

Corporate Criminal Liability Under §29A(D) of Insolvency and Bankruptcy Code, 2016

Mayank Udhwani*

Department of Business Law, National Law University, Jodhpur, India

Abstract

The object of this article is to analyse §29A(d) of the Insolvency and Bankruptcy Code, 2016 under the lens of the concept of Corporate Criminal Liability. §29A, which was inserted vide an amendment act of 2018, lays down 10 criteria which disqualifies a person from submitting a resolution plan. Clause (d) bars a person from submitting a resolution plan if such a person is convicted of an offence punishable with imprisonment for two years or more. The question of interpretation of §29A(d) was determined by the National Company Law Appellate Tribunal (NCLAT) vide its order dated 10th August 2018 in the matter of Renaissance Steel India Pvt. Ltd. v. Electrosteels Steel India Ltd. In this article, the author will establish that §29A(d) does not apply to corporate person, except in two cases discussed in section B.2 of this article. To buttress his claim, the author will present a line of argument, which was not raised before the NCLAT. Lastly, the author presents a case against purposive interpretation of §29A(d) to conclusively establish that juristic entities fall outside the purview of §29A(d) of the Insolvency and Bankruptcy Code, 2016.

Keywords: Amendment; Resolution; Juristic

Introduction

Corporate Criminal Liability is a concept under which a company is held liable for prosecution under criminal offences. The idea is based on the theory of identification [1]. This means that where a person or persons who constitute the 'directing mind and will' of the company have committed a crime, the company will be treated as liable as well because such people 'are' the company [2].

§29A of the Insolvency and Bankruptcy Code, 2016 (IBC) was inserted by the Insolvency and Bankruptcy Code (Amendment) Act, 2018 (Amendment Act) [3]. It deals with "persons not eligible to be resolution applicant". Clause (d) of §29A provides that a person will not be eligible to submit a resolution plan if such person or any other person acting jointly or in concert with such person or 'connected person' "has been convicted for any offence punishable with imprisonment for two years or more" [4].

Electrosteels case

The question of interpretation of §29A(d) was raised before the NCLAT in Renaissance Steel India Pvt. Ltd. v. Electrosteels Steel India Ltd [5]. In this case, the Appellant had challenged the eligibility of Vedanta Limited as the successful bidder in the Corporate Insolvency Resolution Process of the Defendant. The ground for challenging such eligibility was that one of the 'connected persons', namely Konkola Copper Mines [6], of Vedanta Limited had been convicted of an offence punishable with imprisonment of three years under the laws of Zambia. However, Konkola Copper Mines was sentenced to pay a fine of ZMK 100,000. The Appellant had first approached the Kolkata Bench of National Company Law Tribunal (NCLT). The Kolkata Bench of NCLT had dismissed the application of Appellant vide its order dated 17th April 2018. Thus, the Appellant approached the NCLAT. One of the primary reasons for the NCLAT to dismiss the appeal was that the offence in question prescribed for imprisonment or fine whereas §29A(d) only covers an offence punishable with imprisonment. On the basis of this distinction, the NCLAT upheld the eligibility of the Vedanta Limited as the Resolution Applicant.

Analysis of §29A(d) of the IBC

§29A of the IBC provides for ten pigeon holes for disqualification of

a person from submitting a resolution plan. Clause (d) of §29A reads, "(d) has been convicted for any offence punishable with imprisonment for two years or more;" [4]. A plain reading of §29A(d) indicates that in order to be ineligible to submit a resolution plan, a person must satisfy two ingredients:

- He/She must be convicted of an offence; and
- The offence must be punishable with imprisonment for two years or more.

In the text that follows, the author will establish: (1) §29A(d) is applicable only to natural persons; and (2) the grounds for disqualification under §29A are not equally applicable to natural and juristic persons.

§29A(D) will apply only to natural persons

Literal construction and principle against doubtful penalisation:

It is evident that the import of §29A(d) is penal in nature and it is a well-established principle that a penal enactment must be construed strictly within the terms and language of a particular statute [7]. It has been held that penal statutes should not be subject to a liberal construction with the aid of assumption and presumption to cover such persons who are otherwise not intended to be dealt with by a particular enactment [8]. A reference must also be made to the principle against doubtful penalisation. This principle states that a court should "strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful, or penalizes him in a way which was not made clear" [9]. It is important to note that this principle against

*Corresponding author: Udhwani M, Student of B.A. LL.B. (Business Law Hons), Department of Business law, National Law University, Jodhpur, India, Tel: +91-9711812195; E-mail: mayankudhwani1996@gmail.com

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doubtful penalisation applies equally to ambiguities arising under criminal or civil law [10].

The ambiguity, with respect to §29A(d), arises in relation to its scope of application. That is, whether the section, by using the term ‘imprisonment’ and not ‘imprisonment and/or fine’, applies to juristic persons. According to the author, a provision stipulating imprisonment will apply only to natural persons. §29A(d) would have covered both natural and juristic person, if it had contained the terms ‘imprisonment and/or fine’ [5]. This assertion can be bolstered by the interpretation of the term ‘punishable’ as appearing in §29A(d) of the IBC.

Meaning of the word ‘punishable’: The term ‘punishable’ has been interpreted to mean “capable of being punished by law or right” [11]. In *Standard Chartered Bank v. Directorate of Enforcement* [12], the Supreme Court while holding a company liable for an offence which prescribed mandatory imprisonment and a fine, noted as follows: “... no imprisonment can be imposed on a company or an incorporated body...”. Similarly, in *Iridium India Telecom Ltd v. Motorola Incorporated*, the Supreme Court noted that “As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment...” [13].

As a matter of abundant caution, the author would like to point out that in the aforementioned cases, the Supreme Court had held that a company can very well be prosecuted for criminal offences. However, the reason for citing these cases is to highlight the fact that the Supreme Court had recognized that even though a corporate person can be prosecuted for criminal offences, such corporate persons are not capable of being subjected to imprisonment. Since a corporate person is not capable of incarceration, coupled with the absence of a provision for penalty/fine, it must be concluded that §29A(d) is applicable only on natural persons and not juristic persons.

Other grounds for disqualification under §29A

To further buttress the proposition that §29A(d) is applicable to natural persons only, in this section, the author will explore other grounds for disqualifications under §29A which could apply only to a natural person and not a juristic entity. By doing so, the author will conclude that multiple grounds for disqualifications under §29A do not apply to a natural and a juristic person indiscriminately.

The opening words of §29A refer to a ‘person’. The term ‘person’ as defined under §3(23) of the IBC includes both an individual [14] and a company [15]. Now, attention must be directed to §29A(e) which reads as follows: “(e) is disqualified to act as a director under the Companies Act, 2013”.

If §29A is to apply indiscriminately against a natural and a juristic person, then one will reach a conclusion that a company can act as a director in another company. Consequently, under §29A(e), a company can be disqualified to act as a director in another company. Such a conclusion will not only be absurd but also be legally erroneous for two reasons:

- §149(1) of the Companies Act, 2013 provides that the Board of Directors of every company shall consist of individuals [16]. It is important to note that the term used in §149(1) is ‘individuals’ and not ‘persons’. The usage of the term ‘individuals’ suggests that only a natural person can act as a director in a company [17].
- One of the criteria for disqualification for appointment of director is that such ‘person is of unsound mind and stands so declared by a competent court’ [18]. A company does not have a mind of its own

[19]. Thus, it would be absurd to suggest that a company can ever be declared to be of unsound mind.

Since a company cannot be appointed as a director, it will never be hit by the application of §29A(e). In other words, §29A(e) will apply only to natural persons. Therefore, if one of the clauses of §29A can have application exclusively over natural persons, there is no reason to hold that §29A(d) cannot apply solely on natural persons.

However, the author would like to make it clear that it is not that §29A(d), or for that matter §29A(e), will never apply to a juristic entity. The author points out that §29A(d) could be used to render a corporate person ineligible from submitting a resolution plan in only two situations:

- When a natural person acting jointly or in concert with a corporate person is convicted for an offence punishable with imprisonment for two years or more. This conclusion is derived from the opening words of §29A; and
- When a natural person who has been convicted for an offence punishable with imprisonment for two years or more is a ‘connected person’ [3].

An Argument against Employing Purposive Construction

Those who may advocate against restricting the scope of §29A(d) to only natural persons will rely on a tool of statutory interpretation known as purposive construction. Bennion has defined purposive construction as “a construction which promotes the remedy Parliament has provided to cure a particular mischief” [20]. Purposive construction is usually employed by looking at the objects and reasons of a particular enactment. In this section, the author will present a case against employing purposive construction for the interpretation of §29A(d) to include corporate persons within its ambit. It is important to point out that the arguments that follow are in addition to the arguments made in favour of ‘literal construction’ of §29A(d) and the ‘principle against doubtful penalisation’ (Section B.1). The same have not been reproduced for the sake of brevity.

The mischief sought to be remedied by §29A can be derived from the Statement of Objects and Reasons of the Amendment Act, the relevant portion of which is reproduced below [21]:

“...Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor...”

From the reproduced text, it is clear that the object of introducing §29A was to keep an undesirable party from participating in the resolution or liquidation process. In author’s opinion, the same can be achieved by excluding juristic entities from the scope of §29A(d). The legislature in its wisdom specifically chose to employ the term ‘imprisonment’ and not ‘imprisonment and/or fine’. Furthermore, the Supreme Court in *Standard Chartered Bank (supra)*, had held that “the language of Acts of Parliament.... must neither be extended beyond its natural and proper limits, in order to supply omissions or defects, nor strained to meet the justice of an individual case” [12]. Thus, it would be wrong on one’s part to extend the scope of the term ‘imprisonment’, by employing purposive construction, so as to bring a juristic person within the ambit of §29A.

Another argument against using purposive construction stems from the modus operandi of applying such a construction. As stated earlier, under purposive construction, the mischief sought to be remedied is identified by looking at the intention of the Parliament. In this case, such intention is reflected in the Statement of Objects and Reasons of the Amendment Act. The Law Commission, in its 183rd Report had stated that Statement of Objects and Reasons appended to a bill can only be used to understand the “surrounding circumstances in relation to the statute and the evil which it sought to remedy. However, the same cannot be used to ascertain the true meaning of a substantive provision of a statute” [22]. Thus, the same cannot be used to determine the true meaning of §29A(d), thereby making the use of purposive construction a futile activity. In any case, as stated in the preceding paragraph, the object of inserting §29A can be achieved by excluding a corporate entity from its scope of application.

At this juncture, the author would like to reiterate that the argument in the preceding paragraphs are made notwithstanding the two exceptional scenarios in which §29A(d) could be applied to disqualify a corporate person from submitting a resolution plan. The aforesaid scenarios have been discussed under part B.2.

Conclusion

The foregoing was the author’s attempt to analyse and interpret §29A(d) of the IBC in light of the concept of corporate criminal responsibility to reach the conclusion that a corporate person must necessarily fall outside its ambit. While the recent decision of the NCLAT will definitely act as a guiding light for the interpretation of §29A(d), there is still a need for a more authoritative pronouncement on the said section. Further, the NCLAT omitted to consider two lines of arguments, i.e., a comparison of other grounds for disqualification and a case against purposive construction of §29A(d). The author has presented both the lines of arguments to lay to rest any issue of interpretation which may be raised in relation to §29A(d) of the IBC.

References

1. Davies P (2010) Introduction to Company Law. (2ndedn), Clarendon Law Series.
- 5.

2. Regina V ICR HAULAGE LTD: KBD 1944.
3. Insolvency and Bankruptcy Code (Amendment) Act, 2017.
4. Section 29A(d), Insolvency and Bankruptcy Code, 2016.
Renaissance Steel India (P) Ltd. v. Electrosteels Steel India Ltd. (2018) Company Appeals (AT) (Insolvency) Nos. 175, 223, 221, 233 of 2018.
6. Vedanta Limited had a subsidiary called ‘Vedanta Resource PLC’. Konkola Copper Mines was the subsidiary of Vedanta Resource PLC.
7. Bhan (2007) M/s Virtual Soft Systems Ltd v. Commissioner of Income Tax. Supreme Court of India.
8. Thomas KT, Sethi RP (2001) J.K.(Bombay) Ltd vs Bharu Matha Mishra. Supreme Court of India.
9. Section 271, Bennion FAR (1990) Bennion on statute law. (5thedn).
10. ESS Production Ltd (in administration) v. Sully, EWCA Civ 554 (Court of Appeal Civil Division. (2005).
11. Rangnath M (1988) Sube Singh vs State Of Haryana. Supreme Court of India.
12. Balasubramanyan P (2005) Standard Chartered Bank v. Directorate of Enforcement. Supreme Court of India.
13. Nijjar SS (2010) Iridium India Telecom Ltd v. Motorola Incorporated. Supreme Court of India.
14. Section 3(23)(a), (Insolvency and Bankruptcy Code, 2016.
15. Section 3(23)(c), Insolvency and Bankruptcy Code, 2016.
16. Section 149(1), Companies Act, 2013.
17. Sarkar A (1960) Oriental Metal Pressing Works v. Bhaskar Kashinath Thakoor. Supreme Court of India.
18. Section 164(1), Companies Act, 2013.
19. Davey L (1897) Welton v Saffery: 1897 AC 29.
20. Section 303, Bennion FAR (1990) Bennion on statute law (5thedn).
21. The ‘Statement of Objects and Reasons’ appended to the Insolvency and Bankruptcy Code (Amendment) Bill, 2017 (Bill No. 280 of 2017).
22. Law Commission of India, 183rd Report on “A continuum on the General Clauses Act, 1897 with special reference to the admissibility and codification of external aids to interpretation of statutes”, p: 13.