
Whether the vacation of office of managing director during CIRP, requires to be filled in by the Resolution Professional?



Rohit Dubey

Advocate, ACS

This Article deals with a situation of casual vacancy of managing director of a company during the pendency of Corporate Insolvency Resolution Process. Ideally, in a non-CIRP situation the same is required to be filled in by the Board of Directors u/s. 203(4) of the Companies Act, 2013.

We understand, on admission of an insolvency application by the adjudicating authority and upon appointment of the Interim Resolution professional the complete management of affairs of Corporate Debtor vests with the IRP by virtue of Section 17 of the Insolvency and Bankruptcy Code, 2016.

As per Section 17(1), the powers of the board of directors of the Corporate Debtor stands suspended and be exercised completely by the IRP. Hence, all the powers conferred upon the board are to be exercised and discharged by the IRP/RP. The relevant portion of Section is reproduced hereunder:

"17(1). From the date of appointment of the interim resolution professional, —

- (a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;*
- (b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;"*

Now coming to the mandatory requirement under the Companies Act, 2013. The Section 203(4) of the Companies Act provides that in case of a vacancy in the office of any whole time KMP the Board is required to fill-in within a period of 6 months from the date of such vacancy. Further, Section 203(5) provides for a penalty in case this mandatory requirement is not fulfilled. The relevant portion of Section is reproduced hereunder:

"(4) If the office of any whole-time key managerial personnel is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.

(5) If any company makes any default in complying with the provisions of this section, such company shall be liable to a penalty of five lakh rupees and every director and key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees and where the default is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such default continues but not exceeding five lakh rupees."

At this juncture it is also to be kept in mind that, "Appointment of KMP" is a power conferred upon the Board of Directors U/s. 179 of the Companies Act, 2013 R/w. Rule 8 of the Companies (Meeting of Board and its Powers) Rules, 2014. Hence, it is notable that by virtue of Section 17 of the Code the IRP/RP is vested with the power to appoint KMPs in the Corporate Debtor.

Additionally, in view of the MCA General Circular No. 08/2020 dated 06.03.2020 the RP is responsible for filing all the E-forms in the MCA portal and sign the form in the capacity of CEO in order to meet filing protocol at the portal. Now, the Section 196 (4) & (5) of the Companies Act, 2013 requires mandatory approval of the Shareholders upon such appointment. Hence, another connected issue is whether such requirement is to also be followed, which will be dealt with in later part.

The issue that remains is that whether the provisions of Section 203(4) of Companies Act are required to be complied with by the IRP/RP during the period when the powers of the board is itself suspended. In this respect the following needs to be considered:

- (a) Section 17(2) of the Code provides that the IRP who is vested with the management of corporate debtor **shall be responsible** for complying with the **requirements under any law** for the time being in force.
- (b) The IBBI Circular No. 002/2018 dated 03.01.2018 provides that the IRP/RP is required to ensure compliance with the requirements of all the applicable laws. The Relevant Portion of the same is as under:

*"A corporate person undergoing insolvency resolution process ...under the Insolvency and Bankruptcy Code, 2016 (Code) **needs to comply with provisions of the applicable laws** (Acts, Rules and Regulations, Circulars, Guidelines, Orders, Directions, etc.) during such process.... unless the provision is specifically exempted by the competent authority or becomes inapplicable by operation of law for the corporate person.*

*2. It is hereby directed that while acting as an Interim Resolution Professional, a Resolution Professional, or a Liquidator for a corporate person under the Code, **an insolvency professional shall exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person undergoing any process under the Code complies with the applicable laws.***

3. It is clarified that if a corporate person during any of the aforesaid processes under the Code suffers any loss, including penalty, if any, on account of non-compliance of any provision of the applicable laws, such loss shall not form part of insolvency resolution process cost or liquidation process cost under the Code. It is also clarified that the insolvency professional will be responsible for the non-compliance of the provisions of the applicable laws if it is on account of his conduct."

- (c) Section 238 of the Code provides overriding powers to the provisions of this Code over any inconsistent provisions under any other law for the time being in force. But, it has been a settled law that only those provisions of the other applicable laws which are not in consonance with the provisions of the Code are to be overridden.

However, the exact position of law is yet to be settled by the higher courts. In the case of *Minita Raja Vs. Ministry of Corporate Affairs* [MA 502/2019 in CP No.1792/IBC/NCLT/MB/MAH/2017] the NCLT Mumbai was of opinion that, in case a vacancy out of director disqualification has occurred in the company which is under CIRP, as the RP is already vested with the powers of Board of Directors there is no requirement to appoint any directors.

However, it is notable at this juncture that the Hon'ble NCLT though touched upon the captioned issue, but the position is yet to be cleared as to the conduct of RP in a situation where the law mandatorily requires (Section 203 of Companies Act) such appointment and on non-compliance the penalties will be levied.

Further, it is also to be kept in mind that any such appointment may construe a change in management of corporate debtor, and can only be done by RP after taking prior approval of COC as per Section 28(1)(j) of the Code.

Hence in view of the above, having known that the RP is vested with the powers of the Board of Directors U/s. 17(1) of the Code and is mandatorily required to discharge such powers (including the power to appoint the KMPs under Section 203 of the Companies Act) and at the same time he is required to ensure compliance with all of the Applicable Laws (under Section 17(2) R/w. 23(2) and the IBBI Circular), ideally, as a mandatory Compliance, the RP should appoint the Managing Director and fill in the vacancy subject to approval of COC as to the appointment of a particular person as MD and his term & remuneration. But, such appointment may not entitle such Managing Director with any of the Powers & Duties (by reason of the board being suspended), and his term & remuneration shall be as per the decision of the COC. In this situation, the minutes of Board Meeting for the appointment should also specify the reason of such appointment being done during CIRP and the fact of the appointed Managing Director being without Power & Duty and as per the Term & Remuneration fixed by COC. However, the person so appointed shall be bound to provide assistance and perform duties to the Resolution Professional as required under the Code.

However, the law in this respect is yet to receive some more clarity by way of judicial pronouncements.

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