3

COMPANY LAW

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I INTRODUCTION

IN THE YEAR 2019, the significant development in the area of Company law is the enactment of Company Law (Amendment) Act, 2019. The new amendment brought out many important changes which has removed ambiguities in the parent act. The act removed the word "public' from section 29(1)(b), and the section is now applicable to all "other class or classes of companies as may be prescribed" by the Central Government. Further, a new section 29(1A) has been added, which states that "In case of such class or classes of unlisted companies as may be prescribed, the securities shall be held or transferred only in dematerialized form in the manner laid down in the Depositories Act, 1996 and the regulations made there under". The year under survey has seen the passage of umpteen numbers of cases pertaining to Company law.

II DIRECTORS OF A COMPANY

In *Gaurang Balvantial Shah* v. *Union of India*[1] the High Court of Gujarat dealt with the section 164(2) and held that there was no provision in the Companies Act, 1956 for disqualification of directors for failure by the companies to file the annual returns and the financial statements. Such provision for disqualification of the directors of a company, public or private, has been incorporated for the first time in section 164(2) of the Companies Act, 2013. Such being the case, that provision has to be construed as having prospective effect. If retrospective effect is given to it, that would destroy, alter and affect the right of the directors of private company existing under the 1956 Act. Sub-section (2) of section 164 of the 2013 Act could be made applicable only prospectively and not retrospectively. Therefore, the financial years contemplated in that provision had to be counted from April 1, 2014, that is financial years 2014-15, 2015-16 and 2016-17. The disqualification under that provision would be attracted, or the director of a company would become ineligible to be reappointed as the director of a company would become ineligible to the reappointed as the director of the defaulting company or appointed in other company for a period of five years, only if the company in which he was the director had not filed the financial statements or annual returns for continuous period of three financial years from 2014-15.

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1 [2019] 214 Comp Cas 199(Guj).

In *Gaurang Balvantlal Shah* v. *Union of India*[2] the High Court of Gujarat has held that till procedure as required under section 168 and rules 15 and 16 of the Companies (Appointment of Directors) Rules, 2014 was followed, neither the registration could be said to have taken the effect, nor followed, neither the registration could be said to have taken the effect, nor could the director, who claimed to have resigned be absolved from the statutory liabilities of the director required to be discharged under the Act. In the absence of any particulars showing that the resignation of the director was tendered and accepted in accordance with the provision contained in the Act and rules, the director could not be exempted from discharging his statutory liabilities under the Act.

This issue often arises with regard to resignation of directors. Does resignation of director relieve him of the corporate criminal liability? When directors of a company are prosecuted for an alleged offence in relaxation to the company, often a director seeks exoneration on the ground that he had resigned his directorship before the offence took place. It is well-settled that a director may at any time resign his office. Where there is no provision making acceptance of resignation necessary, a director vacates office on giving notice of his resignation. He cannot withdraw his resignation without the consent of the company. The position is the same even if the articles require that the vacation of office is not to take effect unless the directors pass a resolution to the effect that the director has vacated his office. Where resignation states that it is to take effect on acceptance, or the articles so require, acceptance is necessary to end the tenure of office. Where, however, resignation says that it is to take effect immediately, acceptance is not necessary unless the articles or any provision of law makes it necessary. Any form of resignation, whether oral or written, is sufficient, provided the intention to resign is clear. In the absence of any indication otherwise, a resignation takes effect immediately. Resignation will not however relieve him from any liability which he may have incurred while in office.

Section 141 of the Negotiable Instruments Act lays down that where the person committing an offence under section 138 (*i.e.,* the offence of cheque dishonour) is a company, the company shall be prosecuted along with every person who was in charge of and responsible to the company for the conduct of the business of the company. In *Himanshu* v. *Shivamurthy*[3] the issue was whether director of a company can be prosecuted for a cheque bounce case, where the cheque was issued by the company, without prosecuting the company itself? It was held that criminal liability on account of dishonour of cheque primarily falls on drawer company and extends to its officers only when conditions incorporated in section 141 stand satisfied. Explaining the words "as well as the company" occurring in section 141, the Supreme Court held that for maintaining prosecution under section 141, arraigning of company as accused is mandatory. The Supreme Court in *Aneeta Hada* v. *Godfather Travels and Tours (P) Ltd.*,[4] and it was held that commission of offence by the company is an express

2 [2019] 214 Comp Cas 199 (Guj).

3 [2019] 213 Comp Cas 16 (SC).

4 (2012) 5 SCC 661: AIR 2012 SC 2795.

condition precedent to attract the vicarious liability of others. Interpreting the provisions of section 141 of the Negotiable Instruments Act, 1881 the Supreme Court held that for maintaining the prosecution under section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. The apex court in these cases held that if the cheque had been issued by the company which has subsequently been dishonoured, a director of the company cannot be prosecuted for the cheque bounce case unless the company is also prosecuted along with, for the same offence.

It was held that criminal liability on account of dishonour of cheque primarily falls on drawer company and extends to its officers only when conditions incorporated in section 141 stand satisfied. Explaining the words "as well as the company" occurring in section 141, the Supreme Court held that for maintaining prosecution under section 141, arraigning of company as accused is mandatory. This judgment of Supreme Court was followed in *Charanjit Pal Jindal* v. *L.N. Metalics.*[5] In a recent case, *Himanshu* v. *B. Shivamurthy*[6] the Supreme Court has reiterated that in absence of company being arraigned as accused, prosecution of director of the company for the cheque bounce case under section 138 was not maintainable. In view of the aforesaid judgments of the Supreme Court, it should be clear that if the cheque had been issued by the company which has subsequently been dishonoured, a director of the company cannot be prosecuted for the cheque bounce case unless the company is also prosecuted along with, for the same offence.

Under section 234(3) (0), the Board's report of every company must disclose the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year. Failure to do so attracts penal consequences under sub-section (8) of that section which provides that, if a company contravenes the provision of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to 25 lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than 50 thousand rupees but which may extend to five lakh rupees, or with both.

According to section 135 (5), the board of every company referred to in section (1), shall ensure that the company spends in every financial at least two per cent, of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its incorporate social responsibility policy: and according to the second provision section 135(5), if the company fails to spend an amount equal to two percent of its net profits of a financial year of CSR activities, the board shall, be its report made under clause (0) of sub-section (3) of section 134, specify the reasons for not spending the amount. Section 135 does not provide for

5 (2015) 15 SCC 768.

6 (2019) 3 SCC 797.

any penalty for non-compliance with any requirement of that section, but in such a case, section 450 will get attached/ This section lays down punishment where no specify penalty or punishment is provided, and states that if a company or any officer of a company or other person contravenes any of the provisions of this Act or the rules made there under, or any condition, limitation or registration subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided elsewhere in this Act, the company and every officer of the company who is in default or such other person shall be punishable with fine which may extend to ten thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.

In *Peregrine Guarding P. Limited*. v. *Registrar of Companies*[7] the National Company Law Appellate Tribunal (NCALT) has held that the requirement under section 134(3)(0) read with section details of the corporate social responsibility policy developed and implemented during the year and to constitute a corporate social responsibility committee was not fulfilled by the appellant-company for the financial year 2014-14, 2015-16 and 2016-17. Finally, the board of directors filed a petition under section 441 of the Act praying for compounding of the offence. The tribunal on hearing the parties and taking into consideration the fact that the provision of laws was newly introduced under 2013 Act and that the appellants and had not much clarity on it and as the default had been subsequently made good, imposed a fine on the company and its directors for compounding the offence for three years, that is 2014-15, 2015-16 and 2016-17.The directors on whom fine was imposed had been party to notice of the board of directors. If nothing had been shown by the Registrar of Companies, it was a hypsographic error and mistake. The directors were liable for penal action under section 134(8) of the 2013 Act. The penal amount was less than 33 per cent of the total maximum penal amount payable. Since the provision of the 2013 Act were practically similar to the provision in the 1956 Act, the lenient view taken by the tribunal on the ground that the new Act had been introduced was not acceptable.

In a petition under section 241 of the Companies Act, 2013 before the National Company Law Tribunal (NCLT) in *Puttanarayanappa Nadikeraiah* v. *Hindu labels P Limited*[8] the respondent company was a closely held family company, in which respondent held 70 per cent. Shareholding of the company and the remaining 30 per cent was held by all the petitioners together. The petitioners were also directors of the Company Act, 1956, *inter alia,* to declare that the resignation filed by the petitioner was illegal, null and void, that the petitioners and the second respondent were first and permanent directors of the company and that therefore, they could not be removed and the alleged resignation of the first petitioner was also denied. This issue often figures in petition under section 241 when removal of a director is challenged by a

7 [2019] 215 Comp Cas 134 (NCLAT).

8 [2019] 215 Comp Cas 524 (NCLT).

minority shareholder who also happens to be on the board of the company and who is removed by the majority by resorting in section 169[9] of the Companies Act, 2013.

III LIMITATION ACT

The issue whether the provisions of the Limitation Act, 1963 are applicable to a petition filed under section 397/398 or not has come up before the Company Law Board (CLB) time and again, and it has been held in several decisions that the Limitation Act, 1963 does not apply. This is based on the view that the provisions of that Limitation Act, 1963 are applicable only with respect to proceedings before "courts" and although the CLB has been clothed with some of the powers of courts, it is not a court. Though the Limitation Act, 1963 does not expressly so provide, it is, nonetheless well-settled that the provisions of the Limitation Act are not applicable to any proceedings except those before courts and that judicial bodies, such as the CLB, are not courts, despite the fact that they discharge certain judicial functions. It is equally well-settled that these quasi-judicial bodies cannot resort to the provisions of the Limitation Act, 1963 in order to condone delays and that in less there is an express provision in the statue under which such a body functions, conferring upon it the power to condone delays, it cannot have inherent power to do so.

In *Dhananjay Krishnanath Gaikwad* v. *Tulijabhavani cold Storage P. Ltd.*,[10] the appellate tribunal held that with regard to matters falling within the purview of sections 241 and 242 of the Companies Act, 2013, the Limitation Act, 1963 does not specifically provide for a period of limitation. In terms of article 137, which is applicable to matters for which no period of limitation is specifically provided, the period of limitation is three years from the date when the right to apply will have to be construed as having accrued when the first violation of the right occurs or is discovered. Successive violation of the right will not give rise to a fresh cause of action.

IV SHARES

In *K. Mukund* v. *Omega Hospitals Pvt. Ltd.*[11] it has been held that in pursuance of the steps initiated by the CLB, the tribunal had appointed a chartered accountant who the consent of the parties and therefore, the parties were bound by the valuation report unless it was *ex facie* illegal based on substantial evidence. The valuation report submitted by S dated September 6, 2018 was based on sound financial principles, and it did not suffer from any legal infirmities, the report was prepared in accordance with law, and was binding on both parties. For auditing the statement of accounts, an auditor was appointed by the tribunal, and two successive independent chairman, and a valuer was appointed at the request of parties in order to resolve the issue. Since the report had been filed by valuer appointed by consent of both parties, it was binding as in accordance with law.

It was contended in a petition filed under section 241 and 242 of the Companies Act, 2013 alleging oppression and mismanagement in the affairs of the respondent

9 Corresponding to s. 284 of the Companies Act, 1956.

10 [2019]216 Comp Cas 71(NCLAT).

11 [2019]216 Comp Cas 104 (NCLT).

company, on the grounds that the transfer of shares by respondent company on the grounds that the transfer of shared by respondent no. 7 in favor of non-members (respondents no.5 and 6) was in violation of the article of association of the company. The NCLT held that "Article 7 of the articles of association of the company ensured that the affairs of the company remained exclusively in the hands of the members and did not pass on to outsiders unless the member did not wish to exercise their pre-emptive right to purchase the shares. In case of transfer or transmission of shared by a member to his family, there could neither by any objection nor any ground to withhold registration of the transfer. A transfer from member to a member therefore did not require prior approval of the board, nor gave the option of purchase to all existing members first. There could be no undesirability in transfer of equity in favor of an existing member. Article 8 was an exception to this provision and was applicable when the transfer took place within the existing members. In such a situation the articles of association were not violated as the only logic behind these articles was to prevent an outsider from purchasing shares without giving opportunity to the existing members to exercise their rights. Approval of the transfer of share fell with the domain of the board of directors. The board had approved the transfer which even otherwise it was legally bound to do. The petitioners being only shareholders had no discretion in this matter and had no right to object. The petitioners were estopped from raising such a specious plea of violating article 7, when in fact their own equity was increased by directly acquiring shares from G, an existing member within the same time period.

Affirming the order of the NCLT it was held by the NCLAT in *Ajay M. Patel* v. *Aarohi Polymers P. Limited*[12] that articles 7 and 8 were intended to block an outsider from purchasing the shares of a private company through the mode of sale or transfer by any other mode and for achieving this objective these articles envisaged that a third party may be allowed to purchase the share of the company only after the existing shareholder had been given the option to purchase the share intended to sold and the existing shareholders or members had declined to purchase the shared offered for sale. This was the general principle. However, an exception was carved out under article 8 by providing that previous section from the board of directors would not be required if the sale of shares was made in favor of an existing member or members, their spouses, children or legal heirs. Article 8 thus dispensed with the issuance of notice for allowing the members to exercise their right of pre-emption or prior purchase in respect of the shared offered for sale to existing members, their spouses, children or legal heirs as this would not induct any third party in the nucleus of members or shareholders. The alteration of the balance of power as a sequel to the transfer of shareholding by a member in favor of an existing member would be a concept alien to the true scope and ambition of these articles. On the facts the tribunal had not found any material alteration on the aspect of balance of power and such finding was not shown to be erroneous, much less perverse.

According to section 430, no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the tribunal or the appellate

12 [2019] 216 Comp Cas 459 (NCLT).

tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force by the tribunal or the appellate tribunal. It was held by the High Court of Delhi in *SAS Hospitality P. Limited* v. *Surya Construction Pvt. Limited*[13] held that section 59 of the Companies Act, 2013 provides for a remedy of recitation of the register of members, if the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register, is without sufficient cause, omitted there from, or if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be a member, the person aggrieved or any member of the company, or the company may appeal in such form as may be prescribed, to the tribunal, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register.

In *Vikram Jairath* v. *Middleton Hotels P. Limited*[14] the High Court of Calcutta has similarly held that under section 430 of the Companies Act, 2013 the jurisdiction of the high court has been ousted specifically with regard to matters that may be decided by the NCLT. The powers of the tribunal with regard to dealing with matters in relation to section 58 and 59 are provided for in rule 70 of the NCLT ruled, 2016, and are extremely wide. Powers such as (a) passing orders or any interim order including any orders as to injunction or stay, (b) incidental or consequential orders regarding payment of dividend or the allotment of bonus or rights generally deciding any question which is necessary or expedient to decide in connection with the application for rectification are provided therein. The entire philosophy of the Companies Act, 2013 is that all matter relation to companies shall be handled by the NCLT except certain matters that have been kept back and not transferred as per section 434 of the Act.

The law relating to transfer of shares in a company, is well-settled by a series of judgments of the Supreme Court and high courts. Section 56 of the Companies Act, 2013 corresponding to section 108 of the Companies Act, 1956 lays down the essential requirements for transfer of shares. According to section 56(1) of the companies Act 2013, (1) A company must not register any transfer of its securities or (in the case of a company not having share capital) the interest of a member in the company other than the transfer between the persons whose names are mentioned in the records if depository as holders of benefited interest, unless the company has received the proper instrument of transfer in the prescribed form which is duly stamped dated and executed by or on behalf of the transferor and transferee specifying the name, address and occupation along with the certificate relating to such securities along with the letter of allotment.[15]

13 [2019] 212 Comp Cas 102 (Delhi).

14 [2019] 216 Comp Cas 235 (Cal).

15 *Vijaya Hospitality and Resorts Ltd* v. *Sibi (CK)*, [2019]212 Comp Cas 67 (NCLAT).

In *Pravin Jain* v. *Diastar Jewellery Pvt. Ltd.,*[16] the major issue was the alleged conflicting gifts of shares of a company by its shareholder in favor two parties. While in the prior gifts, a gift deed along with the relevant share certificates were handed over to the donees of the shares, in the later one , only a gift deed was executed but no shares certificates were delivered (as they were already in possession of the prior done). The later gift could not be acted upon, since it required Reserve Bank of India's approval the done being a foreign citizen.

V OPPRESSION/ MISMANAGEMENT

It was held by the Supreme Court in a landmark case[17] that in a given case even if the case of oppression is not provide, substantial justice must be done between the parties and the parties must be placed as nearly as may be in the same position if they could have been placed. In *K.Mukund* v. *Omega Hospitals P. Ltd*,[18] it has been held that even is oppression is not established under section 397 of the Companies Act, 1956, the court can grant relief in the interest of justice. One of the issues in *Venkat Sudhakar Sattur* v. *Dictasol (India) Pvt. Ltd*.[19] was regarding appointment of an additional director by the board of directors of the company. The NCLAT held that the third respondent was appointed as an additional director on February 20, 2010 under an arrangement under article 30 of the articles of association of the company. Under section 260 of the Companies Act, 1956, the Act applicable at that time, the third respondent could hold office only up to the date of the next annual general meeting of the company. After the appointment of the third respondent as additional director on February 20, 2010 the annual general meeting of the company was held on September 26, 2010. The notice for the annual general meeting was issued on August 27, 2010 and there was no agenda item for appointing the third respondent as a regular director. Admittedly the appointment of the third respondent was never got approved in the annual general meeting held on September 26, 2010.Even if there was such provision in the articles of association not in consonance with section 260 of the 1956 Act, It would not be valid provision. Therefore, in the continuation of the third respondent as additional director after September 26, 2010 the date of annual general meeting was not in accordance with law.

In the Companies Act, 2013 the provision corresponding to section 260 in section 161(1) according to which the article of company may confer on its board of directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as additional director at any time who shall holed office up to the date of the next annual meeting or the last date on which the annual general meeting should have been held, whichever is earlier. The purpose of section 241 is to provide a remedy to shareholders of a company, especially the minority shareholders, who feel oppressed by the company's other shareholders, epically the

16 [2019]212 Comp Cas 35 (NCLAT).

17 *Needle Industries (India) Ltd*. v. *Needle Industries Newly (India) Holding Ltd*.,[1981] 51 Comp Cas 743 (SC).

18 [2019]216 Comp Cas 104 (NCLT).

19 [2019]216 Comp Cas 120 (NCLT).

majority shareholders. It is essentially a statutory remedy that can invoked by shareholder or a group of shareholders, taken to the NCLT for resolution mainly by the shareholder who is in minority.

In *Atlas Cycles (Haryana) Limited* v. *Vikram Kapur*[20] it has been held that if the board of directors on perusal of the record found that there was no money payable or receivable to pay to the operational creditors or to the financial creditors to save it from initiation of the corporate insolvency resolution process, the tribunal or the appellate tribunal could not go into the commercial wisdom and financial matrix of the company to decide whether a particular asset or one or other asset was required to be sold to satisfy the liabilities of the company. If the salvation for the company was improving liquidity through sale of non-performing assets of the company including the non-core assets that were proposed to be sold and servicing the territory, it was not open for the tribunal or the appellate tribunal to prohibit the company from taking such decision that is from initiation of the corporate insolvency resolution process. The essence of section 241 and 242 would be defeated if during the pendency of the petition, the operational creditors or the financial creditors were allowed to initiate the corporate insolvency resolution process itself. The tribunal while dealing with the matter failed to notice this fact. The Board of directors should be allowed to take its own decision as to how it would meet the liabilities of the operational creditors or the financial creditors and whether the liability was of one or other unit including the unit and the board of directors were allowed to take such decision to save the company from initiation of the corporate insolvency resolution process and not for other purpose.

In *Chaitanya Manohar* v. *Allsquare Tealtors India Pvt. Limited* [21] during the pendency of the petition filed under section 397 of the Companies Act, 1956, the respondents submitted that in terms of the master data available on the website of the Ministry of Corporate Affairs, the status of the company was displayed as “Struck off”. Therefore, the maintainability of the proceedings was challenged. The petitioner contended that the petition was still maintainable, as the striking off of the name of the company during the pendency of the petition was illegal. The NCLT held dismissing the petition, that on order to maintain a petition under section 397 and 398 of the 1956 Act of section 241 and 242 of the Companies Act, 2013 alleged acts of oppression and mismanagement should have existed not only as on the date of filing such petition but they should waist at the time of taking up the case. The nature of the relief sought by the petitioner could not be considered and granted, in the absence of the name of the company being available on the register with the Registrar of Companies. No petition had been filed seeking to restore the name of the company in the register maintained by the Registrar of Companies. However an application under section 252 of the 2013 Act could be filed by persons eligible to do so seeking restoration of the name of the company and tribunal could consider the issue whether the Registrar of Companies was justified in seeking off the company, while the petition was pending.

20 [2019 216 Comp Cas 189 (NCLT).

21 [2019] 216 Comp Cas 22(NCLT).

In *Amritsar Swadeshi Woolen Mills P. Limited* v. *Vinod Krishan Khanna*[22] the tribunal directed the petitioners to sell their entire shareholding held by then in the respondent to the respondents jointly or severally at the fair price. The appellate tribunal held that, it was not articulate when it directed the petitioners to sell their entire shareholding held in the company to "the respondents." It was necessary for the tribunal to clearly identify the respondents as respondent was a company and the other respondents were shareholders. The order nowhere indicated that the Tribunal found it appropriate that *i.e.,* should direct the company to buy-back its shares. If it was a case of purchase of shares by the company further directions would be required relating to reduction of its share Capital. In *Cyrus Investments P. Limited* v. *Tata Sons Limited* [23] and in *Vishwanath Bathla* v. *Sarthak Madhur Publications P. Limited*,[24] in a petition filed under section 241 of the Companies Act, 2013, alleging acts of oppression and mismanagement against the respondents, the petitioners sought waiver of the eligibility criteria under section 244(1) (a) and (b) of the Act on the ground that his shareholding of 25 per cent had been reduced to "nil" due to the oppressive act of the respondents, it was held that in the absence of any proof the petitioner could not be shut out under section 244 of the Act on mere statements of the respondents without any shared of evidence being produced to deny opportunity to the petitioner to prosecute the company petition. The requirement as specified in clause (a) of sub-section (1) of section 244 of the Act was to be waived and the petitioner was to be permitted to prosecute the company petition. This decision was affirmed by the NCALT in *Manoj Bathla* v. *Vishwanath Bathla.*[25]

In *Green line Transit System P. Limited*.v. *Airone P. Limited* [26] the NCLT emphasized that a petitioner under section 241 must show that he is a member of the respondent-company. The definition of a member of a company shows that there should to be an application in writing and the name of the member should be entered in the register of members of the company. The provision requires as a condition precedent for membership that the name of the person in question is entered in the register. Secondly such a person may be regarded as a member if he has acquired the right of membership although his name is not in the register. One may become a shareholder in a Company Act, 1956, by allotment apart from other modes. An effective has to comply with the requirements of the law of contracts relating to acceptance of an offer. An allotment is required to be made by the proper authority. The allotment is a duty primarily failing upon the directors. In the first place, an allotment must be made by a resolution of the board of directors and it cannot be delegated. The allotment is also required to be made within a reasonable period of time which is a question of fact in each case, say six months. On the expiry of reasonable time, section 6 of the Indian Contract Act, 1872, applies and the application must be deemed to have been

22 [2019] 214 Comp Cas 8 (NCLAT).
23 [2019] 212 Comp Cas 269 (NCLT).
24 [2019] 214 Comp Cas 449 (NCLT).
25 [2019] 214 Comp Cas 455 (NCLT).
26 [2019] 215 Comp Cas 116 (NCLT).

revoked. An allotment must be absolute and in accordance with the terms and conditions of the application. An allotted of shares is entitled to have a document, called share certificate, unless by precedent of the company shared are kept in its safe custody. Thus, every company making an allotment of shared is obliged to deliver to an allotted a certificate of shares within three months after the allotment.

VI BOOKS OF ACCOUNT AND RECASTING FINANCIAL STATEMENTS

In terms of section 130 the companies Act, 2013, a company shall not reopen its book of account and shall not recast its financial statements, unless an application in this regard is made by the Central Governments, the income-tax authorities, the Securities and Exchange Board, any other statutory regulatory body or authority or any person concerned and an order is made by a court of competent jurisdiction or the tribunal to the effect that:

(i) The relevant earlier accounts were prepared in a fraudulent manner; or

(ii) The affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements.

In such a case, the court or the tribunal, as the case may be, must give notice to the Central Government, the income-tax authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned or any other person concerned and shall take into consideration, Securities and Exchange Board or the body or authority concerned or the other person concerned before passing any order under his section.

In a petition[27] filed by the Central Government under sections 241 and 242 of the 2013 Act, the tribunal by a detailed and reasoned order allowed the petition and suspended the board of directors of three company, and appointed the newly constituted board to conduct the business in terms of memorandum and articles of association of the companies. Subsequent thereto, the government filed an application under section 130 (1) of the Act seeking permission for reopening of the books of account and recasting thereof, including the financial statements of the companies for the last five years, *viz.,* from financial year 2012-13 to financial year 2017-18. The tribunal issued notices to the statutory regulatory body or authority, or other person's concerned. All the parties including the newly constituted board of directors and the erstwhile directors were heard by the tribunal. An order was passed permitting reopening the books of account, and recasting the financial statements of three companies for the last five years, *viz.,* from financial year 2012-13 to financial year 2017-18. The appellate tribunal affirmed the order.

The Supreme Court dismissed the appeal and held that the tribunal may pass an order of reopening of accounts if the tribunal is of the opinion that (i) earlier the accounts were prepared in a fraudulent manner; or (ii) the affairs of the company were mismanaged during the relevant period casting a doubt on the reliability of the financial statements. The world used is "or". Therefore, if either of the conditions

27 *Hari Sankaran* v. *Union of India*, [2019]216 Comp Cas 166 (SC).

precedent is satisfied, the tribunal would be justified in passing the order under section 130 of the Act.

VII SHAREHOLDERS

In *Suman Dhir* v. *Gyan Ganga Educational Institute*[28] has held that an agreement between shareholders of a company concerning the conduct of affairs of the company could not bind the shareholders. The agreement had been executed on September 7, 1991 and the company was incorporated subsequently on November 28, 1991, the company after incorporation was regulated by the memorandum or association and article of association of the company and not by any agreement prior to its incorporation. Admittedly the terms and conditions of the agreement were not part of the articles of association. Therefore, the reliance on the agreement were not part of the article of association was not permissible under the law. Although the NCLT or the NCALT orders do not refer to the case law on this subject, there is a long line of cases decided by the Supreme Court and high courts.

The question in *Gireedh Kumar Sanghi* v. *Ravi Sanghi*[29] was whether appeal against an order of NCLT under section 425 of the Companies Act, 2013 can lie. Answering this question in the negative, the NCLAT has held in that although the tribunal and the appellate tribunal are empowered to punish a person for violation of their orders under the Contempt Courts Act, 1971 no appeal is maintainable. Whether transfer of shares of a company constitutes transfer of property and assets of the company. The High Court of Delhi has dealt with this subject in *Gillette India Limited.* v. *Delhi Development Authority.*[30] A company (TGC) held substantial shares in the petitioner (GIL). On June 10, 2006 TGC transferred 41.02 per cent of its shareholding in GIL to PG of the Netherlands as part of takeover of GIL by PG. High court held that, the transfer of shared held by TGC in GIL, could not be construed as transfer of the assets of GIL. The takeover of the G group by PG was obviously for commercial reasons and the transaction was not crafted for transferring of the property. Shares of a company are separate asset wholly distinct from assets held by the company. Thus, where there was a transfer of shares held by TGC by TGC in GIL. The premises that there had been a transfer of subject property of GIL were erroneous. The court pointed out that, "the fundamental principle is that a company is a separate juristic entity distinct from its shareholders. It is well-settled that shares of a company are a separate asset wholly distinct from the assets held by the company"

In *Arun Bhat* v. *Banana Country Resort P. Limited*[31] The NCLT has held that as legal their of his father, the son could get the deceased father's estate, which included the shares held by his father, after applying for transmission in accordance with law and the company had to consider it. The son could not maintain the petition which was filed by his father making allegations of various acts of oppression and mismanagement. However, the son, after getting transmission of the shares of his

28 [2019] 216 Comp Cas 321 (NCLT).
29 [2019 216 Comp Cas 526 (NCLT).
30 [2019] 214 Comp Cas 525 (Del).
31 [2019] 215 Comp Cas 1 (NCLT).

father, could claim his rights based on such transmission, in accordance with law. The son was not involved in the affairs of the company by attending annual general meetings or board meetings as contended by the respondents. Therefore, he could not maintain the petition filed by his father, under section 397 and 398 of the Act.

In *Ram Parshotam Mittal* v. *Hotel Queen Road P Limited* [32] partly affirming the decision of the Delhi High Court in *Hillcrest Realty Sdn. Bhd.* v. *Hotel Queen Road P. Limited*[33] the Supreme Court once again dealt with the subject of voting rights of preference shareholders, and held that in terms of section 87 of the Companies Act, 1956, a notice of a general meeting had to e issued to the preference shareholders also for the meeting and they had a right to participate in the meeting, *prima facie,* when dividend had not been declared. Therefore, the preference shareholders had a right to vote in the meeting.

VIII COMPANY LAW BOARD

In *Dhananjay Mishra* v. *Dynatron Services P. Ltd.,*[34] the issue was whether an arbitration between the parties to a petition under section 397/398 of the Act should override the jurisdiction of the CLB had been the subject matter of proceedings under those sections and although there have been some case in which the CLB refused to subordinate its jurisdiction to the arbitration agreement, the general view is otherwise. In this case, a petition filed under section 241 to 244 of the Companies Act, 2013, and application was filed by one of the respondents under section 8 of the Arbitration and Conciliation Act, 1996. The tribunal found that the grounds urged in the application under section 17 of the Arbitration Act and the issues raised in the company petition were separate therefore the application under section 17 of the Arbitration Act did not preclude the petitioner agitating its grievance of oppression and mismanagement in the petition. The tribunal was further of the opinion that the reliefs sought in the company petition did not be adjudicated upon by the sole arbitrator. It further held that the powers available to the tribunal to adjudicate upon issues of oppression and management, financial irregularities appointment of directors could not be exercised by the sole arbitrator. It held that the petition was maintainable. On appeal, the held that the statutory jurisdiction vested in the tribunal could not be exercised by the arbitrator. Given the nature of the allegations in the company petitions in the context of reliefs that survived for consideration there was no escape from the conclusion that the dispute raised in the company petition and sought to be referred for arbitration was not arbitrable. The order did not suffer from any legal infirmity and did not call for interference.

Likewise in *Karvy Comtrade Limited* v. *Registrar of Companies*[35] the offence was under section 134(3)(0) which requires disclosure in the director's report the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year. This offence is punishable under

32 [2019] 215 Comp Cas 163 (SC).
33 [2013] 179 comp Cas 475 (Del).
34 [2019]214 Comp Cas 45 (NCLT].
35 [2019] 214 Comp Cas 96 (NCLT).

section 134(8) which provides that if a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than fitly thousand rupees but which may extend to 25 lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both. The tribunal held that, since the maximum amount of fine which could be imposed under both section was above Rs 25 lakh and hence the tribunal had jurisdiction to compound the offence. According to section 441(1) of the Act, the tribunal had power to compound any offence under the Act, except an offence punishable with imprisonment only or punishment with imprisonment and also with fine. The offence did not fall in either of these two categories and hence was compoundable. The registrar had already instituted prosecution but the tribunal had power to compound an offence even after institution of prosecution.

In *Vis-Ram Financial Services P. Limited* v. *Pioneer Distilleries Limited*[36] it has held that, the petition under section 59 of the Act challenging the allotment that took place in 1996 after 21 years was not maintainable. The National Company Law Tribunal accepted the submission of the respondents that the petition was time barred as per the Limitation Act, 1963. The NCLAT dismissed the appeal against the order of the NCLT. Neither the NCLT order nor the NCLAT order contains any detailed discussion on the applicability or inapplicability of the provisions of the Limitation Act, 1963 to the proceedings before the NCLT.

According to section 59(1) of the Companies Act, 2013, if the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register, is without sufficient cause, omitted there from, or if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be member the person aggrieved or any member of the company, or the company may appeal in such form as may be prescribed, to the Tribunal or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register.

IX SCHEME OF COMPROMISE OR ARRANGEMENT

Under section 391 of the Companies Act, 1956 while almost all high courts used in appropriate cases and subject certain condition, to dispense with meetings of members and/or creditors in the case a scheme of compromise or arrangement, the courts sometimes did decline to dispense with these meetings in exercise of their discretionary powers. There were, however, cases in which the courts had questions the very existence of the power in this regard and emphasized the language of the statue and construed it so that the court has no discretion. In some cases, the courts had, while declining to dispense with meetings, questioned the propriety of the

36 [2019] 214 Comp Cas 136 (NCLT).

37 [2019] 215 Comp Cas 45 (NCLT).

dispensation or rationale behind the requirement of holding a meeting. Under the Companies Act, 2013 while section 230(1) requires meeting of members and creditors or their classes, to be held, sub-section (9) of that section provides that the tribunal may dispense with calling of a meeting of the creditors or a class of creditors where such creditors or class of creditors, having at least 90 per cent. Value, and confirm, by way of affidavit to the scheme of compromise or arrangement.

There is no similar provision concerning meetings of members or classes of members. One would think that the holding of meetings of member is mandatory even if there are only two members (or even only one member of a class of shares). In this confusing state of affairs, the *National Company Law Appellate Tribunal's order in MEL Windmills Pvt. Limited*. v. *Mineral Enterprises Limited* [37] will add confusion inasmuch as the appellate tribunal has held observed that "the Tribunal, while dealing with an application under section 230 of the Companies Act, 2013 on being satisfied that the compromise or arrangement had been proposed in connection with a scheme for the reconstruction of the company or companies involving merger or amalgamation of two or more companies and under the scheme property or liabilities of the transferor company are required to be transferred to the transferee company or divided among or transferred to two or more companies required to order meetings of the creditors or members, as the case may be, to be called, sub-section (9) thereof empowers the tribunal to dispense with calling a meeting of the creditors where such creditors, having at least 90 percent". Value agrees to and confirms the scheme of compromise or arrangement. The creditors or members are required to file an affidavit stating that they agree to and confirm the scheme of compromise or arrangement. Where the creditors or members having at least 90 per cent. value signify their consent to the scheme of compromise or arrangement by filing affidavits, the tribunal will have the discretion to dispense with calling the meeting of creditors or members.

In *Dalgreen Agro Pvt.Ltd.* v. *State of West Bengal*[38] the stamp duty was payable in West Bengal under article 23A in Schedule I to the Indian Stamp Act. A scheme of amalgamation between the transferor and the transferee companies was sanctioned and the authorities adjudicated the stamp duty payable in respect of the scheme of amalgamation, by the writing dated January 8, 2018 at Rs.17, 65,500. On a writ petition contending that since for transferee company was not the beneficiary of any immovable property long transferred to it by virtue of sanction granted to the scheme of amalgamation, the stamp duty for a conveyance of an immovable property was not payable by the transferee company and that article 23A prescribed half per centum of the value of the issued, paid-up and subscribed share capital of the transferee company as the transferee company. The high court held that the transferor company did not have any immovable property located within the State of West Bengal.

In *Cabs Investments P. Ltd* v. *Ajanta Pharma Ltd* [39] the NCLT has dealt with the issue to whether a scheme which had the only intention of tax avoidance would be sanctioned under section 230 of the Companies Act. The NCLT held, "According to

38 [2019]215 Comp Cas 452 (Cal).

39 [2019]215 Comp Cas (NCLT).

the proposed scheme of amalgamations and arrangement shares of transferee company would be allotted only to the four shareholders of the transferor company who were promoters of the transferee company common promoters of both transferor and transferee company. The proposed scheme was a deliberate measure to avoid tax and resulted directly and indirectly, in the misuse or abuse of the provisions of the income-tax Act, 1961. No provision was also made with regard to open offer to be made by the promoters of transfer company. The common promoters of the petitioner-companies were prima facie required to comply with the provisions of the Securities and Exchange Board of India (Substantial Acquisition of shares and Takeovers) Regulations, 2011.According to the report of the income -tax Department, the proposed scheme would amount to transfer or sale of shares. In view of these infirmities, no benefit accrued to the thousands of shareholders of the transferee company especially the retail shareholders of the transferee company. Therefore, the scheme was unfair, unreasonable and not in the public interest and could not be sanctioned as proposed".

X SECURITIES AND EXCHANGE BOARD OF INDIA

The High Court of Bombay in *Securities and Exchange Board of India*[40] addressed the question whether the Securities and Exchange Board of India can be compelled to agree to compound of an offence. In the high court's view the Securities and Exchange Board of India cannot be compelled to settle a dispute. Section 24A of the 1992 Act indeed imputes that notwithstanding anything contained in the Code of Criminal Procedure, 1973 any offence punishable under the 1992 Act not being an offence punishable with imprisonment only or with imprisonment or also with fine may either before or after the institution of any proceedings be compounded by the securities appellate tribunal or the court before which such proceedings are pending. The interpretation of the provision would not mean that whenever an application is preferred by the accused such offence has to be compounded of that the prosecution agency cannot oppose such an application. It would also not mean that the prosecuting agency *viz,* the Board can be compelled to concede for allowing compounding application. Compounding cannot be found fault with if it is done applying all parameters.

XI COMPOUNDING UNDER THE COMPANIES ACT

In *Serious Fraud Investigation Office* v. *Il and FS Engineering and Construction. Co Limited* [41] the High Court of Telangana and Andhra Pradesh has held, in the context of section 621 A of the Companies Act 1956, that cases seeking compounding under the Companies Act, 1956 that are required to be considered applying principles analogous for compounding of offences under section 320 of the code the criminal procedure, 1973. The Serious Fraud Investigation Office, after completion of investigation assigned to it, had launched prosecution against the respondent-company and its directors, During the pendency of the prosecution, the company and its directors approached the CLB admitting the violations and seeking to compound the

40 [2019] 215 Comp Cas 251 (Bom).

41 [2019] 215 Comp Cas 282 (T and AP).

contravention of the provisions of section 297 of the Companies Act, 1956. The CLB compounded the offences, subject to payment of a fee. On an appeal by the Serious Fraud Investigation Office contending that the violations committed were of serious nature affecting public interest and the CLB gravely erred in allowing compounding of offences in a casual manner, the court, dismissing the appeal, held that the offence alleged against the company and its directors of violation of the provisions of section 297 of the Act was compoundable in terms of section 621A of the Act. The CLB had applied the necessary parameters for compounding the offences. The penalty imposed for compounding was substantially high and would serve as a deterrent in future to the respondents and similarly situated entities or persons. The decision of the CLB was based on the material placed before it. No question of perversity of finding of fact having been raised, interference was not called for.

XII NATIONAL COMPANY LAW TRIBUNAL

Section 465(1) of the Companies Act, 2013 provides that the Companies Act, 1956 and the Registration of Companies (Sikkim) Act, 1961 shall stand repealed; and the first proviso states that the provisions of Part IXA of the Companies Act, 1956(1 of 1956) shall be applicable mutates mutandis to a producer company in a manner as if the Companies Act, 1956 had not been repealed until a special Act, is enacted for producer companies. In *Kozhikode Coconut Farmers Producer Co Limited* v. *Moolath Mannio Sreenivasan*[42] the question before the NCLT was whether a petition files under before the NCLT was whether a petition filed under section 241 of the Companies Act, 2013 by a member of a producer company was maintainable. The NCLT was of the view that such a petition was maintainable. But reversing the NCLT decision the NCLAT held that the provision of Part IX- A of the Companies Act, 1956 shall be applicable mutates mutandis to a producer company as if the Companies Act, 1956 had not been repealed until a special Act is enacted for producer companies.

In the NCLAT view, the provision of section 241 and 242 of the Companies Act, 2013 could not be invoked for settlement of dispute regarding oppression and mismanagement of a "producer company". Such disputes would continue to be resolved through conciliation or arbitration. The Tribunal had narrowed down the definition of "dispute" for purpose of section 581ZO by misinterpreting the explanation which only sought to include certain types of dispute within the ambit of "dispute" as defined in the provision. The explanation could not be read in a manner so as to restrict the meaning of "dispute" as contemplated under the section in the context of objects of the producer company and its being treated as a class apart. The tribunal had proceeded to return a finding that the dispute alleged in the petition did not fall under the explanation of "dispute" thereby usurping the jurisdiction vested in the "arbitrator" under the Act. The order could not be sustained and was liable to be set aside.[43]

Section 408 of the Companies Act, 2013 entitled "Constitution of National Company Law tribunal" Provides that the Central Government shall, by notification,

42 [2019] 215 Comp Cas 514 (NCLT).

constitute, with effect from such date as may be specified therein, a tribunal to be known as the NCLT consisting of a president and such number of judicial and technical members, as the Central Government may deem necessary to be appointed by it by notification, to exercise and discharge such powers and function as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

The High Court of Delhi, in this case[44] has dealt with the scope of jurisdiction of the NCLT and interpreted the relevant provision widely in a case in which allotment of new shares by a company was alleged to be in violation of section 62 of the Companies Act, 2013. This section allows companies to offer new shares by rights issue and preferential issue. In the Delhi Court's view, the NCLT is a tribunal which has been constituted to have exclusive jurisdiction in the conduct of affairs of a company and its powers can be contrasted with that of the CLB under the unlamented Companies Act, 1956. In various ways, the NCLT is not merely exercising the jurisdiction of a company court under the new Act, but is also vested with inherent powers and powers to punish for contempt. The increase in the share capital and allotment of shares to any person has an automatic effect on the alteration of the register of members and hence such a case would attract section 59 of the companies Act, 2013. Thus while the power to issue share capital vests in the company, the power without complying with the section has of no effect, and has no consequence. Any dispute in respect of rectification of the register of members under section59 can be raised by any person aggrieved to the NCLT. Section 430 of the 2013 Act, which bars the jurisdiction of the civil court entertaining " any suit" or "any proceedings", which the NCLT is" empowered to determine" has to be give effect in this background.

In *Shashi Prakash Khemka* v. *NEPC Limited* [45] as a result of the high court's order on a appeal, the order of the CLB under section 111A of the Companies Act, 1956 was reversed and the appellants were left to a remedy of the civil suit. However, as a result of the enactment of the Companies Act, 2013, the power of rectification of the register under section 59 of the Act was vested in the NCLT. The Supreme Court held that as the civil suit remedy was completely barred and the power was vested with the tribunal under section 59 of the Act, although the cause of action had arisen at a stage prior to the enactment of the Companies Act, 2013 relegating the parties to civil suit now would not be the appropriate remedy, especially considering the manner in which section 430 of the Act was widely worded, the appropriate course of action would be to permit the appellants to file a fresh petition before the tribunal under the Companies Act, 2013 within two months.

The question whether withdrawing functional areas of a director and stopping paying remuneration to him there was a *status quo* order of the CLB (under the Companies Act, 1956), amounts to oppression of a member under section 241 of the

43 *SAS Hospitality Pvt. Limited* v. *Surya Constitution P Limited* [2019] 212 Comp Cas 102 (Del).

44 *International Paper APPM Limited In re* [2019] 212 Comp Cas 91 (NCLT).

45 [2019] 212 Comp Cas 385 (SC).

Companies Act, 2013 was answered by the NCLAT in a landmark case.[46] It may be noted that under section 241 (corresponding to section 397 of the Companies Act, 1956) any member of a company who complains, inter alia, that the affairs of the company have been or are being conducted in a manner prejudicial or oppressive to him or any other member or members, may apply to the NCLT for an order to remedy the oppressive conduct with a view to bringing to an end the matters complained of.

XIII REGISTRAR OF COMPANIES

Section 248 of the Companies Act, 2013 contains [provisions regarding striking of companies by the Registrar of Companies from the register, thereby bringing the life of a company to an end, Sub-section (1) of this section provides that, where the registrar has reasonable cause to believe that:

(a) A company has failed to commence its business within one year of its incorporation.

The registrar, before initiating an action under this provision, has to follow strictly the procedural requirements, in particular the notice and an opportunity of hearing, which are the canons of natural justice.

Section 252 provides for a remedy of appeal against the registrar's action of striking off a company. Any person aggrieved by an order of the registrar, notifying a company as dissolved under section 248, may file an appeal to the NCLT within a period of three years from the date of the order of the register and if the tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the registrar, it may order restoration of the name of the company in the register of companies. But before passing any order under this section, the Tribunal shall give a reasonable opportunity of making representation and of being heard to the Registrar the company and all the persons concerned.

In this case,[47] in an appeal from the order of the NCLT, upholding the removal of the appellant company's name from the Register of Companies by the registrar of companies the NCLAT noted that the appellant had not filed the balance sheets and annual returns from the financial year 2011 onwards and its directors ought to have filed the statutory returns in compliance with the provisions of the 2013 Act. No material was placed by the appellant before the Registrar of Companies to show that the company was doing any business. Further, the appellant was incorporated in the year 1991 and was filing its balance-sheet and annual returns till financial year 2011. Therefore, the directors of the appellant were well aware of the legal provisions. Moreover, there was no material or substance in the income tax returns to show that the conclusion drawn by the NCLT that payment of nil tax evidenced that the appellant was not carrying on any business and was a shell company, was perverse. The NCLT held, dismissing the appeal the registrar had duly issued to the appellant and it was

46 *Surjeet Sing* v. *Prowess International P. Limited* [2019] 212 Comp Cas 121 (NCLT).

47 *Palaniandavar Benefit Fund Ltd.* v. *Registrar of Companies*, [2019] 212 Comp Cas 78 (NCLT).

directed to submit its detente along with the relevant documents within thirty days from the date of receipt of the notice. Further in terms of section 248(1) and (4) of the Companies Act, 2013 and under the second provision to rule 7(1) of the companies (removal of names of companies from the Register of Companies) Rules 3016, notice in form STK-5 was given for removal of names of companies from the Register of Companies and publication of the notice was five in both vernacular and English language. Therefore, it could not be said that proper procedure was not followed or that no opportunity was given to the appellant of being heard. The principles of natural justice had been complied with.

In *Cayenne Developments P Ltd* v. *Registrar of Companies*,[48] Registrar of Companies had struck off the name of the petitioner company from the Register of Companies on the ground that the company had not submitted the financial statements since its incorporation till March 31, 2016. He also observed that the company was not carrying on any business. On a petition files under section 252(3) of the Companies Act, 2013, with a prayer for issuance of directions to the Registrar of Companies to restore the name of the company in the Register of Companies. Dismissing the petition the NCLT held that a special resolution was passed in the meeting dated December 13 2016 where in it was resolved that the company should make an application to have its name struck off the Register of Companies in terms of the provision of section 248 (2) From the report of the Registrar of Companies it was clear that the company was not carrying on business or any operations at the time when its name was struck off. There were no just grounds to order restoration of the name of the company. There were no materials from the company to establish that it was an ongoing concern at the time when its name was struck off. Therefore the name of the company could not be restored and the Registrar of Companies had rightly removed the name of the company from the Register of Companies.

Similarly in *G. S. C. Industries P. Limited* v. *Registrar of Companies, NCT of Delhi and Haryana*[49] on an appeal against the registrar's action of striking off the company's name on account of default in statutory compliances, the NCLT held that the company had not been able to show that on June 23, 2007 when it was struck off it was carrying on business or was in operation. The company had not been able to show any evidence that it had filed income tax returns from 2005 till 2014. The balance sheets pertaining to financial year from 1999-2000 to 2015-16, which were filed in the court during the course of hearing were not accompanied by an affidavit, and were not taken on record. Section 560(6) of the Companies Act, 1956 would not come to the rescue of the company as no credible evidence had been shown to prove that the company as no credible evidence had been shown to prove that the company was carrying on its business or was in operation on the date of striking off or that it would be just that the name of the company be restored on the Registrar of Companies.

48 [2019] 212 Comp Cas 362 (NCLT).

49 [2019] 212 Comp Cas 582 (NCLT).

This case[50] dealt with waiver under section 244 of the Companies Act, 2013. The NCLAT observed that, while considering the application for waiver under the proviso to sub- section (1) of section 244 of the Act, the tribunal would look in to the proposed petition under sections 241 and 242 but could not take in to consideration the merits of the petition to decide the application for waiver. It was only in application where exceptional circumstances were made out by a member having less than 10 per cent. Of the shareholding, that the tribunal would allow petition for waiver. There was no need to interfere with the order.

In *State Bank of India* v. *Kamlesh Kalidas shah,*[51] the NCLAT has held that the state bank of India was a body created by an act of parliament and had higher responsibility than an ordinary company to take care of its all stake holders. The State Bank of India was a company within the meaning of the Companies Act for the (purpose of transfer of securities). Therefore, the tribunal had the jurisdiction to entertain or try disputes pertaining to transfer of equity shares therein. This is a debatable decision and its correctness is doubtful. The State Bank of India is not a company as defined in the Companies Act, 2013 or its predecessor companies Act, 1956, but it is body corporate not being a company. The term "company" is defined in section 2(20) as "a company incorporated under this act or under any company law". The expression "body corporate" is defined in section (11) inclusively, as including a company incorporated outside India. In *IDBI Bank Limited* v. *Administrator, Kothare Orient Finance Limited*[52] the only immovable property of a company was proposed to be sold and the High Court of Madras held that the provision in section 293(1)(a) was applicable. This decision was affirmed by the Supreme Court in *IDBI Bank Limited* v. *Official Liquidator*, office of the official liquidator of Companies[53] and it was categorical finding by both the courts below that the subject property was the only immovable property of the company.

XIV THE INSOLVENCY AND BANKRUPTCY CODE, 2016

In the year 2018 parliament passed the insolvency and Bankruptcy Code (Second Amendment) Act, 2018 incorporating three amendments by inserting (i) Explanation to section 5(8)(f) defining financial debt, (ii) section 21(6A) (b), and (iii) section 35A providing for rights and duties of the authorized representatives of the financial creditors. Validity of these amendments were challenged in the *Pioneer Urban Land and Infrastructure Limited* v. *Union of India* [54] and it has been upheld by the Supreme Court. Code to have overriding effect over the Act" It was made clear that even by a process of harmonious construction, the Act and the Code must be held to co-exist, and, in the event of clash, the Act must give way to the Code. The Act was not a special statute, which in the case of conflict would override the general statute *viz.,* the Code. The Supreme Court upheld the constitutional validity of Insolvency and

50 *S. Ahmed Meeran* v. *Ronny George* [2019] 212 Comp Cas 407 (NCLAT).

51 [2019] 212 Comp Cas 558 (NCLAT).

52 [2009] 152 comp Cas 252(Mad).

53 [2019] 217 comp Cas 302 (SC).

54 [2019] 217 Comp Cas 1 (SC).

Bankruptcy Code, 2016 and NCLT and held that it is not violative of article 14 of the Constitution[55] in *Swiss Ribbons P Limited* v. *Union of India.*[56]

XV MISCELLENOUS

In *Gouri Prasad Goenka* v. *Punjab National Bank*,[57] the period wherein the corporate debtor was declared a sick industrial Companies (special Provision) Act, 1985 whereby the secured creditors could not to take any coercive action against it till repeal of Act was excluded from computation limitation for the purpose of section 7 petition on account of the statutory bar. The petition under section 7 of the Code had been filed by the financial creditor in May, 2018, that is within three years from the date of enforcement of section 7 of the Code. This was further strengthen by the fact that there was acknowledgement of the outstanding debt on the part of the corporate debtor and as on the date of such acknowledgement the debt was not time barred and the insolvency resolution process was initiated within the period of limitation in terms of article 137 of the Limitation Act, 1963, computed from such date.

Likewise in *Kanchan Ostwal* v. *MEC Shot Blasting Equipment Pvt. Limited* [58] the adjudicating authority admitted a petition under section 9 of the Code in respect of invoices were raised in 2011 on the ground that the corporate debtor had acknowledged its debt by letter dated January 30, 2016 and issued the cheques in lieu of payment of the debt. It relied on section 25(3) of the Indian Contract Act, 1872 to hold that the matter was within limitation.

One of the key aspect for any amount to be covered under section 5(8) of the Code as financial debt would be its disbursement against consideration for time value. Payment of interest on the amount disbursed is a vital clue to decide if the amount gets covered under section 5(8) of the Code. In *Saregama India Limited* v. *Home Movie Makers Pvt. Limited* [59] the marketing agreements and subsequent correspondence exchanged between the parties it was not mentioned that the amount paid by the appellant was repayable with interest over a period of time in a single or series of payments in future. Therefore, it was held that the appellant had not disbursed money against the consideration for the time value and its claim was not a "financial department".

XVI CONCLUSION

An analysis of the judicial pronouncements in the area of Company law reveals that in the survey year the judiciary had to tackle a number of issues like director's liability, oppression and mismanagement of a company, shares and shareholders *etc*.

55 *Ram Krishna Dalmia* v. *Justice S. R. Tendolkar* [1959] SCR 279 was also relied on in this aspect.

56 [2019] 213 Comp Cas 198 (SC).

57 [2019] 217 Comp Cas 418 (NCLAT).

58 [2019] 217 Comp Cas 567 (NCLT).

59 [2019] 217 Comp Cas 276 (NCLAT).