

**PROJECT REPORT**  
**ON**  
**NCLT & NCLAT-OPPORTUNITIES & CHALLENGES;**  
**PROVISIONS UNDER NCLT**  
**FOR**  
**OPPRESSION & MISMANAGEMENT**

**35<sup>th</sup> BATCH OF MSOP**  
**OF**  
**BENGALURU CHAPTER,**  
**THE INSTITUTE OF COMPANY SECRETARIES OF INDIA**

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## PREFACE

This report is prepared as per the requirement of MSOP of Bengaluru Chapter, as prescribed by Institute of Company Secretaries of India.

The purpose of this report has very well served to us in getting theoretical and procedural knowledge of National Company Law Tribunal and Appellate Tribunal and Oppression & Mismanagement. The report emphasizes the procedural details of NCLT and NCLAT under the Companies Act, 2013.

The data contained herein has been collected from various study materials, books, Articles, journals issued by the Institute, laws, rules and notifications issued by the Ministry of Corporate Affairs (MCA) and opinion of the experts.

## ACKNOWLEDGEMENT

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**PART-I**  
**NATIONAL COMPANY LAW TRIBUNAL**  
**&**  
**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**

**BACKGROUND:**

In the evening of 1<sup>st</sup> June, 2016, came a pleasant surprise. The National Company Law Tribunal and National Company Law Appellate Tribunal were finally constituted by the Central Government. The National Company Law Tribunal (NCAT) and National Company Law Tribunal are quasi-judicial body in India, that adjudicates issues relating to the Companies in India. The NCLT and NCLAT were established under the Companies Act 2013 and were constituted on 1<sup>st</sup> June 2016.

The constitution of the aforesaid Tribunals is in exercise of the powers conferred by Sections 408 and 410 respectively of the new Companies Act, 2013.

**JOURNEY/SNAPSHOT OF IMPLEMENTATION OF NCLT:**

The Ministry of Corporate Affairs ('MCA') on 1st June 2016 notified the constitution of National Company Law Tribunal ('NCLT') and National Company Law Appellate Tribunal ('NCLAT') in exercise of powers conferred under Section 408 and Section 410 of the Companies Act 2013 ('Companies Act'). This notification has been in abeyance for almost 14 years, since it was first introduced by the Companies (Second Amendment) Act 2002 based on the recommendations of Eradi committee. However, in recent times the Government of India has been emphasizing on easing the process of carrying out business in India. Thus, in recent times, various legal reforms have been carried out and the constitution of the NCLT and the NCLAT is one most important step in this direction.

The genesis of setting up of specialized tribunals can be traced in the Supreme Court judgment 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, therefore, to reduce the burden of High Courts and to fulfill the growing need for empowering the Company Law Board, they felt the need to constitute a high-power Tribunal, which could take up all matters relating to Company Law and other Corporate Laws at one Forum.

Hence, in 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 (CLB) and Board for Industrial and Financial Reconstruction (BIFR).

The setting up of NCLT as a specialized institution for corporate justice is based on the recommendations of the Justice Eradi Committee, a committee set up to examine the existing law relating to winding up proceedings of companies in order to re-model it in line with the latest developments and innovations in the corporate law and governance and to suggest reforms in the procedure at various stages followed in the insolvency proceedings of companies to avoid unnecessary delays in tune with the international practice in this field.

The setting up of the NCLT and NCLAT are part of the efforts to move to a regime of faster resolution of corporate disputes, thus improving the ease of doing business in India.

### POWERS OF NCLT & NCLAT:

The establishment of the National Company Law Tribunal (NCLT), consolidates the corporate jurisdiction of the following authorities:

1. The Company Law Board.
2. The Board for Industrial and Financial Reconstruction (BIFR)
3. The Appellate Authority for Industrial and Financial Reconstruction including those pending under the Sick Industrial Companies (Special Provisions) Act, 1985.
4. Jurisdiction and powers relating to winding up, restructuring, reduction of share capital and other such provisions, vested in the High Courts.

With the establishment of the NCLT and NCLAT, the Company Law Board under the Companies Act will stand dissolved.

While provisions relating to the investigation of a company's accounts, freezing of assets, class action suits, conversion of a public company to a private company, compromise, amalgamation and capital reduction will now be governed by the NCLT, and appeal there from would be before NCLAT instead of High Court.

### WHY NCLT & NCLAT REQUIRED:

The constitution of NCLT and NCLAT was a step towards to improving the ease of doing business by bringing all aspects of Company law matters under one roof. Some of most important advantages are as under:

- a. Single Window:** The most important benefit that the tribunals will act as a single window for settlement of all Company law related disputes effectively. It shall avoid unnecessary multiplicity of proceedings before various authorities or courts.
- b. Speedy Process:** The NCLT and the NCLAT are under a mandate to dispose of cases before them as expeditiously as possible. In this context, a time limit of three (3) months has been provided to dispose of cases, with an extension of ninety (90) days for sufficient reasons to be recorded by the President or the Chairperson, as the case maybe. The speedy disposal of cases will save time, energy and money of the parties.
- c. Reduction of work of High Court:** The number of pending cases with High Court is too high and now the matters in respect to compromise, arrangement, amalgamations and winding-up transferred to NCLT. Accordingly, NCLT and the NCLAT will reduce the work of overburdened High Courts.

Hence, with the constitution of NCLT and The NCLAT, we do hope that not only the corporate would obtain its benefits but stakeholders would also be benefitted.

### CONSTITUTION OF BENCH:

The NCLT has eleven benches in the following jurisdiction:

Sl. No.	Name of the Bench	Location	Territorial Jurisdiction of the Bench
01	(a) National Company Law Tribunal, Principal Bench  (b) National Company Law Tribunal, New Delhi Bench.	New Delhi	1. State of Rajasthan.  2. Union territory of Delhi.
02	National Company Law Tribunal, Ahmedabad Bench.	Ahmedabad	1. State of Gujarat.  2. State of Madhya Pradesh.  3. Union Territory of Dadra and Nagar Haveli.  4. Union territory of Daman and Diu.
03	National Company Law Tribunal, Allahabad Bench.	Allahabad	1. State of Uttar Pradesh  2. State of Uttarakhand
04	National Company Law Tribunal, Chandigarh Bench.	Bengaluru	State of Karnataka.
05	National Company Law Tribunal, Chennai Bench.	Chennai	1. State of Kerala.  2. State of Tamil Nadu.  3. Union territory of Lakshadweep  4. Union territory of Puducherry.
07	National Company Law Tribunal, Guwahati Bench.	Guwahati	1. State of Arunachal Pradesh.

Sl. No.	Name of the Bench	Location	Territorial Jurisdiction of the Bench
			2. State of Assam. 3. State of Manipur. 4. State of Mizoram. 5. State of Meghalaya. 6. State of Nagaland. 7. State of Sikkim. 8. State of Tripura.
08	National Company Law Tribunal, Hyderabad Bench.	Hyderabad	1. State of Andhra Pradesh. 2. State of Telangana.
09	National Company Law Tribunal, Kolkata Bench.	Kolkata Bench	1. State of Bihar. 2. State of Jharkhand. 3. State of Odisha. 4. State of West Bengal. 5. Union territory of Andaman and Nicobar Islands.
10	National Company Law Tribunal, Mumbai Bench.	Mumbai Bench	1. State of Chhattisgarh. 2. State of Goa. 3. State of Maharashtra.

### COMPOSITION OF TRIBUNAL:

The president and member shall have following qualifications:

- i. The President shall be a person, who is or has been a Judge of a High Court **for five years**.
- ii. The following persons were appointed as Judicial Member-
  - a. He is, or has been, a **judge of a High Court**; or
  - b. He is, or has been, a **District Judge** for at **least five years**; or
  - c. He has, for at **least ten years** been an advocate of a court.
- iii. The technical member of the Bench shall be;
  - a. has, for at least **fifteen years been** a member of the Indian Corporate Law Service **or** Indian Legal Service out of which at least three years shall be in the pay scale of Joint Secretary to the Government of India **or** equivalent or above in that service; **or**
  - b. has been, in practice as a chartered accountant for at least fifteen years; **or**
  - c. has been, in practice as a cost accountant for at least fifteen years; **or**
  - d. has been, in practice as a company secretary for at least fifteen years; **or**
  - e. is a person of proven ability, integrity and standing having special knowledge and experience, of **not less than fifteen years**, in law, industrial finance, industrial management or administration, industrial reconstruction, investment, accountancy, labour matters, **or** such other disciplines related to management, conduct of affairs, revival, rehabilitation and winding up of companies; **or**

- f. has been, for at least five years, a presiding officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947 (14 of 1947).

#### TENURE OF OFFICE OF PRESIDENT, CHAIRPERSON AND OTHER MEMBERS OF TRIBUNAL:

As per provisions of Companies Act, 2013 the tenure of president, chairperson and other members are as follows:

1. The President and every other Member of the Tribunal shall hold office as such or a **term of five years from the date** on which he enters upon his office, but shall be **eligible for re-appointment** for another term of five years.
2. A Member of the Tribunal shall hold office as such until he attains;
  - a. in the case of the President, the age of sixty-seven years;
  - b. in the case of any other Member, the age of sixty-five years;
  - c. a person who has not completed **fifty years of age** shall not be eligible for appointment as Member;
  - d. The Member may retain his lien with his parent cadre or Ministry or Department, as the case may be, while holding office as such for a period not exceeding one year.

### NATIONAL COMPANY LAW APPELLATE TRIBUNAL (NCLAT):

The National Company Law Appellate Tribunal (NCLAT) was constituted under Section 410 of the Companies Act, 2013 for hearing appeals against the orders of National Company Law Tribunal(s) (NCLT), with effect from 1<sup>st</sup> June, 2016.

The NCLAT is also the Appellate Tribunal for hearing appeals against the orders passed by NCLT(s) under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC), with effect from 1<sup>st</sup> December, 2016 and also Appellate Tribunal for hearing appeals against the orders passed by Insolvency and Bankruptcy Board of India under Section 202 and Section 211 of IBC.

The NCLAT is also the Appellate Tribunal to hear and dispose of appeals against any direction issued or decision made or order passed by the Competition Commission of India (CCI) – as per the amendment brought to Section 410 of the Companies Act, 2013 by Section 172 of the Finance Act, 2017, with effect from 26<sup>th</sup> May, 2017.

### COMPOSITION OF APPELLATE TRIBUNAL:

The president and member of the appellate tribunal shall poses following qualifications:

1. The **chairperson** shall be a person who is or has been;
  - a. Judge of the Supreme Court; or
  - b. The Chief Justice of a High Court.
2. A **Judicial Member** shall be a person who is or has been;
  - a. Judge of a High Court; or
  - b. Judicial Member of the **Tribunal for five years.**

3. A Technical Member shall be a person of proven ability, integrity and standing having special knowledge and experience, of **not less than twenty-five years**, in law, industrial finance, industrial management or administration, industrial reconstruction, investment, accountancy, labour matters, or such other disciplines related to management, conduct of affairs, revival, rehabilitation and winding up of companies.

#### TENURE OF OFFICE OF CHAIRPERSON & OTHER MEMBERS OF APPELLATE TRIBUNAL:

The tenure of office of chairperson & others members shall be;

1. The **chairperson** or a **Member** of the Appellate Tribunal shall hold office as such for a **term of five years** from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of five years.
2. A Member of the Appellate Tribunal shall hold office as such until he attains-
  - a. in the case of the Chairperson, the age of seventy years;
  - b. in the case of any other Member, the age of sixty-seven years;
  - c. a person **who has not completed fifty years of age shall not be eligible** for appointment as Member:

#### BENCH OF APPELLATE TRIBUNAL:

Sl. No.	Name of the Bench	Location	Territorial Jurisdiction
01.	NCLAT	New Delhi	All over India

### SCOPE OF TRIBUNAL:

The Tribunal is bound by the rules laid down in the Code of Civil Procedure Code and is guided by the principles of natural justice, subject to the other provisions of this Act and of any rules that are made by the Central Government. The Tribunal and the Appellate Tribunal has the power to control its own procedure.

Further, no civil court has the jurisdiction to consider any suit or proceeding with reference to any matter which the Tribunal or the Appellate Tribunal is empowered to decide.

Sl. No	Act/Clauses under the Companies Act, 2013	Particulars
01.	Sec. 2 (41)	Application for change in Financial year.
02.	Sec. 7 (7)	Application to Tribunal where company has been incorporated by furnishing false or incorrect info or by any fraudulent action.
03.	Sec. 14 (1)	Conversion of public company into a private company.
04.	Sec. 55 (3)	Application for issue further redeemable preference shares.
05.	Sec. 58 (3)	Appeal against Refusal of Registration of Shares.
06.	Sec. 59	Appeal for Rectification of Register of Member
07.	Sec. 62 (4)	Appeal against order of Govt. fixing terms and conditions for conversion of debentures and shares
08.	Sec. 71 (9)	Petition by Debenture-trustees.
09.	Sec. 71(10)	Application in the event of failure of redeeming of Debentures.
10.	Sec. 73 (4)	Application by Deposition for repayment of Deposit or interest.
11.	Sec. 74 (2)	Application for calling of Annual General meeting.

12.	Sec. 97 (1)	Application for calling of general meeting of company other than annual general meeting
13.	Sec. 98 (1)	Petition to pass an order directing immediate inspection of minute's books or directing a copy thereof be sent forthwith to person requiring it.
14.	Sec. 119 (4)	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 regulatory body or authority.
15.	Sec. 130 (1)	Application by company for voluntary revision of financial statement on Board's report.
16.	Sec. 131 (1)	Application for not sending the copy of representation of auditor to the members.
17.	Sec. 140 (4)	Application by any other person concerned for change of auditors.
18.	Sec. 140 (5)	Application for not sending copies of representation
19.	Sec. 169 (4)	Application to Tribunal for investigation into company affairs.
20.	Sec. 218 (1)	Application for approval for action proposed against employee.
21.	Sec. 222 (1)	Application for imposition of restrictions on securities.
22.	Sec. 230 (1)	Application for compromise arrangement and amalgamation.
23.	Sec. 230 (12)	Application in the event of grievance of takeover of company.
24.	Sec. 235 (2)	Application by dissenting shareholders.
25.	Sec. 237 (4)	Appeal to Tribunal against assessment of compensation.
26.	Sec. 238 (2)	Appeal against order of Registrar refusing register any circular.
27.	Sec. 241 (1)	Application in cases of oppression and mismanagement.
28.	Sec. 242 (4)	Application for regulating the conduct of company.
29.	Sec. 243 (1) (b)	Application for appointment as Managing Director

30.	Sec. 244 (1)	Application for waiver of requirement specified in clause (a) or (b) of Sec. 224 (1)
31.	Sec. 245	Application for class action suits.
32.	Sec. 252 (1)	Appeal against order of Registrar
33.	Sec. 252 (3)	Application to Tribunal against strike-off from Register of Company.
34.	Sec. 253 (1)	Application for determination of sickness.
35.	Sec. 255	Reference to Tribunal by Public Financial Institution or State Level Institution or Scheduled Bank.
36.	Sec. 254 (3)	Application for revival and rehabilitation of sick company.
37.	Sec. 269	Application by Company for withdrawal of funds from Rehabilitation and Insolvency funds.
38.	Sec. 272	Petition for winding-up of company.
39.	Sec. 276 (1)	Application for removal and replacement of liquidation.
40.	Sec. 277 (4)	Application for constitution of winding-up committee.
41.	Sec. 279 (1)	Application for stay of suits on winding-up order.
42.	Sec. 283 (3)	Application for custody of company's property.
43.	Sec. 288 (2)	Application for revision of orders passed by Tribunal.
44.	Sec. 289 (1)	Application for stay of winding-up by promoter, shareholder or creditors or any other interested person.
45.	Sec. 289 (4)	Application for stay of winding-up by promoter, shareholder or creditors or any other interested person by company liquidator.
46.	Sec. 290 (1)	Application for exercise of power by company liquidator.
47.	Sec. 291 (1)	Application seeking professional assistance by company liquidator.
48.	Sec. 292 (4)	Application by any person aggrieved by any act on decision of company liquidator.
49.	Sec. 293 (2)	Application by creditor or contributory for inspection of books maintained by company liquidator.
50.	Sec. 299 (1)	Application to summon persons suspected of having the property of company.

51.	Sec. 302	Application for dissolution of company by Tribunal.
52.	Sec. 306 (3)	Application by company for winding-up.
53.	Sec. 322 (1)	Application for determining questions etc.
54.	Sec. 322 (2)	Application for setting aside attachment, distress or execution.
55.	Sec. 328 (1)	Application for setting aside fraudulent preference.
56.	Sec. 331	Application for determination of liability and rights of certain persons fraudulently preferred.
57.	Sec. 333 (1)	Application for disclaimer of onerous proper.
58.	Sec. 333 (5)	Application for rescinding the contract etc.
59.	Sec. 333 (6)	Application for vesting or delivery of property etc.
60.	Sec. 334 (1)	Application for transfer of shares etc.
61.	Sec 335 (1)	Application for obtaining leave of Tribunal for effecting attachments, executions etc.
62.	Sec. 339	Application for fraudulent conduct of biz.
63.	Sec. 340 (1)	Application for assessing damages against delinquent director etc.
64.	Sec. 342 (1)	Application for prosecution of delinquent offices and member of company.
65.	Sec. 342 (2)	Application for directing company liquidator to make a report.
66.	Sec. 343 (3)	Application with respect to exercise of powers by company liquidator.
67.	Sec. 347	Application of disposal of books and papers of company.
68.	Sec. 350 (2)	Application by company liquidator to retain sum in excess of Rs.5,000/-
69.	Sec. 353 (1)	Application for directing company liquidator to make good the default.
70.	Sec. 356	Application to declare dissolution of company as void.
71.	Sec. 373	Application for stay of suits on winding-up order.

72.	Sec. 399 (2)	Application seeking leave of Tribunal.
73.	Sec. 425	Petition for initiating contempt.
74.	Sec. 441	Application for compounding of certain offences.
75.	Sec. 421	Appeals to NCLAT
76	Sec.441	Any Application which have contravened the other provisions of Companies Act, 2013 and which is compoundable <b>with fine only and where the minimum penalty involved</b> should be more than more than 5 lakhs.

#### TRANSFER OF CERTAIN PENDING PROCEEDINGS:

The different date fixed by the Central Government for transfer of pending case;

- c. The pending case before the Court and other authorities all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10E of the Companies Act, 1956 (1 of 1956), transferred with **effect from 01<sup>st</sup> June, 2016** to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act.
- d. Any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on **any question of law arising out of such order**.
- e. all proceedings under the Companies Act, 1956 (1 of 1956), including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal **with effect from 28.02.2017**.

- f. Any appeal preferred to the Appellate Authority for Industrial and Financial Reconstruction **or** any reference made **or** inquiry pending to **or** before the **Board of Industrial and Financial Reconstruction** or any proceeding of whatever nature pending before the Appellate Authority for Industrial and Financial Reconstruction or the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) transferred with effect from 01<sup>st</sup> June, 2016.

#### PROCEDURE TO MAKE APPLICATION WITH NCLT:

Following are the requisite points for consideration before filing petition, appeal or application before NCLT as per NCLT Rules:

- i. Every application, petition, documents to be filed before NCLT shall be in English and if in any other language, it shall be accompanied with copy of Translation in English.
- ii. It shall be type written, printed in double space, on one side of legal paper, with margins: Top 4 c.m., Right-2.5 c.m. and left-5c.m. and it shall be duly paginated, indexed and stitched together in paper book form.
- iii. The cause title shall state “**Before the National Company Law Tribunal**” and shall specify the Bench to which it is presented and also set out the proceedings or order of the authority against which it is preferred.
- iv. Appeal or petition or application or counter or objections shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point.

- v. Every petition, application, appeal or document shall be filed in **Triplicate** shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.
- vi. Copy of petition, application or appeal shall also be filed to the opposite party and copy of Resolution for authorisation to sign, verify and institute on behalf of the company shall also be enclosed.
- vii. On scrutiny, the appeal or petition or application or document is found to be defective, such document shall, after notice to the party, be returned for compliance and if there is a failure to comply within seven days from the date of return, the same shall be placed before the Registrar who may pass appropriate orders.
- viii. The Registrar may for sufficient cause return the said document for rectification or amendment to the party filing the same, and for this purpose may allow to the party concerned such reasonable time as he may consider necessary or extend the time for compliance.
- ix. On admission of appeal or petition or caveat or application, the same shall be numbered and registered in the appropriate register maintained in this behalf and its number shall be entered therein.
- x. On the admission of appeal or petition or application the Registrar shall, if so directed by the Tribunal, call for the records relating to the proceedings from any adjudicating authority and retransmit the same.
- xi. The Tribunal shall notify to the parties the date and place of hearing of the petition or application in such manner as the President or a Member may, by general or special order, direct.

- xii. Where at any stage prior to the hearing of the petition or application, the applicant desires to withdraw his petition or application, he shall make an application to that effect to the Tribunal, and the Tribunal on hearing the applicant and if necessary, such other party arrayed as opposite parties in the petition or the application or otherwise, may permit such withdrawal upon imposing such costs as it may deem fit and proper for the Tribunal in the interests of the justice.
- xiii. Every party may appear before a Tribunal in person or through an authorised representative, duly authorised in writing in this behalf.
- xiv. The Registry shall send a certified copy of final order passed to the parties concerned free of cost and the certified copies may be made available with cost as per Schedule of fees, in all other cases.
- xv. The certified copy of the order of NCLT shall be filed with ROC in Form NO. INC-28 within the time prescribed by the Act.

## PART-II

### CHALLENGES & ROLE OF COMPANY SECRETARIES

#### CHALLENGES OF NCLT:

The main reason for the challenge was the constitutionality of the tribunal as it involved the wholesale transfer of jurisdiction of the High Courts in company matters to a quasi-judicial body. It was argued that such transfer will result in vesting of intrinsic judicial functions in a quasi-judicial body, which was vulnerable to executive interference.

#### ROLE OF COMPANY SECRETARIES:

As per Section 432, A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or **authorize one or more:-**

- i. Chartered accountants; or
- ii. **Company Secretaries; or,**
- iii. Cost accountants; or,
- iv. Legal practitioners; or,
- v. Any other person like officer of the company.

### SCOPE OF PRACTICING 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 and winding up proceedings under the Companies Act, 2013.

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

**a. 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.

**b. Sick Companies:**

**i. Timely Detection of Sick company:**

The Practicing 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.

ii. **Making a reference of sick industrial company to NCLT:**

A Practicing 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.

c. **Winding up:**

The National Company Law Tribunal has also been empowered to pass an order for winding up of a company. Therefore Practicing 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 Practicing Company Secretaries have been permitted to act as Liquidator** in case of winding up by the Tribunal.

d. **Reduction of Capital:**

As per Section 66 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 Practicing Company Secretaries will be able to represent cases of reduction of capital before the Tribunal.

**e. 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. Therefore, Practising Company Secretaries would for the first time be eligible to appear for matters which were hitherto dealt with by the High Court.

**f. Appearance before NCLAT:**

A Practising Company Secretary has been authorized to appear before National Company Law Appellate Tribunal.

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.

**CHALLENGES FOR COMPANY SECRETARIES:**

With every opportunity there comes challenges for the professionals in the manner of dealing with the cases with NCLT and NCLAT like court craft and art of advocacy etc., since the cases that are being dealt with Company Law Board, High Court and BIFR will be now dealt by NCLT and NCLAT.

**Art of Advocacy:**

1. Filing Memorandum of Appearance with Tribunal along with Pleading.
2. Dress code as prescribed by Institute/NCLT Rules.
3. Services of documents to opposite party, if any.

4. SWITCH OFF Mobile Phone.
5. Standing position of councils petitioner at Left hand side of Judge & defendant at Right Hand side of Judge.
6. Case summery /fact sheet of the case.

#### Preparation & Rehearsal:

1. Use notes-as prompts not to read.
2. Find Merits-Focus on it
3. Body Language-Positive and Respectful.
4. Make clear brief on law and evidence. Keep focus on main issues & results to be achieved.
5. Avoid frequent interruptions or objections. Wait for chance.
6. Knowledge of development of law and background will be helpful.
7. Do not argue with the Judge, explain with reason. Focus on winning war not battle.
8. Co-operate with opposite counsel or representative
9. Make clear brief on law and evidence. Keep focus on main issues & result to be achieved.
10. Look previous similar cases and their determination.

### PART-III

#### OPPRESSION & MISMANAGEMENT UNDER NCLT

##### WHAT IS OPPRESSION:

'**Oppression**' means when affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members'.

##### WHO CAN APPLY WITH TRIBUNAL:

Any **member** of a company who complains that;

<b>Activity</b>	<b>Interest of</b>	<b>Applied by</b>
the affairs of the company have been or are being conducted in a manner prejudice to	Interest of public	Member
	Oppressive to him	
	The interests of the company	
the material changes by or in the interests of, any creditors, including debenture holders or any class of shareholders of the company has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, which Prejudicial to;	interests of members or any class of members	Member

Activity	Interest of	Applied by
The affairs of the company are being conducted	prejudicial to public interest	The Central Government

#### STRENGTH FOR MEMBER TO APPLY TRIBUNAL:

The following members of a company shall have the right to apply with Tribunal-

Type of Company	Strength of member	
Company having share capital	not less than 100 members of the Company.	Whichever is less
	not less than 1/10 <sup>th</sup> of the total number of its members.	
Not having a share capital	any member or members holding not less than 1/10 <sup>th</sup> of the issued share capital of the company, subject to the condition that the applicant(s) has or have paid all calls and other sums due on his or their shares.	
	Not less than 1/5 <sup>th</sup> of the total number of its members	

#### DIFFERENCE BETWEEN OPPRESSION & MISMANAGEMENT UNDER COMPANIES ACT, 1956 & COMPANIES ACT, 2013:

Sl. No.	Under Companies Act, 1956	Under Companies Act, 2013
01.	Section 397 to 410 deals with oppression & mismanagement	Section 241 to 246 deals with Oppression & mismanagement
02.	Member could only complain about ongoing/continuing instance	Member can approach NCLT for seeking relief for past cases of oppression & mismanagement

Sl. No.	Under Companies Act, 1956	Under Companies Act, 2013
03.	Member could apply tribunal if the acts would justify the making of a winding up order on the ground that it was just & equitable	The petitioner is not required to make out a case for winding up of the company on just & equitable ground.
04.	There is no provisions for apply to the Tribunal for oppression & mismanagement.	Section 241(2) the Act enable the Central Government to approach NCLT for relief if it forms an opinion that the affairs of the company are being conducted in a manner prejudice to the public interest
05.	The central government to waive the requirements pertaining to the number of members permitted to file an application to seek relief under oppression & mismanagement	The tribunal has the power to waive.
06.	The central government has the power to waive the threshold limit only if it opinion that just and equitable to do so.	The tribunal may waive the threshold limit on any ground.

MISMANAGEMENT UNDER COMPANIES ACT, 2013:

The term “**Mismanagement**” means 'conducting the affairs of the company in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company or there has been a material change in the management and control of the company, and by reason of such change it is likely that affairs of the company will be conducted in a manner prejudicial to public interest or interest of the company.

The following procedures are applicable for mismanagement;

1. The following class of member(s) or depositor(s), if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders:

Type of Company	Strength of member/depositor	
Company having share capital	not less than one hundred members of the company.	Whichever is less
	not less than such percentage of the total number of its members	
	any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares	

Type of Company	Strength of member/depositor	
Not having a share capital	Not less than 1/5 <sup>th</sup> of the total number of its members	
In case of depositor	shall not be less than one hundred depositors	Whichever is less
	not less than such percentage of the total number of depositors as may be prescribed	
	any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.	

**has made an application;**

- a. to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;
- b. to restrain the company from committing breach of any provision of the company's memorandum or articles;
- c. to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors.
- d. to restrain the company and its directors from acting on such resolution;
- e. to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;
- f. to restrain the company from taking action contrary to any resolution passed by the members;

- g. to claim damages or compensation or demand any other suitable action from or against-
  - i. the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
  - ii. the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or
  - iii. any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;
- 2. Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability **shall be of the firm as well as of each partner who was involved in making any improper or misleading statement** of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.
- 3. In considering an application, the Tribunal shall take into account, in particular
  - a. whether the member or depositor is acting in good faith in making the application for seeking an order;
  - b. any evidence before it as to the involvement of any person other than directors or officers of the company.

- c. whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;
  - d. any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;
  - e. where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be-
    - i. authorised by the company before it occurs; or
    - ii. ratified by the company after it occurs;
  - f. where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.
4. If an application filed is admitted, then the Tribunal shall have regard to the following-
- a. public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;
  - b. all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;

- c. two class action applications for the same cause of action shall not be allowed;
  - d. the cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.
5. Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.
  6. Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.
  7. Nothing contained in this section **shall apply to a banking company.**

#### POWER OF TRIBUNAL UNDER OPPRESSION & MISMANAGEMENT:

The NCLT has following powers under Oppression & mismanagement:

- A.** On any application made by the member's or Central Government, the Tribunal is of the opinion;
  - i. that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; **and**
  - ii. that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up.

- B.** Without prejudice to the generality of the power mentioned above, an order under that sub-section may provide for-
- i. The regulation of conduct of affairs of the company in future;
  - ii. The purchase of shares or interests of any members of the company by other members thereof or by the company;
  - iii. In the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;
  - iv. Restrictions on the transfer or allotment of the shares of the company;
  - v. The termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;
  - vi. The termination, setting aside or modification of any agreement between the company.
  - vii. The setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;
  - viii. Removal of the managing director, manager or any of the directors of the company;

- ix. Recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;
- x. The manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h);
- xi. Appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;
- xii. Imposition of costs as may be deemed fit by the Tribunal;
- xiii. Any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

#### **PROCEDURAL ASPECT UNDER OPPRESSION & MISMANAGEMENT:**

The following procedures are involved in oppression & mismanagement:

1. Any member of the Company as mentioned above, shall have right to apply under Companies Act,2013.
2. Any application shall be made in the requisite form as prescribed by the NCLT Rules, 2016 with Tribunal along with brief fact of the case.
3. After hearing, the Tribunal issues the certified copy of the order and the certified copy of the order of the Tribunal shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.

4. The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.
5. Where an order of the Tribunal makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.
6. Any alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act.
7. A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.

#### DECISIONS & ONGOING PROCEEDINGS UNDER NCLT PERTAINING TO OPPRESSION & MISMANAGEMENT:

##### **a. Cyrus Investments & Anr. ("Petitioners") v. Tata Sons & Ors. ("Respondents")**

The National Company Law Tribunal ("NCLT") in the recent case of Cyrus Investments & Anr. ("Petitioners") v. Tata Sons & Ors. ("Respondents"), dismissed both the waiver plea and the company petition alleging oppression and mismanagement against Tata Sons. The Petitioners sought waiver from the requirement of holding at least one-tenth of 'issued share capital' of the company or representing at least one-tenth of the company's minority shareholders under Section 244(2) of the Companies Act, 2013.

The Petitioners failed to establish any cause of action under Section 241(3) of the Companies Act, 2013 ("Act"). The Petitioners have appealed against this decision and the matter is currently pending before the National Company Law Appellate Tribunal ("NCLAT") for adjudication.

### **BACKGROUND/FACTS:**

The Petitioner (companies controlled by Cyrus Mistry's family) collectively held 18.37% equity shareholding in Tata Sons ("Company"). After considering the preference shareholding, the Petitioners holding drops below the minimum threshold prescribed under Section 244 of the Act for maintaining an oppression and mismanagement claim. Post removal of Mr. Cyrus Mistry as the Chairman of the Tata Group, the Petitioner filed this proceedings alleging that affairs of the Company were conducted in a manner not only prejudicial and oppressive to them but also to the company and public at large. The Respondents contended that company petition was not maintainable as they failed to fulfil the conditions under Section 244 of the Act. We have analyzed below all the allegations in the company petition and waiver application.

### **Arguments - Allowing Waiver Application**

The Petitioner collectively hold 18.37% equity in the Company and if preference shareholding is considered none of the groups would have the requisite 10% issued and paid up share capital and would lead to an absurdity as none of them would be able to maintain an application.

NCLT is the appropriate forum to deal with issues under Section 241 of the Act, if they affect the interest of member, class of members, company or the general public. The waiver should be granted to further a remedy rather than preventing it.

No other court would have jurisdiction except NCLT as envisaged under Section 430 of the Act. The power of waiver should be applied to sub-serve such purpose. Section 244 (1) is an enabling provision. In the absence of waiver being granted, minority will always be deprived of approaching NCLT under Section 241 and 242 of the Act.

The issues should be considered on face value basis and NCLT need not get into the merits of such cases at this stage. If averments are correct and cause of action is established as per threshold under Order VII Rule 11 of the Code of Civil Procedure, waiver application should be allowed.

### **Allegations and NCLT Ruling**

The Articles of Association of the Company ("Articles") are per se oppressive as they ensure that Sir Ratan Tata Trust and Sir Dorabji Tata Trust control the affairs of the Company. Further the Articles have been abused and misused by Ratan Tata.

The Petitioners alleged that the powers vested under certain Articles were not exercised in a judicious manner and should be struck off in entirety. However the Petitioners failed to disclose in their pleadings whether at the time of making amendments to the specific Articles they did not attend the meeting, contested and voted against the resolution.

The NCLT held that in the absence of disclosure, it would be construed that by voting they acquiesced to the amendment to the Articles. The parties having acquiesced to an action, at a later stage cannot raise complaints on the same issue. Further, due to the Petitioner's failure to provide details on the dates, actions and their effect causing prejudice or oppression no cause of action was established under Section 241 of the Act.

Investment of USD 12 billion by Tata Steel Limited ("TSL") at a substantial premium in Cora Group Plc. in 2007 and usage of powers in relation to investment

The NCLT found no cause of action in this issue. The transaction in question took place almost 9 years back and was not in relation to the affairs of the Company. TSL and its Directors were not made party to the proceedings nor was the Company a subsidiary of TSL and held only 31.35% shareholding. Ratan Tata himself was not either a Director or Chairman of the Company and no objections were raised on the transaction for the last ten years. The NCLT held that it would not intervene in case of business decisions taken by a Company.

**Continuation of business of Nano Car Project undertaken by Tata Motors upon insistence of Ratan Tata**

The NCLT held the transaction referred was in relation to the proposal of manufacture of cars in 2007-08. There was no disclosure with respect to shareholding of the Company in Tata Steel or it being a subsidiary therefore it did not fall within the parameters of Section 241. The courts would not interfere in business decisions unless actions are "unconscionable, unjust and laced with fraud" to cause oppression to the complaining party.

**Illegal removal of Cyrus Mistry as the Chairman of the Company was in violation of law, principles of governance, fairness, transparency and probity.**

The Petitioners alleged that Cyrus Mistry was removed as the Chairman of the Company contrary to the Articles and resolution for his appointment under the dictate of Ratan Tata. It is an admitted position that Selection Committee is constituted for appointment and removal of Chairman, however no Section Committee was set up for Cyrus Mistry's removal but done by Board of Directors itself due to loss of confidence in his leadership.

NCLT held that directorial complaint does not give rise to a grievance under Section 241 of the Act. Cyrus Mistry was not appointed Chairman based on shareholding of Petitioners in Tata Sons but done on selection and taken on employment. Section 241 only addresses shareholder grievances and directorial issues cannot be taken up as a cause of action.

### **Use of Tata Sons shareholding in certain Tata Group Companies to requisition EGM for removal of Cyrus Mistry as Director from Group Companies.**

Actions of Tata Sons undermined the position and status of independent Directors in listed Tata Group companies and taking steps to remove Nasli Wadia as he expressed support towards Cyrus Mistry

The group companies were not made party to the proceedings and therefore actions in those entities cannot be considered to constitute affairs of the Company. The NCLT therefore concluded that no cause of action arose under Section 241 of the Act.

### **Actions of Ratan Tata constitute breach of SEBI Regulations on prohibition of Insider Trading**

The NCLT held that allegations of insider trading were raised at a pre-mature stage and should be dealt with only by the Securities Exchange Board of India ("SEBI"). In the event of any violation/irregularity detected by SEBI, it could then be considered as a probable ground under Section 241 of the Act.

### **Close relationship of Ratan Tata with Shiva leading to leakage of Board meeting discussions**

The NCLT held that actions alleged dated ten years back and in relation to Tata Teleservices Limited ("TTSL"). TTSL is not made party to the proceedings and the allegations do not relate to affairs of the Company. Further, the allegations have been raised only post removal of Cyrus Mistry and Ratan Tata himself having

retired five years back no cause of action has been established under Section 241 of the Act.

**Actions in relation to sale of immovable property of Tata Sons and awarding contracts of Tata Power to benefit persons close to him**

Since no details of the transaction were provided or how Ratan Tata abused his position in awarding contracts, the allegation was dismissed for being without any cause of action.

**Bestowing contracts upon Mr. Mehli Mistry and enriching him at the cost of Tata companies;**

Joint Venture between Air Asia Limited and Telstra Trade Place Private Limited entering the aviation sector including possible fraudulent, hawala transactions as indicated in the Deloitte Forensic Report

NCLT held with respect to both allegations that no details were provided in relation to the transaction or any documentation submitted. Mr. Cyrus Mistry was on the Board for five years and raised these issues only post his removal, therefore no cause of action was made out under Section 241 of the Act. The allegations was dismissed as they were vague and did not contain any details and were not in relation to the affairs of the Company.

**JUDGMENT & ANALYSIS:**

NCLT considered the following factors to consider the issue of waiver:-

- a. What is the interest of Petitioner in Company-is it significant or substantial?
- b. What are the issues raised and whether Section 241 is the most appropriate jurisdiction to deal with same?

- c. Is this cause raised up substantial importance to Petitioner or to any class of member or to the company itself or public interest?

The NCLT concluded that no cause of action was established in any of the allegations raised by the Petitioners. Further, there is no rule that the Bench cannot get into merits at the time when waiver application is decided. The Bench does have the discretion to find out whether cause of action exists to file the case and three tests are required to be applied:-

- i. Cause of action test;
- ii. Prima facie case test;
- iii. Merits (proof) test

NCLT rejected the waiver application as Petitioners did not have the requisite qualification to maintain the application. Consequently, NCLT also dismissed the main petition itself. However, the NCLT did not merely reject the petition on the ground of non-maintainability but appears to have rejected the allegations of the Petitioners on the ground that they failed to disclose cause of action or satisfy the NCLT on merits test.

The NCLT held that Petitioners failed to establish any cause of action in all the allegations, therefore the petition should be rejected at the threshold itself. Further, the Petitioners even failed to establish how acts complained of caused harm or injury to their economic interest as substantial interest is not sufficient and cannot claim that all actions are thrust on minority as fait accompli.

Waiver applications should be allowed entirely on the basis of facts of each case, nature of the company, nature of relationship between the shareholders, existing structure amongst others. The interpretation and application of the relevant provisions is critical to understand the law for maintainability of

oppression and mismanagement cases before NCLT. In the absence of there being a case of shareholder action and affecting economic interests, waiver applications may not be maintainable. NCLT has adopted a technical approach to ensure that frivolous litigation is prevented and adopted the basic principles for granting relief in interim applications.

**b. Mr. Vikrm Bakshi V/s. McDonalds India Private Limited:**

McDonalds India has recently been in the news for shutting down 43 of its 55 Delhi outlets. The bone of contention leading to this event is the ongoing dispute between Mr. Vikram Bakshi and McDonalds India Private Limited ("MIPL"). This case has clarified that the National Company Law Tribunal ("NCLT") can establish its jurisdiction to hear disputes regarding oppression and mismanagement, even with the existence of a Joint Venture Agreement ("JVA"). The NCLT confirmed that the mere existence of a JVA and arbitration clause would not impede the NCLT from establishing its jurisdiction, as the jurisprudence around oppression enables the tribunal to keep the best interest of the company, its shareholders and, in this case, also the general public's best interests in mind.

Mr Bakshi was the Managing Director of Connaught Plaza Restaurants Private Limited ("CPRL"). CPRL was incorporated in furtherance of a Joint Venture Agreement ("JVA") between Mr. Bakshi and MIPL in 1995; and both parties have a 50:50 share in the said company. The JVA was entered into for setting up franchises of McDonalds in North India and getting all the prerequisite approvals and running the business in North India. In due course, a dispute arose out of the JVA, and Mr. Bakshi approached the NCLT alleging acts of oppression and mismanagement against him by MIPL.

The NCLT decision dated 13<sup>th</sup> July 2017 granted clarity on such allegations by confirming oppression, reinstating Mr. Bakshi as the Managing Director and appointing Justice G.S. Singhvi to act as an Administrator in the company, with the right to vote in Board Meetings.

**ANALYSIS:**

While the decision of the NCLT in this case delves into the facts of the issue, there is a need to elucidate the establishment of jurisdiction of the Tribunal in cases of oppression arising from the scope of a personal contract (in this case, the JVA). The question arising from the facts is whether private agreements lie beyond the scope of Section 397 of the Companies Act, 1956. The NCLT's decision confirmed that oppression under Section 397 establishes the jurisdiction of the CLB (now the NCLT) under Section 402 of the Companies Act, 1956.

In the present case, the NCLT held that since the provisions of the JVA had for all practical purposes been incorporated into the AoA, any malafide action or act of oppression would be considered an act of oppression against the shareholder (in this case, Mr. Bakshi). Further, such acts of oppression are also against the best interests of the company, thereby granting the NCLT the right to pass an order, even though the dispute was stemming from a private contract. In this case, the NCLT also spoke about the interests of the public, especially the employees who would lose their jobs due to the ongoing dispute. Hence, this elevation of a private contractual agreement to a company law dispute is effectuated keeping the interests of the shareholders and the company in mind.

The incorporation of the JVA into the AoA also illuminates the common intentions of the parties, their fiduciary duties towards each other and is an evidentiary document of their shared good faith. It is in this context that the NCLT has held that while the JVA is a private contract, MIPL's actions amount to oppression under the Companies Act, 1956 due to the incorporation of the same into the AoA. Further, both parties have referred to the AoA in the past (such as Article 35 – Board to appoint a Director in furtherance of Clause 7 of the JVA) and it would be unfair to now adopt a contrary interpretation. Hence the NCLT held that Clause 7 of the JVA that states that the "Partner" (Mr. Bakshi) must be reappointed every two years is incorporated into Article 35 of the AoA and any acts of oppression to undermine the same will attract the jurisdiction of this Tribunal.

The main takeaway from this NCLT decision is rooted in the understanding that Section 398, 398 and 402 of the Companies Act, 1956 form a self-sufficient code for the regulation of the management of the company to ensure there is no harm to the interests of the company or any of its shareholders. This manifests in the broad powers given to the CLB (now the NCLT), leading to the establishment of its jurisdiction, even when a separate JVA (with an arbitration clause) exists.

## CONCLUSION:

One size doesn't fit all. Introduction of any new reform comes with its own set of challenges. The effect of notification is that CLB stands immediately dissolved. With only 11 benches currently operative, there will be a huge burden on the tribunal to deal with cases transferred from CLB and other forums. This may serve as an impediment in the transition process. Further, all provisions with respect to NCLT have been notified Overall the constitution of NCLT and NCLAT has paved way for a much needed judicial reform. For now all that can be said is that in the light of increasing globalization and the need to move in-sync with changing times, a landmark step has been taken to promote better corporate dispute redressal mechanism.

In view of vast opportunities emerging with the establishment of National Company Law Tribunal, the Practicing 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.

## BIBLIOGRAPHY:

1. A. Ramaiah – Companies Act, 2013
2. A Ramaiah – Companies Act, 1956
3. ICSI Study Material
4. Company law Procedures
5. Company Law Bare Act, Taxman Publications

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