

SCOPE AND LIMITATIONS OF SUBORDINATE LEGISLATION UNDER IBC

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The Insolvency and Bankruptcy Code, 2016 (Code/IBC) is a comparatively large piece of legislation. It deals with the subject of resolution and liquidation of different types of entities in an elaborate manner. There are more than 250 sections in the Code. At many places, the Code demands making of subordinate legislation for the purpose of carrying out its purposes. The subordinate legislation can be in the form of ‘rules’ or ‘regulations’. This paper analyses the scope and limitations of subordinate legislation under the Code.

The Code uses two different terms viz., ‘prescribe’ and ‘specify’ to denote the making of subordinate legislation under it. Clause (26) of section 3 of the Code defines the term prescribed as ‘*prescribed by rules made by the Central Government*’. The term specified is defined in clause (32) of the very same section as meaning ‘*specified by regulations made by the Board*’. In the Code, the rule making powers of the Central Government are conferred by section 239. Section 240 of the Code provides for the regulation making powers of the Insolvency and Bankruptcy Board of India (IBBI/ Board). By exercising such powers, a good number of rules and regulations have been made by the Government and the Board.

What is the scope of subordinate legislation? In one case¹, the Hon’ble Supreme Court observed that the essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. The legislature must retain in its own hands the essential legislative functions.² It can formulate the policy as broadly and with such details as it thinks proper, and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy.

DISTINCTION BETWEEN RULES AND REGULATIONS

While thinking about the rules and regulations, the first question that comes to the mind of a lay reader is the need for such a distinction. Under the Indian legislative practice, rules are what the Central Government or the State Governments make, and the regulations are made by any institution or organisation established by a statute. While rules apply to all matters covered by the statute, the scope of the regulations is narrower - being usually confined to internal matters of the statutory body. When regulations standardise the conditions of service of the employees or purport to formulate them, their character is further diluted by the nature of the subject matter.³ In this article, for ease of description, the terms rules and regulations are used interchangeably, unless otherwise specifically indicated.

Source of power need not be mentioned always

It is beyond doubt that rules and regulations can be framed only if there is an enabling power in the body of the statute. Such powers may be express or implied but should be clearly traceable to the provisions enacted by the Legislature. The fact that the source of power is not mentioned in the subordinate legislation is not going to affect its validity.⁴ As long as the power is present, non-quoting of the relevant source of power also does not vitiate the regulation. Even a misquoting of the section is not fatal.

Rules and regulations cannot travel beyond the Code

The rules are essentially meant for carrying out the purpose of the Act. It is one of the established principles of subordinate legislation that the rules and regulations cannot travel beyond the scope of the parent Act.⁵ If so done, it will be declared as *ultra vires* by courts. Further, the conferment of rulemaking power by an Act does not enable the rule making authority to make rule which are inconsistent with the provisions therein or repugnant thereto.⁶

*'It is fundamental that a rule-making body cannot frame rules in conflict with or derogating from the substantive provisions of the law or statute under which the rules are framed.'*⁷

Rules made under the rule making provision of an Act cannot take away what is given by the Act.⁸ A conferment of general power to make rules is strictly ancillary and does not enable the authority to extend the scope of general operation of the enactment. Of course, the power will also cover what is incidental to the execution of its specific provisions. At the same time, such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.⁹

Ordinarily, recourse to rules is not advisable to interpret the provisions of the primary enactment. However, where the statute is ambiguous or doubtful and a particular construction has been put upon the Act by the rules for a particularly long time, it might be justified.¹⁰

Can rules or regulations be made retrospectively?

It is a settled law that the rule-making authority does not possess plenary power to give the subordinate delegated legislation retrospective operation unless and until that power is expressly conferred by the parent enactment.¹¹ However, there is no general legal bar in law against giving a retrospective effect to a subordinate legislation. Normally, rules and regulations operate prospectively, and retrospectivity is an exception. It would be possible only if the parent Act permits such retrospective rule making.¹² Even where the statutes permit framing with retrospective effect, the exercise of the power must not operate discriminately or in violation of any constitutional right so as to affect a vested right.¹³ The Supreme Court has held that the rule making authority should not be permitted normally to act in the past.¹⁴ A look at sections 239 and 240 of the IBC will make it clear that neither the Government nor the Board has powers to make retrospective subordinate legislation.

Is levy of fees permissible under a subordinate legislation?

As indicated earlier, an authority can make rules or regulations only if the parent statute contains an enabling provision to do so. The delegated authority must act strictly within the parameters of the authority delegated to it and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power and impose any tax or fee by a delegated authority.¹⁵ Sometimes, the general powers to levy fees for carrying out the purposes of the Act is treated as an enabler for levying of fees.¹⁶

PROCEDURE FOR LAYING BEFORE PARLIAMENT AND ITS EFFECT

Normally, the rule making powers specifically provide the manner in which the rules are to be placed before Parliament. It would also prescribe the number of days the concerned rules are to remain before Parliament.

In the case of the IBC, every rule and every regulation made has to be laid before each house of Parliament, while it is in session, for a total period of 30 days. During that period, if both houses agree in making any modification in the rule or regulation or both houses agree that the rule or regulation should not be made, they have effect only in such modified form or be of no effect, as the case may be. At the same time, the statute declares that any such modification or annulment shall not prejudice to the validity of anything previously done under that rule or regulation.

What is the consequence of failure to lay the regulation? A laying requirement has been held as directory¹⁷ when not coupled with affirmative mandate of laying rules in draft form requiring approval of the houses.

It is true that the Legislature has prescribed that the rules shall be placed before the Houses of Legislature, but failure to place the rules before the Houses of Legislature does not affect the validity of the rules merely because they have not been placed before the Houses of the Legislature.¹⁸

In other words, if a laying clause defers the coming into force of the rules until they are laid, the rules do not become effective before laying. In case of a laying clause which requires a negative procedure, the coming into force of the rules is not deferred and the rules come into force as soon as they are made. The legal effect of a laying clause of this type is that the rules continue to be in force, subject to any modification that Parliament may choose to make when they are laid; but the rules remain operative until they are so modified.¹⁹

Laying before the houses of Parliament will not give the rules the status of the statutes made by Parliament. The rules become effective as soon as they are made and published. Parliament is, no doubt, entitled to modify the said rules in such manner as it thinks appropriate or even annul them. Once these rules and notifications are published in the official gazette these must be deemed as being incorporated in the Act itself.²⁰

Draft Rules

Rules even in their draft stage can be acted upon provided there is a clear intention on the part of the rule making authority to enforce those rules in the near future.²¹

Is public consultation mandatory for publication of rules and regulations?

Public consultation before making of a subordinate legislation is not a mandatory requirement unless the relevant statute specifically so mandates. In case of the IBC, the Governing Board (GB) has framed the Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018. According to the said regulations, the Board has to upload on its website, the following documents seeking comments from the public:

- (i) draft of proposed regulations;
- (ii) the specific provision of the Code under which the Board proposes regulations;
- (iii) a statement of the problem that the proposed regulation seeks to address;
- (iv) an economic analysis of the proposed regulations;
- (v) a statement carrying norms advocated by international standard setting agencies and the international best practices, if any, relevant to the proposed regulation;
- (vi) the manner of implementation of the proposed regulations; and
- (vii) the manner, process and timelines for receiving comments from the public.

The regulations contemplate completion of a period of 21 days before acting upon the draft regulations put up for public consultation. However, in urgent matters, this procedure can be dispensed with.

When does a rule or regulation become effective?

The rules and regulations become effective when they are published in the manner prescribed. If there is no prescription about the nature of publication, it would be necessary to publish in such a

way as to make it available to those who are supposed to act as per the regulations.²² A reasonable procedure may have to be adopted for this purpose.²³ Where the parent statute does not specify, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient.²⁴ In case of the IBC, both the rule and regulation making powers indicate that they are to be notified. An unannounced law cannot bind. In the context of the IBC, notification would mean publication in the official gazette.²⁵ The Supreme Court has ruled that publication in the Gazette amounts to sufficient notice.²⁶ In one case²⁷, it was observed by the court:

It would be a proper publication if it is published in such a manner that persons can, if they are so interested, acquaint themselves with its contents. If publication is through a Gazette, then mere printing of it in the Gazette would not be enough. Unless the Gazette containing the notification is made available to the public, the notification cannot be said to have been duly published.

In *Avdhesh Singh v. Bikaram Ahir*²⁸, the Allahabad High Court considered a similar issue and held that unless it is determined on facts that the persons interested had an occasion to know the notification, it could not be made effective. Similarly, an office memorandum or executive instruction must be made public or made known to everybody concerned in order to be efficacious and applicable.²⁹

Power to make includes power to amend

The power to make the rules or regulations carries with it the power to amend them.³⁰

Penal provisions should not be brought through subordinate legislation

The subordinate legislation power should not be utilised for making penal provisions. Such provisions are to be brought through primary statute itself.

Frequent amendments not desirable

Though the rule making authority has all powers to make amend the rules it has made, frequent amendments to the rules is not a healthy sign.³¹ One possible reason for such frequent amendments could be the lack of a holistic consideration of issues at the time of initial making. This leads to a number of operational difficulties for the persons who are governed by the rules. If the law has to be effective, it has to have a certain amount of stability and continuity.

Cost-benefit analysis of regulations

A cost-benefit analysis of regulations would be mandatory in India only if the primary statute makes such an exercise compulsory. In the context of the IBC, regulation 5 of the Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018 provides that the Board shall cause an economic analysis of the proposed regulations to be made. The issues to be covered by the economic analysis are: (i) expected costs to be incurred by, and the benefits that will accrue to, the society, economy, stakeholders and the Board, both directly and indirectly on account

of the proposed regulation; and (ii) how the proposed regulations further strengthen the objectives of the Code.

Increased illustrative enumerations

A recent phenomenon that is seen in the legislation making is a tendency to enumerate a large number of issues in the section, conferring power for making regulations. This is unnecessary. In most of the legislations, there will be a sub-section preceding the enumerations, which would specifically empower the regulation making authority to make regulations for carrying out the purposes of the Act. What follows subsequently is by way of illustration. Where a statute confers particular powers without prejudice to the generality of a general power already conferred, the particular powers are only illustrative of the general power and do not in any way restrict the general power.³² If there are too many enumerations, it may lead a court to conclude that the intention of the Parliament was to make the list exhaustive, and therefore, there cannot be a regulation making beyond the enumerated items there.

Court's powers to direct framing or amendment of rules

The Supreme Court has ruled that no court can direct a legislature to enact a particular law. So is the case when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated powers.³³ A direction of that nature would result in usurpation of legislative power of the executive by the judiciary.³⁴

CONCLUSION

Subordinate legislation making is an extremely important activity delegated to the Government and the Board by Parliament. While exercising the delegated powers, the Government and the Board have to ensure that they do not travel beyond the scope of the Code. The language of subordinate legislation should be clear, and the regulated entities should be able to understand them without much effort. This is especially true when there is a penalty prescribed for the violations.

NOTES

¹ *In Re The Delhi Laws Act*, 1912 [1951] S.C.R. 747.

² *Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi and Anr.*, AIR 1968, SC, 1232.

³ *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* (1975), (1) SCC 421: AIR 1975 SC 1331.

⁴ *V.T. Khanzode v. Reserve Bank of India*, AIR 1982 SC 917: (1982) 2 SCC 7.

⁵ *Huzrat Syed Shah Mustarshid Ali Al Quadari v. Commr. of Wakfs*, AIR 1954 Cal 436.

⁶ *Addl. District Magistrate (Rev.) Delhi Admn. v. Siri Ram*, AIR 2000 SC 2143.

⁷ *Abdul Gani v. Settlement Officer, Nowgong*, AIR 1955 Gau 45.

⁸ *Radha Krishan v. Compensation Officer, Meja, Allahabad*, AIR 1954 All 202.

⁹ *Shanahan v. Scott* (1957), 96 CLR 245 at 250 (Aus).

¹⁰ *All India Lakshmi Commercial Bank Officers' Association v. Union of India*, [1985] 20 TAXMAN 412 (Delhi).

¹¹ *Bagga B. Murhar Rao*, AIR 1956 Hyd 35.

¹² The power to frame rules to regulate the conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect: *B. S. Vadhera v. Union of India*, (1968) 3 SCR 575; *Raj Kumar v. Union of India*, (1975) 3 SCR 963; *K. Nagaraj v. State of A.P.*, (1985) 1 SCC 523.

¹³ An amendment which retrospectively takes away the benefit already given under the existing unamended rule is violative of Articles 14 and 16 of the Constitution. *Food Corporation of India v. Om Prakash Sharma* (1998), 7 SCC 676.

¹⁴ *K. Narayanan and Ors. v. State of Karnataka and Ors.*, AIR 1994 SC 55; 1994 Supp (1) SCC 44. For instance, it has been held that the power to frame rules to regulate the conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect. *B. S. Vadera v. Union of India*, AIR 1969 SC 118.

¹⁵ *Ahmedabad Urban Development Authority v. Sharad kumar Pasawalla* (1992), 3 SCC 285.

¹⁶ In *BSE Brokers Forum, Bombay & Ors. etc. v. SEBI & Ors.* [(2001)3 SCC482] the power of SEBI to levy registration fee from stock brokers for the purpose of registration was challenged. SEBI had contended that the fee collected was a combination of a regulatory fee as well as a registration fee. The Supreme Court upheld SEBI's action relying upon the express powers available to it under section 11(2)(k) of SEBI Act to 'levy fees or other charges for carrying out the purposes of this section' and under section 12 to levy fees for registration.

¹⁷ *State of Kerala and Ors. v. Annam and Ors.*, AIR 1969 Ker 38.

¹⁸ *Jan Mohammad Noor Mohammad v. State of Gujarat*, AIR 1966 SC 385.

¹⁹ *Prasad Yadava v. Inspector General, Railway Protection Force*, 1974 MPLJ 373 (M.P.).

²⁰ *Brojendra Kumar Saha v. Union of India*, AIR 1961 Cal 217.

²¹ *Vimal Kumari v. State of Haryana and Ors.* (1998), 4 SCC 114.

²² *State of Maharashtra v. Mayer Hans George*, AIR 1965 SC 722; *Joti Parshad v. State of Haryana*, AIR 1993 SC 1167.

²³ *Harla v. State of Rajasthan*, AIR 1951 SC 467.

²⁴ *B. K. Srinivasan & Ors. v. State of Karnataka & Ors.*, AIR 1987 SC 1059.

²⁵ Clause (22) of section 3 of IBC.

²⁶ *Pankaj Jain Agencies v. Union of India and Ors.* (1994), 5 SCC 198; *Jai Singh v. Punjab National Bank and Ors.*, AIR 2005 SC 3134.

²⁷ *Collector of Central Excise v. New Tobacco Co.*, AIR 1998 SC 668.

²⁸ AIR 1975 All. 324.

²⁹ *Sub-Inspector Rooplal v. Lt. Governor, Delhi* (2000), 1 SCC 644.

³⁰ *Rajkumar v. Union of India*, AIR 1975 SC 1116.

³¹ *Sonal Sihimappa v. State of Karnataka*, AIR 1987 SC 2359.

³² *D.K. Trivedi v. State of Gujarat*, AIR 1986 SC 1323; 1986 (Supp) SCC 20.

³³ *Supreme Court Employees' Welfare Association v. Union of India*, AIR 1990 SC 334.

³⁴ *Mallikarjuna Rao v. State of A.P.* (1990), 2 SCC 707; *State of J&K v. A.R. Zakki*, AIR 1992 SC 1546; *M. Basheer v. Kerala Assistant Motor Vehicle Inspectors Association*, 1995 Lab IC 620 (Ker) (DB) (A direction to frame rules will be illegal and without jurisdiction).