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Eleven Regulatory changes in Companies Act, 2013 and Insolvency & Bankruptcy Code, 2016 was made in the month of December. View the list…

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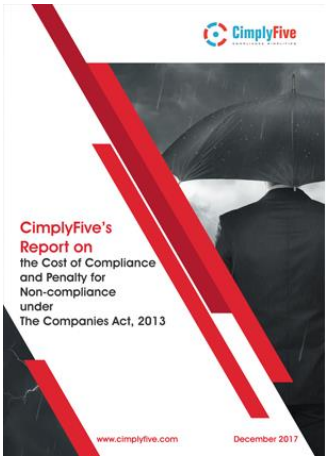
1612: Sutton Hospital Case-The First landmark Case that shaped the Corporate World



By Shankar Jaganathan

I. Facts of the Case: Mr. Thomas Sutton, one of the richest citizens of England, a coal miner and money lender by profession set up a corporation in London chartered by English King for the establishment of a hospital and a free grammar school for charity among others such initiatives. Read more…

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Editorial

Team **CimplyFive** wishes you, your family and your colleagues a **BLISSFUL 2018**. As we eagerly welcome the New Year, we look back at 2017 for what it was, a landmark year for company law enforcement that has long term implications for both the companies and corporate law professionals. The three events that stood out in 2017 for their emphasis on enforcement:

1. In June, a single notification automatically withdrew all the exemptions given to private limited companies, Section 8 companies and government companies that failed to file their Annual Return and Financial Statements with MCA. **A landmark move to rewarded compliant companies for their efforts.**
2. In September, the sudden (without any advance notice), large scale (lakhs of companies and directors), and stringent action (bank accounts frozen and directors disqualified) taken against companies and directors for their failure to file annual returns with the MCA. **An action that galvanized compliance initiatives in companies by highlighting the important role enforcement action plays.**
3. In December, the Company Law amendment approved by both the houses of the parliament significantly raised the filing fees and penalty costs for defaulting companies by amending section 403. **This amendment could cast a negative shadow on defaulting companies thereby giving section 403 of the Companies Act the notoriety that section 420 of the IPC has.**

All in all 2017 has set the stage for a strong and compliant 2018, which is at the core of good governance. This also sets the stage for CimplyFive to contribute to good governance in India by launching a new series titled **CALL FOR CHANGE.** This series identifies points of unfeasible regulations and attempts to build a consensus to have them modified thereby enabling a more compliant regulatory framework for the Indian corporate sector. For this month we have identified the challenges involved in conducting a board meeting with members participating through video conference and the need for change in it.

Continuing our series in the **First of First,** in this issue we have captured the first landmark case in Corporate Law that goes back to the year 1612 CE that recognized companies as an entity independent of its shareholders. Our other regular features –**Gist of Changes in the Companies Act** and the **Statutory Compliance Calendar** is also included in this issue.

Please feel free to share your feedback with us at contact@cimplyfive.com. We look forward to your feedback with interest and as ever strive to improve the quality of everything we do.

Happy reading,

Shankar Jaganathan
Editor of iComply
January 5, 2018

A CALL FOR CHANGE:
An Issue of Minutes and Seconds:

The Unintended Challenge of Conducting Board Meeting with Video Conference participants.

Technical advances need more than just equipment to be harnessed effectively. The critical element that converts technical advances into efficient and effective practices is belief systems. Use of video conference for board meeting is one such instance in India where the two have not moved in tandem.

ISSUE

The Companies Act, 2013 permit directors to participate in board meeting with some stipulations. However, one of the condition specified in Section 173(2) requires the video recording of such meetings to be stored, a stipulation that almost negates this facility. Recording and storing of video recording inadvertently converts the requirement to record 'Minutes' of the meeting into maintaining 'seconds' of the meeting.

In conventional board meetings where the participants are physically present, records of the decisions taken at the meeting along with the gist of discussions is captured and circulated to the participants for the consent before the minutes of the meeting is finalized. The requirement to record minutes is the only way to capture decisions made by the company, a distinct legal entity. However, in a board meeting where

directors participate in video conference mode, the requirement to store video recording of the entire meeting converts the requirement to maintain minutes of the meeting into maintaining, for the want of a better word, 'seconds' of the meeting that captures a detailed second-by-second recording of the meeting.

CHALLENGE

The requirement to record and store video recording of board meetings has major implications for good decision making. The fact that verbatim details of the discussions, with each and every dialogue exchanged is being recorded and stored which can be accessed by regulators and in case of disputes be produced as evidence in courts of law could inhibit fair and well deliberated discussion that is essential for good decision making; especially on the following matters in particular:

1. Evaluating political and economic environment during the business planning process,
2. Analysing competitive performance and responding to it,
3. Considering all options in succession planning,
4. Evaluating options for mergers, acquisition and divestures;

Further in case of large companies where the board meetings last six to eight hours with lunch and tea breaks or in joint ventures or companies with foreign investors that have directors located in different time zones, the need to have roll call at the beginning and end of each of the session imposes onerous requirements that add little value to the quality of decisions made.

CHANGE REQUIRED

The requirement to have video recording of the board meetings is not a global practice and is peculiar to India. Given the onerous procedural requirement imposed by having the board meeting video recorded and stored, and the implications arising therefrom of not enabling a free and frank discussion to take place in the board meeting, an amendment to bring it in line with international practices is vital in promoting well deliberated decisions and promote ease of doing business. The provisions related to video conference in the corporate law of the six large economies is reproduced here for ready reference:

1. Australia: Section 248D of the Australian Corporation Act, 2001 mandates 'using any technology consented to by all the directors. The consent may be a standing one and a director may withdraw their consent within a reasonable period before the meeting.'
2. USA: Section 8.20 (b) of the Model Business Corporation Act, 2002, that is adopted by 24 states permits 'conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting.'
3. South Africa: Section 73 of the Companies Act, 2008 stipulates that 'the electronic communication facility employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and also to participate effectively in the meeting.'
4. Canada: Section 114(9) of the Canada Corporations Act, 2009 permits using any facility that 'permits all participants to communicate adequately with each other during the meeting.'
5. Ireland: Section 161(6) of the Companies Act, 2014 requires the technology used in the meetings is such that 'each of whom is able (directly or by means of telephonic, video or other electronic communication) to speak to each of the others and to be heard by each of the others.'

A common feature of the law on using video conference in four of the five countries is the need to use technology that has the facility for all directors to speak and be heard concurrently, with Australia the earliest country requiring only the consent of all the directors for using any technology for board meetings.

In the United Kingdom, the Companies Act, 2006 does not contain any specific provision related to board meetings conducted using electronic medium. However by convention, where the articles of association permit attendance of directors using electronic medium is practiced.

We at CimplyFive believe that India has taken a revolutionary step in mandating the use of video conference for the board and board sub-committee meetings and not leaving it at the option of individual companies. However, to ensure that this facility is fully leveraged to promote ease of doing business and enable well deliberated decisions, the provisions

related to video recording and storing of the board meetings be deleted from the Companies Act, 2013, as the existing provisions for recording minutes of a board meeting that require the draft minutes to be circulated for board members feedback before it is finalized is an adequate safeguard.

Further if required as an interim measure the provision contained in general circular 28/2011 issued under the Companies Act, 1956 can be retained. This circular required the company to maintain for one year a video recording of the conclusion of the meeting where the Chairperson summarized the decision taken in the meeting with respect to each agenda item and the names of directors who consented or dissented to those decisions.

Please do write to us if you concur with the need to have this change in place for creating a more enabling regulatory environment that promotes ease of doing business without diluting elements of good governance.

1612: Sutton Hospital Case-The First landmark Case that shaped the Corporate World

By Shankar Jaganathan

I. **Facts of the Case:** Mr. Thomas Sutton, one of the richest citizens of England, a coal miner and money lender by profession set up a corporation in London chartered by English King for the establishment of a hospital and a free grammar school for charity among others such initiatives. Unfortunately, he died before the hospital could be constructed leaving a large portion of his wealth in the hands of the corporation, which was intended for the construction of this hospital.

One of his heirs Simon Baxter, contested the wealth given to the corporation and wanted it cancelled on the ground that the corporation set up to construct the hospital was nothing but a 'mathematical or Utopian hospital' in the nature of a cipher or empty placeholder, that did not exist physically.

II. **Issue in contention:** The issue in contention was whether a corporation is an entity that could own properties in its own name as a principal owner. As long as Mr. Sutton was alive, the corporation could own the property as his agent, but on his death who owns the property that was given to the corporation was the moot question.

The heirs who contested the wealth given to the corporation contended that a corporation can own property only as an agent of its shareholders and not in its own right. Hence on the death of Mr. Sutton, the property returns to his estate, and is available to all the heirs.

III. **Basis for decision:**
Sir Edward Coke, the judge deciding the case held a corporation to be a 'legal' entity with the right to own property in its own, distinct from that of its shareholders. He went on to elaborate the nature of the corporation as a legal entity by describing it as:

"A Corporation aggregate of many is invisible, immortal, & rests only in intendment and consideration of the law; and therefore a dean and chapter cannot have predecessor nor successor. They may not commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person nor swear. It is not subject to imbecilities, death of natural body, and diverse other cases"[1]

IV. **Concept Defined:** With this case, the Company as a distinct legal entity with the right to hold property in its own name independent of its shareholders was established. By extension, a company could sue and be sued in its own name distinct from that of its shareholders.

V. **Exceptions:** Lifting of the corporate veil, or disregarding the corporation as a separate entity and looking at its Directors and shareholders is done only

[1] Holdsworth, W S., English Corporation Law in the 16th and 17th Centuries, The Yale Law Journal, Vol. 31, No.4 (Feb 1922), p386

under certain circumstances which is listed out in this judgment.

"It is "hornbook" law that a duly formed and registered company is a separate legal entity from those who are its shareholders and it has rights and liabilities that are separate from its shareholders. A court can "pierce" the carapace of the corporate entity and look at what lies behind it only in certain circumstances. It cannot do so simply because it considers it might be just to do so. Each of these circumstances involves impropriety and dishonesty. The court will then be entitled to look for the legal substance, not just the form. In the context of criminal cases the courts have identified at least three situations when the corporate veil can be pierced. First if an offender attempts to shelter behind a corporate façade, or veil to hide his crime and his benefits from it. Secondly, where an offender does acts in the name of a company which (with the necessary mens rea) constitute a criminal offence which leads to the offender's conviction, then "the veil of incorporation is not so much pierced as rudely torn away". Thirdly, where the transaction or business structures constitute a "device", "cloak" or "sham", i.e. an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts."[2]

An example to illustrate each of the three circumstances identified above will illuminate the situation further:

1. If a public servant receives illegal gratification not in person but in a company owned or held for their benefit, it would be an attempt of the offender to hide behind the façade of corporate veil.
2. Where a company through the negligence or of intent causes harm to employees, customers or general public like in the case of Union Carbide Bhopal gas tragedy
3. A party to a contract who is barred from undertaking certain activities for consideration received like in the case of non-compete clause, sets up a company to undertake those barred activities.

But for these specific circumstances, in all other cases, a Company is considered distinct from that of its shareholders and directors.

[2] para 76 of 2009 England and Wales Court of Appeal (Criminal Division) case 1303

Compliance Calendar

January 7th	TDS Payment for December, 2017.
January 10th	GSTR-1 (Nov, 2017)
January 15th	Pay PF contribution for December, 2017
	ESIC monthly deposit
January 18th	GSTR-4 (Oct-Dec, 2017)
January 20th	Professional Tax payment
	GST Payment for December, 2017- GSTR 3B
January 25th	PF Return for December, 2017

Gist of regulatory changes in Companies Act, 2013 in the month of December, 2017

➢ **04.12.2017**

- **Designation of Special Court for the state of Karnataka**

  The Central Government with the concurrence of the Chief Justice of the High Court of Karnataka, has designated the LIX Additional City Civil and Sessions Judge, Bengaluru City, as special court for the state of Karnataka to ensure speedy disposal of trials in cases where the offence is punishable with imprisonment of two years or more.

- **The Companies (Filing of Documents and Forms in Extensible Business Reporting Language), Second Amendment, Rules, 2017**

  Substitution of Annexure III: The XBRL taxonomy for filing cost audit report and other documents to the Central Government provided in Rule 4 of the Companies (Filing of Documents and Forms in

Extensible Business Reporting Language) Rules, 2015 is substituted.

- **Relaxation of additional fee and extension of last date of filing E-Form CRA-4 vide General Circular no. 15/2017**

  MCA has extended the last date for filing E-Form CRA-4 for the financial years starting on or after 1st April 2016 without payment of additional fee till December 31, 2017.

➢ **07.12.2017**

- **Companies (Cost Records and Audit) Amendment Rules, 2017**

  Clause defining Indian Accounting Standards as referred in Companies (Indian Accounting Standards) Rules, 2015, has been added under the definitions of Companies (Cost Records and Audit) Rules.

  Further, by this amendment, Form CRA-1 (Particulars relating to the items of costs to be included in the Books of Accounts) and Form CRA-3 (Form of the Cost Audit Report) is substituted and deemed to be substituted with effect from the 1st day of April, 2016.

- **Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017**

  IBBI has issued Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017 prescribing the manner of filling complaints and grievances against insolvency professional agency or its member or information utility and disposal of such complaints and grievances. These regulations prescribe the form, information to be provided and the time within which the grievance to be filed with the prescribed authority. The regulations also provide for the prescribed authority to not take cognizance of anonymous complaints.

➢ **15.12.2017**

Insolvency Professionals to act as Interim Resolution Professionals or Liquidators (Recommendation) Guidelines, 2017

IBBI has issued guidelines specifying the methodology that will be used by them for recommending /proposing the name of an Insolvency Professionals who may act as an interim resolution professional, including constitution of Panel of Insolvency Professionals.

➢ **19.12.2017**

Clarification regarding Submission of Financial Information to Information Utilities

RBI has issued instructions to all financial creditors regulated by RBI to submit financial information and information relating to assets in relation to which any security interest has been created to an information utility in accordance with provisions of chapter V of IBC, 2016 and IBBI (IUs) Regulations, 2017.

IBBI has registered National E-Governance Services Limited (NeSL) as the first IU under the IBBI (IUs) Regulations, 2017 on September 25, 2017.

➢ **20.12.2017**

Companies (Cost Records and Audit) Second Amendment Rules, 2017

MCA vide an amendment notification has substituted the definition 'Central Excise Tariff Act Heading' as referred in Central Excise Tariff Act, 1985 to 'Customs Tariff Act Heading' as referred in Customs Tariff Act, 1975. This substitution is deemed to be effective from 1st July, 2017.

➢ **29.12.2017**

Condonation of Delay Scheme, 2018- General Circular 16/2017

MCA vide a General Circular has issued a Condonation of Delay Scheme, 2018 providing an opportunity to the companies that had failed to file financial statements or annual returns with the MCA to rectify their defaults by filing overdue documents and seek condonation of delay by filing e-form CODS 2018 thereafter. The scheme shall come into force with effect from 01.01.2018 and shall remain in force up to 31.03.2018. The e-Form CODS 2018 will be available from

20.02.2018 or an alternate date, which will be intimated by the Ministry.

➢ **31.12.2018**

- **The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2017**

Substitution in Sub-Regulation 2(1)(f): The definition of "dissenting financial creditor" is substituted to include even those financial creditors who abstain from voting for the resolution plan approved by the committee.

Substitution in Sub-Regulation 35(3): The regulation is amended to mandate that the resolution professional shall provide the liquidation value to every member of the committee in electronic form only after receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the liquidation value and shall not use such value to cause an undue gain or undue loss to itself or any other person.

Insertion of Regulation 35(4): It provides that every interim insolvency professional or the resolution professional shall maintain confidentiality of the liquidation value.

Omission of Regulation 36(2)(j) and (k): Liquidation value need not be disclosed in the information memorandum.

Substitution of Regulation 39(1): It provides that the resolution applicant shall submit the resolution plan(s) to the resolution professional within the time given in the invitation for the resolution plans in accordance with the provisions of the Code.

- **The Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2017**

The corresponding changes are made under the Fast Track Insolvency process as is the case in normal process detailed above.

CimplyFive's Report on Cost of Compliance and Penalty for Non-Compliance under the Companies Act, 2013

"CimplyFive's Report On Cost of Compliance and Penalty for Non-Compliance under the Companies Act, 2013" is a first of its kind Report that quantifies the Cost of Compliance.

This is an in-depth report on compliance costs and non-compliance penalties across six countries that introduces a new concept, quantifies cost of compliance and provides a comparative stock take of compliance requirements across six countries. This report quantifies the cost of compliance for companies with an authorized capital of Rs.1 lakh, Rs.5 crores and Rs.25 crores.

To read full report click here

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About us

CimplyFive Corporate Secretarial Services Pvt Ltd

Vision:
Leverage research and technology to eliminate procedural non-compliance risk for entities regulated by the Indian Companies Act, 2013

Mission:

Provide a cost-effective, secure web-based, menu driven, subscription services that provides curated resolutions, timely alerts and informative dashboards to free the management bandwidth for pursuing business goals

BLISS
(Board Leaders Integrated Software Solution)

Our product BLISS (Board Leaders Integrated Software Solutions)

- A digital productivity tool for Compliance with the Companies Act,2013
- Provides comprehensive coverage of Board meetings, Shareholder meetings and Sub-committee meetings
- Rich bank of curated but editable resolutions
- Fully integrated modules- Agenda, Minutes, Registers and Returns
- Timely alerts and reminders
- Rich and real-time dashboard

www.ca2013.com: Company law at your fingertips. A free to use website, integrating Companies Act with Rules, Notification, Orders and Circulars that is real time and online

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CAIRR



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