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COMPANY LAW

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I INTRODUCTION

THE MAJOR significant development in the field of Company Law in the year 2017 was the passage of the Companies Amendment Act, 2017. There are many important changes brought out by the Companies Amendment Act, 2017 which addresses difficulties in implementation, inclusion of the provisions for achieving better harmonization with other statutes such as Reserve Bank of India Act, 1934 and rectifies inconsistencies in the Companies Amendment Act, 2013. The Amendment Act replaces the words "during any financial year" with the words "during the immediately preceding financial year". The amendment act aims to provide for a regime of offences and penalties that is commensurate to the gravity of the offence. The Amendment Act rationalized certain important provisions and also introduced strict actions and penalties against the defaulter companies as well as in cases of non-filing of balance sheet and annual return every year, which will act as deterrent to shell companies.

II OPPRESSION AND MISMANAGEMENT

In *Prabhakar Balwant Amolik* v. *Bombay Diocesan Trust Association P. Ltd.*[1] it was held that 'even when tribunal found some oppression/mismanagement, it is well within its jurisdiction to decide as to what relief should or should not be granted'. In this case an appeal filed against the order of the National Company Law Tribunal which held no relief granted for the removal of directors, with regard to a petition filed by a member for a company licensed under section 25 of the Companies Act, 1956 and section 8 of the Companies Act, 2013 that the company (initially incorporated under the Indian Companies Act, 1913 as a company limited by guarantee not having any share capital and subsequently in the year 1950, the company registered its properties under the Bombay Public Trusts Act, 1950). The persons elected as directors in the company were continued as trustees of the properties registered under the 1950

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1 [2017] 202 Comp Cas 378 (NCLAT).

Act, to regulate and adjudicate over the affairs of the trusts falling within the territorial jurisdiction of Maharashtra, the Charity Commissioner had been constituted under the 1950 Act, and this office had been regulating the affairs of this trust since long. Every trust falling under the 1950 Act had to register its governing body, details of the assets and financials with this office and the trust had every time to file a change report whenever any change took place in relating to the governing body, members' list, assets and financial, and the Charity Commissioner was conferred with power to adjudicate over the affairs of the trust. Therefore, it made no difference whether it had been incorporated under the 1956 Act, or registered under the Bombay Public Trusts Act, the net result was the affairs of this trust had been regulate by the Charity Commissioner's office at Mumbai and these petitioners could not say that since it was company registered under the Companies Act, the decisions given by the Charity Commissioner were not binding upon the company. Therefore, where criminal cases are pending against the appellant director/trustee and they have been removed from directorship/trusteeship and other trustees have been appointed, the order of the Tribunal upholding their removal as director/trustee cannot be held to be illegal.

In *M Sridhar Reddy* v. *Rohini Auto Electricals (P.) Ltd* [2] the National Tribunal held that 'even though the acts complained of justified ordering winding up, the Tribunal will be justified in passing an appropriate order to put an end to oppression/ mismanagement'. In this case, a petition was filed for relief against act of oppression/ mismanagement under sections 111, 397 and 398 of the Companies Act, 1956. The act complained of found to be oppressive to petitioners, and affairs of company found not being run in just and fair manner. The issue was whether the tribunal be justified in passing appropriate order to put an end to matters complained of even though case for winding up is made out. The tribunal held that 'where several major decisions including enhancement of authorized share capital and collusive activities in establishing a parallel company have taken place in the absence of petitioner shareholders there is no doubt that these things constitute oppression and mismanagement of affairs of the company on the part of respondents'. Though the facts justifying the process of winding up of the instead of ordering for winding up Company the Tribunal passed an appropriate order giving appropriate directions to put an end to matters of oppression and mismanagement. The National Company Law Tribunal in *Montreaux Resorts P. Ltd.* v. *Ascot Hotels and Resorts P. Ltd*[3] held that, in the absence of any resolution passed by the petitioner-company, the maintainability of the proceeding was vitiated by lack of authorization. The company was a separate entity and could not be represented through the individual petitioners. In this case a petition was filed for the act of oppression and mismanagement under section 241 of the Companies Act.

In *Cheran Properties Ltd.* v. *Kasturi & Sons Ltd.*[4] it was held that where the background justify, it is always open to the Tribunal to pass order under section 111

2 [2017] 137 CLA 63 (NCLT).

3 [2017] 201 Comp Cas 1 (NCLT).

4 [2017] 203 Comp Cas 598 (NCLAT).

of Companies Act, 1956 without answering the question of oppression and mismanagement even though such allegations were raised in the present case. Where the background was that from the finding of the Madras high court, which is final and binding between the parties, it is clear that respondent recognized right of another respondent or his nominees to sell or transfer the holdings of the company to any other person of his choice, provided the proposed transferee accepted the terms and conditions mentioned in the agreement for the management of the company and related financial aspects covered by the said agreement, it is open to the Tribunal to pass order under section 111 without answering question of oppression and mismanagement even though such allegations were raised.

Similarly in *Sudhindran Parikkal and Shri Chokkalingam* v. *East India Investment Holding Pte. Ltd* [5] for the issue whether it is open to the Tribunal to direct the Institute to investigate the matter under the Chartered Accountants Conduct Rules and Chartered Accountants Act and take necessary action against the applicants if the allegations against them were found correct, it was held that 'Even though the practicing chartered accountants were exonerated from being respondents, but complaint against them for not following procedure in filing certified documents was forwarded to the Institute of Chartered Accountants for investigation with a direction to take appropriate action'. The factual matrix of the case was that the petition was filed under sections 111A/397 /398 read with section 402 Companies Act, 1956. In this case two practicing chartered accountants made respondents for allegedly having certified documents without following the laid down procedure in the declaration contained in the certificate. Where practicing chartered accountants were made respondents in a company petition because they had allegedly certified documents, for appointment of additional director, director and for shifting of registered office of the company without following the procedure laid down in the declaration contained in the certificates, and they filed applications praying for exoneration from being respondents, the Tribunal deemed it appropriate to delete their names from the array of respondents in the company petition, but to direct the Institute of Chartered Accountants of India to treat the relevant paras of the petition and the counter filed thereto to be treated as complaint against the applicants under sub-rule (1) of rule 3 of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 read with section 21(3) of the Chartered Accountants Act, 1949, and to investigate into the allegations levelled against the applicants, and if found correct to take appropriate action against them. Likewise, in *M. K Sivaprakasam* v. *SKN Boarding & Lodging (P.) Ltd.*[6] the NCLT Chennai bench held that where grievances are related either to past or concluded transactions and lacked substance or details and the allegations is vague and unsubstantiated, they would not constitute the basis of a petition under section 397/398. Further, where the petitioners fail to establish that the respondent company is liable to be wound up on just and equitable grounds and such

5 [2017] 137 CLA 282 (NCLT).

6 [2017] 140 CLA 98 (NCLT).

winding up would unfairly prejudice the interest of shareholders, they would not be entitled to relief under section 397/398'.

In *Kamlesh Thakurbhai Shah* v. *Amita Hemant Shah*[7] it was held that according to the facts and circumstances of the case, the act of removal of names of petitioners as shareholders is undoubtedly an act of oppression**.** Where the plea of respondents about acceptance of offer of set off given by the petitioners and in pursuance thereof the transfer of shares of the petitioners to the respondent is rejected as not having been established, it stands therefore established that removal of names of petitioners as shareholders is undoubtedly an act of oppression**.** The court further held that 'even though acts of oppression and mismanagement have clearly been committed but there is no justification to order investigation into the affairs of the company'. Clearly the respondents have committed acts of oppression and mismanagement which calls for winding up, but that would unfairly prejudice the petitioners. However, there is nothing to show that the business of the company has been conducted with intent to defraud its creditors or to play fraud in the management to justify an order for investigation. In another case[8] the National Company Law Tribunal held that where the nominee directors do not vote in favour of the petitioner as managing director of joint venture company violating the provisions of the joint venture agreement that act is an acute act of oppression, and, hence, liable to be corrected by exercising necessary power under section 397 read with section 402. In *Sanjivbhai Kiritbhai Patel* v. *Biocare Remedies P. Ltd* [9] the National Company Law Tribunal held that, not giving notice of the annual general meeting was oppressive to the shareholder who was not given the notice. The consent letter must be signed by the consenter; otherwise the petition will be dismissed for lack of proper consent. Again in *Arjandas B. Khatri*. v. *Pure Pharma Ltd.*[10] the National Company Law Tribunal held that, in the consent letter the petitioner had signed but there was no mention in the consent letter that the petitioner signed consent letter for and on his behalf and also on behalf of others. Therefore, the petitioner was not entitled to apply for any relief under section 397 and 398 of the Act.

III LIFTING OF CORPORATE VEIL

In *Estate Officer, Union Territory of Chandigarh* v. *Esys Information Technologies P. Ltd.*[11] the apex court has restored the principle of lifting of corporate veil. In this case, the issue before the Supreme Court was whether a transfer of shares of the Indian subsidiary by the respondent to Esys Dubai or a further transfer to Teledata resulted in transfer of, inter alia, the assets (including the allotted land) in violation of

7 [2017] 137 CLA 285 (NCLT).

8 *Vikram Bakshi* v. *Connaught Plaza Restaurants (P.) Ltd.*, [2017] 140 CLA 142 (NCLT).

9 [2017] 200 Comp Cas 589 (NCLT).

10 [2017] 201 Comp Cas 95 (NCLT).

11 [2017] 200 Comp Cas 1 (SC).

Rule 9 of the Allotment Rules.[12] By applying the principle of lifting of corporate veil held that the transfer effectively transferred the immovable property owned and constituted a violation of the Allotment of Small Campus Site in Chandigarh Information Services Park, Rules 2002. The court ordered a resumption of the land by the estate officer.

The factual matrix of the case was that the respondent-company was allotted a plot under the Allotment of Small Campus Site in Chandigarh information Services Park Rules, 2002, rule 9 of which provided that transfer of the campus site by the allottee was not to be allowed for a period of 10 years from the date of allotment or till all dues were fully paid-up, whichever was later. It was necessary to make the construction within 3 years from the date of allotment. The company transferred a major portion of its shares to another company EG, Dubai, without informing the Estate Officer or seeking necessary permission as provided in the allotment letter which in turn sold its stake to T, a Chennai based company. The Estate Officer by order dated September 24, 2008 cancelled the allotment and ordered resumption of the site and forfeiture of 10 per cent. Of the total premium, interest earned and other dues payable in respect of the site. The appeal filed against this order was dismissed and the revision petition filed against this order was also dismissed. Aggrieved by the order of resumption of allotment, Esys India approached the High Court of Punjab and Haryana. The high court by setting aside the order of resumption passed by the estate officer, applied the theory of distinct legal personality, held that as the shareholders of Esys India are distinct from the company, a change in shareholding of the company would not amount to a transfer of the allotted land. On appeal, the Supreme Court held, by transferring the shares the provisions of rule 9 of the Rules and clause 15 of the allotment letter had been clearly violated. There was concealment of material facts by the respondent in spite of having been directed to disclose the full facts in the counter affidavit by specific order passed on July 16, 2015.

In *Bhatia Industries and Infrastructure Ltd.* v. *Asian Natural Resources (India) Ltd.*[13] the division bench of the High Court of Bombay applied the principle of the lifting of corporate veil where two companies were under common control and one of the companies was used to evade an attachment order. The court held that the doctrine of piercing or removing the corporate veil was applicable not only in the case of holding and subsidiary companies or in the case of tax evasion but could be equally applied in execution proceedings. The doctrine had been referred to in cases: (i) where "two separate corporate entities were functioning as if they were in partnership with one company as an alter age of the other company, where one company was bound hand and foot by the other"; (ii) where "parent company's management had steering influence on the subsidiary's core activities that the subsidiary could no longer be regarded to perform those activities on the authority of its own executive director";

12 Allotment of Small Campus Site in Chandigarh Information Services Park, Rules 2002.

13 [2017] 201 Comp Cas 46 (Bom).

(iii) where "the company was the creature of the group and the mask which was held before its face in an attempt to avoid recognition by the eye of equity or was a mere cloak or sham and in truth the business was being carried on by one person and not by the company as a separate entity"; and (iv) where "two companies were inextricably interlinked corporate entities". Therefore, the corporate veil could be lifted in cases where the court from the material on record came to the conclusion that the judgment debtor was trying to defeat the execution of the award which was passed against him.

In another landmark case,[14] the Supreme Court emphasized that, the principle that the company is at law a different person altogether from the subscribers to the memorandum is subject to several exceptions amongst others, when the corporate personality is blatantly used as a cloak for fraud or improper conduct. The concept of corporate entity was evolved to encourage and promote trade and commerce and not to commit illegalities or to defraud people and thus when the corporate character is employed for the purpose of committing illegality or for defrauding others, the court ought to ignore the corporate character and scan the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties. The principle of lifting the corporate veil is well recognized not only to unravel tax evasion but also where protection of public interest is of paramount importance and the corporate entity is only all attempt to evade legal obligations and lifting of veil is necessary to prevent a device to avoid any welfare legislation. It is difficult to enumerate the classes of cases where lifting the veil is permissible but it must necessarily depend on the relevant statutory or other provision the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc. The doctrine of lifting the veil could be invoked, if the public interest so requires or if there is violation of law by using the device of a corporate entity.

IV SICK INDUSTRIAL COMPANY

In *President/Secretary, J.K Synthetics Mazdoor Union* v. *Arfat Petrochemicals P. Ltd.*[15] the Supreme Court held that under section 22A[16] the Board for Industrial & Financial Reconstruction (BIFR) does not have competence to issue directions to a company which is not a sick industrial company. The court also referred to the definition of "sick industrial company" in section 3(o) of the Act as "sick industrial company" means an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth. The Supreme Court held that it is clear from a plain reading of

14 *State of Karnataka* v. *Selvi J. Jayalalitha,* [2017] 201 Comp Cas 230 (SC).

15 [2017] 200 Comp Cas 80 (SC).

16 S. 22 A of the Sick Industrial Companies (Special Provisions) Act, 1985 deals with direction not to dispose of assets.

section 22A of the Act that the BIFR can issue a direction not to dispose of assets only to a sick industrial company. In the present case, there was no dispute that the first Respondent was not a sick industrial company and that it purchased the assets from a sick industrial company in accordance with the sanctioned scheme. Therefore, it was held that the BIFR was not correct in passing an order of status quo and directing the First Respondent not to alienate/transfer the assets by its orders dated 05.05.2008 and 30.06.2008. The Supreme Court agreed with the findings of the High Court in the impugned judgment that the BIFR does not have competence to issue directions to a company which is not a sick industrial company under section 22A of the said Act. In another case,[17] the Supreme Court held that the directors of a sick company for contempt of court, for violation of the order not to alienate the company's assets and property, and imposed fine.

V SCHEME OF ARRANGEMENT

In *Royalsoft Services Ltd., In re*[18] the National Company Law Tribunal had sanctioned a scheme of compromise and arrangement involving share capital of a company and held, allowing the petition, that there was no apprehension that any of the creditors would lose or be prejudiced if the proposed scheme was sanctioned. The scheme of arrangement would not cost any additional burden on the stakeholders and also would not prejudicially affect the interests of any class of the creditors in any manner. Also, no intervention of the official liquidator was required as the matter was nowhere connected to the liquidation process. There did not require any modification subject to the condition that the company was to furnish the information relating to unclaimed amount, if any, on its website as was required and the company was to transfer the unclaimed amount, if any, after seven years to the Investor Education and Protection Fund. The scheme of arrangement appeared to be fair and reasonable, not contrary to public police and also not violative of any provisions of law. All the statutory compliances had been made under section 391 of the Act. The scheme of arrangement was to be sanctioned and was to be binding on all the members, creditors and shareholders.

VI WINDING UP

In *Angelo Brothers Ltd. (in liquidation)* v. *Bennett, Coleman and Co. Ltd.*[19] the court held that, a combined reading of section 2(30) with section 445(3) of the Companies Act, 1956, led to the conclusion that the directors stood divested of their

17 *Ghanshyam Sarda* v. *Sashikant Jha, Director of J.K. Jute Mills Co. Ltd*., [2017] 200 Comp Cas 101 (SC).

18 [2017] 203 Comp Cas 430 (NCLT).

19 [2017] 203 Comp Cas 180 (Cal).

power to act on behalf of the company except for the limited purpose provided in sub-section (1) of section 445. The submission that different meanings had been attributed to the term "officer" in different provisions of the act, and in appropriate cases the directors of a company in liquidation could retain the right or power to sue in the name of the company could not be accepted. Such power had been vested with the official liquidator, and this power would extend to bringing an action to invalidate something which occurred proper to the time the company went into liquidation, if such action was called for protect the interest of the company, in such a situation also, the proper course would be for the parties interested to bring the issue before the company court hearing the winding up proceedings and obtain appropriate directions. Therefore, the application of ABL, not being presented by the official liquidator was not legally sustainable.

VII SHAREHOLDERS OF A COMPANY

Shares of a company are the important freely transferable assets under law. The provisions of nomination by a shareholder of a company contained in section 72[20] of the Companies Act, 2013 which stipulates that a shareholder, during his lifetime, is free to transfer shares held by him in a public company subject to reasonable restrictions, if any, imposed under the Articles of Association. Nomination enables a shareholder to provide sufficient directions to a company with regard to disposal or transmission of shares held by him in the event of his death.

In *Shakti Yezdani* v. *Jayanand Jayant Salgaonkar*[21] the court ruled that legal heirs and not the nominees will obtain the ownership rights of share certificates, effectively circumscribing the scope of the nomination of shares under the provisions of the Companies Act, 1956. This bunch of appeals before the high court was to bring out clarity between the conflicts between the rights of nominees and those of successors in the case of ownership of various financial instruments, including shares of a company. Overruling the decision of the single bench in *Harsha Nitin Kokate* v. *The Saraswat Co-operative Bank Limited,*[22] where it was declared that nominee gets absolute right over shares and nomination overrides other modes of succession, the court held that it is well settled that provision of nomination under these statutes are merely for the protection of the properties of the deceased pending the assertion and settlement of succession related issues by the heirs or successors of the deceased.

20 S. 72 of the Act provides that every holder of securities of a company may nominate any person to whom his securities shall vest in the event of his death. The term Securities includes shares of a company and if the shares are held by joint holders, such joint holders will have to nominate a single person as nominee.

21 [2017] 200 Comp Cas 143 (Bom).

22 [2010] 159 Comp Cas 221 (Bom).

Accordingly, an insurance company is well discharged of its payment obligation under the insurance policy, if payment is made to the nominee without conforming the ownership of the nominee over the policy. The court further added that the provisions regarding nomination are made with a view to ensure that the estate or the rights of the deceased are protected till the legal representatives of the deceased take appropriate steps. In *Cyrus Investments P. Ltd*. v. *Tata Sons Ltd.*[23] it has been held that issued capital includes preference and equity share capital and therefore the petitioner holding 18.37 per cent of equity share capital but not more than 2-17 per cent of the issued share capital was not eligible to maintain the petition. The fact that preference shareholding was shown as a debt in accounting treatment was not relevant. In *Vipulkumar Dahyalal Bheda* v. *V.S. Cosmopharma P. Ltd*.[24] the Gujarat high court held that a subscriber to the memorandum of the company was a member of the company and that the facts on record with evidence suggested that the appellant was one of the three promoters and an initial subscriber to the memorandum of association of the company. He had also paid for the shares shown in front of his name.

Section 113[25] of the Companies Act, 1956 provides for the limitation of time for the issue of share certificates. In *Securities and Exchange Board of India* v. *Information Technologies (India) Ltd.,*[26] a complaint for offence punishable under section 113 of the Companies Act, 1956 was filed beyond the period of limitation of six months prescribed under section 468[27] read with section 469[28] of the Code of Criminal Procedure, 1973. It was prayed that the delay may be condoned. The Industrial Finance Corporation of India Ltd. (IFCIL) had informed the SEBI about the delay. The High Court held that although IFCIL had informed the Board the complete knowledge and all the facts were revealed could not be attributed to the Board. A perusal of the complaint and the application seeking condonation of delay revealed that efforts were made to trace the respondents and to inspect the records which were all frustrated and finally reverting back to the IFCIL, the Board collected the documents and filed the complaint. Thus, the date of knowledge of offence to the board could be attributed only when complete facts with incriminating documents were disclosed by IFCIL

23 [2017] 201 Comp Cas 403 (NCLT).

24 [2017] 205 Comp Cas 221 (Guj).

25 S.113 of the Companies Act, 1956 provides that 'every company, unless prohibited by any provision of law or of any order of any court, tribunal or other authority, shall, within three months after the allotment of any of its shares, debentures or debenture stock, and within two months after the application for the registration of the transfer of any such shares'.

26 [2017] 200 Comp Cas 217 (Delhi).

27 S. 468 of Code of Criminal Procedure, 1973 provides for the bar to take cognizance after the lapse of the period of limitation (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub- section (2), after the expiry of the period of limitation.

28 S. 469 of the Code of Criminal Procedure, 1973 provides for the commencement of the period of limitation.

after appointment of the inquiry officer. Hence it could not be held that there was a delay of one year and nine months in filing of the complaint from the date of knowledge of the offence. Considering the fact that the date of knowledge of the offence to the Board which fell in the category of a "person aggrieved by the office" could be attributed when complete records were given by IFCIL and the complaint was filed there was no delay in tiling of the complaint. Hence there was no need to seek condonation of delay in fi1ing the complaint. The complaint was to be proceeded -within accordance with law.

In *Afzal Khan* v. *Mehboob Ayub Khan*[29] by confirming the order of the Company Law Board, the high court held that so far as the refusal to transmit was concerned, in case death of one or more joint holders the survivors were the only persons recognized as having title or interest in the shares under article 25 of the Articles of Association. As to the question whether the appointment made on the date of execution of the share purchase agreement is appointment during offer period, the Supreme Court held in *Securities and Exchange Board of India* v. *Burren Energy India Ltd.*[30] that in the definition of "offer period" contained in regulation 2(1)(f) of the Regulations a concluded agreement was not contemplated to be the starting point of the offer period. But such a consequence must naturally follow once the offer period commenced from the date of entering into a memorandum of understanding which, in most cases would reflect an agreement in principle falling short of a binding contract. If the offer period could be triggered by an understanding that was yet to fructify into an agreement, there was no reason why it could not be said to have commenced from the date of the concluded agreement, *i.e.*, share purchase agreement as in the present case.

The National Company Law Tribunal has held *in Vyomesh M. Shah* v. *Vinca Developer P. Ltd.*[31] that when rights and obligation of two groups of shareholders are governed by an agreement, the rights of foreign shareholders cannot be whittled down by setting up a case under section 241. Since, the petitioners on their own entered into an agreement with the respondents to get Rs. 418 crores into the company and thereafter, to align the articles with the agreement entered into with them and had incorporated clauses of the agreement as the articles of association could not later say that the respondents acting in accordance with the articles were unfair and prejudicial to the petitioners because they had voluntarily and openly agreed to provide the affirmative vote to the foreign shareholder to vote on reserved matters and it had become an integral part of the articles of the company. Seeking alteration of articles would not and could not amount to a conduct oppressive to the petitioners.

In *Rahuldev Pramodkumar Vyas* v. *Surgi Aid Lifecare P. Ltd.*[32] the National Company Law Tribunal held that in order to do substantial justice to the parties and smooth conducting of business and affairs of the company, the tribunal under section

30 [2017] 200 Comp Cas 519 (Bom).

31 [2017] 200 Comp Cas 583 (SC).

32 [2017] 201 Comp Cas 162 (NCLT).

242(2) of the Companies Act, 2013, could pass an order even in the absence of a finding of oppression. The petitioner being one of the promoters of the company and being a technical person certainly had rights and expectation which, would submerge in corporate structure. His legitimate expectations and the interests of the company and inputs given by the respondents would also be taken into consideration. The appointment of respondent no. 3 as director was to be set aside. Allotment of shares as per resolution was also to be set aside. The petitioner was not entitled to any other reliefs in the petition. The petitioner was directed to sell his shares in the company to respondents and was to purchase shares of the petitioner at a fair market value fixed by the independent valuer and confirmed by the Tribunal.

In *B and A Packaging (India) Ltd.* v. *Amrex Marketing P. Ltd.*[33] it was alleged that the respondent had acquired shares of the company in violation of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 and Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992, and hence the register of members should be rectified by deleting the respondent's name from the register. The National Company Law Tribunal held that, that the SEBI had imposed penalty for the violation of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 but section 111A (3) of the Companies Act, 1956, empowered the Tribunal to direct the parties so that the mischief was undone. Respondents Nos.1 and 2 had acquired shares in excess of 5 per cent of the shareholding in violation of regulation 29(1) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 which was punishable under section 15A (b) of the Securities and Exchange Board of India Act, 1992. Therefore, whatever shares which had been acquired in excess of 5 per cent. In violation of the regulations, were to be offered for buy-back to the company at the market value of the shares as on the date of the presentation of the petition under section 111A(3) of the 1956 Act.

In *Mohan Paul* v. *City Hospital P. Ltd.*[34] a petition was filed under section 111A of the Companies Act, 1956, corresponding to section 58/59 of the Companies Act 2013. In this case, the respondent-company had contended that since attachment of shares was ordered by the court, it could not accede to the request of the petitioner for transmission of shares. But, allowing the petition, the National Company Law Tribunal held that it was settled law that with the death of the accused person, the attachment if any ordered under section 83 of the Code of Criminal Procedure, 1973, would not survive and hence the plea that had been taken by the company was wrong and contrary to law. The company had deliberately not transmitted the shares of the petitioner in spite of the request made through counsel. The company was directed to effect transmission of the equity shares in the name of the petitioner. In *N. Ramji* v. *Ashwath Narayan Ramji*[35] the High Court of Madras has held that if the issue of title of shares

33 [2017] 203 Comp Cas 75 (NCLT).
34 [2017] 203 Comp Cas 454 (NCLT).
35 [2017] 203 Comp Cas 516 (NCLT).

is raised, the same cannot be decided by the NCLT, but by the Civil Court. Such a question of title has not been raised in the present case. It was further held that from the provisions of the Companies Act, 2013 and the Companies Act, 1956, it was clear that the Tribunal or Board as the case be could decide only the rectification of register of members with regard to shares and connected incidental issues. When the issue of tile to the shares is the main issue, it must be decided in the civil suit.[36]

The issue in the present case[37] was whether the increased share capital requires alteration in the Memorandum of Association. The factual matrix of the case was that in accordance with the increased share capitals, new shares were distributed and the shares were even offered to respondent but he declined to accept them. The articles of association were amended in accordance with the provisions of section 14 of the 2013 Act. The Bombay high court has held that the articles of association were internal regulations of a company. It was a subordinate document to the memorandum of association. In accordance with the provisions of section 13(6) of the 2013 Act, after amendment of the memorandum of association, the company had filed an application with the Registrar of Companies for recording alterations of its memorandum. Accordingly, the Registrar of Companies had registered it. Therefore, there was reasonable and statutory compliance with the provisions of law. If companies were unable to alter their memorandum or articles of association to give effect to their desired changes, the corporate enterprise was likely to get frustrated and the purpose and object for which the company was formed would get defeated. Under clause V of the memorandum of association the share capital could be increased in accordance with company regulations and the legislative provisions of the 2013 Act, *vis a vis*, sections 13(1), 61 and 64. The board of directors had amended the memorandum of association and articles of association by a simple majority but in an extraordinary general meeting of the company called on March 23, 2017, passed a special resolution for amending the articles of association.

VIII AMALGAMATION

Sections 391 and 394 of the Companies Act, 1956 empower the court to sanction the compromise or arrangement proposed by the companies. The courts in a number of decisions held that the courts have very wide powers under these sections. It is also well settled that when an order passed by the court sanctioning a scheme of amalgamation, the transferor company's liabilities devolve on the transferee company and it becomes liable for all the transferor company's liabilities.

In *Competent Hotels P. Ltd. In Re*[38] the income tax liability of the transferor company in case of amalgamation was the main issue wherein the court held that the

36 [2017] 203 Comp Cas 574 (Mad).

37 The same view was reiterated in *Sunil Setin* v. *Symphony Ltd*, [2017] 203 Comp Cas 492 (NCLT).

38 *H. Fillunger and Co. P. Ltd*. v. *Ajit Arvind Marathe*, [2017] 203 Comp Cas 625 (Bom).

transferee company should be liable for all tax liabilities of the transferor company including towards income taxes. The Transferor company filed a petition for the sanction of a scheme of amalgamation and arrangement with the transferee company under sections 391 (2) and 394 of the Companies act, 1956. It was opposed by the Regional Director, Ministry of Corporate Affairs on the ground that an outstanding amount of Rs.25 lacs against the transferor company was pending. The court sanctioned the scheme of amalgamation and arrangement on the ground that all the liabilities of the transferor company would accrue to the transferee company including the income tax liability.

IX OVERIDING EFFECT OF COMPANIES ACT, 2013

As a result of enactment of the Companies Act, 2013 and constitution of the National Company Law Tribunal replacing the Company Law Board, the question of effect on the proceedings pending at the Company Law Board, was considered by the Calcutta high court in *Prasanta Kumar Mitra* v. *India Steam Laundry P. Ltd.*[39] in the context of the provisions of section 434[40] of the 2013 Act. For winding up proceedings, this provision states that only such proceedings relating to winding up, which are at a certain stage as prescribed by central Government, are to be transferred to the NCLT. In the present case, the question before the court was whether the term "all" and "including" in section 434(1)(c) of the 2013 Companies Act are expansive in nature or the same is to be read in a restrictive manner?" The court held that the term 'including' in section 434(1) (c) of the 2013 Act is extensive and expansive and not restrictive in nature. Accordingly, section of the 2013 Act that states "all proceedings under the Companies Act 2013 would include all matters, without any exception, pending before the District Courts and High Court and all such matters would have to be transferred to the NCLT".

X MISCELLANEOUS

The National Company Law Tribunal has held in *Anilkumar Poddar* v. *Futura Commercials P. Ltd.*[41] that the petitioner who does not have any kind of interest in the

39 [2017] 200 Comp Cas 16 (Raj).

40 [2017] 201 Comp Cas 509 (Cal).

41 S. 434 of the act stipulates that the transfer of certain pending proceedings- (1) On such date as may be notified by the Central Government in this behalf,- All matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of s. 10E of the Companies Act, 1956 (1 of 1956), immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act."

company is not entitled to seek inspection of the records falling in ambit of section 163. More so, when petitioner is a rank outsider and the company is a private limited company closely held by limited members. The words 'any other person' mentioned in section 163 cannot be construed to mean that any person can seek inspection and supply of copies of the records falling in the ambit of section 163 of the Companies Act, 1956. A person can be called aggrieved only when such person's interest is affected by the affairs of the company. In the similar vein the court held: [42]

> The word "any other person" mentioned in section 163 cannot be construed that any person can seek inspection and supply of copies, though he has no commercial interest or any other kind of interest irrespective to the affairs of the company. A person could be called aggrieved only when such person interest is affected by the affairs of the company. Since the word "any other person" being preceded by the word "member or debenture–holder" being the persons holding interest in a company, the following word "any other person" cannot be said that it is extendable to the persons having no interest in the company.

In *Vaibhav Global Ltd., In re*[43] a petition was filed for the High Court's sanction to the reduction of share premium account for the purpose of writing off accumulated losses. Sanctioning the reduction, the Rajasthan high court held: the decision to adjust the consolidated loss with surplus or deficit in securities premium account was purely a commercial decision with the approval of the shareholders by a required majority by way of a special resolution. It was in consonance with the articles of association of the company. There was no outflow of any fund or assets of the company nor did any disability resultantly obtain to the company's working in its day-to-day business, or otherwise, from the reduction of the share capital (securities premium account). The adjustment sought by the company only facilitated reflecting of the correct financial statement of the affairs of the company to its benefit in the market place.

In *Brahmani Infratesh P. Ltd*. v. *Mahalaxmi Infra Ventures (India) Ltd.*[44] the National Company Law Appellate Tribunal has held that, when the National Company Law Tribunal had held that the company petition was not maintainable and that was affirmed by the Appellate Tribunal, it was not justified in directing the appellant-company to reinstate the second respondent as director of the company. This direction was to be set aside. In *Viavi Solutions India P. Ltd*. v. *Registrar of Companies, NCT of Delhi and Haryana*[45] the National Company Law Appellate Tribunal laid down certain broad criteria that are to be considered while dealing with applications for compounding

42 [2017] 201 Com Cas 12 (NCLT).

43 *Id.* at para 17.

44 [2017] 201 Comp Cas 32 (Raj).

45 [2017] 203 Comp Cas 1 (NCLAT).

of offences under the Companies Act, namely: (i) the gravity of offence, (ii) whether the act is intentional or unintentional, (iii) the maximum punishment prescribed for such offence, such as fine or imprisonment or both fine and imprisonment, (iv) the report of the Registrar of Companies, (v) the period of default, (vi) whether the petition for compounding is suo motu before or after notice from the Registrar of Companies or after imposition of the punishment or during the pendency of a proceeding, (vii) whether the defaulter has made good of the default, (viii) the financial condition of the company and other defaulters, (ix) whether the offence is continuous or one time, (x) whether or not similar offences were earlier committed, (xi) whether the act of defaulters is prejudicial to the interest of the members or company or public interest, and (xii) the share value of the company.

In *Reebok India Co*. v. *Subhinder Singh Prem*[46] the National Company Law Tribunal held that the discretion to compound an offence under the Act is with the Tribunal and should primarily be exercised in cases in inadvertent technical aberrations. The discretion to compound the offence is to be considered on the merits of each case, whether such a mistake was inadvertent and bona fide or deliberate. Compounding of these offences would prejudice the prosecution under the penal provisions also. Therefore, the prayers for compounding could not be permitted, as these were not due to any bona fide omission or a delayed rectification of a statutory requirement. Compounding of the offence under the Act would be allowed to get away with deliberate large scale bungling and fabrication of documents carried out with criminal intention.

In *Vasudev Hemubhni Dabhi* v. *Registrar of Companies, Gujarat*[47] the National Company Law Tribunal ordered restoration of the company and held that the company was going ahead with its business and it had to pay the balance amount to the owner of the land from whom the company purchased the land. Therefore, even otherwise it was just to restore the name of the company. Therefore, the Registrar of Companies was directed to restore the name of the company in the Registrar of Companies subject to the appellant complying with the conditions prescribed. In *Microtch Infoserve P. Ltd*. v. *Registrar of Companies*[48] the National Company Law Tribunal ordered restoration of the company on the ground that the company had been carrying on its operation which was evident from the fact that it made payment to its employees, it provided services to H, it received payment for the services provided to various clients of the company and it had availed of services from various agencies.

In *D3R Gateway Logistics P. Ltd.* v. *Registrar of Companies*[49] the National Company Law Tribunal held that in view of the facts and circumstances involved in the case, the name of the company was to be restored to the register maintained by the

46 [2017] 203 Comp Cas 165 (NCLAT).
47 [2017] 203 Comp Cas 605 (NCLT).
48 [2017] 205 Comp Cas 435 (NCLT).
49 [2017] 205 Comp Cas 439 (NCLT).

Registrar of Companies. Likewise in *China Development Bank Corporation* v. *Reliance Communication Ltd*.[50] the National Company Law Tribunal observed, inter alia, that there was no hard and fast rule that objections were to be head only at the time of final hearing not at the time of admission.

XI DIRECTORS OF THE COMPANY

In *Ajit Banik* v. *Teesta Torsa Chemicals P. Ltd*[51] the National Company Law Tribunal held that, in the absence of the notice, the petitioner could not be removed as director in terms of section 284 of the Act. Further, the photocopy of notice dated November 15, 2013 for the extraordinary general meeting to be held on December 24, 2013 reflected that resolution for removal of petitioner no.1 was taken under section 284, but no ground was shown for removal of the petitioner. Since the respondents intended to take a drastic step to remove the petitioners, notwithstanding that the petitioner was a family member or friend, they had deliberately ignored the mandatory provisions of the Act. The illegal removal of the petitioner from the board of directors was to be set aside and he was to be reinstated on the board of directors with his original shareholding, *i.e.* 60.69 per cent.

The tribunal further held that, although section 81 was not applicable to a private company, which cast a heavier burden on directors of such companies. Private Limited companies are normally closely held *i.e*., the share capital is held within members of a family or within a close-knit group of friends. This brings in considerations akin to those applied in case of partnership where the partners owe a duty to act with utmost good faith. Mere non-applicability of section 81 of the Act to private companies does not mean that the directors have absolute freedom in the matter of management of affairs of the company. Therefore, if the directors fail to act in the manner prescribed they can in the sense be held liable for breach of trust for misapplying funds of the company and for misappropriating its assets. Therefore, where the shares had been issued by the directors, not for the general benefit of the company but for the purpose of controlling the holders of the greater number of shares by obtaining a majority of power they ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used. The power to issue shares is fiduciary in nature and it should befit proper purpose doctrine.

In Chartered Accountants Act, 1949, In re[52] the High Court of Allahabad has held that in service jurisprudence it is settled that resignation is a bilateral and is a voluntary act of relinquishment of office. The resignation becomes effective only when it is accepted by the competent authority and the person resigning can withdraw it before it is accepted unless there is an express provision to the contrary. But, in the

50 [2017] 205 Comp Cas 477 (NCLT).
51 [2017] 205 Comp Cas 525 (NCLT).
52 [2017] 205 Comp Cas 10 (NCLT).

companies Act, 1956 there is no specific provision relating to resignation of a director of a company. If the memorandums of association or articles of association of the company do not contain anything in this regard, then the common-law principle would apply so far as the resignations of the directors of a company are concerned. The common-law recognizes the resignation of a director of a company to be unilateral act which comes into effect as soon as the resignation is tendered by the director of the company. The directors are merely agents of the company and the agents are competent to determine the agency at his own end.

XII EXTRAORDINARY GENERAL MEETING

In *Yatin Chandulal Devda* v. *Iberchem India Ltd.*[53] an application to cancel an extraordinary general meeting called by the respondent-company was rejected by the National Company Law Tribunal by saying that since the applicant had already received notice of the extraordinary general meeting, he was at liberty to attend the meeting and raise his objections, if any. There was no reason at this stage to pass any order to restrain the holding of the extraordinary general meeting by the respondents and if at all there were any illegality that could be recovered and could be raised before the Board by the applicants as and when required for redressal of their grievances since the company petition was pending. An application under section 391(1) of the Companies Act 1956, for an order to convene a meeting of creditors and members or any class of them shall be by a judge's summons supported by an affidavit in terms of rule 67 of the Companies (Court) Rules, 1959. Rule 67 further requires the proposed compromise or arrangement to be annexed to the affidavit as an exhibit. If one reads rule 67 with Form Nos. 33 and 34, essentially the court while issuing such summons is required - to apply its mind to the checklist indicated in rule 69.

The court needs to be prima facie satisfied about the genuineness and bona fides of the application. When rule 67 categorically states that summons for directions shall be moved ex-parts, the question of prejudice or rule of natural justice does not come into play. Rule 73 requires issue of notice of the meeting to the creditors and members of such other classes after summons for direction to convene a meeting is ordered. There is a clear dichotomy between the threshold stage of issuance of directions to convene a meeting and the subsequent stage of a notice of the meeting which is contemplated by rule 73 and for that precise reason rule 67 states at the summons shall be moved *ex-parte*. A company applied under sections 391 to 394 of the Companies Act, 1956, in the form of judge's summons supported by an affidavit seeking directions to hold a meeting of shareholders and members to consider the proposed scheme of amalgamation. The company contended that the judge's summons for directions regarding holding of meetings could be moved *ex parte* in accordance with rule 67 of the Companies (Court) Rules, 1959. The Supreme Court held that if at

53 [2017] 205 Comp Cas 194 (All).

the threshold stage of directions to convene a meeting hearing is required to be given to the members, the scheme of the Companies (Court) Ru1es, 1959, would become unworkable.

XIII CONCLUSION

In the year under survey, the apex court, the various high courts and the company law tribunal has dealt with many important issues pertaining to company law. Majority of the cases decided by the courts were on some key areas in Company Law like oppression and mismanagement, winding up and scheme of amalgamation etc. Unlike previous years, the attitude of the judiciary was consistent in tackling these issues.