5
COMPANY LAW

*Arya A Kumar**

I INTRODUCTION

IN VIEW of the global economy and the changed social-economic development, the company law has developed drastically. Correspondingly, the Companies Act, 1956 is proposed to be replaced by a new law, the Companies Bill, 2012. If it is enacted it would definitely bring growth and regulation in the corporate sector as the bill contains several provisions for investor protection, transparency and accountability in the working of companies *etc*.

II DISSOLUTION OF PARTNERSHIP

In *G.Vijaalakshmi Alias Brinda* v. *Tirupur Textiles P. Ltd.*[1] the Company Law Board (CLB) held that on some material indicating that there was a basic understanding between the parties for equal participation in the management of the affairs of the company and that the appointment of the directors of the company was done in accordance with the articles of association, the principles of dissolution of partnership could not be invoked. This decision has been reiterated by the Madras High Court.

III SEBI' POWER TO INVESTIGATE ON THE MATTERS OF PUBLIC LISTED COMPANIES

The Securities and Exchange Board of India Act (SEBI Act) is a special legislation bestowing the SEBI with special powers to investigate and adjudicate to protect the interests of the investors. These special powers of SEBI are not derogatory to any other provisions under any other law and should be read harmoniously with such other provisions and there is no conflict of jurisdiction between the Ministry of Corporate Affairs (MCA) and the SEBI in the matters where interests of the investors are at stake. This power of SEBI was challenged in the *Sahara India Real Estate Corporation Ltd.* v. *Securities and Exchange Board of India*[2] wherein the apex court has upheld the powers of SEBI investigate and adjudicate protecting the

---

* Asst. Professor, The Indian Law Institute, New Delhi.

1 [2012] 175 Comp Cas 1: [2013] 113 CLA 299.

2 [2012] 174 Comp Cas 154.

interests of the investors. The SEBI has also directed the erring companies to refund the money to their investors.

As per the facts of the case, both the companies (SIRECL – Sahara India Corporation Real Estate Ltd. and SHICL) collected huge amount of money from the investors after special resolutions under section 81(IA) were passed at their general meetings. The memorandum which was filed with the registrar of companies under section 60 (B) of the Companies Act did not comply with the requirements applicable to the public issue of securities and it was presented as a 'private issue.' After conducting inquiry under sections 11, 11A, 11B of SEBI Act and under section 55A of the Companies Act, SEBI directed the two companies to refund the money so collected to the investors. Against this SIRECL preferred an appeal before Securities Appellate Tribunal (SAT) which confirmed the order of SEBI. Subsequently, against this order, an appealing filed before the Supreme Court. The Supreme Court, while confirming the findings of the SAT has further asked SEBI to probe into the matter and find out the actual investors who have subscribed to the Optionally Fully Convertible Debentures (OFCDs) issued by the two group companies SIRECL and SHICL.

The major issues addressed by the court were:

a) Whether the SEBI has the power to investigate and adjudicate in this matter as per sections 11, 11A, 11B of SEBI Act and under section 55A of the Companies Act, or whether it is the MCA which has the jurisdiction under section 5A(c) of the Companies Act?
b) Whether OFCD is a hybrid security and falls within the definition of 'securities' so as to vest the SEBI with the jurisdiction to administer, investigate and adjudicate?
c) Whether the issue of OFCDs was a private placement issue or a public issue so as not to fall within the purview of SEBI Regulations and various provisions of Companies Act?

For the first issue, it was held that SEBI does have power to investigate and adjudicate in this matter. Section 55A of the Companies Act was inserted to confer on the SEBI special powers in matters of issue, allotment and transfer of securities of listed companies and the companies which intend to go in for listing. Under section 55A, so far matters relate to issue and transfer of securities and non-payment of dividend, the SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India.

For the second issue it was held that although the OFCDs issued by the two companies are in the nature of 'hybrid' instruments, it does not cease to be a 'security' within the meaning of the definition of 'securities' in section 2(h) of the Securities Contracts (Negotiation) Act (SCRA). That definition does not contain the term 'hybrid instruments,' however; the definition is an inclusive one and covers all 'marketable securities.' In this case the OFCDs were offered to millions of persons; therefore, the OFCDs were marketable securities. OFCD was a debenture since the name itself contained the term 'debenture', it is deemed to be a security as per the provisions of the Companies Act, SEBI Act and SCRA.

For the third issue it held that although the intentions of the two companies were to make the issue of OFCDs as a private placement, their actions were incompatible with and contrary to their intentions and in that process the provisions of section 67(3) were violated. Section 67 of the 1956 Act lays down the criterion for construction of references to offering shares or debentures to the public, *etc*. In other words, this section provides an aid to determine as to when an offer or invitation for subscribing for securities can be said to be one to the public and when it is not. An offer which is not a private placement offer would be deemed to be a public offer. Broadly, an offer to subscribe to shares or debentures to the public at large or to any section of the public would be treated as a public offer if it is intended to invite anybody or it is made in such a way that anybody who wishes to invest can do so or, if he does not so wish, he can renounce the offer made to him. Thus, the offer is not restricted only to specific persons; it does not remain a 'domestic affair;' on the contrary, it turns out to be a 'public affair".

IV FOREIGN COMPANIES

Sections 591 to 599[3] of the Companies Act deal with the obligations of the companies incorporated outside India and running its business in India. Under these sections, if a foreign company failed to comply with the provisions under the Act, it will not affect the validity of any contract, dealing or transaction entered into by the company but the company shall not be entitled to bring any suit, claim or institute any legal proceeding in respect of any such contract, dealing or transaction, unless it has complied with the provisions of these section.

In *Dabur (Nepal) P. Ltd.* v. *Woodworth Trade Links P. Ltd.,*[4] the petitioner's suit was dismissed by the court on the ground that being a foreign company it was not entitled to institute legal proceedings. As per the facts of the case, the petition was challenged by the respondent on the grounds that the petitioner, a foreign company incorporated outside India having a place of business within India, had not complied with the requirements under sections 592 to 598. Although the petitioner company contended that it was only a subsidiary of an Indian company, the court dismissed the petition as a foreign company which had not complied with the requirements under section 599 and it cannot institute any legal proceedings.

V SCHEME OF AMALGAMATION/ARRANGEMENT

Scheme of arrangement

It is well-settled that under section 391 the court is vested with very wide powers to approve any scheme of amalgamation, arrangement, compromise or reconstruction for which the court has to follow special procedure. Sections 391,[5]

3 Part XI of the Companies Act, 1956.

4 [2012] 175 Comp Cas 338 (Delhi): [2013] 112 CLA 216 (Del).

5 S. 391 deals with the power to compromise or make arrangements with creditors and members.

392[6] and 394[7] mainly deal with the power of the high court to interfere with scheme of compromises and arrangements. Section 392 empowers the court to enforce compromises and arrangements sanctioned by it under section 391; whereas section 394 contains provisions for facilitating reconstruction and amalgamation of companies. The court may under section 433 of the Act make an order winding up the company, if it is satisfied that a compromise or arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications. Although under these sections power is conferred upon the court to interfere with the compromises and arrangements, the courts declined to interfere with such schemes in many of the judgments.

In *J. K. Agri Genetics Ltd.* v. *Union of India*[8], a scheme[9] of arrangement was pending before the court for approval under section 391 of the Act. Majority of the shareholders approved the scheme. Declined to interfere with the matter, the court held that 'if a scheme is approved by the requisite majority of members and creditors, the court was not competent to question such decision'. In *Unique Delta Force Security P. Ltd ., In re,*[10] it was ruled that the court has no inherent powers to abrogate, rescind or cancel the scheme or even modify a scheme even if it is not necessary for its proper working. By interpreting section 392 of the Act, the court ruled that 'by exercising powers under this section the court cannot change the basic fabric of the scheme and once a scheme is sanctioned and effected, the changes allowed in it should be minor ones and not 'wholesale changes' which would tamper with the essence of the scheme'. Furthermore, if a company desires to modify a scheme though the modification is not necessary for the proper working thereof it must follow the procedure prescribed under section 391 of the Act.

As states earlier, the court is given wide powers under section 391 of the Act, to sanction a scheme of amalgamation/arrangement which is for the benefit of the company. The courts can always give green signal to the scheme if it thinks that it is for the benefit of the company. In *BSBK Engineers P. Ltd., In re*[11] the issue was whether a scheme of compromise or arrangement provided for the conversion of the status of a company from public company to private company could be sanctioned by the court? The court upheld the scheme under section 391 of the Act with an observation that no further act on the part of company was required to be done for

---

6 S. 392 of the Companies Act provides that where a high court makes an order under s. 391 sanctioning a compromise or an arrangement in respect of a company, it (a)shall have power to supervise the carrying out of the compromise or arrangement; and (b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

7 This section deals with the provisions for facilitating reconstruction and amalgamation of companies.

8 [2012] 175 Comp Cas 306 (Cal).

9 Earlier in *J. K. Agri Genetics Ltd* v. *Florence Alumina Ltd.* [2010] 157 Comp Cas 200, the court held that a scheme beneficial to only one group of shareholders should not be sanctioned.

10 [2012]175 Comp Cas 318.

11 [2012] 175Comp Cas135.

giving effect to conversion of a public company to a private company, alteration in the memorandum of association of the company and change in the name of the company.

Integra India Group Ltd. In re[12] the scheme of arrangement[13] to add words 'and reduced' as suffix to name of company for five years or more was sanctioned by the Gujarat High Court on the ground of the interest of the stakeholders/creditors and public interest. In *Vasupujiya Jewels Pvt. Ltd. In re*[14] the scheme of amalgamation was sanctioned by the court on the ground that the scheme was not prejudicial to interests of shareholders and public affairs of petitioner companies was not conducted in a manner prejudicial to interest of its members or public interest. In this case, the transferor companies sought sanction to their scheme of amalgamation with the transferee company. Similarly in another case[15] the court sanctioned the scheme of amalgamation and held that the transferee company was not required to pay additional fee and stamp duty on the increase in its authorized capital upon transfer of transferor company's share capital. In *Reliance Jamnagar Infrastructure Ltd., In re*[16] the Gujarat High Court sanctioned the scheme of amalgamation between the, Reliance Jamnagar Infrastructure Ltd. and the Reliance Industries Ltd. The court further held that the scheme of amalgamation provides for the transfer of all assets and liabilities of the transferor company (RJIL) to the transferee company (RIL).

In *Noble Enclave and Towers P. Ltd., In re*[17] the court rejected to approve the scheme on the ground that the expression 'shareholder of the company' in section 293(1) (a) had to be restricted to the shareholders of the' concerned company and not extended to prospective shareholders. The issue in this case was whether a resolution passed by the transferor company remains valid and effective after the amalgamation is sanctioned by the court and whether the transferee company can act on such resolution after such resolution? The court held that the particular clause pertaining to the resolutions which would amount to prospective shareholders of the transferee company prior to the shareholders of the transferor companies becoming shareholders of the transferee company cannot be approved. Likewise, in *Raheja Universal Ltd.* v. *NRC Ltd.,*[18] the Supreme Court held that the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 have overriding effect over the provisions of Transfer of Property Act and the Board of Industrial and Financial Construction (BIFR) should oversee the entire affairs of the sick industrial company and ensure that the same are within the framework of the scheme

12 [2012] 174 Comp Cas 120.

13 This scheme of arrangement provides for the reorganization of the share capital of the transferee company as well as for the amalgamation of the transferor company with the transferee company pursuant to ss. 391 to 394 and other applicable provisions of the Companies Act.

14 [2012] 175 Comp Cas 382 (Guj).

15 *Doosan Chennai Works P. Ltd., In re* [2012] 175 Comp Cas 144: [2013] 2 Comp LJ 219 (Mad).

16 [2013] 176 Comp Cas 217 (Guj).

17 [2012] 174 Comp Cas 109: [2012] 2 Comp LJ 120.

18 [2012] 115 SCL 715 (SC).

formulated and approved by it for revival of the company in accordance with SICA.

In *Vodafone International Holdings* v. *Union of India*[19] the court held that 'every tax payer is entitled to arrange his affairs so that his taxes shall be as low as possible and that he is not bound to choose that pattern which will replenish the treasury'. In this case, the Supreme Court considered the provisions of section 195 of the Income Tax Act. This decision is followed in *Vodafone Essar Gujarat Ltd*. v. *Department of Income Tax* [20] wherein the Gujarat High Court reversed the order of the company court[21] and sanctioned the scheme of arrangement. In this case, the court clarified that it cannot be said that the sole purpose of the scheme was to avoid tax. The court observed as follows: [22]

> The Scheme of Arrangement sanction is hereby granted to the Scheme of Arrangement under sections 391 and 394 of the Companies Act, 1956 while protecting the right of the Income Tax Department to recover the dues in accordance with law irrespective of the sanction of the Scheme. However, while sanctioning the Scheme it is observed that said sanction shall not defeat the right of the Income Tax Department to take appropriate recourse for recovering the existing or previous liability of the transferor company and the transferor company is directed not to raise any issue regarding maintainability of such proceedings in respect of assets sought to be transferred under the proposed Scheme and the same shall bind to transferor and transferee company. The pending proceedings against the transferor company shall not be affected in view of the sanction given to the scheme by this Court. In short, the right of the Income Tax Department is kept intact to take out appropriate proceedings regarding recovery of any tax from the transferor or transferee company as the case may be and pending cases before the Tribunal shall not be affected in view of the sanction of the Scheme.

VI OPPRESSION AND MISMANAGEMENT

Chapter VI of Companies Act, 1956 (sections 397 to 409) deals with oppression and mismanagement and wide powers has been given to Company Law Board (CLB) under section 402 of the Act. While section 402 is specific to the powers of CLB, section 403 deals with the scope of passing interim orders by the CLB pending a main petition under sections 397 and 398. These provisions of the Companies Act, 1956 dealing with the issue of providing relief to the minority shareholders against the acts of oppression and mismanagement in the company by the majority shareholders have been subjected to judicial interpretations in number of decisions.

---

19 (2012) 1 Comp LJ 225 (SC).

20 [2013] 176 Comp Cas 7 (Guj).

21 The company judge rejected the scheme on the ground that the sole object of the scheme is to avoid tax and the scheme is void under s. 281 of the Income Tax Act, 1961.

22 *Id*., para 55.

Under sections 397 and 398 of the Companies Act, only members of a company are eligible for claiming relief for mismanagement of the company affairs. In a number of decisions[23] the courts have clarified that when the petitioners' ceases to be a member of the company, the petition could not continue. The same decision has been reiterated by the Calcutta High Court in *ABA Builders Ltd*. v. *Anjula Nagpal*[24] in which the court held that where all the petitioners to a petition under sections 397 and 398 of the Act, cease to be petitioners of the concerned company, the petition is over; unless an overwhelming matter of public importance impels the Company Law Board (CLB) to pursue the petition on its own. As per the facts of the case, the respondents had approached the CLB claiming to be oppressed under sections 397 and 398 of the Companies Act, 1956. During pendency of the proceedings, the respondents transferred their shareholding in the company to the appellants. Therefore, the appellants approached the CLB to dismiss the petition pending before it which had alleged oppression and mismanagement. The respondents, however, alleged that they were not given adequate consideration by the appellant group for the transfer of shareholding. The CLB ordered assessment for the fair valuation of shares and the appellants filed the instant application seeking dismissal of the petition before the High Court of Calcutta.

The High Court of Calcutta dismissed the petition on the following grounds:

(a) Share qualification is a requirement for the maintenance of a petition under sections 397 and 398 of the Companies Act, 1956;
(b) Upon the execution of the share transfer forms and handing over of the share certificates, and the subsequent registration of the transfer thereof, the character of the party as a member of the company was lost and hence the respondents were no longer capable of maintaining an application before the CLB for oppression and mismanagement;
(c) Adequacy of consideration for share transfer is material and it should be verified prior to the transfer of shares.

Similarly in another case,[25] with regard to the question whether substitution of an intervener in place of deceased petitioner gives him any right to sue for application under section 397 and 398 of the Companies Act, 1956 as his shares were not mutated and he was not allowed to participate in the company's affairs was answered by the Calcutta High Court negatively. In the present case, an application filed by the substitutors of the deceased under sections 397 and 398 of the Companies Act, 1956 was challenged on the ground that substitution in a proceeding was granted only when the right to sue survived. In fact, the intervener was not a member of the company in register of the members and hence his interest was not represented in the petition. The court clarified that in order to allow the appellants to substitute the proceedings; it has to complete new proceedings on a fresh grievance. In *Vyshak International Hotels P. Ltd.* v. *P.S. Kurian*[26] in a petition filed under sections 397

23 *Rai Mathura Prasad* v. *Hanuman Prasad Bhagat* [1984] 56 Comp Cas 467.
24 [2012] 175 Comp Cas 165.
25 *Ajith Kumar Agarwal* v. *Nischintapur Tea Co. Ltd.* [2012] 175 Comp Cas 289 (Cal).
26 [2012] 175 Comp Cas 401.

and 398, the CLB held that the respondents had no *locus standi* to file the petition as they had ceased to the members of the company by transferring their entire shareholdings.

In the case of oppression/mismanagement, under section 397, the CLB may order for the purchase of shares of the minority by the majority. Wide power is given to the CLB which can make a 'buyout order' as to which members' shares should be bought by which members or as to the price at which the shares should be purchased. When the buyout order is passed the CLB may order for the valuation of the company's shares.

In *Mecamidi SA* v. *Flovel Mecamidi Energy P. Ltd.*,[27] the CLB ordered for the valuation of the company's shares which was agreed by both the petitioner and the respondents and accordingly a valuer was appointed as per the agreement. Later the petitioner filed an application under section 402 of the 1956 Act for the directions to modify the valuation report and issuing of a fresh consent for a modified valuation report. Declined to accept the request of the petitioner, the CLB held that the valuation report had already prepared by the valuer with the consent of the petitioner and there was no justification to interfere with the valuation on the ground of suppression of documents and information.

VII WINDING UP OF COMPANIES

Under section 433 of the Companies Act, 1956 it is the discretion of the court to pass an order to wind up a company in the circumstances mentioned therein. 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. Such an attitude of the court can be seen in the present case.

In *Spedag East Africa Ltd.* v. *Surendra Engineering Corporation P. Ltd.*[28] the issue was regarding the maintainability of a winding up petition wherein the debt was acknowledged by the company through an e-mail communication. By rejecting the defense of the company that there was no privity of contract with the appellant and no admission of liability, the Bombay High Court held that the petition was maintainable as the company had acknowledged its liability of a debt through e-mail communication. The court ruled that the acknowledgement of a debt by e-mail can be treated as admission of the debt on the basis of which a winding up petition can lie and the court can order winding up of the company.

In this case the observation made by the court is quite appreciable.[29]

> …..[I]t is the discretion of the court to pass an order to wind up a company in the mentioned in section 433 of the Companies Act, 1956. While the circumstances stipulated in any of the clauses of section 433 of the Act are present, still it is in the discretion of the court to pass an order to wind up a company. It is for the court to bestow its attention to protect public interest. Public interest was involved, as the company was a public sector

27 [2012] 174 Camp Cas 85 (CLB).
28 [2012] 115 SCL.
29 *Id.*, para 13.

undertaking with the government holding 99% of its shares. It was a matter of public concern as to whether such a company was to exist or was to be wound up irrespective of the ability of the company to pay its debts. The order of winding up passed without considering all aspects was vitiated and was to be set aside. Therefore the appellant company was to be given adequate opportunity to put up its defense before the petition for winding up was examined.

The court ordered for the winding up of a company in a case[30] when it had failed to comply with the SEBIs instructions issued under section 24 of the SEBI Act, 1992. The shareholders of the company filed the petition on the ground that the company was not carrying out its business properly and was not able to pay off its debts. In *Jitendra Nath Singh* v. *Official Liquidator,*[31] the apex court by giving a wider interpretation to section 529A of the Companies Act clarified the difference between the rights of a secured creditor and an unsecured creditor in the case of winding up of a company. Section 529A[32] of the Companies Act specifically deals with the application of insolvency rules in case of winding up of companies. For the issue of the secured creditor's right over the assets of the company, the Supreme Court held that a secured creditor has the right only over particular asset of company offered to it as security and dues of secured creditor enjoy preference only to the extent not realized because of *pari passu* charge in favour of workmen in terms of section 529, Where, therefore, a creditor does not hold a mortgage, charge or lien on the property of the company or any part thereof as a security for a debt due to it from the company, it is not a secured creditor for the purposes of sections 529 and 529A of the Companies Act. Therefore, a secured creditor of an insolvent company which is being wound up has only a right over the particular property or asset of the company offered to the secured creditor as a security and the unsecured creditors have rights over all other properties or assets of the insolvent company.

In *Commissioner, Commercial Tax, Govt of Madhya Pradesh* v. *Official Liquidator*[33] dismissing the appeal the court held that if there was a conflict with the provisions of section 529A[34] of the Companies Act, a central legislation had to override the provisions of section 53 of the Madhya Pradesh Commercial Tax Act, 1994, a state legislation. In this case, the appellant-state had been ranked as a

30 *Manoj Prasad* v. *Shivam Plantation P. Ltd.* [2012] 174 Comp Cas 132 (Patna).

31 [2012] 175 Comp Cas 251.

32 According to s. 529 A (1), in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to (a) debts provable; (b) the valuation of annuities and future and contingent liabilities; and (c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. ' Then, according to the proviso, the security of every secured creditor shall be deemed to be subject to a *pari passu* charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debts opts to realise his security.

33 117 SCL 55 Del.

34 *Ibid.*

preferential creditor contended that the tax dues payable by the company in liquidation shall be the first charge on the property of the company and as such the appellant be treated *pari passu* with the secured creditors. Dismissing the appeal, the court held that section 53 of the Madhya Pradesh Commercial Tax Act, 1994 under which the appellant was claiming his right, clearly specified that the tax liability would be subject to the provisions of section 530 of the Companies Act which had to be read subject to the provisions of section 529A of the Companies Act.

Generally, under section 433(c) the court may order winding up of a company if the company does not commence its business within one year after its incorporation. The section stipulates for certain conditions[35] mandatory for the winding up of a company. In *Dharmappa P. Hanji* v. *Jayhind, Techno Machines P. Ltd.,*[36] the court rejected the winding up petition of a company filed under section 433(c) and (f) of the Act on the ground that the balance-sheet of the company revealed that it was earning interest and it was in this manner carrying on its activities from the date of its incorporation till date. The winding up petition was filed on the ground that the company had not taken measures for commencement of its activities as envisaged in its memorandum of association. The court observed that the company had been earning profits as reflected in the balance-sheet and no creditors had demanded winding of the company and its financial resources were sufficient to meet any contingency.

Under section 434[37] of the Companies Act, a notice should be served and the statutory period of three weeks should have been expired for filing up a winding up petition against the company. In *Applause Entertainment P. Ltd.* v. *A. Entertainment P. Ltd.*[38] the court held that the statutory notice has been send for filing a winding up petition. It clarified that when the proof of dispatch of the letters through speed post had been placed on record and no reply had also been filed by the company to the legal notice, then the notice must be presumed to have been served in terms of section 114(f) of the Indian Evidence Act, 1872.

---

35 Under s. 433 (c) the company may be wind up when:
(a) the subject-matter of the company is gone, or;
(b) the object for which it was incorporated has substantially failed, or;
(c) it is impossible to carry on the business of the company except at a loss which means that there is no reasonable hope that the object of trading at a profit could be attained, or;
(d) the existing and probable assets are insufficient to meet the existing liabilities.

36 [2012] 174 Comp Cas 118 (Karn).

37 According to s. 434 of the Companies Act a company shall be 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 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.

38 [2012] 175 Comp Cas 437 (Delhi).

The maintainability of a winding up petition was discussed in *Paper Prints (India)* P. *Lid.* v. *Phoenix ARC P. Ltd.* where assignment of a debt of the company by a bank to the securitization and reconstruction of company had been made before filing a winding up petition. The company was granted financial assistance and had utilised it, a statutory notice of winding up had been issued and no reply was filed to the petition for winding up, the debt was not in dispute and the company had even failed to deposit the full admitted amount as directed by the court in an *ad interim* order for stay, there was no need to interfere with the order of the single judge ordering winding up of the company. The Gujarat High Court in *Asim Pharmchem Industries* v. *Nilisim Ultrachem Ltd.,*[39] held that if debt itself is disputed then the winding up petition has to be disposed. The court held as under: [40]

> It is therefore necessary that there must be debt due and the company must be unable to pay it. If the debt is a disputed debt and the defence is substantial one order of winding up should not be passed. It is also note worthy that after the petitions were admitted no other persons have raised any claim and, therefore, this Court finds that the debt being disputed and there exists a bona fide dispute. The present petitions cannot be used as tool for recovery and, therefore, considering the aforesaid facts and circumstances of the case, when the debt itself is disputed the petitions deserves to be dismissed.

In *Michael Hart* v. *Ninestars Information Technologies Ltd*.,[41] the court dismissed the winding up petition on the ground that the company could not be wound up in respect of a legally unenforceable claim. In this case, the respondent company engaged the petitioner as a consultant agreeing to pay him a certain amount every month for his services. The company made incomplete and irregular payments and due to this the petitioner tendered his resignation and claimed the amount payable under the agreements. The company acknowledged its liability by an e-mail where in execution of the promissory note was also admitted but failed to pay the amount. In a petition under section 433(e) and (f) of the Companies Act, 1956, the petitioner sought winding up of the respondent company on the ground that the company was unable to pay its debt. Dismissing the petition, the court held that the petitioner was entitled to claim the remuneration under the agreement. The order dismissing the applications was interlocutory in nature and did not dispose of the dispute between the parties finally and would not operate as *re judicata*. Again in *Deutsche Bank* v. *Prithvi Information Solutions Ltd.*[42] the court dismissed the winding up petition filed by the petitioner, a body corporate on the ground that the petitioners failed to prove that the respondent company liable to pay the amount claimed by the petitioner.

---

39 [2012] 176 Comp Cas 460 (Guj).
40 *Id*., para. 18.
41 [2012] 175 Comp Cas 178 (Mad).
42 [2012] 171 Comp Cas 116 (AP).

In one case[43] the Madras High Court upheld the sale of the assets of the company by the secured creditor bank in case of winding up as there is no infirmity in conducting the sale which is permissible under the Securitization and Reconstruction of Financial Assets Act, 2002. The court further observed that although wide publicity has been given for the sale, the company court, while fixing the price of the property to be brought to sale, has to take into consideration the larger interest of not only the company, but also all the persons connected with the company and therefore, it is not restricted to one or two claims towards the company. In *H.P. State Electricity Board* v. *Shivalik Casting Pvt. Ltd.*[44] the court held that the grant of leave by the winding up court is not a condition precedent to filing of a suit against a company in liquidation. In this case, a suit which was instituted by the appellant against the respondent company for recovery of money was challenged on the ground that it was barred by limitation as it had been filed after the winding up order had been passed against the company and that the leave of the company court had been obtained after the expiry of time limit for filing of the suit. The single judge dismissed the suit as time barred. Allowing the appeal, the Supreme Court held that the suit was filed within limitation. Merely because the leave was granted after the period of limitation had expired that did not mean that the suit which was otherwise filed within the period of limitation would be deemed to be beyond time.

The Supreme Court while considering the scope[45] and ambit of section 446(2) of the Companies Act, 1956 held that 'it is settled that a winding up order once made can be revoked or recalled but till it is revoked or recalled it continues to subsist'. In *Omprakash J. Mehra* v. *Official Liquidator*[46] the petitioner filed an application for recalling the winding up order under section 466 of the Companies Act. The court permitted the same with the direction that the official liquidator should hand over the possession of all movable and immovable properties of the company.

VIII RIGHTS OF THE SHAREHOLDERS

In *Vodafone International Holdings BV* v. *Union of India*[47] with regards to the nature of the relationship of shareholder with property or assets of company it was held that holding of shares in a company usually entitles shareholder automatically to a concomitant congeries of rights and liabilities, such as voting rights, controlling rights, meeting rights, management rights, right to share in profits, share in surplus upon liquidation, *etc*., which are creatures of Companies Acts and memorandum and articles of association of company. All these rights are personal rights/contractual rights flowing from ownership of the share, are not property rights, and cannot by themselves and apart from the share be acquired or disposed of or taken possession

43 *V. Thirumurgan* v. *Rajshriya Automobile Industries Pvt Ltd*., 2012 Comp Cas 175 (Mad) at 186.

44 [2012] 175 Comp Cas (HP) 203: [2013] 115 Comp Cas 310: [2004] 50 SCL 212.

45 *Sudarsan Chits (I) Ltd*. v. *O. Sukumaran Pillai* (1984) 4 SCC 657.

46 [2012] 116 SCL 382 (Bom): [2013] 112 CLA 225 (Bom.).

47 (2012) 6 SCC 613.

of shares, and said concomitant rights which emanate from them, flow together and cannot be dissected. Thus, transfer of such concomitant rights upon transfer of shares cannot be construed as separate and independent transfers.

IX DIRECTORS OF A COMPANY

With regard to the liabilities of the director's of a company under the general principles of company law, the directors being agents of the company are not personally liable for contracts purporting to bind their company as the contracts are made by them for and on behalf of the company. In many judgments the courts have also taken the view that the director's are not personally liable for the acts of the company.

But in *New Horizon Sugar Mills Ltd*. v. *Government of Pondicherry Tr. Addl. Sec*.[48] the court took a different view by holding that attachment of personal properties of directors[49] of a company on the company's default in repayment of a loan which was guaranteed by the directors by executing guarantee bonds in favour of the bank is permissible. In *KPS Selvaraaj* v. *Selvaraaj Tex P. Ltd.,*[50] the Madras High Court held that when a director of a company is alleged to have ceased to be a director of a company and the CLB passes an interim order restraining the director without hearing him, the order has to be set aside on the ground of violation of principles of natural justice. In *Daewoo Motors India Ltd.* v. *WG CDR* (*Retd*.) *H. D. Teluxmi,*[51] with regard to the question of the liability of a Director the court held that the definition of a 'director' provided under section 2(13) of the Act includes even a nominated director and hence he is not free from any liability. The issue of director's liability was discussed in *Samdev Dasgupta*'s case[52] in which the court ruled that for making a director liable for misfeasance in case of winding up the liquidator must establish a strong case against the director.

Under section 454[53] of the Companies Act, the statement of affairs of the company has to be prepared and submitted to the official liquidator by the director of a company. In *Ashwani Suri* v. *Ganga Automobiles Ltd.*[54] the court clarified that in the case of directors, the duty cast on them to submit and verify a statement is automatic and not dependent on any direction of the court or a notice from the

48 [2012] 175 Comp Cas 475.

49 In *Grindlays Bank Ltd*. v. *M. Joy Mathew* (1993) 78 Comp Cas 33 (Ker) it was held that a personal guarantee provided by a director in respect of the company's borrowing would however make the director personally liable for the repayment of the loan in the event of the company's default to repay it. The liability would continue even after the director ceases to hold the office of director.

50 [2012] 175 Comp Cas 149.

51 *Supra* note.11.

52 *Samdev Dasgupta* v. *Official Liquidator* [2012] 174 Comp Cas 453.

53 S. 454 of the Act stipulates that directs that where the court has made a winding up order or appointed the official liquidator as provisional liquidator, unless the court in its discretion otherwise orders, a statement as to the affairs of the company in the prescribed form, verified by an affidavit, and containing the following particulars must be made out and submitted to the official liquidator.

54 [2012] 174 Comp Cas 432.

official liquidator. It is only in the case of second category of persons that the obligation to submit and verify the statement arises when there is a direction of the court or when the official liquidator issues notice requiring them to submit and verify the statement.

In the case of the winding up of a company, the court may appoint an official liquidator[55] who is required to take into his custody all the properties of the company. Likewise, section 454 stipulates for the statement of affairs to be made to official liquidator. Generally, the duty of preparing this statement of affairs has been cast on the person specified in sub clause (2) of 454[56] of the Act.

In *Daewoo Motors India Ltd.* v. *WG CDR* (*Retd*.) *H. D. Teluxmi*[57] the Delhi High Court held that a nominated director also falls under the category specified in sub clause (2) of section 454 of the Act and is liable to file the statement of affairs on behalf of the company.

X COMPANY LAW BOARD

Section 402 of the Companies Act, 1956 stipulates for obtaining consent of the third party in order to modify an agreement between the company and the third party. In *Lake Shore Palace Hotel P.Ltd* v. *Mahendra Sigh*[58] by giving a wider interpretation to clause (e) of section 402,[59] Rajasthan High Court ruled that relief

55 S. 456 of the Companies Act deals with the powers and duties of the Official Liquidator in the case of winding up of a company.

56 S. 454 (2) provides that the statement of affairs shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date the manager, secretary or other chief officer of the company, or by such of the following persons as the official liquidator, subject to the direction of the court, may require to submit and verify the statement, that is to say, persons (a)who are or have been officers of the company; (b) who have taken part in the formation of the company at any time within one year before the relevant date; (c) who arc in the employment of the company, or have been in the employment of the company within the said year, and are, in the opinion of the official liquidator, capable of giving the information required; (d) who are or have been within the said year officers of, or in the employment of, a company which is, or within the said year was, an officer of the company to which the statement relates.

57 *Supra* note 51.

58 [2012] 175 Comp Cas 57.

59 S. 402 of the companies Act confers on the CLB wide powers. Under this section, without prejudice to the generality of the powers of the CLB under s. 397 or 398, any order under either section may provide for the regulation of the conduct of the company' s affairs in future; the purchase of the shares or interests of any members of the company by other members thereof or by the company; in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital *etc*. As specified in clauses (d) and (e) of the section being;

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned.

can be granted only after serving due notice to the third party concerned. As per the facts of this case, the petitioner entered into a contract of taking 'interest free financial assistance' from respondent company. The respondent company filed a company petition before CLB with reference to sections 397 and 398 of the Companies Act alleging that various acts and omission of the persons in charge of the affairs of the company were leading to oppression of the minority shareholders and to management. The high court by applying the maxim *generalia specialibus non derogant, i.e.,* if a special provision has been made on a certain matter that matter is excluded from the general provision, the court also ruled that regardless of the general powers under sections 397 and 398 of the Act, a modification of an agreement between the company and a third party cannot be ordered without the consent of such third party.

In *K. Saravanan* v. *Cosmopolis Properties Pvt. Ltd.*[60] the court clarified that a suit for the declaration that notice of a board meeting of a company was illegal could be filed in a civil court as the civil courts have jurisdiction to entertain the suits of civil nature. It also clarified that the CLB has exclusive jurisdiction to deal with matters which exclusively fall within the domain of the CLB constituted by the Act. Under section 2(11) of the Act, the civil court have jurisdiction in respect of other matters which do not come within the exclusive jurisdiction of the CLB.

CLB's power to call an extra ordinary general meeting

Under section 186 of the Companies Act, if it is impracticable to call a meeting of a company other than an annual general meeting, the CLB may, either of its own motion or on the application of any director of the company, or of any member of the company who would be entitled to vote at the meeting order a meeting of the company to be called, held and conducted in such manner as the CLB thinks fit.

In *Amrita Media P. Ltd*. v. *Amrita Bazar Patrika P. Ltd.*[61] the issue was in order to call an extra ordinary general meeting under section 186, whether section 169 is a pre-requisite for the exercise of the powers by the CLB? The court clarified that although compliance with section 169 is not a pre-requisite for the exercise of the powers by the CLB section 186[62] could be invoked only where convening of the extraordinary general meeting in terms of section 169 had failed or did not take place for any reason or was not practical and the petitioner was required to comply with section 169 of the Act.

XI COMPANY MEETINGS

Section 283 (1) (g) of the Companies Act has always been in controversy on the ground that a 'certificate of posting' which gives intimation about the board meetings is not a reliable proof of dispatch of notice due to reliability of the post

60 [2012] 175 Comp Cas 210.

61 [2012] 175 Comp Cas 342 (CLB): [2013] 2 Comp. LT 416.

62 S.186 of the Companies Act vests in the CLB an extraordinary power concerning extraordinary general meetings of companies.

office. This issue is raised in a number of cases[63] wherein the courts has doubted the authenticity of certificate of posting and rejected it as the evidence of notice of a board meeting under section 283(l)(g) of the Act. In *Abdul Latheef Meera Sahib* v. *Tacel Sanitaryware P. Ltd*.[64] the question whether the notice of meeting sent by the certificate of post was sufficient for attracting section 283(1)(g) was addressed by the court. In this case, the CLB held that the notice given under certificate of posting may be accepted as a proof of service. As per the facts of this case, the registered envelope was given to the tenant-appellant who refused to accept it.

XII LEGAL VALIDITY OF VARIOUS SCHEMES UNDER THE ACT

Scheme for strike off the name of the company

The objective of section 560 of the Companies Act is to remove the name and details of a company from the register maintained by the registrar of companies with a view to put an end to the life of the company. The section stipulates that in order to strike off the name of the company, the process should be initiated by the registrar of companies on receiving an application for the same. Also section 560 (6) provides for the restoration of the company which was struck off if the high court orders such restoration. In order to smoothen the procedure under section 560 and also to reduce the number of fake companies, the central government had introduced various schemes which narrate the procedure to be followed in the case of striking off a company under section 560 of the Act.

In *Dasaprakash P. Ltd.* v. *Registrar of Companies*[65] the shareholders of a company applied for the restoration under section 560 (6) of the Companies Act which was denied by the court. Initially, the company volunteered for the removal of its name under the scheme,[66] and later on applied for the benefit of restoration under the section 560 (6). The court ruled that section 560 (6) could not be availed of as the company volunteered the removal of its name under the scheme would have the effect of causing its dissolution without undergoing the process of winding up which in effect put an end to the juristic personality of corporate entity and could not be said to be aggrieved. The benefit of the section for getting the name restored which had been struck off as a penal measure would not be available to companies voluntarily seeking removal from the register.

Almost similar issue was dealt in another case[67] where the issue was if disputes regarding the paid-up capital were in existence, the procedure prescribed under section 560 of the Act which provides for the striking off of a company can be followed? The court in this case clarified that in order to invoke section 560 of the Companies Act; the primary condition is that the company has to admit that it is

63 See, *Marble City Hospital and Research Centre P.Ltd.* v. *Sarabjeet Singh Mokha* [2010] 155 Comp Cas 13 (MP) and *Rajesh Patil* v. *Moonshine Films P. Ltd.* [2008] 141 Comp Cas 482 (CLB)): [2010] 155 Comp Cas 13: [2009] (2) MPL 173.

64 [2012] 174 Comp Cas 33.

65 [2012] 175 Comp Cas 248.

66 The company's name was struck off under the Fast Track Scheme, 2000.

67 *Basanti Cotton Mills* (1998) *P. Ltd.* v. *Registrar of Companies, West Bengal* [2012] 175 Comp Cas 453.

defunct. In case, if the company carries on any business and operative in nature it cannot be declared defunct and it cannot be struck off at all. As per the facts of the present case, there were serious disputes between the persons laying claim on the control of the company and claims regarding paid-up capital. The court observed that in such situation there was no question of treating the company as defunct.

XIII CONCLUSION

In the year under survey, the Supreme Court and the various high courts have dealt with many important aspects of company law. Most of the cases decided by the courts are on 'winding up,' scheme of amalgamation *etc*. The judicial dictum does not show a consistent approach in this area, rather it adjudicated the matter on a case to case basis. In the issue of sanctioning the scheme of amalgamation, the court declined to interfere whereas in winding up matters, the courts was bent towards the aspect of 'public interest' in deciding the cases.