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## BEYOND GOVERNANCE

### Case Study

In order to make the Chartered Secretary Journal (CSJ) more interactive for the members and students, the Case Study section has been introduced from April issue. Each Case Study is followed by question(s) which are to be solved by member(s)/student(s). The answer(s) are to be sent to [cs.journal@icsi.edu](mailto:cs.journal@icsi.edu) latest by 25<sup>th</sup> of each month.

The answer(s) will be reviewed by a Panel of reviewer(s). The winner will be given:

- (i) Certificate of Appreciation.
- (ii) His/Her name will be published in the next issue of the Journal.
- (iii) He/She will be awarded cash award of ₹ 2,500.

### Crossword

A new section 'Crossword' containing terminologies/concepts from Companies Act, IBC, NCLT and such related areas of profession is introduced. Members/ students are to send the answers of Crossword to [cs.journal@icsi.edu](mailto:cs.journal@icsi.edu) latest by 25<sup>th</sup> of each month.

- The answer(s) will be published in the next issue of CSJ.
- The winners will be selected randomly.
- The name of three winners will be published in the next issue of CSJ.



### Parties to the Dispute

ABC Limited ..... the Corporate Debtor, Appellant  
Vs.

Association of Homebuyers.....(Objectors)

An appeal was filed before the National Company Law Appellate Tribunal (“NCLAT”) under section 61 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) challenging the order passed by the Adjudicating Authority (National Company Law Tribunal- NCLT).

### Facts:

1. Appellant, the Corporate Debtor (MSME) instituted an Application before NCLT for pre-packaged insolvency resolution process (“PPIRP”) under Section 54C of the ‘I&B Code’.
2. On 28.09.2021, the Corporate Debtor issued an e-mail addressed to its stakeholders that the Company is intending to take recourse to PPIRP in accordance with Chapter III-A of the ‘I&B Code’. The Corporate Debtor in the e-mail indicated that it shall be appointing Resolution Professional.
3. On 30.09.2021, the Corporate Debtor issued an e-mail at 3.30 A.M. addressed to stakeholders issuing notice of the meeting of Financial Creditors to be held by way of Video Conferencing on 30.09.2021 at 5.00 P.M.
4. Another notice was issued on 02.10.2021 convening a meeting for 03.10.2021 at 10.30 A.M. The Corporate Debtor claimed that the Resolution Professional was appointed and approval of Financial Creditors to pre-packaged insolvency resolution process was also obtained on 30.09.2021.
5. A report dated 05.10.2021 was submitted by Insolvency Professional.
6. On 08.10.2021, the Corporate Debtor filed an Application before the Adjudicating Authority to initiate pre-packaged insolvency resolution process under Section 54C.
7. On 21.10.2021, the matter first came up for hearing before the Adjudicating Authority on which date several objectors appeared who opposed the Application.

8. The Adjudicating Authority granted one-week time to the objectors to file their objections.

### Submission of the Appellant

1. With regard to an Application for PPIRP under Section 54C, the Adjudicating Authority had no jurisdiction to grant any time to the objectors to file a reply.
2. PPIRP is to be completed in a time bound manner and the scheme as delineated by Chapter III-A and the Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021 does not contemplate giving any opportunity to the objectors to oppose the Application prior to its admission.

### Submission by Objectors

1. The Application for PPIRP has been initiated without complying the statutory provisions of the ‘I&B Code’.
2. The Adjudicating Authority had every jurisdiction to grant time to the objectors to show that the Application having not been filed in compliance with the provisions of Section 54A, the same cannot be admitted by the Adjudicating Authority.
3. The meeting for obtaining approval of unrelated Financial Creditors was not convened in accordance with law. The whole process was adopted in hot haste to defeat the rights of Financial Creditors i.e. Homebuyers.
4. From the document filed along with Application, it is clear that many Financial Creditors who have been treated as unrelated are actually related Financial Creditors and they were not entitled to vote.
5. It is further submitted that the votes of several Financial Creditors/ Homebuyers have been wrongly recorded as ‘YES’ whereas they opposed the proposal.

### Decide the case:

1. Whether the Adjudicating Authority while considering Application of pre-packaged insolvency under Section 54C of the ‘I&B Code’ can, before admission of the Application, hear Objectors/ Interveners?
2. Whether plea of homebuyers regarding non compliance of section 54 A of “I&B Code” is tenable?

**Disclaimer:** The case study has been framed from the facts and figures available in the public domain with some modifications/assumptions so as to enable members to apply their professional skills to answer the same and hide the identity of the case. Author is not to be held liable for any resemblance of the facts and figures with any case.

**Winner of Case Study – May 2024**

**CS Saurabh Agrawal**  
ACS-58587

# BEST ANSWER CASE STUDY MAY 2024

**Query 1: Whether in the facts and circumstances of the case, can it be said that the order passed by the learned Tribunal is illegal and/or contrary to Section 130 of the Companies Act?**

**Answer:** It is required to refer the provisions of section 130 of the Companies Act, 2013 (the “Act”) which are relevant for determining the legality of the order passed by the learned Tribunal while considering the aforesaid question and extract of the relevant provisions are as below:-

**Section 130 of the Act: Re-opening of Accounts on Court’s or Tribunal’s Orders**

*(1) A company shall not re-open its books of account and not recast its financial statements, unless an application in this regard is made by the Central Government, the Income-tax authorities, the Securities and Exchange Board, any other statutory regulatory body or authority or any person concerned and an order is made by a court of competent jurisdiction or the Tribunal to the effect that—*

- (i) the relevant earlier accounts were prepared in a fraudulent manner; or*
- (ii) the affairs of the company were **mismanaged** during the relevant period, casting a doubt on the reliability of financial statements:*

*Provided that the court or the Tribunal, as the case may be, shall give notice to the Central Government, the Income-tax authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned or **any other person concerned** and shall take into consideration the representations, if any, made by that Government or the authorities, Securities and Exchange Board or the body or authority concerned or the other person concerned before passing any order under this section.*

*(2) Without prejudice to the provisions contained in this Act the accounts so revised or re-cast under sub-section (1) shall be final.*

As per the aforesaid provisions, certain conditions precedent is required to be follow while considering the said application and in the present case such conditions are (i) application made by the Central Government (ii) application was made before the learned Tribunal of competent jurisdiction (iii) Affairs of the company were mismanaged (as the order u/s 242 of the Act were already passed and the same was not challenged and still in the operation) and Department of Economic Affairs satisfied that there are serious allegations against three group companies and shall be in the larger public interest, to find out the real truth (iv) Notice was issued to all the authorities and none of the authorities had objected in reopening of the accounts of these Companies and the erstwhile directors had opposed the said application and after hearing all parties, the learned Tribunal passed the order for the re-opening of the Account u/s 130 of the Act.

Further, the Board of the Company has already been suspended and it was found that the management of Companies were responsible for negligence and incompetence, and had falsely presented a rosy financial statement. Interim Report dated

30.11.2018 submitted by Serious Fraud Investigation Office in exercise of powers under Section 212 of the Act also confirmed the allegations of Central Government.

Therefore, considering the facts and the circumstances of the case read with the relevant provisions of the Act, it is clearly established that the order passed by the learned Tribunal does not suffer from any illegality and the same in order to the provision of the section 130 of the Act.

**Query 2: Can erstwhile directors of the company make representation under Section 130 of the Companies Act?**

**Answer:** In terms of the proviso to Sub-section (1) of the Section 130 of the Act, before passing order under Section 130 of the Act, the Tribunal is required to issue notice to the Central Government, the Income-tax authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned or “any other person concerned” and is required to take into consideration the representation, if any made by them.

The terms of “other person concerned” inserted pursuant to the Companies (Amendment) Act, 2017 and the same is not defined in that particular section or the Act. Insertion of the said terms was discussed in the Report of The Companies Law Committee, 2016.

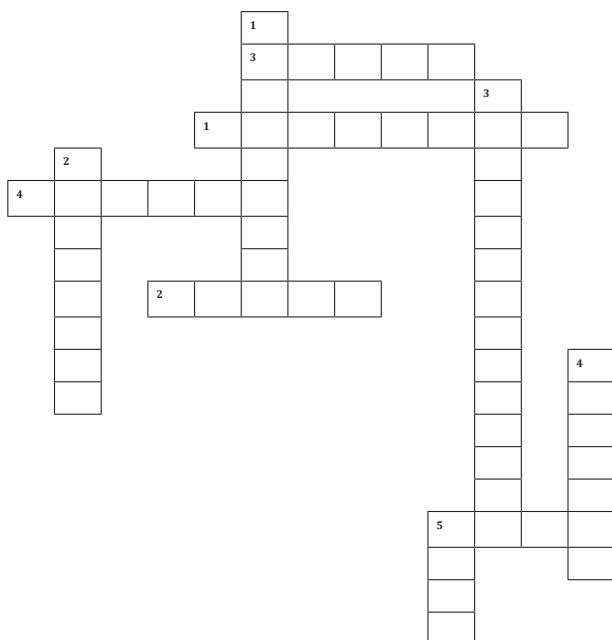
Para 9.7 of the said report states that “.....in the interest of the principle of natural justice, other concerned parties, like a company or the Auditor/Chartered Accountant of the company should also be given an opportunity to present their point of view. The Committee deliberated and felt that while a court/Tribunal always had the inherent power to call/give notice to any concerned party in the process, it would be appropriate if a provision was specifically made in the Section enabling the Court/Tribunal to give notice to any other party/person concerned, in addition to those specifically referred to in the provisions.”

It seems from the aforesaid para of the said report that, while passing order under section 130 of the Act, there shall be re-opening of books of accounts and recasting of the financial statements of a particular Company only. So, the person that can be concerned by the order can be the Company or its Auditors. That means the Directors of the Company which are in the Board of the Company at the time of filing of application u/s 130 may make grievances and can make representation on behalf of the Company.

The erstwhile directors cannot represent the company or make representation as they are suspended in the present case and if the said window open for the erstwhile director(s) it will go long lasting and all the directors since the incorporation of the Company till the filing of the application have right to make representation before the learned Tribunal and it would be quite unreasonable.

Further, if any other person likes to represent before the learned Tribunal, such person may file separate appropriate application or Interlocutory Application. Therefore, considering the facts and the aforesaid provisions, erstwhile directors of the company shall not be considered as any other person concerned in the terms provisions of Section 130 of the Act.

# CROSSWORD PUZZLE – COMPANY LAW - JUNE 2024



## ACROSS

- Under The Insolvency and Bankruptcy Code, 2016 resolution professional shall not make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor unless approved by a vote of \_\_\_\_\_ per cent of the voting shares by the committee of creditors.
- Under Companies Act, 2013, The appointment of proposal shall be in the Form No. \_\_\_\_\_.
- Under the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. A stakeholder, who claims to be entitled to any amount deposited into the Corporate Liquidation Account, may apply to the Board in \_\_\_\_\_ for an order for withdrawal of the amount.
- Under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, A person claiming to be

a creditor in a class shall submit claim with proof to the interim resolution professional in electronic form in \_\_\_\_\_.

- Under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, the issuer shall accept bids using only the \_\_\_\_\_ facility in the manner specified by the Board.

## DOWNWARDS

- Under The Insolvency and Bankruptcy Code, 2016, A resolution applicant may submit a resolution plan along with an \_\_\_\_\_ stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.
- Under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, At the commencement of a meeting, the resolution professional shall take a \_\_\_\_\_ when every participant attending through video conferencing or other audio and visual means shall state, for the record.
- Under the Companies Act, 2013, A special notice required to be given to the company shall be signed, either individually or collectively by such number of members holding not less than one percent of total voting power or holding shares on which an aggregate sum of not less than \_\_\_\_\_ has been paid up on the date of the notice.
- Under the Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 2018, A company shall not make any offer of buy-back within a period of \_\_\_\_\_ reckoned from the date of expiry of buyback period of the preceding offer of buy-back, if any.
- Under the Companies Act, 2013, when an auditor has resigned from the company, he shall file a statement in Form \_\_\_\_\_.

## Winners - Crossword May 2024

**1<sup>ST</sup>** CS DR. M. Govindarajan FCS- 8533

**2<sup>ND</sup>** CS Srishti Jain ACS-73023

**3<sup>RD</sup>** CS Saurabh Agarwal ACS-58587

## Crossword Puzzle – May 2024 Answers

### ACROSS

- TEN
- ONE-TENTH
- DEBT LISTED
- FIVE DAYS
- ONE HUNDRED AND EIGHTIETH

### DOWNWARDS

- TWO
- VIGIL MECHANISM
- FIVE
- CONSULTATION COMMITTEE
- FIFTEEN