6
COMPANY LAW

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I INTRODUCTION

IN THE YEAR 2013, the company law sector has undergone a sea change with the passage of the Companies Act, 2013.[1] The new Act brought out important changes in some of the key areas in the company matters like 'Board meetings, Share capital, Director's powers, duties and liabilities, Annual General Meetings, Compromise, Arrangement and Amalgamation, Merger, Winding Up, Company dividend declaration & Transfer and in cooperation of Companies' *etc*. Indeed, the Companies Act, 2013 (hereinafter CA, 2013) is a progressive legislation enacted with the objective to bring more transparency and accountability in the company managements. In order to protect the interest of the stakeholders, the Act has also legalized the concept of 'Corporate Social Responsibility (CSR) policy [2] and introduced a new concept of 'small company' within the realm of the Act. A cursory glance of the CA, 2013 gives the impression that the new act aimed for a better corporate governance and security in company matters. To a great extent, the new act has clarified many ambiguities existed in the parent Act.

II COMPOUNDING OFFENCES UNDER THE COMPANIES ACT

Section 211 (7) of the companies Act, 1956 prescribes punishment of "imprisonment for a term which may extend to six months or with the fine which may extend to ten thousand rupees, or with both". Whether an offence punishable under section 211 (7) of the Companies Act, 1956, was compoundable by the company law board (CLB) was the question before the apex court in *V.L.S. Finance Ltd.* v. *Union of India*[3] wherein it held that the offence with which the accused had been charged did not necessarily invite imprisonment or imprisonment and also fine. Hence, the nature of the offence was such that it was permissible to be compounded by the CLB.

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1 *Available at*: http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf. Act No. 18 of 2013.

2 Cl. 135 of the Companies Act, 2013.

3 [2013] 178 Comp Cas 348.

An accused charged with the offence under section 211 (7) of the Act has not necessarily to be visited with imprisonment or imprisonment with fine but can be let off by imposition of fine only. Therefore, the punishment provided under section 211(7) of the Act comes under the category of offences which can be compounded under section 621A.[4] Hence, the power to compound can be exercised in relation to offences of the same nature by the CLB or the court of sessions in the matter with the difference that the CLB can proceed to compound such offence either before or after the institution of any prosecution and the criminal court possesses similar power to compound an offence after institution of the prosecution

III STRIKING OFF NON-OPERATIONAL COMPANIES

Generally, the option of the striking off the names of the non-operational companies is considered as an alternative of the process of 'winding up'. Section 560(6)[5] of the Companies Act, 1956 empowers the Registrar of the Companies to strike down the names of those companies which are registered under the Companies Act, 1956, and due to various reasons remain as inoperative since its incorporation or commenced business. The section requires that a notice to be sent to the companies regarding the striking off companies name from the Registrar's list.

In *Raj Chiktsa P. Ltd.* v. *Registrar of Companies*[6] the Patna High Court held that under section 560(6), the court must be satisfied that the company at the time of striking off its name from the register of companies was carrying on business or in operation. The court came to the conclusion that it was not feasible to accept the claim as the claim was neither genuine nor was there disclosure of all material facts.

IV FOREIGN COMPANIES

Section 591[7] of the companies Act, 1956 defines the 'foreign companies'. In *Namkar Vinimay P.Ltd* v. *Yashdeep Trexim Pvt.Ltd.,*[8] the high court held that a

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4. According to s. 621 A, Any offence is punishable under this Act (whether committed by a company or any officer thereof), not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by –the Company Law Board; or b) where the maximum amount of fine which may be imposed for such offence does not exceed fifty thousand rupees, by the Regional Director.

5 See s. 560 of the Companies Act, 1956, Registrar of Companies may strike off the name of companies on satisfying that the company has not done any business since its inception.

6 [2013] 179 Comp Cas 71 (Patna).

7 S. 591

8 [2013] 181 Comp Cas 29 (Cal).

foreign company[9] falls within the purview of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA, 1985). The court further clarified that the definition of the term 'Company' in the SICA cannot be restricted to exclude a foreign company. On appeal, the apex court[10] refused to go into the issue and dismissed the matter with an observation that 'SICA was enacted to overcome grossly inadequate and time-consuming institutional arrangements for revival and rehabilitation of sick industrial companies'.

V SCHEME OF AMALGAMATION

With the sanctioning of amalgamation scheme under section 391[11] of the CA, 2013 all the liabilities of the transferor company and all the rights in relation thereto stand transferred to the transferee company as the transferee company step into the shoes of the transferor company. In *Shahi Exports Pvt. Ltd.* v. *CMD Build tech. Pvt .Ltd.,*[12] the Delhi High Court considered the question whether the transferee company can resort to the remedy of 'winding up' petition against the company which owed a debt to the transferor company? The court answering affirmatively held that since all the assets and liabilities of the company stood transferred to the transferee company petition for 'winding up' is permissible. In the present case, the petitioners had filed a petition for winding up of the respondent-company under section 433, 434 & 439 of the Companies Act, 1956 which was objected by the respondent company on the ground that the petitioner was not competent to file the petition since the loan was not given by them but by other company. By rejecting their objection, the court held that since the company got amalgamated and all the assets and liabilities got transferred to the petitioner and they are entitled to file a petition for 'winding up'.

Generally, there are certain procedures mandatory to be followed for scheme of amalgamation of companies under sections 391 and 394 of the Companies Act, 1956. In *Reliance Jamnagar Infrastructure Ltd., In re*[13] the court examined an important issue whether separate application by transferee company is required under sections 391 or 394 of the Companies Act, 1956 in case of amalgamation? A petition was preferred by the transferor company for sanction of an amalgamation scheme whereby the entire business and the undertaking of transferor company are to be transferred to, and vested in the transferee company. Here, the transferor company is a wholly owned subsidiary of the transferee company. In a scheme involving amalgamation of a wholly owned subsidiary company with its holding company, the transferee company is not obliged to seek sanction. Almost a same

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9 As defined by the s. 591 of the Companies Act, 1956.

10 *Yashdeep Trexim P.Ltd* v. *Namkar Vinimay Pvt. Ltd.,* [2013] 181 Comp Cas 52 (SC).

11 S. 391 is vested with very wide powers of the court to approve any scheme of amalgamation, arrangement, compromise or reconstruction for which the court has to follow special procedure.

12 [2013] 181 Comp Cas 111 (Del).

13 [2013] 176 Comp Cas 217. (Guj)).

issue was analysed by the court in *Jindal Agro Processing Pvt. Ltd., In re*[14] the petitioner-company was proposed to be amalgamated with its wholly owned subsidiary company and dispensation from meetings of the secured and unsecured creditors under section 391(2) of the Companies Act, 1956, was sought. Granting it, the court held that the petitioner-company being the holding transferee company, was not required to take out separate proceedings under section 391 (2) of the 1956 Act to the proposed scheme of amalgamation of its wholly owned subsidiary with itself. The proceedings under section 391(2) of the 1956 Act were to be dispensed with.

When a scheme does not envisage issuance of any shares to the transferee company or does not involve any compromise or arrangement with the shareholders or creditors of the transferee company and when the net worth of both the transferor and transferee company is positive, then transferee company is not required to initiate proceedings under section 391 to 394 of the Act and the transferee company need not approach the high court having jurisdiction over it to seek dispensation of the proceedings under section 391 to 394 of the Act. In one case,[15] following the principles laid down in the previous cases, the Madras High Court held that if the shareholders in their commercial wisdom have accepted the exchange ratio of shares in the scheme of arrangement, with their open eyes, it would not be open to the Regional Director to raise objections to it.

In *Adishree Tradelinks P. Ltd., In re*[16] reversing the direction of the single judge while granting sanction to a scheme of amalgamation under section 391/394 of the Companies Act, 1956, the court held that the amalgamation reserve fund shall not be used for declaring dividend, the division bench of the high court held that the reserve can be utilized for the purpose of declaring dividends. In the court's view, there was no justification in imposing the conditions as to non-utilization of amalgamation reserve for the purpose of declaring dividend when no objection was taken by the regional director and the shareholders had unanimously approved the scheme with the original clause permitting utilization of such reserve for distribution, as incorporation of the clause was not in violation of public policy.

Scheme of arrangement

Section 391 of the Companies Act, 1956 gives companies freedom to frame any scheme of compromise or arrangement and the court's wide powers to sanction such schemes[17]. Any company registered under the Act can take advantage of the said provisions and go in for a corporate restructuring through a scheme of compromise or arrangement.

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14 [2013] 176 Comp Cas 215 (Guj).

15 *V. R. Textiles Pvt. Ltd.*, *In re* [2013] 177 Comp Cas 83 (Mad).

16 [2013] 176 Comp Cas 67.

17 The section stipultes that such schemes are subjected to the company complying with the procedural requirements under the said sections and rules.

The scope and applicability of sections 391[18] and 392[19] was challenged in *Castron Technologies Ltd.* v. *Castron Mining Ltd* [20] wherein the court held that an order recalling the order of sanctioning a scheme of compromise or arrangement cannot be recalled at the instance of one party. It further ruled that these sections can be invoked for the purpose of proper working of the compromise or arrangement scheme. In the present case, an application for recalling was filed by the petitioner. The court observed that the application for recalling was not in the aid of the scheme, but for frustrating the scheme. Since it was no longer possible to give effect to the scheme and the scheme was not beneficial or in the interest of the shareholders or applicants was not a ground to recall the order. The application for recalling the order sanctioning the scheme of arrangement could not be filed by one party. Had both the appellant and the respondent, who were parties to the scheme of arrangement being the transferor and transferee company, respectively, applied for recalling the order sanctioning the scheme, the application could have been considered.

In *IL and FS Engineering and Construction Pvt. Ltd.* v. *Wardha Power Co. Ltd* [21] the court held that as a share premium was used to write off accumulated losses and payment of dividend to preference shareholders, the requirements of the sections relating to reduction of share capital and sections relating to scheme of arrangement, must be complied with as the aggregate of assets was more than sufficient to meet liabilities and the reduction did not involve diminution of liability in respect of unpaid share capital, the scheme as a whole and reasonable and not contrary to any law or to public policy nor against public interest, the scheme deserved to be sanctioned.

The limitation of the court in interfering with the scheme of arrangement under section 392 was explained by the court in [22] as, 'that under the terms of provisions of section 392, powers of court are limited to giving directions which it considers necessary for proper working of compromise or arrangement, however, court cannot add terms to scheme which did not exist in original sanctioned scheme'.

In *Integrated Finance Co. Ltd.* v. *Reserve Bank of India Etc,*[23] the Supreme Court has held that a scheme of arrangement or compromise by non-banking financial company proposing repayment of deposits by conversion of deposits into debentures and then into equity cannot be sanctioned by the court as it was contrary to provisions of chapter III of Reserve Bank of India Act,1934 which

18 *Ibid.*

19 S. 392 of the companies act gives power to the court to implement a compromise or arrangement.

20 [2013] 179 Comp Cas 311 (Cal).

21 [2013] 176 Comp Cas 156.

22 [2013] 122 SCL 43 (Delhi).

23 [2013] 179 Comp Cas 390 (SC).

have an overriding effect, and that failure to disclose by the company in the explanatory note under section 393 violations revealed in inspection by Reserve Bank was a material fact required to be disclosed. The court held that it is a settled proposition of law that a later enactment will override the earlier enactment. Chapter III B has been given overriding effect over all other laws including the 1956 CA Act by incorporating section 45Q with a clear intention to ensure that in case of a non-banking financial company, a scheme under section 391 of the 1956 Act cannot be entertained unless it is in conformity with the provisions of section 45QA of the 1934 Act.

The condition regarding the member's power to approve or sanction a scheme under section 391(2) was challenged in the present case.[24] The court held that though no general meeting of the shareholders of the resulting company was convened for the purpose, they approved the scheme unanimously and their knowledge and approval of the proposal reduction of the resulting company's capital was therefore implicit in their unconditional consent. The court added that before the company court sanctions a scheme of arrangement, it must be satisfied that the procedures prescribed in the Act are duly complied with. The court clarified that the merits of the arrangement have to be judged by the parties who arrive at their own reasoned judgment and agree to be bound by such arrangement. The court cannot scrutinize the scheme to find out whether a better scheme could have been adopted by the parties.

In *Vodafone Essar Gujarat Ltd.* v. *Department of Income-tax*[25] for the question whether income tax department has the *locus standi* to object a scheme of compromise in a court was clarified by the court that the right of the income-tax department to recover the dues in accordance with law irrespective of the sanction of the scheme was to be protected. if any amount is payable to the Income-tax department by the transferor company, the income-tax department is a creditor in relation to claim against the transferor company and therefore the income- tax department has *locus standi* to put forward its objections in this behalf.

VI OPPRESSION AND MISMANAGEMENT

The Bombay High Court in *Union of India* v. *Company Law Board*, *Mumbai Bench*[26] held that that the notice of every application under section 397/398 of the Act has to be given to the Central Government is a mandatory requirement under section 400[27] of the Companies Act, 1956. The court further clarified that serving

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24 *Brilliant Bio Pharma Ltd, In re,* [2013] 180 Comp Cas 168 (AP).

25 [2013] 176 Comp Cas 7 (Guj).

26 [2013] 181 Comp Cas 290 (Bom).

27 S. 400 of the CA, 1956, provides that the Company Law Board shall give notice of every application made to it under section 397 or 398 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing a final order under that section.

a 'notice' is one way of service of proceedings and it is therefore merely a means of giving the Central Government an opportunity of making representations for consideration by the CLB before passing final orders. Therefore, even if section 400 of the Act makes it mandatory for the CLB to give such notice to the Central Government, the section stands complied with once notice is given either by the CLB itself or through its agent or other person authorized to give such notice. Under section 400 of the act it is mandatory to serve the 'notice' and rest of the things like form of the notice, the manner of its service and the identity of the server are directory not mandatory requirements.

The CLB discussed an important issue in *Keystone Realtors P. Ltd., In re,*[28] that whether in a petition under section 397/398 against a company its subsidiary company should be joined as a party to the petition? The board held that the subsidiary company can join as a party for filing a suit for oppression and mismanagement under sections 397/398 of the companies act. The board further ruled that 'although the petitioner and respondent were not shareholders in the subsidiary companies, however, these companies were shown to be in the form of departments of the first respondent and their affairs required the approval of the board of directors of the first respondent- company and in the approval the petitioner's affirmative vote was required. Thus even without being a member or shareholder the petitioner and respondent had stakes in the subsidiary companies and the agreement showed that they had control on the subsidiary companies through the first respondent'. In *Bhagwati Developers* case,[29] the apex court held that where a company petition is filed under section 397 or 398 of the Act with the consent of other shareholders, it must be treated in a representative capacity, and an application for withdrawal by the original petitioner in the petition, would not render the petition non-existent or non-maintainable.

In *Naresh Mohan Mittal* v. *Sangeeta Construction Pvt. Ltd.*[30] the CLB held that appointment and removal of directors by manipulation of records and holding meetings without quorum amounted to harsh, burdensome conduct, against probity and good conduct involving continuous acts of oppression against the petitioners.

In *Ganesh Commercial Co. Ltd.* v. *Arun Kumar Mohata*[31] a petition for oppression and mismanagement was filed by the petitioner on the ground that there was an increase in the share capital. The court held that in spite of the notice of the meeting in which shares were allotted having been received by the respondent, he abstained from the meeting. The reason for increasing the share capital was to facilitate influx of funds and it was not the appellant's intention to convert the respondent into a minority. All that the appellant was doing was to keep the company afloat till such time that the family settlement was worked out. No contribution

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28 [2013] 181 Comp Cas 503 (CLB).

29 *Infra* note 70.

30 [2013] 178 Comp Cas 188.

31 [2013] 180 Comp Cas 1 (Cal).

was made by the respondent to keep the company afloat, nor to honour his commitment under the family settlement.

The court in *Sanjay Gambhir* v. *D.D. Industries Ltd.*[32] held that the powers of the CLB are not limited by other provisions of the Act. The power to grant interim relief under section 403 is incidental to the power to other substantial reliefs as set out in section 402 of the Act. The court observed:[33]

> The width of the power is indicated by the words "any interim order which it thinks fit" and "such terms and conditions as appear to it to be just and equitable." The power is not limited by other provisions of the statute. Section 402 of the Act, in fact begins with the words "Without prejudice to the generality of the powers of the Tribunal . . ." While exercising the powers under section 402 or 403 of the Act, the Company Law Board does not have to account for the mandatory requirements of other provisions like section 169 or 186 of the Act. The language in fact appears to indicate to the contrary. It permits the Company Law Board to pass orders as long as it is in the interests of the proper conduct of the affairs of the company and it is "just and equitable" to pass such order. Whether in fact the order is justified will depend on the facts of each case.

In *Rajeev Kapur* v. *Grentex and Co. Pvt. Ltd.*[34] the high court held that the section 397 can be invoked by any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to the member or members. The grievance of a member that he has been ousted as a working director or his remuneration has been reduced has nothing to do with the status as a share-holder in the company. That relates to his status as a director of the company and not to his status as a shareholder of the company.

VII WINDING UP OF COMPANIES

Under the new CA, 2013 section 271[35] corresponds to section 433[36] of the Companies Act, 1956 was inserted under which it is the discretion of the court to pass an order to wind up a company in the circumstances mentioned in the section. Although it is a discretionary power of the court to order for winding up of the company, it has to take into consideration the amount of "public interest" involved in such cases. Different judicial interpretations of sections 433-434 are analyzed here.

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32 [2013] 177 Comp Cas 99.

33 *Id.* at para 25.

34 [2013] 178 Comp Cas 28.

35 S. 271 of the Companies Act, 2013 deals with "circumstances under which a Company may be wound up by a Tribunal".

36 This section deals with the "circumstances under which a Company may be wound up by the court:- A Company may be wound up by the Court,- if the Court is of the opinion that it is just and equitable that the Company should be wound up".

In order to file a petition for winding up of a company under section 433[37] of the Companies Act, 1956 it is mandatory that the petitioner should exhaust all the alternative remedies available under other sections[38] of the Act. The courts in number of cases[39] clarified that relief under section 433 based on the 'just and equitable' clause is in the nature of last resort when other remedies are not efficacious enough to protect the general interest of the company.

It is now well settled law that winding up is not legitimate means to enforce the recovery by pressurizing the company to enter into a settlement. The general rule with regard to the winding up petition is that under section 433 (e) it is necessary that the petitioner should file the winding up petition. But in *Deutshe Trustee Company Ltd* v. *Mascon Global Ltd.,*[40] although the court have clarified that the winding up petition can be filed even by a person in a representative capacity, and held that it will be too harsh to order winding up of a running company, merely on the petition by trustee, filed without proper authorization. As per the facts of the case, the petition was filed by the petitioner in a representative capacity as a debenture trustee filed a winding up petition under section 433 (e) of the Companies Act.

In *Shahi Exports P. Ltd*. v. *CMD Buildtech P. Ltd.,*[41]the petitioners had filed a petition for winding up of the resident-company under section 433(e) read with sections 434 and 439 of the Companies Act, 1956 on the ground that the respondent company was unable to pay debts. The respondent-company raised preliminary objection to the maintainability of the petition on the ground that the first petitioner was not competent to file the petition as the loan was not given by the petitioner company. The court rejected the contention and held that since the petitioner company got amalgamated to the parent company, all the assets and liabilities of the parent company stood transferred to the petitioner which had filed the petition for winding up. The case discussed the important issue of maintainability of winding up petition under section 433 (e) of the Companies Act, 1956 in which the company got amalgamated to the other company.

In *Ashutosh Sharma* v. *Torque Cables Pvt .Ltd.,*[42] the court dismissed the petition filed under section 433(f) of the Companies Act, 1956 on the ground that the petition *prima facie* showed that it was a case to which the provisions of sections

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37 *Ibid.*

38 S. 397 & 398 of the Companies Act refer to 'winding up on just and equitable grounds'.

39 *Hind Overseas P.Ltd* v. *Raghunath Prasad Jhunjhunwalla*, [1976] 46 Comp Cas 91 (SC); *Atul Drug House Ltd., In re* [1971] 41 Comp Cas 352 (Guj); *Virgin Records (I.) P.Ltd* v. *Milestone Music Distribution Pvt. Ltd*. [2004] 119 Comp Cas 963 (Bom).

40 [2013] 181 Comp Cas 223 (Mad).

41 [2013] 181 Comp Cas 111 (Delhi).

42 [2013] 181 Comp Cas 61 (Del).

397 & 398 of the Act might be attracted. As per the facts of the case, the petitioner, a shareholder and a director of the company filed a petition seeking winding up of a company under section 433 (f) of the Companies Act, 1956. The petition was based on some allegations that 'the Company had been continuously suffering loss and its capital had eroded'. By observing that the winding up proceedings under section 433 had to be used as a last resort, the court ordered to resort to the alternative remedies available under sections 397 & 398 of the Act. In another case[43] the court ordered for the winding up of the company under section 433 (f) on the ground that there was sufficient reasons to invoke 'just and equitable' clauses for winding up of the company. In this case, the court pointed out that there was complete lack of faith and probity resulting in irretrievable breakdown between the major shareholders of the company and the liabilities of the company had far exceeded its assets which can be treated as the valid ground to invoke section 433 (f) of the Companies Act, 1956. In *Bibby Financial Services India Pvt .Ltd* v. *Ecotech Apparels Pvt. Ltd*[44] the court held that even if the conditions in section 434(1) (a) and (1) (c) regarding the service of notice on the Company at its registered office is not fulfilled that will not invalidate the winding up petition.

In *Etisalat Mauritius Ltd.* v. *Etisalat DB Telecom Pvt. Ltd.*[45]the Bombay High Court admitted a winding up petition filed under section 433(f) for there existed "deadlock" among the shareholders and the company was losing substratum. As per the facts of the case, there was complete lack of faith and probity resulting in irretrievable breakdown between the major shareholders of the company and the liabilities of the company had far exceeded its assets. *Michael Hart* v. *Ninestars Information Technologies Ltd*.[46] raised an important question whether petition seeking winding up of a company on the ground of inability to pay debts is barred by the period of limitation? In the present case, the petition filed by the appellant under section 433(e) and (f) of the Companies Act, 1956 seeking winding up of the company was dismissed by the single judge on the ground that the claim ought to have been made within three years from the date of resignation and that communication did not amount to an acknowledgment of the debt as it was given after expiration of the three year period. The factual matrix of the case was that the appellant, engaged as a consultant to the respondent-company under an agreement, sent invoices every month towards consultation fees but the company failed to make the payments. The appellant tendered his resignation and claimed the amount payable under the agreement. Although the company acknowledged its liability failed to pay the amount. The court held that the managing director of the company had admitted its liability and the issuance of the promissory note in favour of the appellant and the company had clearly admitted the fact that it could not make the payments, payable to the appellant, due to financial constraints. As

43 *Etisalat Mauritius Ltd.* v. *Etisalat DB Telecom P.Ltd*, [2013] 181 Comp Cas 417 (Bom).

44 [2013] 181 Comp Cas 211 (Del).

45 [2013] 181 Comp Cas 417 (Bom).

46 [2013] 179 Comp Cas 187 (Mad).

the acknowledgment of debt had been made by the respondent-company, before the limitation period of three years was over, a fresh limitation period had started from the date of such acknowledgment. Thus, the winding up petition filed by the appellant, was within the period of limitation. The court with the observation that the single judge had erred in dismissing the petition filed by the appellant, remitted back to the single judge to be disposed of on merits and in accordance with law.

Almost a same issue was dealt by the court in *Vishnu Manglani* v. *Tuff Energy Pvt. Ltd.*[47] wherein the court admitted the petition of winding up and held that that there was no merit in the defense raised by the company. The respondent-company had taken premises for rent under a lease agreement and paid the monthly rent for seven months but failed to pay thereafter. A notice under section 433 read with section 434 of the Companies Act, 1956 was issued but no reply was received to the notice from the company. The lesser filed a petition seeking winding up of the company. The company, *inter alia,* contended that the lease deed was not registered and, therefore, could not be looked into.

Section 434 (1)[48] makes it mandatory for a company to send a statutory notice about the inability to pay debts to which the company is indebted. In *IFCI Factors Ltd.* v. *Koutons Retail India Ltd.,*[49] a notice was issued by registered post to the company but there had been no response from it. Therefore, the petitioner filed a petition seeking winding up of the company. The company contended that the notice was not sent to the company at its registered office. However, the court held that even if the legal notice was not served to the company at its registered office, there was no denial that in fact it received such notice. As long as the petitioner was able to demonstrate that there was an admitted liability which the company had unable to pay, it could pursue this petition.

In *Official Liquidator, U.P. and Uttrakhand* v. *Allahabad Bank*[50] the Supreme Court clarified the role of official liquidator in case of 'winding up'. The court clarified that the official liquidator has a role under the Companies Act, 1956 to protect the interests of the workmen and the creditors and, hence, his association at the time of auction and sale is appropriate. He has been conferred locus to put forth his stand in these matters. The official liquidator whose association is mandatorily required may make an appeal as a person aggrieved relating to the action taken by the Recovery Officer which would include the manner in which the auction is conducted or the sale is confirmed.

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47 [2013] 179 Comp Cas 589 (Delhi).

48 S. 434(1) of the Companies Act, a company is deemed to be unable to pay its debts if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor

49 [2013] 179 Comp Cas 235 (Delhi).

50 [2013] 177 Comp Cas 426.

VIII GROUP OF COMPANIES

The concept of 'group of Companies' was legally recognized under the new Act, 2013. But prior to this the apex court in *Chloro Controls (I) P. Ltd.* v. *Severn Trent Water Purification Inc.*[51]examined the question whether a group of companies can be parties to arbitration agreement without having singed it? The court answered affirmatively and held that even 'a non- signatory party could be subjected to arbitration provided these transactions were with the group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties'. As per the facts of the case, there was a joint venture agreement between an American company and an Indian company which provided for several agreements required to be entered into between the groups of companies. By giving a wider interpretation to section 45 of the Arbitration Act, 1996 the court held that if the court is satisfied that there is a valid and enforceable arbitration agreement, then the expression 'person claiming through or under' provided under section 45 of the Act indicates that the section does not refer to parties to the agreement but persons in general and if a party is able to establish that a person is claiming through or under the signatory to the arbitration agreement then the matter could be referred to arbitration.

IX TRANSMISSION OF SHARES

The objective of section 111 A of the Companies Act,1956 is to provide for a statutory remedy against the company's failure to register transmission of shares in the Company to the legal heir/representative of a deceased shareholder. In *Suman Kumar Sinha* v. *Baroda Crystal Glass Works Ltd.*[52] the petitioner sought a direction to the respondent- company to rectify its register of members by inserting the name of the petitioner against shares of the company. The petitioner's claim was based on a succession certificate issued by the court. The company was directed to issue duplicate share certificates to the petitioner within four weeks since the company failed to consider the petitioner's claim on time for the transmission of the shares. In this case, the petitioner approached the company to rectify its register of members by inserting the name of the petitioner against the shares of the company based on a succession certificate issued by the court. Although the company had not refused the transmission of shares, the board of the directors of the company had not considered the petitioner's proposal properly in a just manner. The court ordered the company to rectify the register of the members and to issue the share certificate at the earliest.

In *Shah Pulp and Paper Mills Ltd.* v. *Pravinchandra Hirji Shah,*[53] the Bombay High Court ordered buying by the majority of the minority's shares, in view of the fact that it would not be in the interest of the company or its shareholders including

51 [2013] 181 Comp Cas 339 (SC).

52 [2013] 181 Comp Cas 65 (CLB).

53 [2013] 179 Comp Cas 36 (Bom).

the respondents themselves for the respondents to remain in the company along with the appellants and therefore the circumstances warranted that the respondents be directed to sell their shares to the appellants at a value to be ascertained by the valuer appointed on the basis of the balance-sheet.

X RIGHTS OF THE SHAREHOLDERS

With regard to the question of shareholder's right to inspect the register of members in *Rajendra G. Patel* v. *Sanghi Industries Ltd.,*[54] the CLB has held that as the Companies Act, 1956 has provided a right to the members or debenture holders of inspection of the statutory registers and records, there is no bar on a member seeking inspection of the documents irrespective of the fact when he became a member of the company. The right to inspect the documents of the company is a mandatory provision and the CLB could compel an immediate inspection on failure by the company to provide such rights to a member or shareholder.

XI DIRECTORS OF A COMPANY

Under the Companies Act, 1956 there were no direct provisions mentioning about the duties and responsibilities of the director's of a company. The Act[55] only stipulated for the general powers of the board of directors. The new act 2013 has introduced provisions specifying duties and responsibilities of the directors of a company such as independent directors, conduct and responsibilities of the directors, mandatory director appointment *etc.* With regard to the liability of the directors for offence committed by the company, the apex court in a number of cases[56] held that the director's of a company can be made vicariously liable for a criminal offence only if he was in charge and responsible for the conduct of the business of the company at the time of commission of an offence.

FOllowing the judicial precedents the Kerala High Court in *Briji Gopal Daga* v. *State of Kerala,*[57]held that under section 141[58] of the Negotiable Instruments Act, 1881(NIA, 1881) a person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. The important question raised in the present case was whether a non-executive

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54 [2013] 176 Comp Cas 49.

55 S. 291 to 314 of the Companies Act, 1956 provides for the Director's duties and responsibilities regarding the Company matters.

56 *S.M. S. Pharmaceuticals Ltd.* v. *Neeta Bhalla,* [2005] 127 comp Cas 563, 578 (SC); *National Small Industries Corp. Ltd.* v. *Harmeet Singh Paintal*, [2010]154 Comp Cas 313 (SC); *State of NCT of Delhi* v. *Rajiv Khurana*, [2010] 158 Comp Cas 151 (SC).

57 [2013] 181 Comp Cas 320 (Ker).

58 S 141of the NIA, 1881 stipulates that 'if the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business

independent director of a company who is not concerned with the management of the day to day affairs of the company would be held liable for the dishonor of a cheque issued by the company under section 141 of the NIA, 1881? The court observed that 'A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of section 141 of the NIA, 1881 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases. With regard to the appointment of directors in the company in *Kumbakonam*'*s* case[59] it was held that the appointment a director in place of retirement of a director shall be made only in Annual General Meeting (AGM) and not in extra-ordinary general meeting.

In a plethora of cases the apex court has clearly laid down the law that the authorization in the form of a power of attorney may given to a director through a resolution of the board meeting. For the issue whether a person holding a power of attorney given by the payee of the cheque or the holder in due course can file a complaint on behalf of the payee of the cheque or the holder in due course, was the question before the Supreme Court in *A.C. Narayanan* v. *State of Maharashtra.*[60] Answering the question in the affirmative the Supreme Court held that section 200 of the Cr PC, 1973, does not create any embargo that the attorney holder of legal representative cannot be a complainant. The power of attorney holder is the agent of the grantor. When the grantor authorises the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. The power of attorney holder cannot file a complaint in his own name as if he were the complainant. In other words, he can initiate criminal proceedings on behalf of the principal. However when the power of attorney holder of the complainant does not have personal knowledge about the transactions, he cannot be then examined and, therefore, in such a case, he cannot file a complaint.

Likewise in *Jer Rutton Kasvasmaneck* (*alias Jer Jawahar Thadani*) v. *Gharda Chemicals Ltd.*[61]for the issue whether it is obligatory to appoint a proxy through the form of proxy prescribed in schedule IX, the court held that where a company (which was a member of another company) had given a power of attorney in favour of another company and while it was in force on the date of the

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of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence'.

59 *Infra* note 67.

60 [2013] 180 Comp Cas 258 (SC).

61 [2013] 177 Comp Cas 268.

62 [2013] 180 Comp Cas 124 (CLB).

extraordinary general meeting, that company was authorized to vote in the extraordinary general meeting. Similarly whether the proxies in the proper format were lodged or not also had lost significance. The power of attorney executed by the appellants in favour of somebody included power to vote on behalf of the appellants; so long as any instrument contains all the requisite particulars set out in the form in schedule IX, it can be treated as proxy.

In *Tarjitsingh Bakhatawarsing Batth* v. *Ratan Wood P. Ltd.,*[62] the court discussed an issue of great significance in regard to the validity of decisions taken at board meeting in the absence of proper quorum, especially private companies, where chances of absence of a quorum are often. The issue was where a company had only two directors, in the absence of the petitioner there could not be any quorum to transact business at the meeting and therefore appointment of a director at a meeting attended by only one of the two directors was invalid? The court decided the issue affirmatively and interpreted section 287[63] and clarified the concept of "total strength" as the total strength of the board of directors of a company as determined in pursuance of the Act, after deducting the number of directors, if any, whose places may be vacant at that time. Needless to state, in determining the "total strength" the number of the directors occupying the position of directors (excluding alternative directions, if any) shall be taken into account. However, the alternative director/s present at a meeting will be counted for quorum.

In *Surya Elevators and Escalators India P. Ltd.* v. *Union of India*[64] the Karnataka High Court dismissed the petition and held that one of the directors of the third respondent-company alone had issued "no objection certificate" for incorporation of the petitioner-company despite a specific resolution passed by the board of directors of the third company that none of the two directors should without the consent of another issue "no objection certificate".

XII COMPANY LAW BOARD

While examining the power and ambit of the CLB under section 402 of the act, the court held that the interest of the company *vis-à-vis* shareholders must be the uppermost in the mind of the court while exercising the power under section 402 of the Companies Act, 1956. Indeed, the limitation of the power of the company Law Board was addressed by Bombay High Court in *Shah Pulp and Paper Mills Ltd*. v. *Pravinchandra Hirji Shah,*[65] wherein the court held that the CLB's powers under section 402 of the Act are wide in nature; but there must be some nexus between the complaint made and the relief granted. There are some limitations to

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63 According to sub-sec (1) of s. 287 the quorum for a meeting of the board of directors of any company, public or private, shall be one-third of the total strength of the board, or two directors, whichever is higher. According to sub-sec (2) of s. 287, any fraction (whether greater or smaller than half) shall be rounded off as one.

64 [2013] 177 Comp Cas 230 (Karn).

65 [2013] 179 Comp Cas 36 (Bom).

CLB's power and one of them is that there should be nexus between the facts and proof of allegations of the petitioners and the relief granted. It observed that the exercise of the powers by the CLB cannot be divorced from the case of alleged oppression made out by the petitioner before the CLB and other existing circumstances which may necessitate such directions being issued'. There must be some basis for the CLB to issue direction in proceedings under section 397 of the 1956 Act.

XIII COMPANY MEETINGS

Section 186[66] of the Companies Act, 1956 stipulates about the power of the CLB to order for convening the company meetings. The Indian judiciary in a plethora of cases have interpreted section 186 and laid down certain important principles pertaining to this section. The court have clarified that although the power given to the CLB under section 186 of the act is in the nature of a discretionary power, the board may exercise this power if it is fully satisfied that there is an 'impracticability' to call the general meeting in the usual way.

The aspect of 'impracticability' to convene a company meeting under section 186 of the Companies Act, 1956 was challenged in *Kumbakonam Mutual Benefit Fund Ltd*. v. *S. Kalyanasundaram*[67] wherein the CLB in exercise of its power under section 186(1), directed the company to conduct an extraordinary general body meeting. The petitioner contended that it had become impracticable to approach the company with a request to call for an extraordinary general meeting in view of the intimidating attitude of the respondents and the inability of the petitioners to fulfill the one-tenth share criterion to make the requisition as required under section 169(4) of the Act. On appeal, the high court held, allowing the appeals, that the CLB while deciding the question as to whether intervention of the court was warranted or not had gone to the extent of deciding against the validity of removal of directors and appointment of fresh directors and rendered a specific finding as if there was flagrant violation of procedural law and principles of natural justice and it was against corporate democracy. The court criticized the Board's decision as the CLB had not considered the allegations raised by the groups against each other, by appreciating the overall circumstances. The findings were rendered mainly by highlighting the allegations raised on the side of the petitioners in the petition and hence were one sided and one of the main grounds of which the impracticability to convene the meeting was decided by the CLB hence the decision on impracticability to convene any meeting on such findings was perverse.

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66 S.186 of the companies act stipulates about the power of Company Law Board to order for a meeting.

67 [2013] 179 Comp Cas 133 (Mad).

The high court held that 'Power of CLB to direct convening of extraordinary general meeting to be exercised only when impracticable to call meeting in manner prescribed under Act or articles of association'. In this regard the court observed:

> ...[l]ack of requisite number of shares is the statutory requirements and pre-requisite to call for an extraordinary general meeting. However, it cannot be one of the grounds on which the question of impracticability is decided. The expression "impracticable" is not to be construed as "impossible". The word "impracticable" means impracticable from a reasonable point of view. The court must take a "common sense view" of the matter and must act as a prudent person of business. It must not be held impracticable on the slightest excuse that the directors cannot agree. Under section 186, the power of the court can be exercised only when it is impracticable to call for a meeting of a company, other than an annual general meeting, in any manner in which other meetings of the company may be called or to hold or conduct the meeting of the company in the manner prescribed by the Act or the articles. The failure on the part of the petitioners to resort to any other mode as prescribed under the Act, disentitled them to invoke the power of the court under section 186 of the act. The order passed was beyond the jurisdiction of the Company Law Board vested upon it under section 186 of the Act and the order was the outcome of total non-application of mind and was biased.

XIV COLLECTRIVE INVESTMENT SCHEME BY SEBI

Section 11AA of the SEBI Act, dealt with the regulations on Collective Investment Scheme (CIS), according to which a scheme of arrangement where contributions, or payments made by the investors are utilized with a view to receive profits, income, produce or property, and are managed by a manager on behalf of the investors is a CIS.

In *P. G. F. Ltd.* v. *Union of India*[68] the apex court imposed costs on a Chandigarh registered company which was involved in the sale and development of agricultural lands. The costs were imposed while hearing an appeal filed by PGF against the decision of the Punjab and Haryana High Court. In this case, a scheme was concerning development of land purchased by the customers under an agreement and the customers were assured of high amount of appreciation in value of land after development. The scheme comprised uncertainty in transactions. The promoters of the scheme failed to demonstrate how lands would be developed. The Supreme Court held that the nature of activity fell under the definition of collective investment scheme and hence the promoters were under obligation to comply with the directions of the SEBI. The challenge to the *vires* of section

68 [2013] 179 Comp Cas 352 (SC).

11AA was held to be without substantive ground. The court further ruled that the power of Parliament to make law to regulate collective investment schemes does not encroach upon activity of sale and development of agricultural land.

In the similar vein the court observed:[69]

> section 11AA of the SEBI Act section 11AA(2), which defines a collective investment scheme discloses that it is not restricted to any particular commercial activity such as in a shop or any other commercial establishment or even agricultural operation or transportation or shipping or entertainment industry, etc. The definition only seeks to ascertain and identify any scheme or arrangement, irrespective of the nature of business, which attracts investors to invest their funds at the instance of someone else who comes forward to promote such scheme or arrangement in any field and such scheme or arrangement provides for the various consequences. As a matter of fact the provision does not make any reference to agricultural or any other specific activity and there is no question of testing the validity of section 11AA in the anvil of entry 18 of List II of the Seventh Schedule to the Constitution. Section 11AA was not intended to cover an activity relating to agriculture and its development and, therefore, does not conflict with entry 18 of List II of the State List. Section 11AA is not intended to affect the development of agricultural land or any other operation connected therewith or put any spokes in such sale-cum-development of such agricultural land. By seeking to cover any scheme or arrangement by way of collective investment scheme either in the field of agricultural or any other commercial activity, the purport is only to ensure that the scheme providing for investment gets registered with the authority concerned and the provision would further seek to regulate such schemes in order to ensure that any such investment based on any promise under the scheme or arrangement is truly operated upon in a lawful manner and that by operating such scheme or arrangement the person who makes the investment is able to really reap the benefit and that he is not defrauded. The object of introducing section 11AA was to protect gullible investors most of whom are poor and uneducated or retired personnel or those who belong to the middle income group and who seek to invest their hard earned retirement benefits or savings in such schemes with a view to earn some sustained benefits or with the fond hope that such investment will appreciate in course of time.

69 *Id*. para.32.

XV SECURITIES

For shares in a public limited company to come within the definition of 'securities' as defined under section 2(h)(i) of the Act they have to be marketable. The word, "marketable" has been equated with the word saleable. However, when the statute prohibits or limits transfer of shares to a specified category of people with onerous conditions or restrictions, the right of shareholders to transfer or the free transferability is jeopardized and in that case those shares with these limitations cannot be said to be marketable. In *Bhagwati Developers Pvt. Ltd.* v. *Peerless General Finance Investment Co. Ltd.*[70] the Supreme Court has held that shares of unlisted public companies are "securities" within Securities Contracts (Regulation) Act, 1956 and hence refusal by such a company to register a transfer which was in violation of the provisions of Act was justified. Therefore, shares in a public limited company though not listed in the stock exchange come within the definition of securities and hence, the provisions of the Act apply. From the fact that the Act was enacted to prevent "undesirable transactions in securities by regulating the business of dealing therein" one cannot infer that it applies only to transfer of shares on the stock exchange. The provisions of the Act would cover unlisted securities of public limited companies. In other words, shares in a public limited company not listed in the stock exchange are covered within the ambit of the Act.

XVI CONCLUSION

Although the new Companies Act, 2013 has offered many new provisions for protecting the interest of the investor's and the stakeholders, the act also includes few favorable provisions for the functioning of the companies which may be misused in future. If implemented in true spirit, the new Act, will bring impeccable record of growth and prosperity in the corporate sector in India.

70 [2013] 179 Comp Cas 421 (SC).