in a Clarificatory Affidavit regarding its financial position which is not in the negative and also that the reduction of the Share Capital was approved by the Shareholders of the Appellant Company unanimously by way of a Special Resolution and that the Creditors of the Company have also not objected to the same and further that this reduction does not cause any prejudice to any class of Creditors, we are of the considered view that the reduction of the Share Capital, as approved by the majority of Shareholders by way of a Special Resolution, be confirmed and the proposed Minutes be approved.*"

This decision of NCLAT, Delhi in approving scheme of reduction of capital is based on the precedent set by the decision of Hon'ble Supreme Court of India in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd. NCLAT, Delhi has upheld the principle that courts acts as an umpire in approving schemes of arrangements and would act if any foul play is seen. NCLAT, Delhi in this case has quoted some judgments[5] wherein it has been held that, if the court takes into consideration the commercial viability of the scheme before approving the same, then it over-reaches its jurisdiction.

Conclusion

In essence, the judiciary in India recognizes that the members and creditors of a company are best equipped to make informed decisions about corporate actions based on their understanding and experience. If such decisions align with legal requirements and do not harm the public interest, the courts and tribunals have upheld the rights of shareholders to exercise their democratic voice in shaping the destiny of the companies they invest in. Shareholder democracy remains a vital force in shaping the corporate landscape and promoting transparency and accountability in the realm of Indian business.

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https://www.taxmann.com/research/company-and-sebi/top-story/105010000000023345/judicial-perspectives-on-shareholder-democracy-in-corporate-decisions-experts-opinion

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[5] High Court of Andhra Pradesh in 'Hyderabad Industries Ltd.', (2005) 123 Comp. Cas 458, British and American Trustee and Finance Corporation, Limited', 1984 A.C. 399, Reckitt Benckiser (India) Ltd.', 2005 SCC OnLine Del 674, UFO Moviez India Ltd. & Anr. V. UOI,
Company Appeal (AT) No. 48 of 2019, NCLAT

The importance of Waterfall Mechanism u/s 53 of IBC

In the matter of Paschimanchal Vidyut Vitran Nigam Limited (Appellant) v.s Raman Ispat Private Limited and Ors (Respondent) at the Supreme Court dated 17th July 2023

Facts of the Case:

- The NCLT in its order allowed an application directing the District Magistrate (**DM**) and Tehsildar, Muzaffarnagar, to immediately release a property (previously attached) in favour of the liquidator of the Respondent, Raman Ispat Private Limited (**Corporate Debtor/CD**), to enable its sale and thereafter, distribution of the sale proceeds in accordance with the provisions of Insolvency and Bankruptcy Code,2016 (IBC).
- In 2010, the appellant Paschimanchal Vidyut Vitran Nigam Limited (Paschimanchal) and CD had entered a contract for supply of electricity. The said contract provided that a 'charge' would be constituted on the assets of the CD in case of any outstanding electricity dues.
- Paschimanchal raised bills for electricity dues from time to time. However, it continued to remain unpaid, hence, on 12 January, 2016, Paschimanchal attached the properties of the CD.
- On 23 January, 2016, the Tehsildar created a charge on the CD's properties, thereby, restraining a transfer via sale, donation, etc.
- On 11 April, 2017, CD got admitted into Corporate Insolvency Resolution Process (**CIRP**) upon filing an application u/s 10 of IBC.
- On 31 January, 2018, the National Company Law Tribunal (NCLT) passed a liquidation order and appointed a liquidator.
- The liquidator alleged that unless the attachment orders of the DM and Tehsildar, were set aside by the NCLT, no buyer would purchase the property of the CD due to uncertainty about the authority of the liquidator to sell the property. The liquidator also took the plea that Paschimanchal's claim would be classified in order of priority prescribed under Section 53 of the IBC, and Paschimanchal would be entitled to pro rata distribution of proceeds along with the other secured creditors from sale of liquidation assets.
- On 5 March, 2018, the DM ordered auctioning of the CD's properties for recovery of outstanding dues. The NCLT directed the DM and Tehsildar to release the attached property to enable the sale and distribution of the sale proceeds in accordance with the IBC. The liquidator's position ultimately led the NCLAT to direct the DM and Tehsildar to immediately release the attached property in its favour so as to enable sale of the property, and after realisation of the property's value, to ensure its distribution in accordance with the relevant provisions of the IBC. The NCLAT also endorsed NCLT's reasoning that Paschimanchal fell within the definition of 'operational creditor', which could realize its dues in the liquidation process in accordance with the law.
- Aggrieved by the order of the NCLAT, Paschimanchal approached the Hon'ble Supreme Court seeking appropriate reliefs/ remedies.

Arguments of the Appellant:

- Sections 173 and 174 of the Electricity Act, 2003 (Act) had an overriding effect on all other laws except Consumer Protection Act, 1986; the Atomic Energy Act, 1962; and the Railway Act, 1989. Being a special law relating to all aspects of electricity – generation, transmission, distribution and adjudication of disputes – it had primacy over all other laws, including the IBC, which was a 'general' law dealing with corporate insolvency implemented much later.

- In terms of the Act, and the regulations framed under it, a special mechanism for recovery of electricity dues existed. The rights of electricity suppliers like Paschimanchal, therefore, were not subordinate and subject to the 'priority of claims' mechanism under the IBC. Therefore, Paschimanchal could opt to independently stay out of the liquidation process and recover its due.

- *Also replied on the judgement of Supreme Court – in which Board of Trustees, Port of Mumbai v. Indian Oil Corporation, wherein the court had ruled that port dues, under the Major Port Trust Act, 1963 overrode all other claims, including those of secured creditors in liquidation proceedings. Section 238 of IBC could not override Sections 173 and 174 of the Act, since the latter (i.e. the Electricity Act) is a special enactment, and would prevail over the IBC, which is a later general law, dealing with insolvency.*

- *Also replied on the judgement- in State Tax Officer v. Rainbow Papers Ltd., in which court held that by virtue of a security interest created in favour of the government for tax claims under the Gujarat Value Added Tax Act, 2003, tax authorities i.e., the government, was a secured creditor under the IBC. The court held that if a resolution plan excluded such tax or statutory dues payable to the government, it would not be in conformity with the provisions of the IBC and, as such, would not be binding on the State.*

- Electricity dues were also 'security interests' in favour of electricity service providers. Also, relied on the definition of 'secured creditor' which meant "a creditor in favour of whom security interest is created.

- A reading of the definitions of 'security interest' and 'transfer' indicated that the intent of the IBC was to include, in the concept of 'security interest', all claims, including statutory claims arising in law, against the corporate debtor. Thus, obligations and statutory charges were also 'security interests'

Arguments of the Liquidator:

- Under the IBC, creditors were classified either as secured or unsecured. Further, a highlight of the IBC was the distinction between the financial and operational creditors, and their differential treatment with regards to recovery.

- Bankruptcy Law Reforms Committee Report, 2015 and the UNCITRAL Legislative Guide on Insolvency Law, stipulate that government dues were not given priority under the IBC. This formed the backdrop of the legislation. In fact, the Statement of Objects and Reasons to the IBC stipulates alteration in the priority of payment of government dues.

- Section 52(3) of the IBC, before realization of security interest by secured creditors, the liquidator had to verify the existence of security interest from the records maintained by an information utility or by such other means as may be specified by the Insolvency and Bankruptcy Board of India ((IBBI).

- Registration of any charge was mandatory u/s 77 of the Companies Act, 2013 (the Act, 2013) It was highlighted that Section 48 of the Transfer of Property Act, 1882 (TPA) dealt with priority of rights, and inter-se priorities amongst creditors prevailed in the distribution of assets in liquidation proceedings and referred the order of *Jitender Nath Singh v. Official Liquidator & Ors. and ICICI Bank Ltd. v. Sidco Leathers Ltd.*

- It was submitted that government dues were placed in the 'waterfall mechanism' under Section 53(1)(e)(i) of the IBC.

- Even under the old Companies Act, 1956, Section 529A provided priority to the debts due to the secured creditors and the workers, and Section 530 made payment of taxes subject to the priority embodied in Section 529A. Similarly, priority of debts due to secured creditors and workers was reflected under Section 326 of the Act, 2013. Section 327 made payment of taxes subject to the priority embodied in Section 326.

- Electricity dues did not enjoy any priority, and cited High Court rulings, especially the judgment of the *Calcutta High Court in the West Bengal State Electricity Distribution Company Limited v. Sri Vasavi Industries Limited & Anr*. It was submitted that creation of charge under a law was a matter of fact which had to be proved. In the present case, the statute merely enabled recovery of electricity dues as though they were recovery of arrears of revenue. That did not result in the creation of 'security interest' in favour of the appellant. Moreover, such interest was not registered in accordance with the Liquidation Regulations and Section 77 of the Act, 2013.

- In case of apparent overlapping between the two entries, the doctrine of 'pith and substance' had to be applied to find out the true nature of the legislation and the entry within which it fell – reliance was placed on the decisions of Union of India & Ors. v. Shah Goverdhan L. Kabra Teachers' College and UCO Bank & Anr. v. Dipak Debbarma & Ors.. Having regard to this principle, IBC was thus a special law dealing with the entire subject matter of insolvency, bankruptcy and winding up of companies. Its provisions were later than those of the electricity Act. Despite Sections 173 and 174 of the Act, by virtue of Section 238 of IBC, the provisions of the latter would prevail and have overriding effect. It was submitted that the law under IBC was constantly evolving since its inception in 2016. Reliance was placed on Innoventive Industries Ltd. v. ICICI Bank & Anr., and Swiss Ribbons (P) Ltd. v. Union of India which upheld the IBC, and emphasized the overriding nature of the enactment, by virtue of Section 238.

Held:

- The court highlighted the scheme of the IBC and analysed the waterfall mechanism provided u/s 53 of the IBC which provides for the order of distribution of assets. Section 53 confers Government debts and operational debts lower priority in comparison to dues owed to unsecured financial creditors. It is imperative to note that a secured creditor must make an informed decision, at the very outset of the liquidation process whether to relinquish its secured interest. In case the creditor relinquishes its interest, then its dues rank high in the waterfall mechanism. If the creditor chooses not to relinquish its security interest, and instead enforce it, but is unsuccessful in realizing its dues, then it will stand lower in priority, and accordingly, will have to await distribution of assets upon realization of the liquidation estate.

- The rationale behind giving higher priority to secured creditors who relinquish their interest was provided in the Report of the Insolvency Law Committee (2020), which noted that Section 53(1)(b) of the IBC intends to replicate the benefits of security even when it has been relinquished, to promote overall value maximisation.

- The Court also analysed the Government dues **u/s 53(1)(e) and** opined that owing to the hierarchy stipulated in Section 53 of IBC, government dues must be understood separate from dues owed to secured creditors. Additionally, dues payable to corporations created by statutes need not necessarily constitute 'government dues. Such corporations may be operational, financial, or secured creditors, depending on their nature of transactions. Whereas, on the other hand, dues which are payable to the Treasury, such as tax, tariffs, etc., broadly fall within the scope of Article 265 of the Constitution as 'government dues' and hence, governed by Section 53(1)(e) of IBC.

- The Court opined that even though Paschimanchal had government participation, the same does not render it a government or a part of the state government as its functions can be replicated by other entities (both private and public). Therefore, the Hon'ble Supreme Court has held that dues payable to Paschimanchal do not fall within the description of 'government dues' as under Section 53(1)(e) of the IBC.
- Section 238 of the IBC has an overriding effect over the Act, even when the Sections 173 and 174 of the Act have primacy/ overriding effect over other statutes.
- The Court also relied on the seminal cases of *Innoventive Industries Ltd. v. ICICI Bank* and *Principal CIT v. Monnet Ispat & Energy Limited.,* wherein the Hon'ble Supreme Court upheld the non-obstante clause of IBC, which would prevail over the Maharashtra Relief Undertaking (Special Provisions) Act, 1958, and the Income Tax Act, 1961, respectively.
- The rationale that the Supreme Court wished to reaffirm in this case was that the IBC is a special statute that accounts for the dues of all creditors to be disbursed as per the waterfall mechanism during CIRP. More importantly in the case of *State Tax Officer v. Rainbow Papers Ltd*., the applicability has been confined to its own factual circumstances, thereby limiting its effect on treatment of government dues under the IBC.
- In sum, this case -re-affirms the importance of section 53 in the context of reclaiming dues, and the strength of the non-obstante clause of IBC in section 238 in relation to other statutes.

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NEWS UPDATES/AMENDMENTS FOR THE MONTH OF OCTOBER:

Sr. No.	News Updates/Amendments	Link & Brief Summary
	NEWS	
1.	India to take lead in defining global rating standards for ESG.	https://cfo.economictimes.indiatimes.com/news/esg/india-to-take-lead-in-defining-global-rating-standards-for-esg-sanyal/104118278 Traditionally sovereign ratings were dominated by the three private companies such as Moody's, Standard and Poor, and Fitch. Now India's own rating agency, Care Edge, has successfully developed methodology to rate approximately 40 countries, with plans to complete ratings for the rest of the world by March 2024.
2.	Govt. to soon come up with rules for direct listing of Indian companies abroad.	https://legal.economictimes.indiatimes.com/news/law-policy/govt-to-soon-come-up-with-rules-for-direct-listing-of-indian-companies-abroad/104113010 The move would set the stage for unicorns and other entities to have easier access to a larger pool of foreign capital.
3.	Corporate exits under C-PACE now in 100 days instead of 180 days	https://www.business-standard.com/industry/news/corporate-exits-under-c-pace-now-in-100-days-instead-of-180-days-mca-secy-123100401272_1.html MCA has expedited corporate exit from 180 days to 100 days in the current financial year through C-PACE.
4	Searching for lost, unclaimed shares to get easier on MCA's new integrated portal	https://www.cnbctv18.com/personal-finance/investor-education-protection-fund-iepf-mca-corporate-affairs-ministry-lost-unclaimed-shares-17995331.htm MCA is about to make the process of searching and claiming these 'lost' shares easier soon.

5	SEBI resolves over 3,700 complaints through SCORES in September	https://cfo.economictimes.indiatimes.com/news/governance-risk-compliance/sebi-resolves-over-3700-complaints-through-scores-in-september/104357658 SEBI has resolved 3705 complaints through its online grievance redressal system, SCORES, in September.
6	NBFCs driving bank credit growth in India	https://www.livemint.com/industry/banking/nbfcs-driving-bank-credit-growth-in-india-report-11696853191735.html The strong growth of bank credit was led by NBFCs in August this year, according to latest reports.
AMENDMENTS / CIRCULARS /CONSULTATION PAPERS		
1.	Format of Cyber Security Incidence Disclosure under Corporate Governance Report	https://nsearchives.nseindia.com/web/sites/default/files/inline-files/NSE_Circular_29092023%20%281%29.pdf New fields have been added to existing Corporate Governance Utility.
2.	BSE/NSE circular	https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20230929-30 https://nsearchives.nseindia.com/web/sites/default/files/inline-files/Revised%20SOP_29.09-2023_equity.pdf Revised Standard Operating Procedure (SOP) on application filed under Regulation 37 and 59A of SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 w.r.t. Scheme of Arrangements
3.	Extension of timelines (i) for nomination in eligible demat accounts and (ii) for submission of PAN, Nomination and KYC details by physical security holders; and voluntary nomination for trading accounts	https://www.sebi.gov.in/legal/circulars/sep-2023/extension-of-timelines-i-for-nomination-in-eligible-demat-accounts-and-ii-for-submission-of-pan-nomination-and-kyc-details-by-physical-security-holders-and-voluntary-nomination-for-trading-accou-_77320.html Timeline extended till December 31,2023.

4.	Filing of Related Party Transactions disclosure on NEAPS Portal	https://nsearchives.nseindia.com/web/sites/default/files/inline-files/NSE_Circular_29092023.pdf Portal description given for RPT disclosure on NEAPS portal in XBRL form only.
5.	Extension of timeline for verification of market rumours by listed entities	https://www.sebi.gov.in/legal/circulars/sep-2023/extension-of-timeline-for-verification-of-market-rumours-by-listed-entities_77488.html For top 100 listed entities as per market cap- February 1,2024 For top 250 listed entities as per market cap- August 1,2024
6.	SEBI LODR (Listing Obligations and Disclosure Requirements), 2015 fifth amendment	https://www.sebi.gov.in/legal/regulations/oct-2023/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-fifth-amendment-regulations-2023_77867.html SEBI would now specify date for rumour verification.
7.	Centralized mechanism for reporting the demise of an investor through KRAs.	https://www.sebi.gov.in/legal/circulars/oct-2023/centralized-mechanism-for-reporting-the-demise-of-an-investor-through-kras_77534.html Mechanism introduced to smoothen the process of transmission in securities market. It spells out the operational norms including the obligations of regulated entities, including registered intermediaries that have interface with 'investors' / 'account holders' (used interchangeably) who are natural persons.
8.	Limited relaxation from compliance of Reg 58(1)(b) of SEBI LODR Reg.2015	https://www.sebi.gov.in/legal/circulars/oct-2023/limited-relaxation-from-compliance-with-certain-provisions-of-the-sebi-listing-obligations-and-disclosure-requirements-regulations-2015_77763.html Relaxation granted up to September 30,2024.
9.	Relaxation from compliance with Reg 33(1)(b) of LODR Regulation and Reg.44(4) of LODR Reg. 2015	https://www.sebi.gov.in/legal/circulars/oct-2023/relaxation-from-compliance-with-certain-provisions-of-the-sebi-listing-obligations-and-disclosure-requirements-regulations-2015-reg-_77781.html Relaxation granted till September 30,2024.

10	Prompt Corrective Action (PCA) Framework for Non-Banking Financial Companies (NBFCs) – Extension to Government NBFCs	https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12543&Mode=0 Reserve Bank of India introduced PCA Framework for NBFCs on December 14, 2021. The Framework has since been reviewed and it has been decided to extend the same to Government NBFCs (except those in Base Layer) with effect from October 1, 2024, based on the audited financials of the NBFC as on March 31, 2024, or thereafter.