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Decriminalization of Corporate Offences in India: An Analysis

RAJ RADITYA SHAHI ¹

ABSTRACT

Decriminalization is a step towards eliminating provisions consisting of offences. This process is not new to India; decriminalization was started back in 1991 with liberalization of export and Import Regulations, this brought down many criminal offences. After years of torture by the stringent act Foreign Exchange Regulation Act (FERA) was struck down and another act called Foreign Exchange Management Act, 1999 was brought to action. The main motive behind decriminalization has been promoting ease of doing business and now in the Companies Act Amendment, 2019(CAA) the ministry of corporate affairs has done eliminated 16 compoundable offences. The ministry has also introduced a Companies Amendment Bill (CAB) in the Loksabha which suggests further elimination of approximately 54 offences. Although the Bill hasn't got assent of the parliament but few steps have been initiated by the ministry towards these amendments. Hence it becomes important for us to understand the positive and negative aspects of these amendments. In this paper the amendments regarding Decriminalization of corporate offences will be discussed at length.

I. INTRODUCTION

Company law committee (CLC) was set up by Ministry of Corporate Affairs which reviewed the offences attracting penalties under the Companies Act. The committee was supposed to recommend amendments of these offences. The CLC submitted its report suggesting the proposed changes to the Ministry of Corporate Affairs on 14th of August 2018². The committee report suggests this relaxation of corporate offences to civil duties so as to make corporate governance better and lessen the burden of judicial system also to promote ease of doing business. Decriminalization does not mean that the offences would be completely eliminated but it rather means that such offenses would no longer attract any kind Detention; however fine can still be penalized on such offences. The problem of overburdening of

¹ Author is a Student at O.P. Jindal Global University, India.

² Report of the Committee to Review Offences under the Companies Act, 2013, Ministry of Corporate Affairs, August 2018.

Judicial system is prevailing since a very long period of time. It takes a lot of time and effort for a court to decide on a matter also this burden of pending cases is now not just limited to regular courts but is now extended to special courts and tribunals as well.

As we know that every coin has two sides and hence the impact of these amendments can also be negative in many ways. As Indian market has a wide range of companies it starts from very small to very big and powerful and hence the fine fixed can be either very easy to pay or not even affordable depending on the company's capacity to pay this is the first drawback. However paying capacity also can not be the only determining criteria for fixing fines that has a lot more complications. And the major impact which can be one aspect is when the adjudicating authority is transferred from judiciary to other professionals the oppression of poor can be a widespread as there is a high probability of corruption and favoritism. This will lead to a terrible miscarriage of Justice. However this can be overturned if there is a neutral party who is there to check whether the adjudicating authority is functioning properly or not. We will further dive into these amendments so that we can conclude the appropriate impact of these amendments.

II. RECENT AMENDMENTS AND UNDER CAA AND CAB:

The cabinet has initiated a lot of steps towards speedy implementation of CAB 2020, the first such step taken to fulfill the objective of CAB 2020 was to introduce Fresh start scheme.

MCA announced the Fresh Start Scheme for companies on 30th March 2020. The fresh start scheme is the time period starting from 1st April, 2020 and 30th September 2020, this bracket time is relaxation given to companies. During this bracket of time the companies are provided with a relief to correct all the defaults of delays in filing statutory forms with the Registrar of the Companies in India (ROC) for certain categories of companies.

It can be understood as immunity for defaults done in filing with the ROC. It is a period when the companies have a chance to avail benefit to finish all of their pending compliances, even if the duration of default has been very long then also they can avail this benefit without being levied with fine. The immunity provided by the fresh start scheme is also extended to companies against whom ROC have already initiated or is likely to initiate prosecution or penal proceedings attracted by such failure or delay in compliances.

This scheme was launched by Ministry of Corporate of Affairs just before starting of the precautionary Lockdown to prevent the spread of pandemic disease COVID- 19.

As we mentioned that the amendments are towards lessening the burden from the shoulders of

Judiciary and shifting the adjudicating authority to another body let us know in detail about the In-house Adjudication Framework which will deal with appeal and adjudication.

The CAA 2019 brought this key amendment under section 454 of the Act that is the **In-house Adjudication Mechanism (IAM)** which altered the procedures of dealing with cases related to compoundable offenses under the Companies Act, 2013. It substituted the appeal and adjudication process before the NCLT. Now these cases related to certain offences will be dealt by an online platform constituted by the MCA. This entire process does not require physical appearance until and unless there are some exceptional cases. The IAM has a limit on its jurisdiction it can only deal with the offences having provision of monetary penalty to the extent of INR 2.5 Million and the cases having offences which has penalty more than this limit, will continue to be in the hands of NCLT.

Furthermore we are going to discuss the legislative reforms to be done by Companies Amendment Bill, 2020. Before diving into the provisions let us first understand the basic principle behind the proposed amendments. The CLC observed that the major element of any criminal offense is *mens rea* and it can be attracted when there is any intent to harm or fraud or has conflict with the public interest however, mere civil wrongs which arise due to procedural error or technical delays in filing cannot attract *men rea*. This was the main objective behind decriminalization of these corporate offenses to civil wrongs. Now, we can further discuss some major amendments proposed under the Companies Amendment Bill 2020.

1. Public offer documents

Section 26(9) and 40(5) of the Act are proposed to be omitted the punishment which provides for Detention from the provisions which provide for public offering of securities. However, there is no change in the amount of monetary penalty. This omission does not suggest dilution of Detention in the matters which suggest Fraud under the Act. Also non compliance can still attract regulations laid down by SEBI.

2. Buy-back of securities

Section 26(9) and 40(5) of the Act are proposed to be omitted the punishment which provides for Detention from the provisions of section 68 and the rules framed under this section along with SEBI regulations which provide for buy-back of securities. However the Company at default and the officer in default continue to be liable for any non compliance done during the process of buy back of securities with the monetary penalties.

3. SBO (Significant Beneficial Owners)

Section 90 (10) of the Act are proposed to be omitted the punishment which provides for Detention from the provisions Section 90(10) providing for those significant beneficial owner who does not make proper disclosure of their interests on time to the company. This omission is not just limited to the punishment for detention but also proposes to amend the sum of monetary fine. The CAB 2020 proposed to change the penalty from INR 10 Million being the existing penalty to be reduced to INR 50,000, the provision also provides for the per day penalty from the date of default which is INR 10000 which shall be reduced to INR 1000, along with a bar on maximum penalty being INR 200,000.

Under Section 90(4) of the Act, the Companies are also required to file the details received from their SBO with the RoC, and failure to do so within the stipulated timeline could attract penalty extending up to INR 5 Million for both the company and the officer-in-default.³ The Bill also proposed that the quantum of the monetary penalty should be rationalized as per:

- (i) The defaulting company can be penalized up to INR 100,000 and INR 500 for per day penalty since the day of defaults, further total capping is done to maximum of INR 500,000.
- (ii) The officer in default can be penalized up to INR 250,000 and INR 200 for per day penalty since the day of defaults, further total capping is done to maximum of INR 100,000.

4. Financial statements of a company

Under section 134 (8) If a company contravenes the provisions regarding the compliances of Financial statements(section 134(1)), the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with Detention for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.⁴ The punishment provided in the above mentioned section is proposed to be omitted in the CAB 2020, it also proposed to reduce the monetary penalties to INR 300,000 for companies at default and penalty for the officer in default to have a reduction of almost 1/10th of the existing penalty that is INR 50,000.

It also proposes reduction in penalties imposed under section 137(3) of the Act which is

³ Section 90(11) of the Act

⁴ Section 134(8) of the Act

attracted due to delay in ROC filing of the financial statements⁵, existing being INR 10 Million for company at default and INR 600,000 for the officer in default to be reduced to INR 200,000 and INR 60,000 respectively.

5. Corporate social responsibility

CAB 2020 has proposed to omit the punishment of detention up to 3 years as proposed under Section 21 of the CAA 2019⁶ attracted due to a default under Section 135(5) of the Act which mandates the minimum share of profit to be spent under CSR contribution or transfer the amount not spent in the CSR Fund.⁷

Further the CAB 2020 also proposed Ministry to substitute the existing monetary penalty with a justified pattern of penalty which will increase or decrease depending on the minimum CSR spend obligations and hence depending on the profitability of the company in a particular financial year.

CAB 2020 further considered fine under this act as civil penalty in nature. Clause 27 of the bill provides that if a company defaults in complying with sub-sections (5) or (6) of the said section, such company and every officer of such company who is in default shall be liable to a monetary penalty. It also seeks to insert a new sub-section (9) in the said section to provide that the requirement of constitution of Corporate Social Responsibility Committee shall not be applicable, in case the amount required to be spent under sub-section (5) of the said section does not exceed fifty lakh rupees.⁸

6. Director's : Appointment and qualification

It also proposed the omission of punishment of Detention under section 167 (2) of the act regarding a director after being disqualified and the office being declared vacant then also continues to hold the office. The cab 20-20 proposes to increase the penalty 5 times the existing penalty that is INR 500000.

CAB 2020 further proposed to reduce the Amount of Penalty charged per day from the date of default from INR 5,000⁹ to INR 2000 under Section 165(1) of the Act.

7. Related party transactions

Under section 188 of the act it provides for the punishment of Detention in the case when a

⁵ Section 137 (3) of the Act

⁶ Section 21 of the CAA 2019, Amendment provisions regarding the corporate social responsibility under the Act, has not been notified yet.

⁷ Section 135(5) of the Act

⁸ Clause 27 of the Companies Amendment Bill, 2020.

⁹ Section 165(6) of the Act

company listed with SEBI, enters into a related party transaction which may extend to a period of one year.

However the Bill proposes to increase the amount of fine imposed on the listed companies 5 times from INR 500000 to INR 2.5 million. It also proposed to increase the monetary penalty for unlisted companies to be charged with INR 500000.

8. Oppression and Mismanagement

CAB 2020 proposes the omission of punishment of Detention under section 242 (8) and 243 (2) of the said Act which provides for Detention for a period up to 6 months. It omitted the punishment of Detention but it proposes to fix the monetary penalty imposed on the officer-in default at INR 100000 under section 242(8) and INR 500,000 under Section 243 (2) of the Act, while eliminating the bar on minimum of INR 25000.

III. CONCLUSION

a. Positive Impact of recent amendments

Starting with a positive impacts of the proposed amendments we can have a clear picture of the long-term objectives for benefiting the stakeholders and investors as this is providing ease of doing business also providing a way more effective redressal and enforcement mechanism for such statutory non compliances. This is also a step towards protecting the Goodwill of a company which gets tarnished with the imposition of Detention for mere technical lapses. As clearly observed by the CLC the regulatory compliances do not attract penalties such as Detention.

These will also encourage the executive officers to take part in operational matters without having pressure of exposing to a risk. The reduction of burden from the NCLT and shifting it to a new framework it should be appreciated as the burden of minor and non compliances matter is huge and also unnecessary for the precious time of Tribunals like NCLT. The proposed changes of setting up IAM framework will only make this cost effective as well as time efficient as compared to NCLT.

The CAB 2020 showcases a very good objective of sensitizing and rationalizing of monetary penalties accordingly for the company at default and the officer in default due to their paying capacity.

b. Negative Impact of these amendments

There are many positive impact of the decriminalization of these corporate non compliances

but the Ministry should not overlook the fact that this may also have a negative impact on maintenance of compliances because of relaxation of Detention penalties.

It may also give rise to a culture where malpractices of compliances will be done so easily because it will just have an impact on their pockets and not a permanent lesson. This may defeat the main objective or intent behind the legislative reforms under CAB 2020 and CAA 2019.

IV. SUGGESTIONS

Company law lays the foundation for good corporate governance among the Companies. Process of decriminalization of this law is very crucial for regulation of the corporate individuals. This process should be done very carefully to prevent company law from being the tongue in a mouth full of greedy tooth like creatures that are companies running in India.

These negative impacts of this bill can be avoided if there is imposition of punishment for Detention for repetitive offenders. CAB 2020 has a very good legislative intent by elimination punishment of Detention from the offence which does not even have the primary element of criminal act that is *mens rea* it has a great value of interpretation of criminal act as well.
