IMPROVING EASE OF DOING BUSINESS IN INDIA: SUCCESSIVE AMENDMENTS IN COMPANIES ACT

RAMYA ESWARAN
Practitioner (Madras High Court)
, Velachery, Chennai, India - 600042.

ABSTRACT
In the wake of constantly changing business atmosphere in India and across the world, a fully convenient, and transparent, Company Act is necessary. The Indian government opted for making certain changes in the provisions of Companies Act, 2013. These changes have been brought about through the Companies Amendment Act of 2015 (No. 21 OF 2015). Many provisions and regulations have been added to, made substituted, omitted from, inserted, and included in the existing Companies Act of 2013. These changes were related to removal of drafting errors, correction of oversight errors and removal of provisions which are oppressive to an environment to do business.

Keywords*: Company, Amendment, Act, Business.*

1. Introduction

The Indian Government is actively working to improve and ensure ease of doing business in India. In order to achieve that Companies Amendment Act, 2015 (No. 21 OF 2015) has been introduced. This bill facilitates the ease in doing business. The Companies Amendment Bill was passed in Lok Sabha on 17th December 2014 and same was passed in the Rajya Sabha on 13th May 2015. The Companies Amendment Bill got the president assent on 25th May 2015 and subsequently published in the Official Gazette of India on 26th May 2015. The Companies Amendment Act, 2015 is a welcome step which addresses some of the concern in Companies Act 2013, though there are several other concerns which are yet to be addressed by the Government of India. All sections of the amendment act have been made effective from 29th May, 2015 except Section 143 (related to 'fraud') and 177 (related to omnibus approval by audit committee) in the Companies Act, 2013. The amendments deal with related party transactions, fraud reporting by auditors, public inspection of board resolutions, responsibilities of audit committee, restrictions on bail, making common seal optional, commencement of business, minimum paid-up share capital, strength of benches for hearing winding up cases and jurisdiction of special courts to try offences. This article analyses the various aspects of Companies Amendment Act, 2015.

2. Significant changes in the Companies Act, 2013

2.1. Removal of minimum paid up share capital

Earlier, the business organizations which wanted to take up a company it has to full fill the requirement of minimum paid-up share capital. The share capital should not be less than five lakh rupees in case of a public company and one lakh rupees in case of a private company as per Section 2(71) and 2(68) of the Companies Act, 2013 respectively. These requirements have been changed in Amendment Act 2015. A private limited company and a public limited company can be registered without the minimum paid-up share capital[1]. It is a welcome change since it inspires small companies to start a new business.

2.2. Common seal made optional

In the Companies Act 2013, common seal was mandatory for providing various authorizations, attestations and affixations on certain documents such as bills of exchange, share certificates etc. The Amendment Act has omitted the words 'and a common seal' which means it is not mandatory for a

[1] . S. 2 of the Companies (Amendment) Act, 2015.

company to have a common seal. Consequently, several sections such as section 9, 12, 22, 46 and 223 of the Companies Act, 2013 dealing with this common seal, have been amended. Similarly, changes have been made with regard to authorization for execution of documents. As per new amendment, the use of common seal has been made optional and several financial instruments such as bill of exchange, share certificates etc., may now instead be signed by the two directors or one director and a company secretary of the company[2].

2.3. Removal of declaration of commencement of business

Under Section 11 of the companies Act 2013, in order to commence business or exercise borrowing powers, a director of a company required to file a verified declaration with the Registrar of Companies that each subscriber had paid the requisite value of the shares agreed to be paid and that the minimum paid-up share capital requirement had been satisfied. Additionally, the company is also required to a file a verification of its registered office. The said Section had severe consequences under the Act, including a monetary fine and removal of the name of the company. The consequences remain intact by virtue of Section 248. Section 248 prescribes that the name of the company shall be removed, if the members do not subscribe to shares within a stipulated period and "a declaration under sub-section (1) of section 11 to this effect has not been filed[3]". The present Amendment Act has omitted this Section entirety[4]. This means that the companies (with share capital) are now free to commence operations without restrictions.

Though Section 11 has been omitted, consequent amendments in Section 248 have not been carried out. Reading Section 248 with this amendment, one would have to ignore the reference to Section 11 in Section 248 and conclude that companies would need to ensure that the members pay the subscription amounts, that they have agreed to pay, within 180 days of the incorporation of the company and that there is no requirement to file any declaration. The condition has also been removed from one of the power of Registrar to remove name of the company. Hence, companies can now commence business operations soon after receipt of the certificate of incorporation.

2.4. Punishment for acceptance and repayment of deposits

Section 73 prohibits a company from inviting, accepting or renewing deposits from the public except in the manner provided. The penalty for non-compliance with this Section had been inadvertently left out in the Amendment Act, 2015. A new Section 76 A has been introduced for contravention of section 73 and 76 of companies act, 2013 which deals with "Prohibition on acceptance of deposits from public and acceptance of deposits from public by certain companies" the penalty provision above non-compliances and prescribing specific punishment for deposits accepted and to deal with defaults in repayment of depositors[5].

The proposed penalty is (i) the payment of the amount accepted as deposit and the interest due by the company along with payment of fine by the company which shall not be less than one crore rupees and which may extend up to ten crore rupees, and (ii) every officer who is in default shall be punishable with imprisonment which may extend to seven years or fine which may extend to two crore rupees or both. Further, if it is proved that the officer in default has contravened the said provisions knowingly or wilfully, with an intention to deceive then he shall be additionally liable for action under Section 447 which prescribes the punishment for the commission of fraud. It is quite likely that the deposit accepted by the company is much lesser than one crore. In such cases, the punishment prescribed not only seems unreasonable and disproportional but additionally imposes burden on the company to arrange for these funds. The intent of the Amendment Act seems not just to punish the company for the wrongful

[2]. S. 3, 5, 6, 7 and 18 of the Companies (Amendment) Act, 2015.
[3]. S. 19 of the Companies (Amendment) Act, 2015.
[4]. S. 4 of the Companies (Amendment) Act, 2015.
[5]. S. 8 of the Companies (Amendment) Act, 2015.

acceptance of deposit but also to deter the companies from undertaking such acts. Further, with a focus on investor protection, the amendment seeks to bring in specific punishment for acceptance of deposits in violation of the more stringent requirements that have been prescribed under the new Act.

2.5. Board resolutions are confidential

Earlier, under Section 117 read with Section 399, certain resolutions (e.g. all special resolutions, resolutions for terms of appointment of managing director, winding-up resolutions, resolutions in relation to sale of undertaking / borrowings, etc.) filed by a company with the Registrar of Companies were open for inspection by any person or to obtain copies. The Amendment Act 2015 has limited public access of such resolutions relating mainly to strategic business matters. Such documents will no longer be available for public review or permitted to take their copies. This addresses the concerns raised by several corporate in India, specifically private companies, in terms of exposure of critical business matters in public. As per the newly amended law, shall be inserted "provided that no person shall be entitled under section 399 to inspect or obtain copies of such resolutions" thus ensuring confidentiality of such resolutions[6].

2.6. Dividends cannot be declared by companies having losses

Section 123 is an enabling provision for companies to declare dividend in a financial year, subject to fulfillment of prescribed conditions. The amendment act introduced new proviso shall be inserted "Provided also that no company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company for the current year"[7]. Hence, companies undergoing losses or having negative reserves now cannot declare dividends.

2.7. Regulation of transfers of unclaimed dividend and shares

Section 124 of the Act provides for the transfer of the dividend declared, but not claimed within 30 days of such declaration, to the unpaid dividend account. Under sub-section 6, the Amendment Act has now clarified that, if such dividend has not been paid or claimed for a period of seven consecutive years from the date of such transfer then such amount shall be transferred by the company to the Investor Education and Protection Fund along with the shares in respect to which the unclaimed/unpaid dividend has been transferred[8]. By adding an explanation to the proviso of the said sub-section, the Amendment Act has clarified that if any dividend is paid or claimed for any year during the period of seven consecutive years, such shares shall not be transferred to Investor Education and Protection Fund.

2.8. Report by auditor in respect of fraud

In section 134 (3) after clause (c), the following was inserted: "(ca) details in respect of frauds reported by auditors under sub-section (12) of section 143 other than those which are reportable to the Central Government[9]." With this amendment, provide a 'material' limit for reporting of frauds to the Central Government. The amendment gives way to such an interpretation and provides that only frauds above specified limits needs to be reported by the auditors to the Central Government. Frauds of a lesser in value as prescribed above only needs to be reported to the Audit Committee, if any or the Board.

Under Section 143(12), if an auditor has reason to believe that an offence involving fraud is being committed against the company by officers or employees of the company, he shall immediately report the matter to the central government. The Amendment Act, 2015 has now provided that in case of a fraud involving lesser than the specified amount, the auditor shall report the matter to the audit committee constituted under section 177 or to the board in other cases within such time and in such manner as may be prescribed: Provided further that the companies whose auditors have reported

[6]. S. 9 of the Companies (Amendment) Act, 2015.
[7]. S. 10 of the Companies (Amendment) Act, 2015.
[8]. S. 11 of the Companies (Amendment) Act, 2015.
[9]. S. 12 of the Companies (Amendment) Act, 2015.

frauds under sub-section 12 of section 143 to the Audit Committee or the Board but not reported to the Central Government, shall disclosed details about such frauds in the Board Report in such manner as may be prescribed[10]. Accordingly such offences which involve amounts exceeding the prescribed threshold must be reported to the Central Government. Further, all offences that involve fraud but are below the aforementioned threshold, must be reported to the Audit Committee and disclosures pertaining to the same must be made in the Board's Report. The Amendment Act has qualified offences relating to fraud in monetary terms. This amendment ensures that frauds involving small amounts are not escalated to the Central Government. However, there is sufficient deterrence for all kinds of frauds, even those involving smaller amounts, as all frauds need to be reported to the audit committee and further disclosed in the board's report. The above amendment which will require reporting of only material frauds to the central government would provide great relief to both corporate as well as auditors; eases the administrative burden for the auditors, however, these amendments have not been notified as yet.

2.9. Omnibus approval for Related Party Transactions

In sub-section 4 of section 177 of the Companies Act, 2013 provides the audit committee of a company to approve and review related party transactions of the company. After the Amendment Act, in section 177 of the Principal Act, in sub-section (4), in clause (IV), the following proviso shall be inserted, "Provided that the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions as may be prescribed[11]". The Audit committee shall satisfy itself on the need for omnibus approval for transactions of repetitive nature and that such approval is in the interest of the company. The Amendment Act now empowered such audit committees to give collective approvals for related party transactions. Thus, for ease in doing business, now the audit committee will be empowered to give omnibus approvals for related party transactions to be enter into by the company.

2.10. Utilised principal business in respect of loan to director

Under the Companies Act, 2013 section 185, a company give loans, guarantees and securities to its directors or other persons in whom the interest of the directors lie. Loans or guarantees can be provided by the holding company to the subsidiary company. This Act did not have any restrictions on holding company providing loan to subsidiary company. The Amendment Act has clarified the same in abundance of caution. Loans can be made by a holding company to its wholly owned subsidiary company or it can give guarantee or provide security in respect of any loan made to its wholly owned subsidiary company. Also, any guarantee may be given or security may be provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company. Provided the loan in each of these cases is utilised by the subsidiary for its principal business[12]. The amendment for exemption u/s 185 for providing loans to wholly owned subsidiaries and guarantees / securities on loans taken from banks by subsidiaries were already there in the rules to the Section. The purpose of the amendment might be to bring the exemption within the act itself.

2.11. Relaxations to Related Party Transactions

According to section 188 of the Companies Act, 2013, before a company enters into a contract or agreement with a related party, it has to fulfil certain prescribed conditions and with the consent of the Board of Directors through the passing of a resolution at the board meeting. Also the section 188, lists out such related party transactions, which require approval from the board of directors and/or the shareholders, as prescribed. If such related party transactions meet the thresholds prescribed in the

[10]. S. 13 of the Companies (Amendment) Act, 2015.
[11]. S. 14 of the Companies (Amendment) Act, 2015.
[12]. S. 15 of the Companies (Amendment) Act, 2015.

Companies Act, 2013 and the rules there under, approval from the shareholders by way of passing of a special resolution (i.e. requiring approval of three-fourth majority of shareholders) was required.

The Amendment Act relaxed the approval requirement from a special resolution (i.e. requiring approval of three-fourth majority of shareholders) to an ordinary resolution (i.e. requiring approval of simple majority of shareholders) in case of related party transactions which require shareholders' approval[13.] With the amendment, the changes that have been brought to this section are that firstly, the word special has been omitted. Now the resolution could be passed with a resolution and not necessarily with a special resolution. Secondly, earlier a special resolution was required to be passed in case of related party transactions between the holding and subsidiary company. This amendment has removed this requirement as well as a condition that the accounts of the subsidiary company are consolidated with the subsidiary company. In ordinary resolution instead of special resolution for Related Party Transactions will make the approval process easier. Related Party Transactions between holding company and its wholly owned subsidiary would no longer require members' approval, even of the holding company. In consideration of practical difficulties faced by corporate the requirement of special resolution for passing related party transaction has been diluted. Members may pass such transactions by an ordinary resolution.

2.12. Bail restrictions to apply only for offence relating to fraud

Section 212 (6) provides that in the case of certain offences relating to fraud, the accused person cannot be released on bail unless the (i) public prosecutor has been given an opportunity to oppose such bail and (ii) the court is satisfied that there are reasonable grounds for believing that the accused person is not guilty of the offence and he is not likely to commit any offence while on bail. Pursuant to the Amendment Act the bail restrictions to apply only to offence relating to 'fraud' under Section 447 of the Act[14.] The offence of fraud under Section 447 includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

2.13. Winding-up cases to be heard by two member bench

Section 419 (4) states that the president shall, for disposal of any case relating to winding up of companies, constitute a special bench consisting of three or more members. The Amendment Act has rectified the inadvertent error, as the winding up cases are to be heard by two member bench instead of a three member bench. Among the two members, one shall be judicial member and other is technical member. According to that winding up of companies cannot be heard by special benches constituted by the president of the National Company Law Tribunal. In this aspect the words "or winding up" shall be omitted[15.]

2.14. Special court trial offences

According to section 435 and 436, the central government to establish or designate special courts for the purpose of providing speedy trial of offences. However, with the amendment coming into force, the special courts shall no longer have the jurisdiction to try all the offences mentioned in the Companies Act, 2013. They shall try only those offences which are punishable with imprisonment up to two years. Provided that all other offences shall be tried, as the case may be by a Metropolitan Magistrate or a Judicial Magistrate of the first class having jurisdiction to try any offence under this Act or under any

[13]. S. 16 of the Companies (Amendment) Act, 2015.
[14]. S. 17 of the Companies (Amendment) Act, 2015.
[15] . S. 20 of the Companies (Amendment) Act, 2015.

pervious Company Law[16]. This amendment has been introduced to allow magistrate courts to try minor violations and to reduce burden of special courts.

2.15. Power to exemption process

Section 462 deals with the power of the central government to exempt class or classes of companies from the provision of the Companies Act by notification which was required to be approved by each House of Parliament. In this Section also prescribed the process for presenting such notification before the Houses etc. The Amendment Act to Section 462 attempts to rationalize the procedure and clarified that the 30 day period, for issuing draft notifications granting exemptions to various class or classes of companies, for a faster process of giving exemption to classes of companies. Pursuant to the amendment, a copy of every notification proposed to be issued by the central government under Section 462(1) for the purpose of exempting a class or classes of companies from certain provisions of the Companies Act, is to be presented in draft before each House of the Parliament (collectively 'Houses'), while in session, for a total period of 30 days. If both houses disapprove of the issue of such notification, it will not be issued, or will be issued only in such modified form as may be agreed upon by both houses. The Amendment Act 2015 additionally stipulates in the same section that, in reckoning any such period of 30 days, no account is to be taken of any period during which either of the Houses is prorogued or adjourned for more than four consecutive days[17].

3. Conclusion

The Companies (Amendment) Act 2015 has been a pragmatic form of legislation which has brought forward significant changes in the view of corporate establishment and corporate governance. The amendments have clarified certain provisions of the Act and attempted to plug certain loopholes that were existent in the Act. The Amendment Act has also introduced certain provisions that have improved the ease of doing business in the country and will be welcomed by companies and directors. Recently, additional amendments have been introduced in the Companies Act 2013 which regulates incorporation, regulation and winding up of companies. This bill has been introduced in the Lok Sabha on 16th March 2016 and yet to be passed.

[16]. S. 21 & 22 of the Companies (Amendment) Act, 2015.
[17]. S. 23 of the Companies (Amendment) Act, 2015.