

FINALISING ACCOUNTS OF THE CD- RESPONSIBILITIES OF RP AND SUSPENDED DIRECTORS

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BRIEF OVERVIEW OF IBC,2016



- Under the Insolvency & Bankruptcy Code, 2016, an Insolvency Resolution professional is a qualified person appointed to oversee the Corporate Insolvency Resolution Process of a corporate person (hereby known as Corporate Debtor) who is adjudicated as insolvent.
- The Board of Directors of the Corporate Debtor stand suspended and the rights & Duties of the management vest entirely in the hands of the Resolution Professional.
- The Resolution Professional hence oversees the Operational Activities of the corporate debtor along with adhering with compliance requirements of various laws, statutes & Regulations.

IRP TO MANAGE THE AFFAIRS OF THE COMPANY (SECTION 17)

- Management of CD shall vest with IRP.
- The powers of the board of directors or the partners of the corporate debtor shall stand suspended.
- Officials of Company shall report to IRP.
- Financial Institutional of CD shall furnish accounts and information to IRP on his instructions.
- Shall be authorized to act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents. Can access the electronic records of CD available with IU.
- Can access books of account of CD and other records available with Govt.
- Be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor

POWERS, DUTIES AND RIGHTS OF IRP



IRP to Manage the Affairs of the Company
(Section 17)



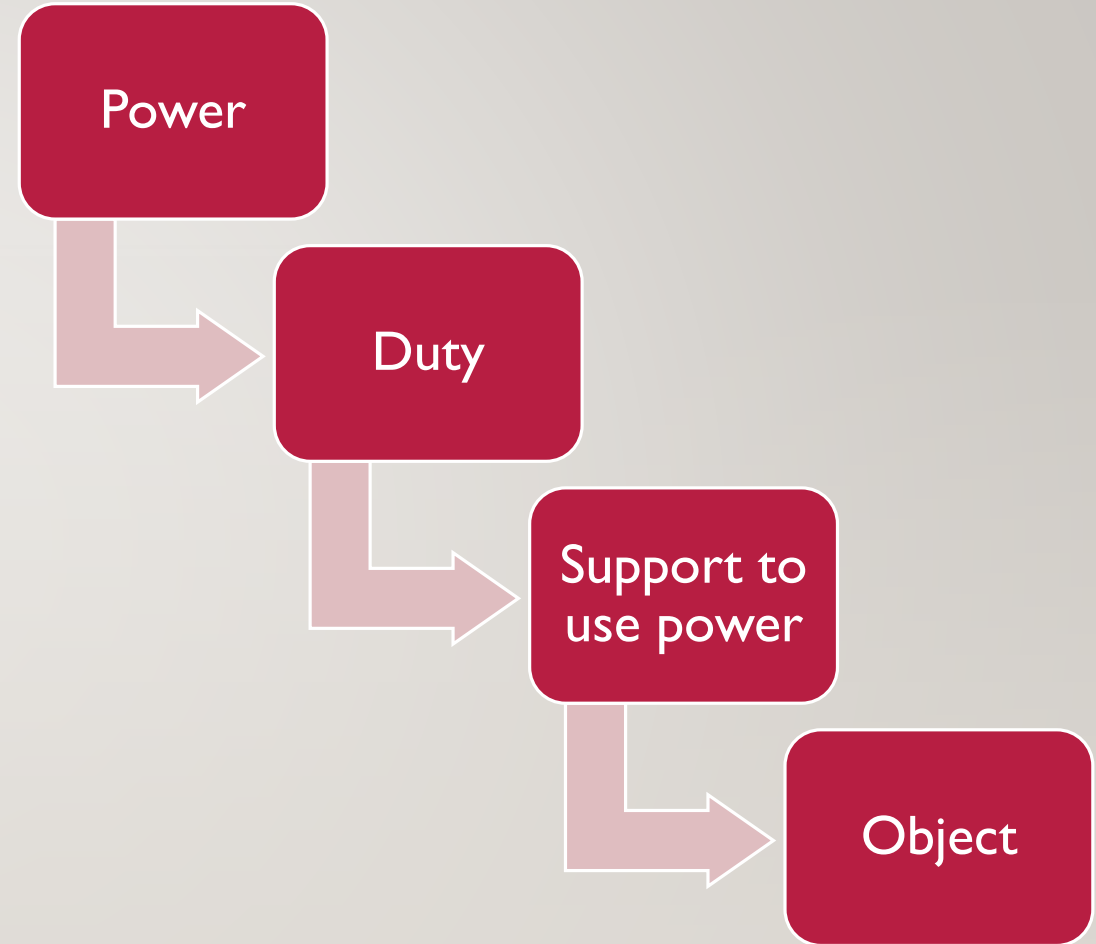
Duties and functions of IRP (Section 18)



Personnel to extend co-operation to IRP
(Section 19)



Management of operations of corporate debtor as going concern (Section 20)



PERSONNEL TO EXTEND CO- OPERATION TO IRP (SECTION 19)

Management's Responsibility

- Personnel, promoters or any other person linked with management of CD shall extend all assistance and cooperation to the IRP.

Failure to Cooperate

- In the event of failure in cooperating or assisting, IRP/RP can apply to NCLT by filing application/s under Section 19(2).

Action by NCLT

- NCLT shall order such personal to cooperate with the IRP/RP

VARIOUS OTHER DUTIES OF THE RESOLUTION PROFESSIONAL

- The Corporate Insolvency Resolution Process is Constrained to a period of 180 days and during this period, the resolution professional is entrusted with the following duties along with powers of management :
 - IBBI Compliance Requirements
 - Preparation of Valuation Reports
 - Corresponding with various Authorities regarding the CIR process
 - Collection of Claims from various creditors, employees, workmen
 - Resolving operational disputes
 - Convening and correspondence with Committee of Creditors and appraising them of the current progress of the CIR Process

ISSUES AT HAND

- Under IBC,2016, the Resolution Professional is granted the powers of management and provided access to all the relevant books, accounts and records to fulfill duties under the CIR process.
- However, the issue arises when the resolution professional is required to sign the financial statements of the Corporate Debtor in lieu of the Suspended Board of Directors and in essence certify the financial statements in the capacity of “Those charged with Governance (TCWG)”
- This gives rise to a fundamental question of whether it is appropriate for the Resolution professional to sign financial statements of the corporate debtor when the Resolution Professional, even if possessing the requisite qualification simply lacks the experience of historically managing the company & the knowledge of various intricate matters required to certify the financial statements to be True & Fair.

RELEVANT PROVISIONS OF THE COMPANIES ACT, 2013

- Sub-section (1) of section 134 of the Act provides for approval and signing of financial statements (as defined in clause (40) of section 2) including consolidated financial statements, if any. Such approval of financial statement needs to be given in a duly convened board meeting.

Further, Such approved financial statements will be signed on behalf of the company by the following:

- i) Chairperson of the company where he is authorized by the Board (OR)
- ii) by two directors out of which one shall be managing director (AND)
- iii) the Chief Financial Officer, wherever appointed , the Company Secretary of the company, wherever appointed

CAN WE VIOLATE THE PROVISIONS SECTION 134(1) OF THE COMPANIES ACT

- For Listed companies, SEBI-LODR provides that the approval and authentication of the financial results shall be done by listed entity in the following manner: (a) The quarterly financial results submitted shall be approved by the board of directors.
- The Financial results to be placed for stock exchanges is to be signed by the Chairperson or the Managing Director or a whole time Director. In the absence of all them it shall be signed by any other Director of the listed entity who is duly authorized by the Board of Directors, at its meeting which approves the financial results, before submitting to the stock exchange(s).
- The annual audited financial results shall be approved by the Board of Directors of the listed entity and shall be signed in the manner specified in clause(b) of sub-regulation(2).

Can all of these be done away by the IRP or RP ?

FILING OF FORM INC-28



Once the INC-28, form is approved, only the IRP/RP/Liquidator shall thereafter be allowed to file any form on behalf of the company



Does that mean on filing INC-28, only IRP/RP needs to do all of the compliance and there is no requirements for the Board or other Directors ?



Filing of INC-28 form indicates that RP is in control of the CD from the ROC compliance point of view and not to be construed that, the Board of Directors are not required to act.

LITIGATIONS START WHEN PROMOTERS DON'T COOPERATE

- Often the promoters inform the employees not to cooperate with the IRP/RP and they will be back in the business soon
- Working capital issues are created like non collection of dues but payments are immediate, and RP is responsible for payments, and this makes it difficult for the RP to keep the CD as a going concern
- Various IA's are filed on the RP
- Preventing access to Data and locations
- Auditors don't cooperate often- Difficult to replace Auditors not withstanding Section 28 compliance process with the approval of the CoC

ADDRESSING THE ISSUE

- Hence it has become clearly evident that given the short time frame for completion of the CIR process, the Resolution Professional is simply not equipped with the time required to fully comprehend and understand the business enough to certify its financial statements in the capacity of “Those Charged With Governance (TCWG)”
- This puts an unfair burden on the resolution professional solely due to the provisions of IBC, 2016 that states that the resolution professional shall continue the duties of Suspended board of directors with respect to the Financial Statements.
- In my professional judgement, this leads to a lapse in compliance & assurance and thereby defeats the purpose of the Companies Act, 2013.
- The following issue is also well addressed in the case law of
- “Mr. Mukund Choudhary Vs. Mr. Subhash Kumar Kundra (RP for CLC Industries Ltd.) – NCLAT New Delhi”

**“MR. MUKUND CHOUDHARY VS. MR. SUBHASH KUMAR KUNDRA
(RP FOR CLC INDUSTRIES LTD.) – NCLAT NEW DELHI”**

SUMMARY OF THE POINTS RAISED BY SUSPENDED DIRECTORS



The Suspended Directors (Appellants) contended that the Resolution Professional (RP)(Respondent) has been in control of the Management of the Corporate Debtor since the initiation of the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor wherein the suspended directors have raised objections in the balance sheet dated 31.03.2021 prepared by the RP and sought clarification for the same.



Further the Suspended Directors (Appellants) were of the view that they are not inclined to sign the financial statement as prepared by the RP, stating that there were objections to various entries & discrepancies in the balance sheet and require justification and clarity regarding the said entries from the RP (Respondent) .



The Appellants further relied upon the General Circular No.08/2020 dated 06.03.2020 (the Circular) according to which the Resolution Professional of the Corporate Debtor is responsible for the signing of the documents of the Corporate Debtor in the capacity of CEO in order to meet the protocol of the Ministry of Corporate Affairs

“MR. MUKUND CHOUDHARY VS. MR. SUBHASH KUMAR
KUNDRA
(RP FOR CLC INDUSTRIES LTD.) – NCLAT NEW DELHI”

SUMMARY OF THE POINTS RAISED BY RESOLUTION
PROFESSIONAL



The Respondent (RP) contended that, Appellants despite of several enquires, reminders and communication, failed to provide the signed financial statements



The Respondent (RP) submitted that the books of accounts were prepared by the Statutory Auditor (Auditor) that was appointed by the Corporate Debtor back in 2017. The draft financial statement and the draft audit report were sent to the suspended directors (Appellants) for their review and perusal. The documents were to be signed by the Appellants who failed to do the same.



The Respondent argued that the signed documents were required for the purpose of enabling the Respondent to file the financial statement before the Registrar of Companies in accordance with the applicable provisions of the Companies Act, 2013.

NCLAT JUDGEMENT

- The Tribunal observed that the Court does not release the directors from their duties being the director towards the company but merely suspends their powers as the directors and appoints the Resolution Professional for the management of Company in view of CIRP procedure.
- The Tribunal referred sub-section of 2 of Section 19 of the Insolvency & Bankruptcy Code and held that; “Section 19(2) of the Code clearly specified that the personnel of the Corporate Debtor, as promoters or any other persons are required to assist the RP failing which an Application can be filed before the Adjudicating Authority seeking direction for co-operation”
- The Tribunal further held that the Circular relied by the Appellants is merely a procedure for the filing of forms. The Circular does not restrict the Suspended Directors of the Corporate Debtor from signing the financial statements of the Corporate Debtor. NCLAT agreed with NCLT judgement on this.
- NCLAT judgement clarified that suspended Directors are not released from the duties of the Directors towards the CD and the suspension is mere suspension of powers and not the suspension of their Duties
- This judgement brings out the clarity on the aspect of signing the financial statements and clears the aspect of preparation, signing and filing of the same.



OTHER CASE LAWS

VINAYAKA PAPER & BOARD V UNION BANK-HDB 2017

- While hearing the matter, the NCLT (Hyderabad) without any rebuttal also considered the fact where a Resolution Professional has written a letter to Statutory Auditor for Audited Financials stating that as per the provisions of Sec 17(b) of the Insolvency and Bankruptcy Code, 2016, “the powers of the board of directors shall stand suspended and be exercised by the interim resolution professional or resolution professional”. However as per the best of knowledge and prevailing practices, the financial statements should be signed by both Directors (suspended) and also the interim resolution professional or resolution professional as the case may be.

PUNJAB NATIONAL BANK V JAMES HOTEL-NCLT CHD

- It was adjudicated that RP could appoint a new CFO for purpose of same and in case any fraud was detected in accounts while finalizing financial statements, matter with regard to proceeding against earlier CFO would remain open and for that purpose, RP would be at liberty to place the matter before the Committee of Creditors.

MINITA RAJA VS MINISTRY OF CORPORATE AFFAIRS, NCLT 2019

- In this case the Directors stood disqualified as per the record of MCA during the CIRP period in view of the provisions for Section 164(2) of the Companies Act 2013. for non-filing of financial statements and Annual Returns for FY 2013-2014. Section 167 of the companies act 2013, further states that “the office of a director shall become vacant in case he incurs any disqualifications specified in section 164.” In such a situation Section 167(3) of the Companies Act, 2013 gives the power of appointment of directors to the promoters of the company, or in their absence to the Central Government. Hence, this application is filed to appoint the directors on the said Board in accordance with due procedure of law.
- The Adjudicating Authority dismissed the application holding that in my opinion, in the event of commencement of CIRP of a Corporate Debtor, the management of the Corporate Debtor is handed over to the RP as per section 17(1)(b) of the Code. in this regard there is no need of appointing any new directors on the board of the corporate debtor as the code gives mandatory power of management to the RP and no one else.

STEEL KONNECT(INDIA) PRIVATE LIMITED VS HERO FINCORP(2017)

- AA held that though pursuant to Section 17, the Board of Directors of a Corporate Debtor stand suspended (for a limited period of CIRP maximum 180 days or extended period of 90 days i.e. 270 days), but they continued to remain as Directors and members of the Board of Directors for all purpose in the records of Registrar of Companies under the Companies Act 2013.

MR ASHWINI MEHRA, RP OF EDUCOMP INFRASTRUCTURE & SCHOOL OF MANAGEMENT LTD VS MR VINOD KUMAR DANDONA, SUSPENDED DIRECTORS & ORS 2019

- AA held that the language of Section 19 suggests that it must issue directions to such defaulting personnel of the ex-management to comply with the directions of the resolution professional and to co-operate with him. The provisions of Section 19 are mandatory in character so as to enable the Resolution Professional to complete the CIRP expeditiously and manage the affairs of the Corporate Debtor as a going concern.
- It also held that on this ground that Director had resigned from the directorship just before the commencement of CIRP is not a good reason to grant exemption from non-submission of requisite details, if any, in his possession.

OTHER CASES

The Independent Directors are part of Board of Directors and have similar duties & responsibilities as other directors: NCLAT in *Shailesh Chawla Vs. Vinod Kumar Mahajan* [\[2020\] ibclaw.in 90 NCLAT](#) held that a mere running of the eye of the ingredients of Section 19 of the Code latently and patently imposes an obligation on the personnel and promoters of the Corporate Debtor to extend all assistance and cooperation which the IRP will require in running/managing the affairs of the CD. In fact, the term 'personnel' is defined to mean the employees, directors, managers, key managerial personnel etc., if any of the Corporate Debtor and this is meant to render assistance to the IRP in carrying out his duties in an effective and efficacious manner. It is to be pointed out that Section 19 of the Code is not only restricted to the Managing Directors/Executive Directors it also to other key managerial personnel Directors, managers, employees and designated partners and any of the Corporate Debtor. In fact, one cannot find the term Sleeping Directors either under the Companies Act, 2013 or under the Code, 2016.

OTHER CASES –(CONTD)

- In Subasri Realty Pvt. Ltd. v. N. Subramanian (2018), the NCLAT put it specifically that the suspension of the board of directors does not amount to a suspension of the managing director or any of the directors of the corporate debtor. Thus, denial of *locus standi* to a director in a matter affecting him directly would not find any strength.
- In 2019, the landmark judgment of the Supreme Court of India (SC) in Swiss Ribbons Pvt. Ltd. v. Union of India, which upheld the constitutional validity of whole of the Code, also laid down that the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the committee of creditors and the adjudicating authority. Thus, even though all the management is vested in the hands of a single person by the Code, yet the independence of the resolution professional's actions is certainly subject to question.

OTHER CASES –(CONTD)

- In *Golden Jubilee Hotels Limited* (2018), the Andhra Pradesh High Court observed that the various duties of an IRP enumerated under section 18 of the Code clearly manifest that one individual cannot undertake all of them. The Court added that, in light of section 19 of the Code, which mandates personnel of the corporate debtor to extend all assistance and cooperation to the IRP in management of affairs, the argument that the IRP cannot delegate some of his duties and functions to such personnel has to be rejected.

SOME INTERPRETATIONS



The Board is not suspended – Only powers are



Officers continue to perform and report to RP



Facilitate the survival of the business, and not to perform the business in a strict sense (Contradicts Going concern objectives and duties under the code in some ways)

CHALLENGES UNDER GST/TDS FILING



Registration/ use of existing registration for GST



Dealing with notices and demand from the authorities



TDS returns default affecting further payment and compliance process-
Discussion



THANK YOU

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