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COMPANY LAW

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I INTRODUCTION

SURVEY 2011 reflects the significant contributions of the Supreme Court, high courts and the company law board (CLB) on company law. Although, these judicial interpretations have been a reiteration of earlier rulings, they have given some sort of conceptual clarity on many provisions of company law. However, in few cases the courts have given a wider interpretation to the statutory provisions giving altogether new dimensions to the subject.

II OPPRESSION AND MISMANAGEMENT

Section 397 of the Companies Act, 1956 provides for right of members of a company who comply with the conditions of section 399 to apply to the court for relief under section 402 of the Act or such other reliefs as may be suitable in the circumstances of the case, if the affairs of the company are being conducted in a manner oppressive to any members. When members are aggrieved by oppression and mismanagement of a company, two alternative remedies are available to them. They may either invoke the powers of the court or the powers of the central government for prevention of oppression and mismanagement of the company. However, the law has not defined 'oppression' and it is left to the courts to decide.

In *Amalgamations Ltd*. v. *Shankar Sundaram*[1] the appellant filed a petition before the CLB claiming reliefs under section 402 of the Act. The appellant in the petition had mentioned some other companies which are in the same group, but they were not made parties/respondents since there were no averments made against them in the company petition. The appellant company and the subsidiary companies raised preliminary objections regarding the maintainability of the petition on the ground that the first respondent was not a shareholder in the subsidiary companies. The important issue discussed in the case was that whether a member of a company can file a petition against the subsidiary company alleging oppression and mismanagement in relation to the conduct of the subsidiary company's affairs? The CLB held that a member of a company cannot file a petition against the subsidiary company alleging oppression and mismanagement in relation to the conduct of the subsidiary company's affairs. It directed the holding company to give reply on all

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1 [2012] 1 Comp LJ 568 (Mad).

the allegations in the petition, including those concerned with the subsidiary companies. Declining to interfere with CLB' s decision, the Madras High Court held that when a statute provided that a particular thing should be done in a particular manner, it should be done in that manner and not in any other way.

In *Chatterjee Petrochem (I) Pvt. Ltd*. v. *Haldia Petrochemicals Ltd.*,[2] the Supreme Court clarified that the remedy under section 397 of the Act for seeking relief against 'oppression' can be invoked only when a shareholder feels aggrieved or oppressed that his rights as shareholder are being affected. The court further observed that for the purposes of section 397, it is for the courts to decide on the facts of each case as to whether such oppression exists, which would call for action under section 397. A shareholder has certain statutory rights conferred by the Companies Act and certain other rights conferred by the articles and agreements to which the company is a party. In all these cases, if shareholders rights are affected they can allege oppression. There could be instances, wherein without any documents, certain rights might have been enjoyed for a long time and when the same are denied, the affected shareholders may allege oppression. In such circumstances, it is for the court to decide if an act of oppression in accordance with the facts of each case exists. In one case[3] the petitioner filed a petition under sections 397 and 398 of the Companies Act, 1956 alleging various acts of oppression and mismanagement. The respondents questioned the maintainability of the petition on the ground that there were innumerable defects in filing the petition and sought summary dismissal of the petition. They further pleaded that the petition be dismissed on the ground that the petitioners have not filed any verifying affidavit to the petition to rectify the irregularity of affidavit accompanying the petition in pursuance of regulation 14(6) and (7) of the Company Law Regulations, 1991. The petition was dismissed on the grounds of procedural defects.

The objective of sections 397 and 398 of the Companies Act, 1956 is to regulate the affairs of the company and the CLB may adopt any measures to put an end to the matters complained. The CLB may ask the petitioner to refer the dispute even to an arbitrator if the agreement provides so. In *G.L. Purohit* v. *S.S. Agarwal*[4] the court held that even if the agreement provides for an arbitration clause, the CLB may entertain the petition. In this petition, only a few parties consented or agreed upon for the arbitration clause in the case of dispute and the subject-matter of dispute as stated in the petition was not same as mentioned in the arbitration agreement. Considering these facts, the court held that the CLB may entertain the matter even if arbitration clause exists.

In *D.K. Balasundaram* v. *G.K. Alloy Steels P. Ltd.*,[5] the minority shareholders of a company challenged the sale of company's land on the ground that the sale had benefited the respondents. The parties to the suit were kins. The petitioners argued for setting aside a sale deed and joint development agreement entered into by the respondents' brothers, as it amounts to oppression under sections 397 and 398 of

2 2011 (11) SCALE 325.
3 *Ramesh Chandra Sabat* v. *Hotel Moti (P) Ltd.* [2011] 4 Comp LJ 66 CLB).
4 [2011] 163 Comp Cas 205 (Del).
5 [2011] 167 Comp Cas 269(CLB).

the Companies Act, 1956. The CLB held that since the land was sold for the purpose of clearing the debt created by the father of the parties, there was nothing wrong in retaining the land within the family if the consideration was sufficient. In *Albert Cambata* v. *Cambata Aviation P. Ltd*.,[6] the petition was filed by invoking various provisions of the Companies Act, 1956 alleging certain acts of 'oppression and mismanagement' in the affairs of the company and various reliefs were sought under it. The petitioner argued that the enhancement of shareholding and allotment of shares to the respondents were illegal and *ultra vires* of article 74 of the articles of association. The CLB held that the increase in the capital and allotment of shares had been recorded and approved in subsequent board meetings and had been shown in the annual returns filed by the company. Moreover, the decisions had been taken during the lifetime of the petitioner's father who had been the chairman of the company and hence there was no illegality in increase of authorized capital and allotment of shares. The CLB also observed that the company had enhanced its authorized capital even earlier and the petitioner had been present in such meetings.

III WINDING UP OF COMPANIES

Section 536(2) of the Companies Act, 1956 provides that in case of winding up, any disposition of the property of the company, and any transfer of shares of the company or alteration in the status of its members, made after the commencement of the winding up shall, unless, the court otherwise orders, be void. Although the section stipulates that any disposition of the property of the company made after the commencement of the winding up is void, in one case[7] the court held that the bonafide disposition of the property in the interest of the creditors would not be effected transferred in the interest of the company in liquidation, the company courts are have the powers to protect the dispositions made even before the winding up orders are passed.

In a landmark judgment,[8] the Supreme Court examined whether priority given to the dues payable by an employer under section 11 of the Employees' Provident Funds Act, 1952 (EPF Act) is subject to section 529 A of the Companies Act, 1956 in terms of which the workmen's dues and debts due to secured creditors are required to be paid in priority to all other debts. The court held that in the liquidation process of a company, in terms of section 530(1) of Companies Act, all sums due to any employee from provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company are payable in priority to all other debts. Interpreting section 11 (2) of the EPF Act, the court held that the amount due from the employer on account of employee's contribution was declared as 'first charge on the assets' and became payable on priority to all other debts. The court further observed that EPF Act is a social welfare legislation intended to protect the interest of the weaker sections, i.e., employees of the society and the legislation

6 [2011] 168 Comp Cas 108 (CLB).

7 *Indian Oil Corporation Ltd*. v. *Southern Petrochemical Industries Corporation Ltd*. [2011] 163 Comp Cas 81 (Mad).

8 *Employees Provident Fund Commissioner* v. *Official Liquidator of Esskay Pharmaceuticals Ltd*. [2011] 168 Comp Cas 206 (SC): 2011 (12) SCALE 479.

made for their benefit must receive a liberal interpretation keeping in view the directive principles of state policy under articles 38 and 43 of the Constitution. In the similar vein the court observed:[9]

> A debt due to a secured creditor, when recovered by realization of the security after commencement of the winding up proceedings, results in depletion of the assets in the hands of the Official Liquidator. This provision is intended to protect the interests of the workmen in proceedings for winding up. In view of the nature of workmen's dues being similar to those of secured creditors, the purpose of this provision is to place the workmen on a par with the secured creditors and create a statutory charge in their favour on all available securities forming part of the assets of the company in liquidation so that the workmen also share the securities *pari passu* with the secured creditors. The workmen contribute to the growth of the capital and must get their legitimate share in the assets of the company when the situation arises for its closure and distribution of its assets first among the secured creditors due to winding up of the company. The aforesaid amendment made in the Act is a statutory recognition of this principle equating the legitimate dues of the workmen with the debts of the secured creditors of the company. To achieve this purpose, it is necessary that the amended provision must apply to all available securities which form part of the assets of the company in liquidation on the date of the amendment.

In *Pyare Lal, President, Wings Wear Lal Jhanda Union* v. *Wings Wear P. Ltd.,*[10] the issue was regarding the real effect of a winding up order over the retirement benefits of the employee under the Employee's State Insurance Act, 1948 and the scheme thereunder.[11] As per the facts of the case, the applicant reached the age of superannuation in the year 2004 and the company had been directed to be wound up in 2002. By interpreting section 445(3) of the Companies Act 1956, the Delhi High Court held that the cessation of employment due to the order of winding up of the company amounted to the deemed superannuation of the applicant. The court also clarified that since the employment of the applicant came to an end on the date of the winding up order, the requirements under rule 61 of the Employee's State Insurance (Central) Rules, 1950 need not be fulfilled. Likewise, in *K. V. Sasidharan Pillai* v. *Indian Overseas Bank*[12] the court held that workmen cannot claim priority in distribution of amount realized where company ordered to be wound up or proceedings for winding up has been pending. The court held:[13]

> It is clear that the workmen of a company, who claim priority in distribution of assets by virtue of Section 529A of the Companies Act, are not entitled to raise any objection against proceedings initiated by the secured creditor

9 *Id.* para 33.
10 [2011] 167 Comp Cas 36 (Del) : (2011) 105 SCL 699 (Delhi).
11 In order to get benefits under the ESI Scheme, there must be an insurable employment.
12 [2011] 168 Comp Cas 137 (Ker).
13 *Id.* para 7.

against the secured assets of the company, unless the company is ordered to be wound up or any proceedings for winding up of the company is pending. Likewise, they are also not entitled to claim priority in distribution of the amounts realized under the RDBFI Act based on the provisions of the Companies Act as long as no winding up order is passed against the company.

Section 531A of the Companies Act, 1956 stipulates that any transfer of property movable or immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by tribunal or the passing of a resolution for voluntary winding up of the company, shall be void against the liquidator.

In *Krishnaswamy Reddiar Educational Trust* v. *Official Liquidator, High Court of Madras,*[14] the court declared a lease deed as ineffective on the ground that it was stated to be for thirty years and the lease agreement was not registered and was for a meager amount. The lease deed was entered into within a period of one year prior to filing of the winding up petition. The lease deed fell within the statutory prohibition of section 531 A of the Companies Act, 1956. In *Rathnam P.V.* v. *Official Liquidator, High Court of Bombay*[15] an application seeking confirmation of transfer filed after 18 years with no explanation for delay was rejected. In this case, the applicant claimed confirmation of certain equity shares of the company before the order of winding up of the company. The court held that although there is no time limit for making such applications, it should be made within a reasonable period of time. The court added that in the present case, there was no explanation for the lapse on the part of the applicant for not making the claim for 18 years.

In *Rahmat Khan* v. *Hanuman Das & Sons*[16] the court clarified the circumstances in which a company may be wound up under section 433 of the Companies Act, 1956. As per the facts of the case, the petitioner was a creditor as well as a shareholder of the respondent-company. The respondent-company borrowed certain sum from the petitioner and failed to satisfy statutory outstanding dues and also amount of loan extended by the petitioner. The petitioner argued that the respondent-company was lying closed since last many years and no business had been transacted and the respondent-company had failed to comply with statutory requirements by filing annual reports and balance sheets with registrar of companies within a stipulated period of holding of annual general meeting and, therefore, it was just and equitable to wind up the company. The company was ordered to be wound up.

Similarly in another case,[17] winding up petition against an Indian company by a foreign company through power of attorney was admitted by the court. In the present case, the petitioner-company was incorporated in Singapore and it entered

14 [2011] 167 Comp Cas 153(Mad).
15 [2011] 168 Comp Cas 168 (Bom).
16 [2011] 110 SCL 643 (Raj).
17 *Copenship Singapore Pte. Ltd*. v. *Prime Impex Ltd.* [2011] 167 Comp Cas 431(Cal).

into two agreements with the respondent company and agreed to pay the amount. Some payments were made by the respondent but it defaulted with respect to the rest. When the petitioner filed winding up petition against the respondent through power of attorney, the respondent raised an objection that power of attorney executed before a notary public of Singapore was not stamped in India and, therefore, the winding up petition filed on basis of such power of attorney was not admissible. The court ordered for winding up on the ground that since power of attorney bore an endorsement recognizing payment of stamp duty, which was authenticated by a seal and emblem of India, power of attorney could not be presumed to be unstamped or deficiently stamped.

In *Tata Communications Ltd*. v. *Channel-99 Media Networks (P.) Ltd.,*[18] the respondent-company was engaged in the business of television broadcasting. It approached the petitioner-company to provide internet and telecommunication services, and up linking services to broadcasters of television channels and said link was delivered to it as per the terms and conditions in the purchase order. However, payments in terms of invoices sent by the petitioner-company were not made. A memorandum of settlement was entered between the parties and it was agreed that the respondent-company would pay a certain sum. Certain post-dated cheques were issued by the respondent-company but were dishonoured. The petitioner-company sent statutory notice to the respondent asking it to make payment of outstanding dues but the same was not made. The petitioner filed a petition under section 433 seeking winding up of the respondent-company which was admitted by the court.

In *Shradhha Aromatics (P.) Ltd*. v. *Official Liquidator of Global Arya Industries Ltd*.,[19] the company was ordered to be wound up and advertisements were issued for sale of its properties. The judge approved the highest bid offer of Rs. 127 lakhs given by the respondent. The appellant filed a company application for recall of order by stating that it was interested in making an offer of Rs. 141 lakhs. An application filed by the appellant for recall of order was allowed which was challenged by the respondent. The division bench held that the confirmed auction sale cannot be set aside merely because subsequently a higher price is offered by one of the bidders. On appeal before Supreme Court, the appellant further enhanced its bid to Rs. 2 crores and fresh bids were asked from parties and at that stage intervenor-cum-promoter submitted that he was willing to give a better offer of Rs. 7.55 crores. The court set aside the impugned order of division bench and the offer made by intervenor-cum-promoter was accepted.

In *Areva T & D India Ltd*. v. *Bheema Cements Ltd*.,[20] the Andhra Pradesh High Court clarified that a petition seeking winding up cannot be dismissed on the ground of the existence of an arbitration clause. In the present case, the petitioner-company had supplied certain equipments to the respondent-company for which they had made a part payment. The respondent-company failed to make the outstanding amount and argued that the petitioner had not fully erected the transformer and not

18 [2011] 110 SCL 395 (Raj).
19 [2011] 164 Comp Cas 396 (SC).
20 [2011] 168 Comp Cas 310(AP): (2012) 1 Comp. LJ 603 (AP).

commissioned the transformer for service and, therefore, it was not entitled for the amounts as claimed in the legal notice. The petitioner accepted to take back the equipment and invoked arbitration in the work order and nominated a district judge as an arbitrator and sought consent of the respondent-company. He then filed a company petition seeking an order of winding up. The respondents contended that since the petitioner invoked arbitration clause and the disputes between the parties are required to be resolved by an arbitrator, the company petition filed by the petitioner seeking an order of winding up was not maintainable. Rejecting this contention and admitting the company's petition, the court held that the petitioner has made out a *prima facie* case for admission of the winding up petition against the respondent-company. In the similar vein, the court observed:[21]

> It is well-settled that the power to order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. In view of the settled proposition of law, existence of arbitration clause is not a ground to dismiss the application seeking an order of winding up of the respondent-company.

Section 446 of the Companies Act, 1956 is a special provision with a summary procedure which enables the company court through the official liquidator to take all legal measures so that the affairs of the company are not involved in multiplicity of judicial proceedings before different fora and thus avoiding possible conflicting decisions. Therefore, all that is necessary under the section is to give an opportunity of being heard to the third party before any step is taken by the court.

The scope and ambit of section 446 of the Companies Act, 1956 was challenged in the present case,[22] wherein the court held that it was the company court alone which can decide all disputes and once the order of winding up of company was passed, the official liquidator would take possession of the assets, properties and affairs of the company. In this case, an appeal was filed against the order of the trial judge which directed the appellant to deliver the vacant possession of the shop rooms in question to the official liquidator. The order was passed in the context of the letter for obtaining direction of the court for eviction of the appellant/lessee of the property of the company in liquidation. For the issue, whether the procedure adopted by the trial judge is in due process of law for passing an order of eviction or not, the court held that the trial judge had correctly recorded that the renewal of the lease was void by virtue of section 536(2) of the Companies Act, 1956.

IV DIRECTORS OF THE COMPANY

Section 313 in the Companies Act, 1956 provides for the appointment and term of office of the alternate directors. Section 313(2) provides that an alternative director appointed may hold the office for the permissible period only and has to

21 *Id.* para 15.

22 *Globex Travel and Exchange Ltd.* v. *Official Liquidator, High Court of Calcutta* [2011] 168 Comp Cas 425 (Cal).

vacate the office if and when the original director returns to the state in which meetings of the board are ordinarily held. The alternate director is essentially appointed during the absence of the original director appointing him from the state in which the meetings of the board are ordinarily held.

In *Naina D. Kamani* v. *Janson Engineering and Trading (P) Ltd.*,[23] the Bombay High Court clarified that under section 313(2) of the Companies Act, 1956 the words "the original director returns to the state" means that when the original director returned to India and the state in which the board meetings were held to carry on his business in India, alternate director would vacate his office. The court observed that section 313 enables the alternate director to hold office for the period that the original director appointed him would have held such office and to vacate that office when the original director appointing him returns to the state. In the present case, the original director returned to India for a short period and during that period the alternate director and original director have met when the signature of original director came to be obtained on a separate paper showing his agreement thereon. The court held that the when the original director returned to India and the state in which the board meetings were held to carry on his business in India than the alternate director would vacate his office under section 313(2) of the Act.

In umpteen numbers of cases, the court has dealt with the issue of director's responsibility for company offences after the cessation of directorship. In majority of the cases, the court has held that there is no responsibility vested upon a director regarding the company offences after the cessation of the directorship. The Supreme Court in *Anita Malhotra* v. *Apparel Export Promotion Council*[24] held that the appellant, an ex non-executive director of a company, who resigned from the directorship was not liable for the offences committed by the company. In the case on hand, despite the appellant's information to the respondents regarding her resignation from the directorship of the concerned company, the respondents filed a complaint against the appellant for dishonor of a cheque under section 138 of the Negotiable Instruments Act, 1881.[25] The appellant filed a petition before the high court for quashing the petition which was dismissed on the ground that the appellant had not placed any records regarding the cessation of directorship. In fact, the information regarding the resignation of the appellant was recorded in statutory form 32 with the registrar of companies. The appellant was unable to produce the same as it was not available from the office of the registrar of companies. Allowing the appeal, the Supreme Court observed:[26]

> This Court has repeatedly held that in case of a Director, complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient.

23 [2011] 167 Comp Cas 89 (Bom): 2012 (1) Bom CR 868.
24 [2011] 168 Comp Cas 240 (SC) : AIR 2012 SC 31.
25 S. 138 deals with the dishonour of cheque for insufficiency of funds in the account.
26 *Id.* para 15.

In *Harshendra Kumar* v. *Rebatilata Koley,*[27] the court held that an ex-director of a company cannot be made accountable and fastened with liability for anything done by company after acceptance of his resignation by the company. In this case, criminal proceedings were initiated against the director of a company who had resigned and his resignation as director of company was accepted and notified to registrar of companies in prescribed form, and on the date when offence was committed by the company, the appellant was neither director of company nor had anything to do with the affairs of the company. The apex court in this case clarified that incidentally, no acceptance of the resignation of a director is necessary and there are several decisions holding that the resignation becomes effective the moment it is tendered unless the articles of association of the company makes acceptance mandatory.

Similarly, in another case,[28] the court held that a director of a company who had already resigned before the offence took place cannot be held liable for the offence committed subsequently by a company. As per the fact of the case, a petition was filed under section 482 of the Cr PC seeking the quashing of criminal complaint pending before the Additional Sessions Judge, Delhi. The allegations in the complaint were that the company floated a collective investment scheme but failed to file the requisite information or details pursuant to a Government of India press release. The Securities and Exchange Board of India (SEBI) wrote letters to the company asking it to submit the information wherein the company failed to make any application with SEBI for registration of the collective investment schemes being operated by it as per the regulations. In exercise of its power under section 11B of the SEBI Act, the company was directed to refund the money collected within one month from that date. The allegation against the petitioners in the complaint was that they were in charge and were responsible to the company for the conduct of its business. Quashing the criminal complaint, the court held that it would be unfair to require the petitioners to go through the ordeal of a trial only for proving a statutory document available for inspection by the SEBI in the office of the registrar and despite sufficient time available to it SEBI has not brought anything on record to doubt their genuineness. In another case,[29] the complaints filed against the petitioners under section 141(2)[30] of the Negotiable Instruments Act, 1881 was quashed as they had resigned from the directorship of a company much prior to the occurrence of the offence. The petitioners produced the certified copies of form 32 issued by the registrar of companies which were accepted by the high court.

In *Mangaleshwar Singh Baghel* v. *Rewanchal Industrial Security India (P.) Ltd*.,[31] the CLB held that where conduct of respondents were wrongful, harsh and lacking in probity, the petitioner was permitted to exit company on receiving fair

27 [2011] 162 Comp Cas 247: (2011) 3 SCC 351.

28 *Virender Kumar Singh* v. *Securities and Exchange Board of India* [2011] 167 Comp Cas 105 (Delhi).

29 *M.L.Gupta* v. *DCM Financial Services Ltd*. [2011] 168 Comp Cas 381 (Del): 167 (2010) DLT 428.

30 S. 141(2) of the Negotiable Instruments Act, 1881 deals with the offences by the companies.

31 [2011] 168 Comp Cas 142 (CLB).

value for his shares fixed by CLB. As per the facts of the case, the petitioner, a director of a company filed a petition under sections 397 and 398 of the Companies Act, 1956 contending that his removal as the director of the respondent company was illegal and void. The petitioner also alleged mismanagement of the affairs of the company and desired to exit company on receiving fair value for his shares. The CLB observed that the respondents had failed to prove the petitioner's allegations of mismanagement. The petitioner was also permitted to exit the company on receipt of fair value for his shares.

The issue in *Official Liquidator* v. *Nagin B. Parikh*[32] was relating to the power of court to assess damages against delinquent directors in case of winding up of a company under section 543 of the Companies Act, 1956. Misfeasance proceedings were initiated against directors of company-in-liquidation and the directors filed separate applications to the court to absolve them from all the charges of misappropriation and misapplication made against them. Since a sum deposited with the company on account of sales tax, PF, ESI and EPLI liabilities had not been paid by company, there was a presumption of misappropriation by respondent Directors, who were in control of company at material time and thus the respondent Directors were liable to compensate company-in-liquidation for loss. The respondent no.10 contended that he was only a non-executive director who had no role in conduct of company's business and had resigned one year prior to winding up of company. There was no evidence to suggest involvement of the respondent no.10 in any act of misappropriation or misapplication of properties of company, proceedings against him were dismissed.

In *Official Liquidator of Microfert Agro Chemicals (P.) Ltd. (In the Liquidation*) v. *N. Shashi Kumar,*[33] an official liquidator filed application under section 543 against respondent, ex-director of company in-liquidation, for alleged act of misfeasance relating to a particular period. The court found that, there was no merit in application filed by the official liquidator as the respondent was appointed as a director of company (in liquidation) with effect from a subsequent period and hence the petition was dismissed.

In *Ravi Raj Gupta* v. *Hansraj Gupta & Co*.,[34] the court held that a director is bound under section 299 of the Companies Act, 1986 to make disclosure of only such rights or interests which other directors are unaware of. As per the facts of the case, appellant was CEO of the respondent company and by a resolution he was removed from the post of CEO. A resolution was passed by the board of directors of the respondent-company whereby a decision was taken to surrender the tenancy of the property to its owner. The appellants filed the suit in question challenging the validity of the above resolution on the ground that the resolution was passed by the respondent as directors of the company. The submission was that since the respondents had interest in the property being coparceners of the HUF which was the owner thereof and as directors of the company, as such, they were bound to disclose their interest in view of section 299 which those respondents failed to do.

32 [2011] 167 Comp Cas 332 (Cal).
33 [2011] 109 SCL 439 (Kar).
34 2011 (124) DRJ 22.

The single judge by impugned order dismissed the suit holding that there was no violation of section 299 and that the suit filed by the appellant was not maintainable being a frivolous suit which had been dragged unnecessary.

The director's power to file a suit on behalf/ in the name of the company has been a contentious issue before the courts in a number of cases. Although Regulation 77[35] of the Companies Act, 1956 permits for delegation of its powers to a committee, it is silent about the sub-delegations of its powers. In majority of the decisions, the court has held that the duly authorized director of a company can file a suit on behalf of the company.

In *State Bank of Travancore* v. *Kingston Computers (I) P. Ltd*.,[36] the issue was related to the proper authorization in filing a suit on behalf of the company. In this case, the apex court rejected an improper document of authorization as no resolution was passed by the board of directors of the company delegating powers to the director to file a suit on behalf of the company. The court held that no resolution has been passed by the company authorizing him to file the suit on behalf of the company. The court clarified that in order to file a suit on behalf of the company, the power to enter into litigation must flow from the board of directors. Similarly, in *Eimco Elecon (India) Ltd*. v. *Mahanadi Coal Fields Ltd.,*[37] the court held that the power to institute a suit could only be given by the board of directors of the company in exercise of its statutory powers by passing a resolution under sections 291 of the Companies Act, 1956. In another case[38] the court held that where the board of directors have delegated its powers to a director sub-delegation of that powers was not feasible, power of delegatee to permit sub-delegation must be express or implied. Similarly, in *Delhi State Industrial Development Corporation Ltd.* v. *J. K. Synthetics Ltd*.,[39] the court held that an *ultra vires* act of the director in representing a company through a suit may be rectified by the board of directors through meetings. In *Central Bank of India* v. *Asian Global Ltd*.,[40] the court held that merely being a director would not make a person liable for an offence that might have been committed by the company. In order to prosecute a director under section 138 read with section 141 of the negotiable instrument Act there must be specific allegation in the complaint that the act has been committed on behalf of the company.

V DEREGISTRATION OF COMPANIES

In *Synergy Steels Ltd* v. *Appellate Authority for Industrial and Financial Reconstruction*[41] the Delhi High Court held that where net worth of a company turns positive before scheme gets fully implemented, company cannot be discharged

35 Regulation 77 of the Companies Act, 1956 provides that the board may subject to the provisions of the Act delegate any of its powers to committees consisting of such member as its thinks fit.

36 [2011] 163 Comp Cas 37 : JT 2011 (3) SC 66.

37 [2011] 167 Comp Cas 596 (Ori).

38 *Md. Shamim Ahmed* v. *Union of India* [2011] 163 Comp Cas 107 (Gau).

39 [2011] 163 Comp Cas 412 (Del)

40 [2011] 163 Comp Cas 398 (SC)

41 [2011] 167 Comp Cas 25: (2011) 1 Comp L J 371 (Del).

from the purview of the Sick Industrial Companies (Special Provisions) Act, 1985 Act. In this case, the question was whether a company which was registered as a sick industrial company under section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985, but ceased to be a sick industrial company before the sanctioned scheme was fully implemented, could be discharged from the purview of the Act. By quashing the orders passed by the Board of Industrial and Financial Reconstruction (BFIR) and Appellate Authority for Industrial and Financial Reconstruction (AAIFR), the court held that it was impermissible under a sanctioned scheme that the company takes all the benefits of reliefs and concessions but does not perform the obligations as envisaged in a scheme. The authorities acting under the 1985 Act could not simply discharge a sick company from the provisions of the Act while the sanctioned scheme was not fully implemented.

VI COMPANY LAW BOARD (CLB)

The CLB is a special forum under the Companies Act, 1956 to be an adjudicator and granting authority at times in the interests of the company or the shareholders. Under section 10(F) of the Companies Act, 1856, a decision taken by the CLB is final and an appeal to the high court is permissible only on the question of law.

The scope of the power of the CLB under section 402[42] of the Companies Act, 1956 was examined by the court in *T.Vinayaka Perumal* v. *T. Balan.*[43] In this case, a petition was filed under section 10(F) read with sections 397, 398 and 402 of the Companies Act, 1956, to set aside the order relating to setting aside the sale of the schedule properties in favour of the appellant and ordering restoration of certain acres to respondent. The CLB held in favour of the company and an appeal was filed before the high court under section 10 (F) of the Companies Act, 1956. After noting all the facts and analyzing the legal position under sections 397, 398 and 402 of the Companies Act, 1956, the high court has set-aside the order of the CLB relying on the knowledge and the issue of *bonafide*. The court observed:[44]

> The property was mortgaged by the 6th respondent in his individual capacity. The parties also came to know about the property being in the name of the 6th respondent, when the suit was filed and got settled by the 6th respondent, by redeeming the property. Therefore, it was not open to the company to challenge the sale, that too, in the CLB, after lapse of 15 years. It seems that the object of moving the CLB was, that the respondents 1 to 4 thought that the civil suit for claiming the property would not be competent, as the property not only was registered in the name of 6th respondent, but he acted as the absolute owner thereof throughout all these years, to the knowledge of the company and other Directors and members of the company.

42 Without prejudice to the generality of the powers of the CLB under ss. 397 or 398, any order under either section may provide for any of the matters specified in the various clauses of the section.

43 [2011] 167 Comp Cas 45 (Mad).

44 *Id*. para 30.

In *Montreaus Resorts R (P) Ltd* v. *Ascot Hotels and Resorts Ltd.,* the issue was whether the disobedience of the order of the CLB amounts to contempt of court under the Contempt of Courts Act, 1971. As per the facts of the case the CLB had ordered the respondent company to maintain *status quo.* Subsequent to the order of the CLB, the respondent company sought permission from the state government for development activities over the said land and the same was granted by the state government. The CLB had directed that if the construction activities were carried out and the *status quo* was altered, the respondents would be responsible to restore the status of the land of the company as it existed on the date of grant of injunction. By observing that the direction of the CLB has been disobeyed, the Delhi High Court ordered to restore the position of the land as it existed on the date of the order of *status quo*.

In *Pankaj Chimanbhai Patel* v. *Karnavati Club Ltd.,*[45] the respondent, a club formed for the purpose of promoting the sports facilities expelled the petitioner from its membership. This was challenged by the petitioner by filing a petition under section 111 of the Companies Act, 1956 seeking directions to declare the proceedings of the meeting of the board of directors to be illegal. Clarifying the objective of section 111(4) of the Companies Act, the CLB observed that subsection (4) must be read in consonance with section 111 of the Act. The CLB further held that the petitioner's case was related to expulsion from membership of the club for which the CLB did not have jurisdiction to deal with.

VII TRANSFER OF SHARES

Section 111A[46] of the Companies Act, 1956 speaks about free transferability of the shares and debentures of the public limited company. In *Sureshkumar Jagdishprasad* v. *Anand Credit Ltd.*,[47] a petition was filed under section 111A of the Companies Act, 1956 seeking directions to the respondents to issue duplicate share certificates in the name of the petitioner since he had lost certain number of shares. The company contended that the share certificates pertaining to some lost shares had been received by share transfer agent with transfer forms containing shareholder's signature which appeared to be genuine. The CLB held that whether the signature was genuine is a question of fact and it needs to be decided in appropriate forum by conducting proper trial.

VIII COMPANY MEETINGS

As per section 171(1) of the Companies Act, 1956, a general meeting of a company may be called by giving not less than twenty-one days' notice in writing. In *Albert Cambata* v. *Cambata Aviation P.Ltd*.,[48] the CLB held that director staying abroad and attending some meetings of board of directors cannot complain non-

45 [2011] 168 Comp Cas 162 (CLB).

46 It provides that subject to the provisions of this section, the shares or debentures and any interest therein of a company shall be freely transferable.

47 [2011] 168 Comp Cas 17 (CLB).

48 *Supra* note. 6.

receipt of notice of meetings. In *Kamlesh D. Shah* v. *Larsen and Toubro Ltd*.,[49] the petitioner who had purchased certain shares through stock broker and lost transfer deeds filed a petition before the CLB. The CLB ordered the company to rectify the register in respect of shares held in physical form and for the issuance of notice to holders in respect of dematerialized shares. The Calcutta High Court in one case[50] pointed out, interpreting section 172(3) of the Companies Act, 1956 that the accidental omission to give notice would not invalidate the proceeding in a general meeting.

In *IFCI Ltd*. v. *TFCI Ltd.*,[51] the company IFCI sent a requisition to TFCI for convening an extraordinary general meeting with the objective of appointing four new directors and removal and replacement of one director on the board of TFCI. However, TFCI questioned the validity of the requisition on the ground that though it was signed by the company secretary of IFCI, but specific authorization/board resolution to file such requisition had not been annexed and it requested IFCI to send the said board resolution within a period of one week. Subsequently, on not getting the said information, TFCI, through its board meeting decided not to convene EOGM of TFCI. On receiving that information, IFCI initiated the process under section 169(6) for convening an EOGM and filed the instant company petition under sections 398 and 402 against the respondent-company. CLB passed the interim order directing both the parties to maintain *status quo* on their board of directors. While disposing application filed by TFCI praying for stay of EOGM called by the IFCI, ordered to defer the EOGM requisitioned under section 169(6) till further orders. The said order was challenged before the high court wherein the court allowed the EOGM to be held but directed that the decisions taken by EOGM would not be given effect to till the CLB would decide the petition finally. The CLB, held that the requisition issued by IFCI as invalid on the ground that it did not bear the signature of the requisitionist and further held that IFCI issued notices subsequent to passing of the order for convening EOGM was a fraudulent act in utter violation of the directions contained in the order.

IX SCHEME OF AMALGAMATION/ARRANGEMENT

In *Claro India Ltd., In re,*[52] the petitioner-company sought sanction of the court to a scheme of amalgamation between it and the transferee company. The scheme had been unanimously approved by the shareholders and the regional director recorded no objection to the scheme. An objection was raised with regard to the compliance with the requirements of section 97 of the Companies Act, 1956 which stipulated for filing form no.5 by remitting the required registration fees for the increased authorized capital. The high court held that the objection regarding compliance with the requirements of section 97 of the Act could not be sustained.

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49 [2011] 167 Comp Cas 228 (CLB).

50 *Sadhan Kumar Ghosh* v. *Bengal Brick Field Owners Association* [2011] 163 Comp Cas 493 (Cal).

51 (2011) 3 Comp LJ 603 (Del).

52 [2011] 168 Comp Cas 132 (Mad).

The court observed that the transferee company need not comply with requirements of section 97 on increase in authorized capital.

In *Suresh Kumar Rungta* v. *Roadco (India) P. Ltd*.,[53] the applicant, a minority shareholder filed a petition for setting aside the scheme of amalgamation, on the ground that no notice of meeting to consider the scheme was received by him. The trial judge dismissed that application which had been affirmed by the division bench and the special leave petition had also been withdrawn. Later on, the appellants filed an application for recalling the order sanctioning the scheme of amalgamation between the respondents and also for cancellation of the scheme of amalgamation between the respondents and for reversal of the respondent-companies to their original position as prevailing prior to the sanction of the scheme. The single judge dismissed the application principally on the ground of *res judicata* and/or constructive *res judicata*. While rejecting the said application the single judge recorded certain findings which had gone against the respondents-companies and as such cross-objection has been filed against the said portion of the judgment. The court held that challenge to order sanctioning scheme of amalgamation by shareholders who had participated in earlier proceedings wherein that order had become final was hit by principle of *res judicata* and barred by the principles of acquiescence.

The provisions of sections 391 and 392 of the Companies Act, 1956 can be invoked for the purpose of proper working of the compromise or arrangement. The power conferred by these sections on the court is a power of superintendence, which may be exercised by issuing appropriate directions or effecting necessary modifications so as to ensure the proper working of such compromise agreement. In the present case,[54] a joint petition was filed by the applicant and the respondent-companies seeking sanction of the court to a scheme of arrangement in terms of the family arrangement. The scheme was sanctioned by the court. Later on, one of the applicant filed application for modifying the sanctioned scheme as the order passed was in contravention of rule 37 of the Mineral Concession Rules, 1960. The court held that the application was not maintainable because the application for recalling was not in the aid of the scheme but for frustrating the scheme and clarified that the provisions of sections 391 and 392 can be invoked for the purpose of proper working of the compromise or arrangement.[55] The court observed:[56]

> The power conferred by the said Sections on the Court is a power of superintendence, which may be exercised by issuing appropriate directions or effecting necessary modification so as to ensure the proper working of such compromise or arrangement. Therefore, direction or modification, whatever is necessary, is only to ensure proper working of the compromise or arrangement only to achieve that object and no other. An order of the

53 [2011] 168 Comp Cas 406 (Cal).
54 *Castron Technologies Ltd.* v. *Castron Mining Ltd.* [2011] 168 Comp Cas 414 (Cal).
55 See also, *Triveni Engineering and Industries, In re*. [2011] 163 Comp Cas 404 (All).
56 *Id.* para 15.

> Court sanctioning this scheme becomes binding on all the shareholders and a shareholder cannot, afterward, question it. The sanction of the Court operates as a judgment in rem. In this company proceeding, however, the Central Government decided not to oppose the prayer for sanctioning of the scheme of amalgamation/arrangement.

In *Globsyn Infotech Ltd., In re*[57] a petition was filed seeking approval of a scheme of amalgamation and also for the reduction of the share capital and the utilization of the securities premium account as approved by the equity shareholders of the company. The petitioner's prayer was for the permission for reduction of the share capital of the transferor company. The court directed the petitioner company to serve a notice to the creditors regarding the reduction of the share capital and also the gist of the petition and prayers in the leading newspapers.

X CONCLUSION

The present survey brings to light the significant contributions made by the courts in the development of company law during 2011. In fact, the year has witnessed a radical change in the attitude of judiciary in interpreting the legislative provisions in protecting the rights of stakeholders. In general, the courts have maintained consistency to the established principles of company law.

57 [2011] 163 Comp Cas 25 (Cal).