NCLT & NCLAT
OPPORTUNITIES & CHALLENGES;
PROVISIONS UNDER NCLT
FOR
OPPRESSION & MISMANAGEMENT

Team -1

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38th Batch of MSOP - ICSI, Bengaluru Chapter
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PREFACE

This project report is prepared as per the curriculum prescribed by the Institute of Company Secretaries of India for the Management Skills & Orientation Programme (MSOP) under the able guidance of Bengaluru Chapter.

The project has given us an insight about National Company Law Tribunal (NCLT) & National Company Law Appellate Tribunal (NCLAT) with respect to its Composition, Powers, Tenure, Opportunities for a Company Secretary, Challenges faced by the Tribunal’s, its role in redressing Oppression & Mismanagement under the Companies Act, 2013.

The information in the said report has been sourced from books, acts and the internet.
ACKNOWLEDGEMENT

We would like to express our sincere gratitude to the Institute of Company Secretaries of India for providing us an opportunity to work and submit a project on NCLT and NCLAT-Challenges and Opportunities and Oppression & Mismanagement.

We would also extend our heartfelt appreciation and gratitude to the Bengaluru Chapter and the faculty members for helping us learn various aspects in preparation of a project report.

Last but not the least, a big thank you to our counterparts and friends who helped us in achieve the purpose of this report through guidance and healthy rebuttal.
PART – I

NATIONAL COMPANY LAW TRIBUNAL (NCLT)
&
NATIONAL COMPANY LAW APPELLATE TRIBUNAL (NCLAT)
BACKGROUND

The National Company Law Tribunal (NCLT) & The National Company Law Appellate Tribunal (NCLAT) were established on 1st June, 2016 under the Companies Act, 2013. The NCLT & NCLAT are quasi-judicial bodies in India that adjudicate issues relating to Indian Companies. 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.

COURSE OF IMPLEMENTATION OF NCLT

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.

The Ministry of Company Affairs (MCA) on 1st June, 2016 notified the Constitution of National Company Law Tribunal (NCLT) & The National Company Law Appellate Tribunal (NCLAT) in exercise of powers conferred under section 408 and 410 of the Companies Act, 2013.

**NEED FOR NCLT & NCLAT**

The constitution of NCLT & NCLAT was a step towards improving and easing all the judicial matters relating to the Company law under one roof. Some of the most important reasons for NCLT & NCLAT’s birth are as follows:

- **Simple 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.

- **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 may be. The speedy disposal of cases will save time, energy and money of the parties.

- **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 & NCLAT, we hope that not only the Corporate entities but also all the stakeholders associated with those entities are benefitted.
# Constitution of Bench

The NCLT has eleven benches in the following jurisdictions:

<table>
<thead>
<tr>
<th>Sl No.</th>
<th>Name of the Bench</th>
<th>Location</th>
<th>Territorial Jurisdiction of the Bench</th>
</tr>
</thead>
</table>
| 1.     | National Company Law Tribunal, Principal Bench  
         National Company Law Tribunal, New Delhi Bench | New Delhi |  
         - State of Rajasthan  
         - Union Territory of Delhi |
| 2.     | National Company Law Tribunal, Ahmedabad Bench | Ahmedabad |  
         - State of Gujarat  
         - State of Madhya Pradesh  
         - Union Territory of Dadra & Nagar Haveli  
         - Union Territory of Daman and Diu |
| 3.     | National Company Law Tribunal, Allahabad Bench | Allahabad |  
         - State of Uttar Pradesh  
         - State of Uttrakhand |
         - State of Karnataka |
| 5.     | National Company Law Tribunal, Chandigarh Bench | Chandigarh |  
         - State of Himachal Pradesh  
         - State of Jammu and Kashmir  
         - State of Punjab  
         - Union territory of Chandigarh |
| 6.     | National Company Law Tribunal, Chennai Bench | Chennai |  
         - State of Kerala  
         - State of Tamil Nadu  
         - Union territory of Lakshadweep  
         - Union territory of Puducherry |
| 7.     | National Company Law Tribunal, Guwahati Bench | Guwahati |  
         - State of Arunachal Pradesh  
         - State of Assam  
         - State of Manipur  
         - State of Mizoram  
         - State of Meghalaya  
         - State of Nagaland  
         - State of Sikkim  
         - State of Tripura |
| 8.     | National Company Law Tribunal, Hyderabad Bench | Hyderabad |  
         - State of Andhra Pradesh  
         - State of Telangana |
         State of Jharkhand  
         State of Odisha  
         State of West Bengal  
         Union territory of Andaman and Nicobar Islands. |
         State of Goa  
         State of Maharashtra. |
TRIBUNAL COMPOSITION

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-

- is, or has been, a judge of a High Court; or

- He is, or has been, a District Judge for at least five years; or

- He has, for at least ten years been an advocate of a court

iii. The technical member of the Bench shall be;

- 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

- has been, in practice as a chartered accountant for at least fifteen years; or

- has been, in practice as a cost accountant for at least fifteen years; or

- has been, in practice as a company secretary for at least fifteen years; or 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

- 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).
POWERS OF THE BENCH & TRIBUNAL

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.
TENURE OF ITS MEMBERS

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.
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 1st 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 1st 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 26th 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**

<table>
<thead>
<tr>
<th>Sl No.</th>
<th>Name of the Bench</th>
<th>Location</th>
<th>Territorial Jurisdiction</th>
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<tbody>
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<td>1.</td>
<td>NCLAT</td>
<td>New Delhi</td>
<td>All over India</td>
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</table>
SCOPE OF THE 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.

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<td>Application to Tribunal where company has been incorporated by furnishing false or incorrect info or by any fraudulent action</td>
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<td>3.</td>
<td>Sec. 14 (1)</td>
<td>Conversion of public company into a private company.</td>
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<td>4.</td>
<td>Sec. 55 (3)</td>
<td>Application for issue further redeemable preference shares</td>
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<td>Sec. 58 (3)</td>
<td>Appeal against Refusal of Registration of Shares.</td>
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<td>6.</td>
<td>Sec. 59</td>
<td>Appeal for Rectification of Register of Member</td>
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<td>7.</td>
<td>Sec. 62 (4)</td>
<td>Appeal against order of Govt. fixing terms and conditions for conversion of debentures and shares</td>
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<td>Sec. 71(10)</td>
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<td>Sec. 73 (4)</td>
<td>Application by Deposition for repayment of Deposit or Interest</td>
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<td>Application for approval for action proposed against employee.</td>
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<td>Sec. 283 (3)</td>
<td>Application for custody of company's property.</td>
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<td>Sec. 288 (2)</td>
<td>Application for revision of orders passed by Tribunal.</td>
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<td>Sec. 289 (1)</td>
<td>Application for stay of winding-up by promoter, shareholder or creditors or any other interested person.</td>
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<td>45.</td>
<td>Sec. 289 (4)</td>
<td>Application for stay of winding-up by promoter, shareholder or creditors or any other interested person by company liquidator.</td>
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<td>46.</td>
<td>Sec. 290 (1)</td>
<td>Application for exercise of power by company liquidator.</td>
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<td>Sec. 291 (1)</td>
<td>Application seeking professional assistance by company liquidator.</td>
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<td>Sec. 292 (4)</td>
<td>Application by any person aggrieved by any act on decision of company liquidator</td>
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<td>49.</td>
<td>Sec. 293 (2)</td>
<td>Application by creditor or contributory for inspection of books maintained by company liquidator.</td>
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<td>50.</td>
<td>Sec. 299 (1)</td>
<td>Application to summon persons suspected of having the property of company</td>
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<td>51.</td>
<td>Sec. 302</td>
<td>Application for dissolution of company by Tribunal</td>
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<td>52.</td>
<td>Sec. 306 (3)</td>
<td>Application by company for winding-up.</td>
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<td>Sec. 322 (1)</td>
<td>Application for determining questions etc.</td>
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<td>Application for setting aside attachment, distress or execution.</td>
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<td>Sec. 328 (1)</td>
<td>Application for setting aside fraudulent preference.</td>
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<td>58.</td>
<td>Sec. 333 (5)</td>
<td>Application for rescinding the contract etc.</td>
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<td>Sec. 333 (6)</td>
<td>Application for vesting or delivery of property etc.</td>
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<td>60.</td>
<td>Sec. 334 (1)</td>
<td>Application for transfer of shares etc.</td>
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<td>61.</td>
<td>Sec 335 (1)</td>
<td>Application for obtaining leave of Tribunal for effecting attachments, executions etc.</td>
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<td>62.</td>
<td>Sec. 339</td>
<td>Application for fraudulent conduct of biz.</td>
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<td>63.</td>
<td>Sec. 340 (1)</td>
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<td>64.</td>
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<td>Application for prosecution of delinquent offices and member of company.</td>
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<td>Sec. 342 (2)</td>
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<td>Application with respect to exercise of powers by company Liquidator</td>
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<td>67.</td>
<td>Sec. 347</td>
<td>Application of disposal of books and papers of company.</td>
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<tr>
<td>68.</td>
<td>Sec. 350 (2)</td>
<td>Application by company liquidator to retain sum in excess of Rs.5,000/-</td>
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<td>69.</td>
<td>Sec. 353 (1)</td>
<td>Application for directing company liquidator to make good the default.</td>
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<td>70.</td>
<td>Sec. 356</td>
<td>Application to declare dissolution of company as void.</td>
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<td>71.</td>
<td>Sec. 373</td>
<td>Application for stay of suits on winding-up order.</td>
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<tr>
<td>72.</td>
<td>Sec. 399 (2)</td>
<td>Application seeking leave of Tribunal.</td>
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<td>73.</td>
<td>Sec. 425</td>
<td>Petition for initiating contempt.</td>
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<td>74.</td>
<td>Sec. 441</td>
<td>Application for compounding of certain offences.</td>
</tr>
<tr>
<td>75.</td>
<td>Sec. 421</td>
<td>Appeals to NCLAT</td>
</tr>
<tr>
<td>76.</td>
<td>Sec. 441</td>
<td>Any Application which have contravened the other provisions of Companies Act, 2013 and which is compendable with fine only and where the minimum penalty involved should be more than more than 5 lakhs.</td>
</tr>
</tbody>
</table>
1. Inherit from High Court & BIFR
   - Merger & Amalgamation
   - De-Merger
   - Reduction of Share Capital
   - Winding Up
   - BIFR

2. Inherit from CLB
   - Oppression & Mismanagement
   - Rectification of Registers
   - Compounding
   - To call AGM/EOGM
   - Removal of Directors & Auditors
   - Others

3. New Concepts
   - Class Action suit
   - Financial Year Changing
   - Cross Border Merger
   - Issue & Redemption of Preference Shares
   - Reopening of Accounts
PART - II

CHALLENGES & ROLE OF COMPANY SECRETARIES
CHALLENGES OF NCLT

Introductions of any new reform come with its own set of challenges. The main reason for the challenge was the constitution of the tribunal as it involved the transfer of matters involving same companies or parties which were spread across different forums viz., High Courts (for winding up, merger and amalgamation schemes), CLB (for oppression and mismanagement) and BIFR (for being declared sick) 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. Later, it was decided that pending CLB cases and certain matters from High Courts and BIFR will be transferred to NCLT.

In this case, CLB stands dissolved immediately.

ROLE OF COMPANY SECRETARIES

1. 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, to present his case before the Tribunal or the Appellate Tribunal, as the case may be.
2. “Officer who is in default”, for the purpose of any provision in the companies act means any of the following officers of a company [Clause 2(60)], namely:

- Whole-time director;

- Key managerial personnel which includes Company Secretary;

- Where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified.

3. If any auditor, cost accountant or company secretary in practise do not comply with the provisions of sub-section (12), he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees. [Clause 143(15)]

Notwithstanding anything contained in this section, if an auditor of a company, in the course of the performance of his duties as auditor, as auditor, has reason to believe that an offence involving fraud is being or has been committed or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed. [Clause 143(12)]

SCOPE OF 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 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 Arrangement and Amalgamation**: 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. **Revival and rehabilitation of Sick Companies**:
   - **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.
   - **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 Practicing Company Secretary can be appointed as a Technical Member of NCLT, provided he has 15 years working experience as secretary in wholetime practice. Therefore, Practicing 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 Practicing Company Secretary has been authorized to appear before National Company Law Appellate Tribunal.

g. **Oppression and mismanagement:**
   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**

They are in terms of NCLT bandwidth and court intervention. Fortunately there wasn’t a burst of cases in the beginning but a gradual increase month on month.
So, for the bandwidth, 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. So far they have done a tremendous job, but these are more complex and difficult cases. The second is that the courts don’t interfere unless they really need to. Where natural justice or the rules are not followed, the courts will have to come in, else they are the last resort.

Then the infrastructure, there are new professionals i.e., the Insolvency professionals. So, they will also be taxed to the limit with all these cases. In majority there has been large accounting firms together with international restructuring firms and the smaller firms and individuals coming up. So, the ramp up has been good. The only piece of infrastructure that is yet to come in place is the Information Utility.

Since company secretaries are new entrants to represent the clients they are yet to be proficient when compared to the existing experienced lawyers

**Art of Advocacy:**

1. Filing Memorandum of Appearance with Tribunal along with Pleading.
3. Services of documents to opposite party.
4. Standing position of councils petitioner at Left hand side of Judge & defendant at Right Hand side of Judge.

**Preparation & Rehearsal:**

1. Use notes-as prompts not to read.
2. Find Merits-Focus on it
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 OPRESSION

**Meaning:** The word Oppression or Mismanagement comes into being when any member of a company complains the following, then such member may apply to the Tribunal:

- The affairs of the company have been or is being conducted in a manner
  - prejudicial to public interest (OR)
  - prejudicial or oppressive to him or any other member (OR)
  - Prejudicial to the interests of the company
  (OR)
- The material change not being a change brought about by or the interests of any creditors, including debenture holders/any class of shareholders/any class of shareholders of the company – has taken place in the management/control of the company –
  - whether by an alteration in the Board of Directors/Manager/In the ownership of the company’s shares (OR)
  - If no share capital in its membership (OR)
  - In any other manner whatsoever
  - And because of this reason it is likely that the affairs of the company will be conducted in a manner prejudicial to the interests/its members/any class of members;

RIGHT TO APPLY TO TRIBUNAL UNDER SECTION 241 (SECTION 244):

An application under Section 241 may be made as follows:

- Members: *Company having a share capital*: Members eligible to apply shall be the **lowest** of the following:
  - 100 members
  (OR)
  - 1/10\textsuperscript{th} of the Total number of members
(OR)

- One or more members holding not less than 1/10th of the issued share capital of the company
  - Company having no share capital: Application shall be valid only if it is made by at least 1/5th of Total number of members.

- The Central Government: The Central Government may itself make an application to the Tribunal.

**POWERS OF THE TRIBUNAL:**

- If on any application made under section 241, the Tribunal is of the opinion:
  - That the company’s affairs are being conducted in the manner prejudicial or oppressive
    - To any member (OR)
    - To public interest (OR)
    - In a manner prejudicial to the interest of the company
  - That to wind up the company would unfairly prejudice such member, It may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

- The Tribunal order may provide for:
  - The **regulation of conduct of affairs** of the company in the future
  - The **purchase of shares/interests of any members** of the company by other members thereof/by the company
  - In the case of purchase of its shares by the company as aforesaid, the consequent **reduction of its share capital**
  - **Restrictions on the transfer/allotment of the shares** of the company
  - The **termination, setting aside or modification**, of any agreement between the company and the managing director, in the opinion of the Tribunal be **just and equitable**
  - The termination, setting aside or modification of any agreement between the company and any other person, provided no such agreement shall be
terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned

- Removal of the Managing Director, Manager or any of the directors of the company
- Recovery of undue gains by an Managing Director, Manager or Director during the period of appointment and the manner of utilization of the recovery including transfer to IEPF or repayment of identifiable victims
- Manner in which the Managing Director or Manager or the Company may be appointed subsequent to an order removing the existing Managing Director or Manager of the company (Appointing another person in his place)
- Appointment of such number of persons as directors to report to the Tribunal as it may direct
- Imposition of costs as may be deemed fit by the Tribunal
- Any other matter, in the opinion of the Tribunal is Just and Equitable.

- A certified copy of Tribunal order shall be filed by the company with the Registrar within 30 days of the order.
- The Tribunal may make an Interim order if it thinks fit for regulating the conduct of company’s affairs to be just and equitable

DIFERENCE BETWEEN THE COMPANIES ACT, 1956 AND COMPANIES ACT, 2013:

<table>
<thead>
<tr>
<th>Sl No.</th>
<th>Companies Act, 1956</th>
<th>Companies Act, 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Section 397 to Section 410 dealt with Oppression and Mismanagement</td>
<td>Section 241 to 246 deals with Oppression and Mismanagement</td>
</tr>
<tr>
<td>2</td>
<td>Member could only complain</td>
<td>Member can apply to Tribunal to seek relief</td>
</tr>
<tr>
<td>3</td>
<td>No specific provision to apply to Tribunal</td>
<td>Section 241(2) of the Act enables the Central Government if it is of the opinion that the affairs of the company are being conducted in a manner</td>
</tr>
</tbody>
</table>
prejudicial to public interest, it may apply to the Tribunal

4. The Central Government had the power to waive the number of members who had the right to apply

5. The Central Government has the power to waive the threshold limit on just and equitable ground

### PROCEDURAL ASPECTS AS PER NCLT RULES, 2016:

- **Right to apply under section 245**: An Application under section 245 (1) and 245(3) shall be filled in Form NCLT-9 along with the prescribed fee of Rs. 5,000.

- **Conducting a class action suit**: The Tribunal may while considering the admissibility of an application take into account the following:
  - Whether the **class** has so many members that joining them *individually would be impractical*, making a class action desirable
  - Whether there are **questions of law or fact** common to the class
  - Whether the **claims or defences of the representative parties** are **typical** of the claims or defences of the class
  - Whether the **representative parties** will fairly and adequately **protect** the interests of the class.

- **Rule of opt out**: A member of class action under section 245 is entitled to **opt-out of the proceedings at any time after the institution of the class action** with the permission of the Tribunal as per Form No. NCLT-1
- **Publication of notice**: A public notice has been issued by the Tribunal in **Form No. NCLT-13** to all the members of the class by:
  - **Publishing** the same **within 7 days** of the **admission of the application** by the Tribunal in vernacular language of the state where the registered office is situated and once in English newspaper that is in circulation in that State
  - Requiring the company to place the **public notice on the website** of such company in addition to publication of such public notice in newspaper

- **Punishment for contravention**:
  - Any Company which fails to comply with an order passed by the Tribunal shall be punishable with Fine **not less than Rs. 5 Lakhs which may extend up to Rs. 25 Lakhs**.
  - Every Officer of the company who is in default shall be punishable with **imprisonment** for a term which may extend to **3 years AND** with **Fine** which **shall not be less than Rs. 25,000 which may extend to Rs. 1 Lakh**.
WHAT IS MISMANAGEMENT?

The term mismanagement refers to the process or practice of managing ineptly, incompetently, or dishonestly.

However it is to be noted that the terms are not defined under the companies act and is left to the discretion of the court to decide on the facts of the case whether there is oppression or mismanagement of minority or not.

Instances which can be termed as mismanagement

1. Preventing directors from functioning
2. Violations of statutory provisions
3. Violations of provisions of MOA & AOA of the company
4. Misuse of funds etc.

A company is a distinct entity separate from the owners of the company where management and ownership is separated by a thin line of roles and responsibilities bestowed upon themselves. In a broad sense it is a group of persons who have come together or who have contributed money for some common purpose and have incorporated themselves into distinct legal entity. The whole scheme of the Companies Act, is to ensure proper conduct of the affairs of the company in public interest and preservation of image of country in public interest.

The section which covers oppression and mismanagement is 241 of companies Act 2013 and chapter XVI which corresponds to a clubbed section of 397 and 398 of the erstwhile Companies Act, 1956.

As India is a democratic country, the companies being a legal citizen also bestows in itself the power of democracy. Corporate democracy is more vulnerable to it because it is reckoned with the number of shares and not with number of individuals involved. The rule of majority has been made applicable to the management of the affairs of the company. The members pass resolution on various subjects either by simple or three-fourth majority. Once resolution is passed by majority it is binding on all members. As a result, court will not ordinarily intervene to protect the minority interest affected by resolution. However there are exceptions to this rule- Prevention of Oppression and mismanagement being one such ground.

Hence, it is to be noted that this section can be invoked whenever there is oppression of the minority or there is mismanagement of the affairs of a company which is prejudicial to the public interest or to the interest of the company and its members. Thus, where a director is oppressed he does not have remedy under this section unless he is also a shareholder of the
company. This section also specifies the circumstances in which an application may be made to the Tribunal by an member of a company or by the central Government for relief in cases of oppression and mismanagement.

**Instances of Mismanagement**

A very clear illustration of mismanagement under Section 398 appears in Rajahmundry Electric Corporation v. Nageshwara Rao. Here, a petition was brought against a company by certain shareholders on the ground of mismanagement by directors. Court found that vice-chairman grossly mismanaged the affairs of the company and had drawn considerable amounts for his personal purposes, the shareholders outside the group of chairman were powerless to set matters right. This was held to be sufficient evidence of mismanagement. The court accordingly appointed two administrators for management of company for period of 6 months vesting in them all the powers of the directorate.

Where the managing directors of the Company continued in office after expiry of their terms, without a meeting being held to re-appoint them prior to making fresh application to Central Government under Sec 269, the continuation of office under these conditions was held to be mismanagement.- Sishu Ranjan v. Bholanath Paper House

Where bank account was operated by unauthorized person. Kuldip Singh Dhillon v. Paragon Utility Financers Ltd. In this case, a certified copy of a resolution had been sent to the bank authorizing certain persons to operate the account. No such resolution was found recorded in the minutes book; rather the resolutions passed on the particular date and recorded in the minutes book were different.

Sale of assets at low price and without compliance with the Act- One of the estates of a tea and rubber plantation company was sold by the direction at a low price to another tea plantation company without complying with the requirements of sec 293(1) which demands approval by shareholders and without giving adequate under Sec 173 and relevant information, giving delivery of possession before general body meeting and accepting consideration in instalment. It was held that all these acts constituted mismanagement of affairs and sale was set aside. The Board of directors and the purchasers were held liable for the company’s losses and were required to submit an account of the income of the estate from the date of delivery of possession to the date of its actual return to the company-Malayalam Plantations Ltd., Re

Violation of statutory provisions and those of articles- Transferring shares without first offering them to the existing members in accordance with their rights under the articles, holding meetings without sending notice to members; issue of shares for consideration
other than cash not represented by corresponding assets and burdening the company with additional rental by shifting the company’s office- Akbarali Kalveri v. Konkan Chemicals Ltd.

Other instances include Gross neglect of interest of the company by sale of its only assets and total inattention thereafter to the affairs of the company; Violation of conditions of company’s memorandum etc.

The famous Satyam fiasco is a very good example of mismanagement of funds of the company and fraudulent accounting, where the Chairman of Satyam Computer Services- Ramalinga Raju in his letter to the Board of Directors confessed to India’s biggest corporate fraud worth Rs 7,000 crore on the company.

**McDonald’s Case: NCLT Decision on Oppression**

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 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.

Facts:

CPRL was to be governed by the terms and conditions set out in its Memorandum of Association ("MoA") and its Articles of Association("AoA"). It was also clearly understood by the parties that in the 25-year period of this JVA, profits would only begin to flow in the last 10 years as the fast food chain was new to the Indian market. The JVA also clearly specified that the Board would comprise of four Directors, two nominated by Mr. Bakshi (who has been referred to as “Partner” in the JVA) and two by McDonalds.
The bone of contention in this dispute lies in Clause 7(e) of the JVA, which states that the Board shall nominate and elect the “Partner” as the sole Managing Director every two years. However, such re-election is subject to him residing in the NCR, owning 50% of the shares of the Joint Venture Company, discharging his duties faithfully and not breaching any of the terms of the JVA.

Clause 32 of this JVA provided that if Mr. Bakshi’s services are terminated or he is no longer the Managing Director of CPRL, MIPL would have the option to purchase his shares. In his petition, Mr. Bakshi stated that in 2007-08, when profits began trickling in, MIPL tried to arm twist him into selling his shares at USD 5 Million and Mr. Bakshi responded by saying that Clause 26 (refers to fair market valuation of shares) should be followed and that he should be paid USD 100 Million instead. The MIPL rejected this offer without providing any substantial reason. A similar attempt was followed in 2011, when the West and South franchise partners attempted to buy Mr. Bakshi’s shares.

Thereafter, in 2013, the board of MIPL decided to terminate Mr. Bakshi as the Managing Director of CPRL and passed a resolution stating they were open to any litigation contingent to this decision. In August 2013, Mr. Bakshi was given a Note stating reasons for not reappointing him as the Managing Director during a CPRL Board Meeting. This included allegations of diversion of funds, mismanagement and creation of pledge on his shares. Mr. Bakshi was not given an opportunity to respond and approached the Company Law Board (“CLB”). MIPL argued that the CLB would not have jurisdiction, as a private contract with an arbitration clause existed. However, in 2014 the CLB rejected the same by stating this was an “ambush operation”, to merely usurp Mr. Bakshi’s shares without following fair market valuation. Later in 2013, MIPL tried exercising their call option again to purchase Mr. Bakshi’s shares.

Arguments:

Mr. Bakshi argued that such attempts of arm twisting him into selling his shares are oppressive and violations of Section 397, 398 and 402 of the Companies Act, 1956. Further, MIPL argued that the NCLT or the National Company Law Appellate Tribunal (“NCLAT”) would not have jurisdiction to hear this case as it was a contractual dispute and not one arising from a violation of the Companies Act; and that only the arbitration clause of the JVA would apply. They also argued that the JVA was not incorporated into the AoA and hence the enforcement of a contractual right could not fall within the ambit of Section 397[1] of the Companies Act, 1956. MIPL also submitted that Mr. Bakshi approaching the CLB for passing orders for his continuation as the Managing Director would lead to creation of fresh terms of the Agreement and that no Court/Tribunal can grant such specific performance of private contracts.

NCLT’s Decision:
The NCLT held in favour of Mr. Bakshi. In summary:

JVA had been incorporated into the AoA, as the AoA included all supplementary agreements and modifications made to the JVA and also directly refers the JVA (For example in cases of appointment of the Managing Director under Article 35 of the AoA).

While Clause 7(e) of the JVA specified the conditions that needed to be met for the reappointment of the Director, the NCLT found that despite the Note stating reasons to not re-appoint Mr. Bakshi he was financially awarded and appreciated by MIPL, showing that the conditions of Clause 7(e) were redundant in the present dispute. Further, the NCLT relied on the Audit Reports of the CPRL and found the allegations of diversion of funds and debts false. The NCLT held that such actions in culmination are indicative of oppression under Section 397,398 and 402 of the Companies Act, 1956 and are based on extraneous consideration, to acquire Mr. Bakshi’s shares.

The NCLT also specified that such allegations were made solely to remove Mr. Bakshi as the Managing Director and exercise a call option to purchase his shares. Hence, the NCLT reinstated Mr. Bakshi as the Managing Director and also appointed Justice Sighvi as an Administrator with a right to vote in Board meetings by specifying that under Section 402 of the Companies Act, 1956, the Tribunal can pass orders for the regulation of the company’s conduct of affairs.

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) exits.
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.
1. Companies Act, 2013
2. Companies Act, 1956
3. ICSI Study Material
4. Company law Procedures
5. NCLT Rules, 2016
6. Internet