



# National Company Law Tribunal

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# Genesis

- On 22<sup>nd</sup> Oct 1999, a Committee consisting of experts to examine the then existing law relating to winding up proceedings of companies under the Chairmanship of Shri Justice V. Balakrishna Eradi, Retd. Judge of Supreme Court was set up
- The Eradi Committee submitted its report on 31<sup>st</sup> Aug 2000 wherein it recommended setting up of National Tribunal though it was not the term of reference of the said Committee.

# Genesis – Cont.

The Eradi Committee recommended as under:

- Tribunal to have the jurisdiction and power presently exercised by **Company Law Board** under the Companies Act, 1956;
- the power to consider rehabilitation and revival of companies – a mandate presently entrusted to **BIFR/AAFIR** under SICA ;
- the jurisdiction and power relating to winding up of companies presently vested in the **High Courts.**

# Amendment to Companies Act 1956

- As per recommendation of Eradi Committee the 1956 Act was amended by Companies (Second Amendment) Act, 2002, and Part 1B and 1C were inserted w. e. f. 1<sup>st</sup> April 2003
- Part 1B contained provisions related to NCLT (sec 10FB to 10FP) and Part 1C contained provisions related to NCLAT (sec 10FQ to 10GF)
- By the said Amendment Act, the powers of the High Court, CLB, BIFR/AAIFR were sought to be transferred to NCLT

# NCLT challenged

Immediately after the Amendment Act 2002

Madras Bar Association filed a writ petition challenging the setting up of NCLT /NCLAT on following grounds:

(i) Parliament does not have the legislative competence to vest intrinsic judicial functions that have been traditionally performed by the High Courts for nearly a century in any Tribunal outside the Judiciary.

# NCLT Challenged-cont.

(ii) The constitution of the National Company Law Tribunal and transferring the entire company jurisdiction of the High Court to the Tribunal which is not under the control of the Judiciary, is violative of the doctrine of separation of powers and independence of the Judiciary which are parts of the basic structure of the Constitution.

# NCLT Challenged - cont.

(iii) Clause (2) of [Article 323B](#) of the Constitution enumerate the matters in regard to which Tribunals can be constituted. The list does not provide for constitution of Tribunal for insolvency, revival and restructuring of the company. And hence providing for a National Tribunal for revival of companies and winding up companies, there is no legislative competence to provide for constitution of NCLT and NCLAT.

# NCLT Challenged cont.

(iv) The various provisions of Chapters IB and IC of the Act ([sections 10FB](#), [10FD](#), [10FE](#), [10FF](#), [10FL\(2\)](#), [10FO](#), [10FR\(3\)](#), [10FT](#) and [10FX](#)) are defective and unconstitutional, being in breach of basic principles of Rule of Law, Separation of Powers and Independence of the Judiciary



# Madras High Court Order

- Madras High Court vide its Order dated 30.3.2004 [(2004) 120 Com Cases 510] held that creation of the NCLT and vesting the powers of the High Courts and CLB in the Tribunal was not unconstitutional except as to
- (1) tenure of President/Chairman (2) Lien on their service in government (3) selection committee (4) eligibility of members etc.

# Further Appeals in Apex Court

- Subsequently, the appeals were filed by UOI and MBA in Supreme Court. The constitutional bench upheld the constitutionality of NCLT / NCLAT - (2010) 156 Com Cases 392(SC) - but directed the government to amend Part 1B and 1C (which were held to be unconstitutional)

# Tribunal versus Court

- All courts are tribunals but all tribunals are not courts – Courts are established by State for justice in general. Tribunals are under some Act or statute
- Courts are manned by Judges. Tribunals may have technical members
- Courts follow CPC and Evidence Act. Tribunals follow their own procedure while applying CPC and Evidence Act

# Tribunal versus Court

- Generally the Tribunals are for settling the disputes between private parties / individuals and Govt. or Authority. Various examples like CESTAT, SAT, ITAT, etc.
- Under the CA 2013 (or CA 1956) the tribunal for settling private disputes is contemplated!
- This aspect has never been considered by SC in NCLT matter

# Gist of Supreme Court 2010 Judgment

On 11.05.2010, the Apex Court upheld the decision of the High Court of Madras in the case of R. Gandhi v. Union of India

- Creation of NCLT and NCLAT is not unconstitutional.

- The issue of the Tribunals to have only judicial members or a combination of judicial and technical members was left open for the Legislature to decide.
- Technical members should be persons with expertise in Company Law or allied subjects and mere experience in civil service cannot be treated as Technical Expertise in Company Law.

## ***Judicial Members***

- Only High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practiced as a Lawyer for ten years, or more, can be considered for appointment as a Judicial Member.

- The expertise in Company Law service or Indian Legal service will at best enable them to be considered for appointment as technical members.



- Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and Indian Legal Service (Grade - 1) cannot be considered for appointment as judicial members

# Technical Members

- Only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as Technical members of the National Company Law Tribunal

- Clauses (c) and (d) of sub-section (2) and Clauses (a) and (b) of sub-section (3) of section 10FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in Central or State Government, being qualified for appointment as Members of Tribunal is invalid

- A member of Indian Company Law Service who has worked with Accounts Branch or officers in other departments cannot be considered as 'experts'. Therefore having special knowledge or professional experience of 15 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as Technical Members in Company Law Tribunal, is invalid

- Persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having expertise in rehabilitation / revival of companies and therefore, eligible for being considered for appointment as Technical Members

- Only Clauses (c), (d), (e), (g), (h), and later part of clause (f) in sub-section (3) of section 10FD and officers of civil services of the rank of the Secretary or Additional Secretary in Indian Company Law Service and Indian Legal Service can be considered for purposes of appointment as Technical Members of the Tribunal

# Selection Committee

Instead of a five-member Selection Committee, the Selection Committee should broadly be on the following lines:

- (a) Chief Justice of India or his nominee - Chairperson (with a casting vote);
  
- (b) A senior Judge of the Supreme Court or Chief Justice of High Court - Member;

# Selection Committee

(c) Secretary in the Ministry of Finance and Company Affairs - Member; and

(d) Secretary in the Ministry of Law and Justice – Member



# Other Observations of SC

- The term should be five to seven years instead of three years.
- The second proviso to Section 10FE enabling the President and members to retain lien with their parent cadre / ministry / department cannot exceed one year.
- To maintain independence and security in service, suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.
- The administrative support for all Tribunals should be from the Ministry of Law & Justice

# Other Observations of SC

- Two-Member Benches of the Tribunal should always have a judicial member.
- Whenever any larger or special benches are constituted, the number of Technical Members shall not exceed the Judicial Members

# Delay in setting up NCLT

- The Government did not amend the Act and also did not make the NCLT operational between 2010 and till 2013 and waited for the new Act (Co.Bill 2011) to be enacted.
- The 2013 Act was again not in consonance with the directions of Supreme Court in 2010 judgment and left much than desired. It was amenable to challenge and was ultimately so challenged

# Where CA 2013 erred !

Following provisions were enacted in 2013 Act:

- Sec. 409(3)(a) indirectly allowed person in the rank of Joint Secretary and below with three years as Jt. Sec. to be the technical member.
- Sec. 412 (2) prescribed 5 members' Selection Committee with majority from Executive(Ministries) than from Judiciary.

# Challenge to NCLT - 2013

- Once again the MBA challenged the provisions of 2013 Act relating to NCLT.
- The MBA had also successfully challenged the National Tax Tribunal and hence the professionals were apprehending the same fate of NCLT. It was also the basis of argument

# Main Challenge in NCLT - 2013

The three issues involved were w r t:

- Constitutional Validity of NCLT and NCLT
- Qualifications of technical members
- Selection Committee for selection of members

# Supreme Court Judgment 2013

- On the constitutionality issue, the SC relied on dictum of co-ordinate Bench 2010 applying *Res Judicata*. Discussed NTT vis-à-vis NCLT/NCLAT
- On qualifications of technical members issue, the SC held that there could be no erosion of independence of judiciary and sec 409(3) cannot stand. Para 120 of SC – 2010 to be scrupulously followed
- Selection Committee: Four members instead of five

# What is now Required?

- To amend section 409(3) - only those in rank of Additional Secretary and above to be considered for technical member
- To amend sec. 411(3) regarding qualification of technical member
- To amend sec. 412(2) – Selection Committee
- To finalize the relevant Rules.



# Professionals and NCLT

- Supreme Court in NTT case raised concerns on appearance by professionals BUT professionals are appearing at CLB, SAT, and other Tribunals
- Section 432 - three professionals apart from advocates
- parties in person and ANY OTHER person

# Authority to CLB

- Removal of Difficulties Order
- u/s 470 could be only to remove difficulty in giving effect to or for implementation of provisions of Act, but could not be inconsistent with provisions of Act!

# CLB is Tribunal for sections Notified

- CLB is authorized to take up the matters
- Sec 24, 58, 59 – notified 12-9-2013 – ROD effective 20-9-2013

New and old matters u/s 58/59 and 111/111A

- 73(4) and 74(2) – 6-6-2014 - 4<sup>th</sup> ROD

# Appeal(!) to NCLT

- Section 58 – Appeal against Refusal of transfer/transmission
- Section 59 – Appeal for Rectification of RoM
- Section 252 -Any person aggrieved by an order of the Registrar, notifying a company as dissolved [under section 248,](#) may file an appeal AND even RoC can file appeal under this section

# Important Provisions

- Sec 408 – Constitution of NCLT-President and such number of members
- Sec 410 – Constitution of NCLAT- Chairman and such number of members not exceeding 11
- 419 – Benches of Tribunals – Principal Bench – Two members or One judicial member
- Reference to two members at any time/stage

# Important Provisions

## Sec 420 - Orders of NCLT

- Pass order as deemed fit, after hearing the parties
- Amendment of order – within two years –except the order appealed

## Sec 421 – Appeal against NCLT Orders

- To NCLAT
- Within 45 days + 45 days

# Important Provisions

- Sec 422- Expeditious disposal
- Three months
- Extension of 90 days by recording the reasons – extension by President or Chairman

## Sec 423 – Appeal to Supreme Court

- Within 60 + 60 days
- Question of Law

# Important Provisions

## Sec 424 – Procedure before NCLT/NCLAT

- Not bound by CPC
- Power to regulate their own procedure
- Guided by PNJ
- Same powers as enjoyed by civil court
- Enforcement of Orders like decree of a court and send the same to court having jurisdiction



# Important Provisions

## Sec 425 – Contempt

NCLT/NCLAT have same powers as that of High Court under Contempt of Courts Act 1971

Sec 429 – Assistance of CMM in proceedings related to sick company or winding up for custody

Sec 430 – Civil Court jurisdiction barred

# Important Provisions

## Section 434- Transfer of pending matters

- Pending with CLB – to be transferred to NCLT and tried under the provisions of 2013 Act
- Appeal against Orders already passed by CLB – within 60 + 60 days to High Court
- Pending with HC – to be taken up by Tribunal and taken from the stage before transfer
- BIFR – Abates and be filed afresh in 180 days

# Some Matters to be dealt with by NCLT

Apart from Sec. 58, 59, 73 and 74, the following are some matters will be dealt with NCLT:

## From HC to NCLT

- Sec 66(1) – Reduction of Capital
- Sec 230(1), 231(1) and 232(1) – Compromise and Arrangements and allied matters
- Sec 270, 271 and 272 – Winding up

# Some matters to be dealt with by NCLT

- Sec. 302(2) – To order dissolution of Company on application by Company Liquidator or if Tribunal is of the opinion
- Sec 306(3)(b) – Application for voluntary winding up of Company by  $2/3^{\text{rd}}$  of creditors that company is unable to pay debts
- Revival and Rehabilitation of sick companies

# Powers from CLB to NCLT

- Sec. 71(10) – To order redemption of Debentures
- Sec. 98(1) – To call meeting of members
- Sec. 119(4) – To order inspection of minutes book
- Sec. 210(2) and 213(1) – To order investigation
- Sec. 169(4) – To restrict copies of representation of directors to be removed

- Sec. 242 & 243 – To pass orders on application u/s 241 for oppression etc.
- Sec. 441(1) to compound certain offences (exceeding Rs. 5 lakhs)
- Sec. 245 – Class action

# Rules to provide for

The Co. Court Rules and CLB regulations to be replaced with elaborate Rules for-

- The procedure for compromise and arrangement, merger and amalgamations winding up
- Format and contents of petitions /applications / reference / appeals to NCLT/NCLAT

- Fees for filing applications/petitions and appeals
- Timings of the bench
- Procedure for filing petitions etc.- the paper books, number of copies etc.
- Filing of reply, counter etc
- Ex-parte orders
- Dismissal for defaults and restoration
- Interim Orders



- Attire i.e. dress code
- Enlargement and abridgment of time
- Publishing of notices in mergers etc.
- Service of petition, notices, documents
- Memorandum of appearance
- Documents to be annexed to petitions / applications
- Powers to review its order by Tribunal

# What Professionals should know?

The provisions of CA 2013 and rules relating to NCLT/NCLAT

Provisions of CPC and Evidence Act

Drafting of petitions/applications – facts, prayers

Decided Cases relevant to the facts

Court craft and dressing sense

Legal terminologies and doctrines

- What is Cause title
- Questions of fact and law
- Necessary and proper parties
- Non-joinder and mis-joinder of parties
- Preliminary objections as to Maintainability of petition

- Reply, rejoinder and sur-rejoinder
- Arbitrability of disputes u/s 241 – provisions of A&C Act
- Interlocutory Application
- Application for condonation of delay
- Amendment of petition or application
- Mentioning of petition and applications

# Tips for Appearance

- Understand the Court and his mood
- Search rules, regulations, decided cases
- Study the decided cases or the case you are dealing
- Co-relate the facts of the decided cases, collate relevant facts and material to make out a case
- Attend all the hearings or seek adjournment only when required

- Collect and carry all the case papers, and Reference books, Bare Acts, sufficient copies Judgments and copies of pleadings
- Note down the arguments made by opponent for reply/rejoinder arguments
- Prepare synopsis of your arguments (with relevant page numbers of your pleadings)
- Don't always object to the adjournment sought by opponent

- Be polite to the court
- Don't allow the opponent to interrupt you and never interrupt him
- Don't be impatient - matters may take long time for disposal



Thank you!