INTRODUCTION

There is discernible trend around the world towards rationalisation of business processes and simplification of legislations governing them. This trend is being driven partly by the use of electronic communication and information technology that has speeded up business transactions as well as making them international. Time is, therefore, ripe to ensure that dispensation of justice and disposal of business matters by the court and authorities should be in tune with the speed with which business is being transacted. Further certain business matters require specialized domain knowledge for dealing with the matters justifiably. Keeping in view the pendency of legal matters and need for specialized knowledge of the persons discharging the responsibility of adjudicating the matters involving intricate issues relating to the subjects, the process of setting up of specialized tribunals has gained acceptability over a period of time.

Genesis of Establishment of Specialised Tribunals

The genesis of setting up of specialized tribunals can be traced in the Supreme Court judgement in Sampath Kumar case. In this case while adopting the theory of alternative institutional mechanism the Supreme Court refers to the fact that since independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. The Supreme Court also referred to studies conducted towards relieving the High Courts of their increased load; the recommendations of the Shah Committee for setting up independent Tribunals as also the suggestion of the Administrative Reforms Commission for setting up of Civil Service Tribunals.

The problem of clearing the backlogs of High Courts, which has reached colossal proportions has been the focus of study for close to a half century. Over time, several Expert Committees and Commissions have analysed the intricacies involved and have made suggestions.

The Law Commission of India in its 124th Report of 1988 pointed out that the different types of litigation coming before the High Court in exercise of its wide jurisdiction has to some extent been responsible for a very heavy institution of matters in the High Courts and recommended for establishment of specialist Tribunals. The Law Commission noted the erstwhile international judicial trend which pointed towards generalist courts yielding their place to specialist Tribunals. Describing the pendency in the High Courts as “catastrophic, crisis ridden, almost unmanageable, imposing an immeasurable burden on the system”, the Law Commission stated that the prevailing view in Indian Jurisprudence that the jurisdiction enjoyed by the High Court is a holy cow required a review and recommended the trimming of the jurisdiction of the High Courts by setting up specialist courts/Tribunals while simultaneously eliminating the jurisdiction of the High Courts.

Here, it is important to point out that though the theory of alternative institutional mechanisms was propounded in respect of the Administrative Tribunals, the concept itself - that of creating alternative modes of dispute resolution which would relieve High Courts of their burden while simultaneously providing specialised justice - is not new. In fact, the issue of having a specialised Tax Court had been discussed for several decades. Though the Report of the High Court Arrears Committee 1972 dismissed it as ill conceived, the Law Commission in its 115th Report 1986 however revived the recommendation of setting up separate Central Tax Courts. Similarly, other Law Commission

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Reports have suggested the setting up of Gram Nyayalayas, Industrial/Labour Tribunals and Education Tribunals.

The Supreme Court in L. Chandra Kumar case while referring to recommendations of the Malimath Committee that the theory of alternative institutional mechanisms be abandoned and institutional changes be carried out within the High Courts, dividing them into separate divisions for different branches of law, as is being done in England pointed out that in the years that have passed since the Report of the Malimath Committee the pendency in the High Courts has substantially increased. In this context, the Supreme Court viewed that the Malimath Committee recommendation is not suited to the present context, the reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times.

**Constitutional Scheme for Setting Up of Tribunals**

Part XIVA of the Constitution was inserted by Constitution (42nd Amendment) Act, 1976 containing Articles 323 A and 323 B, providing for Administrative Tribunal and Tribunals for other matters, respectively.

**Administrative Tribunals**

In pursuance of the power conferred upon it by clause (1) of Article 323A of the Constitution, Parliament enacted the Administrative Tribunals Act, 1985. The Statement of Objects and Reasons of the Act indicates that it was in the express terms of Article 323A of the Constitution and is being enacted because a large number of cases relating to service matters were pending before various Courts; it is expected that the setting up of such Administrative Tribunals to deal exclusively with service matters would go a long way in not only reducing the burden of the various courts and thereby giving them more time to deal with other cases expeditiously but would also provide to the persons covered by the Administrative Tribunals speedy relief in respect of their grievances.

**Tribunals for other Matters**

Article 323B of the Constitution empowers Parliament or the State Legislatures, to enact laws providing for the adjudication or trial by Tribunals of disputes, complaints or offences with respect to a wide variety of matters including inter alia disputes relating to tax cases, foreign exchange matters, industrial and labour cases, ceiling on urban property, election to State Legislatures and Parliament, essential goods and their distribution, criminal offences etc. Clause (3) of Article 323B enables the concerned Legislature to provide for the establishment of a hierarchy of Tribunals and to lay down their jurisdiction, the procedure to be followed by them in their functioning, etc. Sub-clause (d) of clause (3) empowers the concerned Legislature to exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136 of the Constitution, with respect to all or any of the matters falling within the jurisdiction of the Tribunals. The constitutional provision, therefore, invests Parliament or the State Legislatures with powers to divest the traditional courts of a considerable portion of their judicial work.

A number of quasi-judicial forums and tribunals have been established by the Government like Debt Recovery Tribunal, Securities Appellate Tribunal, CESTAT, etc. with a view to provide a speedier and specialized forum for dispensation of justice and disposal of various matters.

**Establishment of National Company Law Tribunal**

The Companies (Second Amendment) Act, 2002 provides for the setting up of a National Company Law Tribunal and Appellate Tribunal to replace the existing Company Law Board and Board for Industrial and Financial Reconstruction. It also provides for dealing with various matters, which fall presently under the jurisdiction of High Court pursuant to various provisions contained in the Companies Act, 1956.

The setting up of NCLT as a specialized institution for corporate justice is based on the recommendations of the Justice Eradi Committee on Law Relating to Insolvency and Winding up of Companies. The Committee examined not only the Companies Act, 1956 but also the other relevant laws having a bearing on the subject such as Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), Recovery of Debts due to Banks and Financial Institutions Act, 1993 and the recommendations of the United Nations and International Monetary Fund Report - “Orderly and Effective Insolvency Procedures- Key Issues”.

The Committee in its report noted that there are at present three different agencies namely, the High Courts, which have powers to order winding up of companies under the provisions of the Companies Act, 1956; secondly, the Company Law Board set up under section 10E of the Companies Act, 1956 to exercise powers conferred on it by the Act or the powers of the Central Government delegated to it and finally, Board for Industrial and Financial
Reconstruction (BIFR) which deals with the references relating to rehabilitation and revival of companies. The High Courts are not able to devote exclusive attention to winding up cases which is essential to conclude the winding up of companies quickly. The experiment with BIFR for speedy revival of companies has also not been encouraging. The committee after a detailed analysis of the working of BIFR, with respect to revival of sick companies and the working of High Courts with respect to winding up of companies recommended for the formation of a composite legal forum to address all aspects of Companies Act 1956 rather than have separate Acts (SICA 1985 etc.) and multiple forums (BIFR, High Court) for various sections of the Companies Act 1956.

Powers of NCLT

The NCLT has been empowered to exercise the following powers:

1. Most of the powers of the Company Law Board under the Companies Act, 1956.
2. All the powers of BIFR for revival and rehabilitation of sick industrial companies;
3. Power of High Court in the matters of mergers, demergers, amalgamations, winding up, etc.;
4. Power to order repayment of deposits accepted by Non-Banking Financial Companies as provided in section 45QA of the Reserve Bank of India Act, 1934;
5. Power to wind up companies;
6. Power to Review its own orders.

The NCLT shall have powers and jurisdiction of the Board for Industrial and Financial Reconstruction (BIFR), the Appellate Authority for Industrial and Financial Reconstruction (AAIFR), Company Law Board, High Courts relating to compromises, arrangements, mergers, amalgamations and reconstruction of companies, winding up etc. Thus, multiplicity of litigation before various courts or quasi-judicial bodies or forums have been sought to be avoided. The powers of the NCLT shall be exercised by the Benches constituted by its President.

On and from the commencement of the relevant sections of the Companies (Second Amendment) Act, 2002, the Board of Company Law Administration (CLB) constituted under Section 10E of Companies Act, 1956 shall stand dissolved. It may be noted that notification to dissolve the CLB under Section 10FA has not yet been issued by the Central Government and till such notification is issued, the Company Law Board shall continue to discharge its duties and exercise its powers under the Companies Act, 1956.

Madras High Court in the matter of R. Gandhi, President, Madras Bar Association v. Union of India held that the Parliament’s power to create National Company Law Tribunal and National Company Law Appellate Tribunal is clearly traceable to Entries 43 and 44 of List I. The Court also viewed that Parliament is thus competent to enact law with regard to the incorporation, regulation and winding up of Companies. The power of regulation would include the power to set up an adjudicatory machinery for resolving the matters litigated upon, and which concern the working of the companies in all their facets.

It may be pointed out that the Law Commission, as referred to by the Supreme Court in the case of L Chandra Kumar, had also recommended the creation of specialist Tribunals in place of generalist Courts. Therefore, the creation of National Company Law Tribunal and Appellate Tribunal and vesting in them the powers exercised by the High Court with regard to company matters cannot be said to be unconstitutional.

The Madras High Court, however, declared that until the provisions in parts 1B and 1C of the Companies Act introduced by the Companies (Amendment) Act, 2002, which have been found to be defective in as much as they are in breach of the basic constitutional scheme of separation of powers and independence of the judicial function, are duly amended, by removing the defects that have been pointed out, it would be unconstitutional to constitute a Tribunal and Appellate Tribunal to exercise the jurisdiction now exercised by the High courts or the Company Law Board.

The matter is now pending before the Supreme Court.

Scope of Services for Practising Company Secretaries under NCLT

The establishment of NCLT/NCLAT shall offer various opportunities to Practicing Company Secretaries as they have been authorized to appear before the Tribunal/ Appellate Tribunal. Therefore, Practicing Company Secretaries would for the first time be eligible to appear for matters which were hitherto dealt with by the High Court viz.
mergers, amalgamations under Section 391-394 and winding up proceedings under the Companies Act, 1956.

Areas opened up for company secretaries in practice under NCLT are briefly stated hereunder:

Compromise and Arrangement

With the establishment of NCLT, a whole new area of practice will open up for Company Secretary in Practice with respect to advising and assisting corporate sector on merger, amalgamation, demerger, reverse merger, compromise and other arrangements right from the conceptual to implementation level. Company Secretaries in practice will be able to render services in preparing schemes, appearing before NCLT/NCLAT for approval of schemes and post merger formalities.

Sick Companies

(a) Timely detection of sick company

The Practising Company Secretary can identify the sickness of the company as defined under the Act and place the matter before the Board of Directors of the company to take necessary action for making reference to the Tribunal for revival and rehabilitation of the Company.

(b) Making a reference of sick industrial company to NCLT

Practising Company Secretary may assist and advise the Sick Company in making reference to the Tribunal, preparing scheme of rehabilitation, seeking various approvals from the Tribunal as may be required. Reference is to be made to the NCLT within a period of 180 days from the date on which Board of Directors of the company or the Central Government, Reserve Bank of India or State Government or a Public Financial Institution or a State level institution or a Scheduled Bank as the case may be come to know of the relevant fact giving rise to causes of such reference or within 60 days of final adoption of accounts whichever is earlier.

Winding up

The National Company Law Tribunal has also been empowered to pass an order for winding up of a company. Therefore Practising Company Secretaries may represent the winding up case before the Tribunal. Unlike the earlier position allowing only government officers to act as Official Liquidators, now professionals like Practising Company Secretaries have been permitted to act as Liquidator in case of winding up by the Tribunal.

Reduction of Capital

As per amended section 100 of the Companies Act, subject to confirmation by the Tribunal, a company limited by shares or a company limited by guarantee and having a share capital may if so authorized by its articles by special resolution reduce its share capital. The Practising Company Secretaries will be able to represent cases of reduction of capital before the Tribunal.

PCS as Member of NCLT

A Practising Company Secretary can be appointed as a Technical Member of NCLT, provided he has 15 years working experience as secretary in whole-time practice.

Appearance before National Company Law Appellate Tribunal

As stated earlier a Practicing Company Secretary has been authorised to appear before National Company Law Appellate Tribunal.

CONCLUSION

In view of vast opportunities emerging with the establishment of National Company Law Tribunal, the Practising Company Secretaries should standardize their competencies with the global benchmarks to provide value added services in assisting the Tribunal in dispensation of justice and speedier disposal of matters like merger, amalgamation, restructuring, revival and rehabilitation of sick companies and winding up of companies.

REFERENCES

1. Justice Eradi Committee on Law Relating to Insolvency and Winding up of Companies.
4. R. Gandhi, President, Madras Bar Association v. Union of India.
5. 115, 121, 223 and 124 Reports of Law Commission of India.
7. The Companies Act, 1956
8. The Companies (Second Amendment) Act, 2002.