

NCLT LAW AND PRACTICE

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by

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IDEA OF NCLT WAS BORN !!

Eradi Committee
Report dated
31.07.2000

Committee was
set up to study
the ecosystem of
Insolvency &
WU

- Justice Eradi Committee was set up in October 1999 under the Chairmanship of Justice V Balakrishna Eradi Judge (retd) Supreme Court of India. It submitted its Report on 31st July 2000.
- The Committee was set-up basically to study the ecosystem of Insolvency and Winding Up.
- But while submitting its recommendations, it also recommended to merge the powers of CLB with National Tribunal.

IDEA OF NCLT WAS BORN !!

setting up
National
Tribunal was
recommended

Para 7.1 of Report deserves reading:

*7.1. The whole issue of law relating to insolvency of companies should be viewed not only on basis of the existing provisions of Part-VII of the Companies Act, 1956 but also 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, UNCITRAL Model Law on Cross Border Insolvency approved by United Nations (Annexure A) and International Monetary Fund report on "Orderly and effective Insolvency Procedures" (Annexure B). The Committee, therefore, recommends that the provisions of Part VII of the Companies Act, 1956, be amended to include the provisions for setting up of a **National Tribunal** which will have:*

IDEA OF NCLT WAS BORN !!

Committee also
recommended
to merge CLB
with National
Tribunal

a) the jurisdiction and power presently exercised by Company Law Board under the Companies Act, 1956;

b) *the power to consider rehabilitation and revival of companies - a mandate presently entrusted to BIFR/ AAFIR under SICA*

c) *the jurisdiction and power relating to winding up of companies presently vested in the High Courts. In view of above recommendations Article 323B of the Constitution should be amended to set up National Tribunal. SICA should be repealed and the Companies Act, 1956 be amended accordingly.*

COS. 2ND AMENDMENT ACT 2000

Recommendations
of Committee
resulted in Cos.
2nd Amendment
Act, 2002

- New Parts IB and IC were inserted in the then Companies Act, 1956 with provisions for setting up of NCLT and NCLAT to replace the existing CLB.
- Steps to establish NCLT were set in motion by notification of the amendment act on 31st March 2003.
- But it stopped short of bringing the respective sections to life – look at the below Press Release.

**COS. 2ND
AMENDMENT
ACT 2000**

Press Release
dated
4th April 2003

No.1/1/2003-CL.V

Government of India

Ministry of Finance and Company Affairs

Department of Company Affairs

5th Floor, "A" Wing, Shastri Bhavan,

Dr. Rajendra Prasad Road, New Delhi-110 001

Dated 4th April, 2003

PRESS NOTE NO: 2/2003

Subject:- Commencement of the provisions of section 2 and 6 of the Companies (Second Amendment) Act, 2002 (11 of 2003) with effect from 1.4.2003.

COS. 2ND
AMENDMENT
ACT 2000

Press Release
dated
4th April 2003



1. The Companies (Second Amendment) Act, 2002 (11 of 2003) received the assent of the President of India on 13.1.2003. Government has decided to bring into force the provisions of section 2 and 6 of the Companies (Second Amendment) Act, 2002 (11 of 2003) with effect from 1.4.2003. Notification has been published in the Official Gazette dated 31st March, 2003 as S.O. 344 (E). This has been notified to enable the Government to initiate necessary steps to establish National Company Law Tribunal and make it operational.

2. For the sake of clarity it is stated that this Notification bringing into effect section 6 of the Companies (Second Amendment) Act, 2002 (11 of 2003) will **only set in motion all preliminary steps required for establishment of National Company Law Tribunal.** Upon establishment of the same a separate Notification regarding **constitution of NCLT** will be issued. Till such time jurisdiction of Company Law Board will continue to remain unchanged.

NCLT GOT COURT-BOUND !!

Writ Petition
filed before
Madras High
Court

Constitutionality
of NCLT
challenged

- Implementation of 2002 Amendment Act was stalled on account of Writ Petition 2198/2003 filed in Madras High Court by Shri R Gandhi, the President of Madras Bar Association.
- The Petition challenged the constitutional validity of Chapters 1B and 1C of the Companies Act, 1956 inserted by the Amendment Act providing for the constitution of NCLT & NCLAT.

NCLT GOT COURT-BOUND !!

Ground of

Violation of
Doctrine of

“Separation of
powers and
independence
of Judiciary”

- The basic contention of the Writ Petition was that *transferring of 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 GOT COURT-BOUND !!

Major
contentions
of the Writ
- points (i)-(ii)

(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.

(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 GOT COURT-BOUND !!

Major
contentions
of the Writ
- point (iii)

(iii) Article 323B of the Constitution enables the appropriate Legislature to provide for adjudication or trial by Tribunals of disputes, complaints or offences with respect to all or any of the matters specified in clause (2). Clause (2) enumerates the matters in regard to which Tribunals can be constituted. The said list is exhaustive and not illustrative. The list does not provide for constitution of Tribunal for insolvency, revival and restructuring of the company. In the absence of any amendment to Article 323B 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 GOT COURT-BOUND !!

Major
contentions
of the Writ
- point (iv)

(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.**

High Court
upheld the
formation of
NCLT/NCLAT

BUT
with some
changes

**APPEAL TO
SUPREME COURT**

SC also
upheld the
judgement of
Madras HC

SC also
required the
changes

SUPREME COURT'S JUDGEMENT

Substantive
observations
of the SC

45. Legislature has the competence to transfer any particular jurisdiction from courts to Tribunals provided that the Tribunals exercise judicial power and the persons who are appointed as President/ Chairperson/ Members are of a standard which is reasonably approximate to the standards of main stream Judicial functioning. On the other hand, if a Tribunal is packed with members who are drawn from the civil services and who continue to be employees of different Ministries or Government Departments by maintaining lien over their respective posts, it would amount to transferring judicial functions to the executive which would go against the doctrine of separation of power and independence of judiciary.

SUPREME COURT'S JUDGEMENT

Substantive
observations
of the SC

46. only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as Technical members. Therefore, only persons with a judicial background, that is, those who have been or are Judges of the High Court and lawyers with the prescribed experience, who are eligible for appointment as High Court Judges, can be considered for appointment of Judicial Members.

SUPREME COURT'S JUDGEMENT

Substantive
observations
of the SC

56. (xii) To maintain independence and security in service, sub-section (3) of section 10FJ and Section 10FV should provide that suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.

(xiii) The administrative support for all Tribunals should be from the Ministry of Law & Justice. Neither the Tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or concerned Department.

COMPANIES ACT 2013 INTRODUCED

NCLT once again faced the roadblock, but the SC once again rescued it

- With introduction of CA 2013, the sections relating to NCLT were also notified w.e.f 12.09.2013, except constitution of Benches.
- Madras Bar Association once again stood up citing inconsistency in the 2013 Act vis-a-vis the directions of the SC in the previous judgment of May, 2010.
- SC again held on the similar lines requiring that the Benches can be constituted after making the corrections directed by the SC.
- **Section 419 providing for constitution of Benches was finally notified w.e.f 1.6.2016.**

ABOUT NCLT/NCLAT

- NCLT has a total of 15 Benches plus one Principal Bench at Delhi
- NCLAT has two Benches – one in Delhi and another in Chennai
- Tribunals are supported by their respective Registries.
- Fresh filings with most of the Benches are now through e-filing mode.

**LEGAL
FRAMEWORK
DEALING WITH
NCLT**

Jurisdiction
&
Spread of
provisions

Under Companies Act, 2013

- Chapter XXVII - 28 sections (407 – 434)
- NCLT Rules consisting of 165 rules & NCLAT Rules consisting of 104 rules
- separate rules for salaries of Members

Under IBC

- NCLT act as Adjudicating Authority; NCLAT acts as Appellate Authority

Under Competition Act, 2002

- NCLAT acts as Appellate Tribunal for orders of Competition Commission

COURTS
VS.
TRIBUNALS

Union of India
vs.
R Gandhi

SC on
11.05.2010
in Civil Appeal
No. 3067 of 2004

- Approach adopted by both the courts and the Tribunals is substantially the same, and there is no essential difference between the functions that they discharge.
- As in the case of courts, so in the case of Tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the State's inherent judicial function which they discharge

COURTS

VS.

TRIBUNALS

Differences

*(Union of India
vs. R Gandhi)*

Both Courts and Tribunals exercise judicial power and discharge similar functions, But there are well-recognised **differences**:

(i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. **Therefore, all courts are Tribunals. But all Tribunals are not courts.**

COURTS

VS.

TRIBUNALS

Differences

*(Union of India
vs. R Gandhi)*

(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an 'expert' in the field to which Tribunal relates. Some highly specialized fact finding Tribunals may have only Technical Members, but they are rare and are exceptions.

COURTS

VS.

TRIBUNALS

Differences

*(Union of India
vs. R Gandhi)*

(iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and Evidence Act, requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of Evidence Act.

CLB

VIS-A-VIS

NCLT

**Power to
punish for
contempt**

Sec 425. The Tribunal and the Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971.....



The power to punish for contempt was not available with the CLB.

**REFERENCES
TO NCLT
UNDER
COMPANIES
ACT, 2013**

SN	Section	Nature of application / petition
1	2(41)	Application for change in financial year (<i>transferred to Regional Director</i>)
2	7(7)	Application to Tribunal where company has been incorporated by furnishing false or incorrect info or by any fraudulent action.
3	14(1)	Conversion of public company into a private company (<i>transferred to Regional Director</i>)
4	55(3)	Application for issue further redeemable preference shares when unable to redeem existing pref shares
5	58(3)	Appeal against refusal of registration of shares

**REFERENCES
TO NCLT
UNDER
COMPANIES
ACT, 2013**

SN	Section	Nature of application / petition
6	59(1)	Appeal for rectification of register of member
7	62(4)	Appeal against order of Govt. fixing terms and conditions for conversion of debentures and shares.
8	71(9)	Petition by Debenture-trustees.
9	71(10)	Application in the event of failure of redeeming of debentures.
10.	73(4)	Application by 'depositor' for repayment of deposit or interest.

**REFERENCES
TO NCLT
UNDER
COMPANIES
ACT, 2013**

SN	Section	Nature of application / petition
11.	74(2)	Application to allow further time as considered reasonable to the company to repay deposits.
12.	97(1)	Application for calling of Annual General meeting.
13.	98(1)	Application for calling of general meeting of company other than annual general meeting
14.	119(4)	Petition to pass an order directing immediate inspection of minute's books or directing a copy thereof be sent forthwith to person requiring it
15.	130(1)	Application for re-opening of books of account, if made by any person other than Central Government, Income Tax authorities, SEBI or any other statutory regulations body or authority

**REFERENCES
TO NCLT
UNDER
COMPANIES
ACT, 2013**

SN	Section	Nature of application / petition
16	131(1)	Application by company for voluntary revision of financial Statement on Board's report
17	140(4)	Application for not sending the copy of representation of auditor to the members
18	140(5)	Application by any other person concerned for change of auditors
19	169(4)	Application for not sending copies of representation
20	213	Application to Tribunal for investigation into company affairs.

**REFERENCES
TO NCLT
UNDER
COMPANIES
ACT, 2013**

SN	Section	Nature of application / petition
21	218(1)	Application for approval for action proposed against employee.
22	222(1)	Application for imposition of restrictions on securities.
23	241(1)	Application in cases of oppression and mismanagement
24	242(4)	Application for regulating the conduct of company
25	243(1)(b)	Application for appointment as Managing Director
26	244(1)	Application for waiver of requirement specified in clause (a) or (b) of Sec. 244(1) <i>{for the purposes of O & M}</i>

**REFERENCES
TO NCLT
UNDER
COMPANIES
ACT, 2013**

SN	Section	Nature of application / petition
27	245	Class action suits
28	441	Application for compounding of certain offences
29	421	Appeals to NCLAT

CONCEPTS FROM RULES

Application & Petition

Application 2(5)

- Means any application or proceedings filed under the provisions of the Act, including any transferred application or transferred petition defined under sub-rule (29).

Petition 2(17)

- Means a petition or an application or an appeal or a complaint in pursuance of which any proceeding is commenced before the Tribunal.

CONCEPTS FROM RULES

Authorised Representative

Authorised Representative 2(6): Means a person authorised in writing by a party to present his case before the Tribunal as the representative of such party as provided u/s 432 of the Act.

Section 432: A party to any proceeding or appeal before the Tribunal / AT, may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal / AT.

CONCEPTS FROM RULES

.....Authorised
Representative

Company Secretary s-2(24) :

“Company secretary” or “Secretary” means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980) who is appointed by a company to perform the functions of a company secretary under this Act.

Company Secretary u/ s 2(1)(c) of CS Act:

“Company Secretary” means a person who is a member of the Institute.

CONCEPTS FROM RULES

Instead of
Certified Copy
from ROC, can
a PCS issue the
Certified Copy?

“Certified” [rule 2(9)] means in relation to a copy of a document as hereunder -

(a) certified as provided in section 76 of the Indian Evidence Act, 1872; or

(b) certified as provided in section 6 of Information Technology Act, 2000; or

(c) certified copy issued by the Registrar of Companies under the Act;

(d) copy of document as may be a downloaded from any online portal prescribed under section 398 of the Act or a photo-copy of the original pertaining to any company registered with the Office of the Registrar of Companies of the concerned State duly certified by a legal practitioner *or a chartered accountant in practice or a cost accountant in practice or a company secretary in practice.*

CONCEPTS FROM RULES

Computation of Time Period *(rule 3)*

Where a period is prescribed by the Act and these rules or under any other law or is fixed by the Tribunal for doing any act,

in computing the time, the day from which the said period is to be reckoned shall be excluded,

and if the last day expires on a day when the office of the Tribunal is closed, that day and any succeeding days on which the Tribunal remains closed shall also be excluded.

CONCEPTS FROM RULES

Forms (like
Application,
advt, etc)
prescribed in
NCLT Rules –
whether
changes
possible?

(rule 4)

The forms annexed as Annexure 'A' to these rules with such modifications or variations as the circumstances of each case may require shall be used for the purpose mentioned therein and where no form is prescribed to cover a contingency, a form as may be approved by the Registrar, shall be used.

CONCEPTS FROM RULES

Inherent
Powers of
NCLT
(rule 11)

11. Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

CONCEPTS
FROM RULES

Inherent
Powers of
NCLT
(rule 11)

***Cygnus Investments and Finance & Anr.
Vs. The Union of India & Ors.***

Order dated 18.08.2020 of HC of Calcutta
[*W.P. No. 5595(w) of 2020*]

<https://www.ibbi.gov.in/uploads/order/c2408a81f80576fadd8d0b4220955f58.pdf>

The High Court has put forward the
limitation of the scope of Inherent Powers of
NCLT

....Contd

CONCEPTS FROM RULES

Inherent
Powers of
NCLT
(rule 11)

....**Cygnus Investments**

- *Sections 7(3)(a) of the IBC, 2016 and 424 of the CA, 2013 are superior norms (statutory provisions of Acts of Parliament), and are on a higher layer above the NCLT Rules, 2016 which is a delegated legislation made by the Central Government made in accordance with its powers under Section 469 of the CA, 2013.*
- *Such powers of the tribunal cannot rise above their source, that is a delegated form of legislation, and obstruct the operation of a statutory provision of the parent Act under which these Rules were formulated.*

CONCEPTS FROM RULES

Inherent Powers of NCLT (rule 11)

NUI Pulp and Paper Industries P Ltd Vs. M/s Roxcel Trading GMBH

Order dated 17.07.2019 of NCLAT
[(AT)(Insolvency) No. 664 of 2019]

<https://nclat.nic.in/Useradmin/upload/14411968585d3065a868ff2.pdf>

- *Once an application u/s 7 or 9 is filed, it is not necessary for the Adjudicating Authority to await hearing of the parties for passing order of ‘Moratorium’ under Section 14 of the ‘I&B Code’. To ensure that one or other party may not abuse the process of the Tribunal or for meeting the ends of justice, it is always open to the Tribunal to pass appropriate interim order.*

CONCEPTS FROM RULES

Inherent Powers of NCLT/NCLAT (rule 11)

Girish Agarwal v. Lavis Signature Panel (P) Ltd

Order dated 13.09.2019 of NCLAT [2019 SCC
OnLine NCLAT 490]

<https://www.scconline.com/Members/SearchResult.aspx?documentLink=JTXT-9000258148>

Application u/s 9 of the Code and was also admitted by the Tribunal – CIRP initiated by IRP - Whilst the proceedings, settlement with the O.C. was made and the C.D. had already paid the entire amount prior to the appointment of CoC

.....Contd

CONCEPTS FROM RULES

.....Girish Agarwal v. Lavis Signature Panel (P) Ltd

Inherent
Powers of
NCLT/NCLAT
(rule 11)

In the light of the settlement reached between the parties, the NCLAT exercised its inherent powers under Rule 11 of the NCLAT Rules, 2016 and overruled the order where a CIRP was initiated against the C.D. Subsequently the application filed under Section 9 was dismissed and withdrawn.

CONCEPTS FROM RULES

Inherent Powers of NCLT/NCLAT (rule 11)

M. S. D. Chandrasekar Raja vs M/s Jayabharath Textiles Pvt

Order dated 06.11.2013 of Madras HC
[Company Appeal No. 6 of 2011]

- *CLB could postpone the hearing to an indefinite date under its inherent powers available in regulation 44 of CLB regulations.*
- *The same position will apply to NCLT also.*

FILINGS AT NCLT

Listing of Urgent Cases (rule 13)

- Urgent matters shall be listed on the following working day, provided filing is complete in all respects and filed before 12 noon.
- In exceptional cases the matter can still be listed on following working day, even if filed after 12 noon but before 3 PM provided specific permission of the Bench is obtained.

EVER WONDERED ?

Why
applications
cannot be in a
language
other than
English
(rule 20)

Rule 20

- Every application, petition, appeal caveat, objection, counter presented to the Tribunal shall be in English.
- If in any other language, it shall be accompanied by a copy translated in English.

EVER WONDERED ?

So much fuss
over stitching,
spacing, one-
side printing,
legal size,
margins, etc
(rule 20)

Rule 20(1)

- To be printed in double spacing
- on one side
- of standard petition paper
- with an inner margin of about 4 cms width on top and with right margin of 2.5 cms, left margin of 5 cm
- duly paginated
- indexed and
- stitched together in paper book form

EVER WONDERED ?

Why
paragraph
numbering
(rule 20)

Rule 20(3), (5) & (6)

- Shall be divided into paragraphs
- shall be numbered consecutively
- each para shall contain a separate fact or allegation or point
- The parties shall be numbered consecutively
- These numbers shall not be changed even in the event of death of the party
- Full name, parentage, age, description of each party and address shall also be set out in the beginning of the Petition.

**EVER
WONDERED ?**

Is there any
specific
sequence for
information to
be written in
the cause title
(rule 20)

Rule 20(2)

- the cause title shall state “Before the” and shall specify the Bench
- shall also set out the proceedings or order of the authority against which it is preferred
- Every proceeding shall state, immediately after the cause title, the provision of the law under which it is preferred.

**EVER
WONDERED ?**

Index sheet,
Number of
copies
(rule 23 & 24)

Rules 23(4) & 24

- All the documents filed in the Tribunal shall be accompanied by an index in triplicate containing their details
- Appeal, petition, application, counter, etc shall be filed in three authenticated copies
- and shall deliver one copy to each of the opposite party

EVER WONDERED ?

At the
Counter, can
they avoid
affixing the
date stamp
(rule 28)

Rule 28

- The person in charge of the filing counter shall immediately affix the date stamp and
 - return the acknowledgement
 - affix his initials on the stamp affixed on the first page of the copies
 - enter the particulars of all such documents in the register after daily filing
 - assign a diary number below the stamp
 - thereafter cause it to be sent for scrutiny

APPEARANCE BEFORE NCLT

Vakalatnama
or MoA?
(rule 45)

Rule 45

- Parties can appear in-person or through Authorised Representative.
- AR shall file Vakalatnama or Memorandum of Appearance [REDACTED]
- Professionals to file MoA (not Vakalatnama)
- There shall be **no audio or video recording** of the Bench proceedings by the parties or their AR.

ENFORCEMENT OF ORDER OF NCLT

Section 424(3)

- Orders of NCLT/NCLAT may be enforced by them as if it were a decree made by a court in a suit pending therein
- it shall be lawful for NCLT/NCLAT to send for execution of its orders to the court having jurisdiction over the party.

NCLT MEMBERS

Are they
public
servant?

- The President, Members, officers and other employees of the Tribunal and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Section 427

NCLT MEMBERS

Immunity to
NCLT
members?

Section 428

- No suit, prosecution or other legal proceeding shall lie against the Tribunal, the President, Member, officer or other employee, or against the Appellate Tribunal, the Chairperson, Member, officer or other employees thereof or liquidator or any other person authorised by the Tribunal or the Appellate Tribunal for the discharge of any function under this Act in respect of any loss or damage caused or likely to be caused by any act which is in good faith done or intended to be done in pursuance of this Act.

