

# National Company Law Tribunal and Appellate Tribunal

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## < EXECUTIVE SUMMARY >

◆ Due to the delay in decisions regarding procedures of merger/amalgamations, reduction of capital and winding up of companies, the High Court has been dispensed with the cases relating to these matters. The government constituted a Committee under the chairmanship of Justice V. Balakrishna Eradi, which made certain recommendations with the objec-

tive of expending the revival/rehabilitation of sick companies. Consistent with the above underlined objective the Companies (Second Amendment) Act, 2002 provides for setting up of the National Company Law Tribunal which shall deal with all matters relating to Companies which were earlier handed by various High courts, CLB, BIFR and AAIFR.

## INTRODUCTION

**B**efore the Companies (Second Amendment) Act, 2002, Corporates were required to apply to High Courts for proceedings such as merger/amalgamation, reduction of capital and winding up of companies. But the High Courts being overburdened with other matters, used to take very long time to dispose off these matters, and as a result of which the society was not able to derive the intended benefits out of such decision. Even the Winding Up petitions before the various High Courts have been pending for a very long time. Similarly various matters before the Company Law Board (CLB), Board for Industrial and Financial Reconstruction (BIFR) and Appellate Authority for Industrial and Financial Reconstruction (AAIFR) have been pending for a very long period. The detailed data given in tabular form (Appendix A) will give an indication that many of the Companies which were referred to BIFR had their natural death for want of timely help and assistance from BIFR and as such, resulted into wastage

of scarce national resources.

Therefore, it was desired that, in place of various bodies presently looking into different matters like merger/amalgamation, acquisition and reconstruction, revival and rehabilitation and winding up of Companies, a body should be constituted to handle all these matters and to dispose of all pending matters as well as fast disposal of new matters which might be referred to it in the future.

Hence the Government constituted a Committee under the Chairmanship of Justice V. Balakrishna Eradi, a retired Supreme Court Judge, to review the law relating to insolvency and Winding Up of Companies and other laws like The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) etc. The Committee made various recommendations with the main objective of expediting the revival/ rehabilitation of a sick Company and protection of workers' interest, which were incorporated in the Companies (Amendment) Bill, 2001. The said Bill was subsequently passed by both the Houses of the Parliament and finally got the assent of the President of India on 13<sup>th</sup> January, 2002 and became the Companies (Amendment) Act, 2002.

Consistent with the underlying objectives, as aforesaid, and in the backdrop of the experience of administration of SICA and winding up process, the Companies (Second Amendment) Act, 2002 provides for setting up of the National Company Law Tribunal (NCLT) and on setting

*The author is member of the Institute. The views expressed herein are the personal views of the author and do not necessarily represent the views of the Institute.*

up of NCLT, all the matters relating to companies which were earlier handled by various High Courts, CLB, BIFR and AAIFR will now be handled by the NCLT. Pending matters with the High Courts and CLB will be transferred to NCLT. As the SICA has not yet been repealed, the sick Companies will continue to be under BIFR. Only sick ancillary undertakings will come under the jurisdiction of NCLT, as the newly inserted definition of Industrial Undertaking, seems to be faulty. Further, the definition of Industrial Undertaking is explicitly exempting the Small Scale Industries (SSI) from its ambit and therefore, SSI will remain out of the purview of the BIFR and the NCLT both.

## CONSTITUTION OF NCLT

The Central Government shall constitute NCLT on the basis of recommendations of The Selection Committee, which will be consisting of the Chief Justice of India or his nominee as Chairman of the Committee and Secretaries of the Ministry of Finance and Company Affairs, Labour Law & Justice as members of the Committee. The NCLT will be headed by its President who has been a Judge of the High Court or is eligible to be appointed as a Judge of a High Court and such number of judicial and technical members but not exceeding 62.

## THE QUALIFICATION FOR THE JUDICIAL MEMBER OF NCLT IS ONE WHO:

- has held judicial office for atleast 15 years in an Indian territory, or
- has 10 years experience of practising as an Advocate of The High Court or one who has held partly the judicial office and partly practised in High Court, then taking together both should be 15 years experience or
- 15 years service with the Central/ State Government on Group 'A' post [including atleast 3 years of service as a member of The Indian Company Law Service (Legal Branch) in a senior administrative grade],
- has held for atleast fifteen years a Group 'A' post or an equivalent post under the Central Government [including atleast 3 years of service as a member of the Indian Legal Service in grade I of that service].

## THE QUALIFICATION FOR THE TECHNICAL MEMBER OF NCLT IS ONE WHO:

- has held for atleast 15 years Group 'A' post or an equivalent post under the Central/ State

Government [including 3 years service as a member of The Company Law Service (Accounts Branch) in a senior administrative grade], or

- is or has been a Joint Secretary to the Government of India which under the Central Staffing Scheme or held any other post under the Central/ State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India, for atleast 5 years and has adequate knowledge and experience in dealing with the problems relating to the Company Law, or
- is or has been for atleast 15 years in practice as a Chartered Accountant/ Cost Accountant / Company Secretary under the relevant Act i.e. CA, ICWA and CS Act, or
- is a person of ability, integrity and standing having special knowledge of and professional experience of not less than 20 years in science, technology, economics, banking, industry, law, matters relating to industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing, or any other matter with the special knowledge or professional experience, which would be in the opinion of the Central Government useful to the Tribunal, or
- is or has been a Presiding Officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947, or
- is a person having a special knowledge of and experience of not less than 15 years in the matters relating to labour.

The qualification requirement for the Judicial Member focuses on their judicial capacity or as an Advocate of the High Court. One of the criteria namely 15 years of service with the Central/ State Government on Group A post (with atleast 3 years of service as a member of The Indian Company Law Service) does not appear to be appropriate. Putting at par such an experience with that of 15 years in a judicial capacity or 10 years as a practising High Court Advocate does not appear to be reasonable. Similarly, the eligibility criteria for a Technical Member includes within its realm in a residual category Central/ State Government Official with a specified number of years of experience which justify inclusion of everybody and anybody in addition to the professional who deserves more to be a Technical Member.

The tenure of the President and of the Members of the Tribunal is 3 years, subject to reappointment, or removal, before the completion of the term. The retiring age of the President and members of the Tribunal is 67 years and 65 years respectively. By reading together, this should imply that those who have retired would only

inspire for a position in the Tribunal. Any other person though otherwise, highly qualified, could not tie his career with a position that has a limited tenure of 3 years.

The President and any Judicial/Technical Member may resign from his Office by notice addressed to the Central Government and on submission of such resignation, the Central Government may allow the Applicant to do so, or he has to wait for a period of 3 months from the date of such notice, or the date of appointment of the successor, whichever is earlier. In case of any vacancy in the office of the NCLT's President it will be filled up by the senior most Member of the Tribunal. The Central Government may in consultation, not with the approval, of the Chief Justice of India may remove the President or any member of the Tribunal but no such removal will be done without giving a reasonable opportunity of being heard. One peculiar criteria for not removing the President Member of the Tribunal is that, although one has been convicted of an offence by the Courts of Law but the Central Government finds that such offence does not involve moral turpitude.

The Tribunal will be functioning through its various Benches all over the country comprising of 2 Members Bench of a Single Member Bench as may be warranted and deemed fit by the President of the Tribunal. Such a set up will enable constituting Benches on geographical or any other appropriate criteria which would expedite the disposal of the cases and at the same time make available the mechanism at the door step of the Companies reducing the cost and efforts involved. The Tribunal will rectify any mistake, within a period of 2 years, from the date of passing of the order and may review its own orders.

### POWER TO SEEK ASSISTANCE OF CHIEF METROPOLITAN MAGISTRATE OR THE DISTRICT MAGISTRATE

The Tribunal may seek the help of The Chief Metropolitan Magistrate or The District Magistrate to take possession of any property, books of account or any other document of any sick industrial Company. The Chief Magistrate or the District Magistrate on taking the possession of such property, books of account or other documents, entrust them to the Tribunal or any operating agency duly appointed by the Tribunal. No act of the Chief Metropolitan Magistrate or the District Magistrate shall be called to question in any Court of Law.

### NATIONAL COMPANY LAW APPELLATE TRIBUNAL

The Central Government shall by a Notification in the Official Gazette, constitute an Appellate Tribunal

which will be called as The National Company Law Appellate Tribunal (NCLAT). The NCLAT will consist of a Chairperson and not more than two Members. The Chairperson shall be a person who has been a Judge of the Supreme Court or Chief Justice of a High Court.

A member of the NCLAT shall be a person of ability, integrity and standing having special knowledge of and professional experience of not less than 25 years in science, technology, economics, banking, industry, law, matters relating to labour, industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing, or any other matter, the special knowledge of, or professional experience which, would be in the opinion of the Central Government useful to the Appellate Tribunal.

Interestingly, no specific qualification has been prescribed to become a Member of the Appellate Tribunal as in case of a Judicial as well as Technical Member of the NCLT although a Member of the NCLAT will be superior to the member of NCLT to review the orders passed by NCLT.

The procedure for resignation/ removal and filling up of a casual vacancy are more or less the same as in the case of the President/ Members of the NCLT.

Any person aggrieved by an order of the NCLT may prefer an appeal before the NCLAT within a period of 45 days from the date of receiving the order or within such extended time as may be allowed by the NCLAT.

### APPEAL TO SUPREME COURT

Any person aggrieved by any decision or order of the Appellate Tribunal may file an Appeal to the Supreme Court within 60 days from the date of communication of the order of the Appellate Tribunal to him, only on any question of law arising out of such decision or order. The Supreme Court may grant an extension of time for filing an Appeal if it is satisfied that the Appellant was prevented by sufficient cause from filing the Appeal within the said period, but the extension period has been limited to a further period of 60 days.

### SOME DISTINCTIVE FEATURES OF NCLT IN COMPARISON TO BIFR UNDER SICA

1. SICA provided for a moratorium period of five years for a newly setup Company and as such no reference was required to be made to BIFR in the first five years of the registration of the Company. This moratorium has been withdrawn by the Amendment Act and now the Company may become sick even in the sec-

ond or the third year of its registration itself.

- Section 22(1) of SICA provided for suspension of all legal proceedings when a Company filed its case in BIFR and the enquiry was pending or the scheme was under preparation or implementation with the BIFR or an appeal was pending with the AAIFR and as such the Sick Industrial Company was protected against any suit for recovery of money, execution against property of the Company or Winding Up proceedings but this provision of SICA was greatly misused by many of the Companies.

This protection has not been provided in The Companies (Second Amendment) Act, 2002 and therefore, pending the proceedings for Revival and Rehabilitation of a Sick Industrial Company before the NCLT the Creditors of the Sick Industrial Company may file a suit for recovery of debts. This provision will create hardship to Companies genuinely interested in revival, because, before the scheme is approved by the NCLT and grant is received if a creditor files a suit against the Company and takes away the property/ assets of the Company, what is left to be revived. However, Winding Up proceedings by any Creditor have been kept pending as the jurisdiction over the same is of that of the NCLT.

- As per Section 32(1) of SICA the provisions of SICA prevailed over all other laws except FEMA and Urban Land Ceiling Act. In the absence of such overriding powers even if the scheme of revival is approved by the NCLT formalities and procedures as required under the Companies Act and other laws will be required to be completed.
- The definition of an Industrial Company seems to be faulty because by strict interpretation it covers only an ancillary undertaking, which indeed cannot be the correct intention of the lawmakers.
- The Definition of a Sick Industrial Company has been tightened. A Company having accumulated losses in any financial year equal to 50% or more of its average net worth during four years immediately preceding such financial year and which has failed to pay its creditors for 3 consecutive quarters will be a Sick Industrial Company. The Net worth has now been defined to mean the sum total of the paid up capital and free reserves, after deducting the provisions or expenses as may be prescribed.

Previously, The Companies Act did not define the net worth and as per Section 3(1)(ga) of SICA which defined the net worth the words 'after deducting provisions and expenses as may be prescribed, were not there, and as such, companies were not deducting preliminary expenses or

development expenses while calculating its net worth.

- Now the burden of preparing the scheme for revival of a sick company is on the Company itself, which was earlier on the BIFR.
- The Application for reference to the NCLT by a company should be accompanied with a Certificate by the Auditor from the approved panel as to the reasons for erosion in the net worth of the Company or default in repayment of debt by the company.
- Previously no cess was payable. Now all companies have to pay cess @ 0.005% to 0.1% of its gross receipts or turnover to the Central Government towards the rehabilitation and revival fund to be used for rehabilitation and revival of sick companies. This may be termed as "robbing Paul to pay Peter".
- The quantum of dues unpaid has been increased from Rs.500 to Rs.1 Lakh in the case of a winding up.

## CIRCUMSTANCES IN WHICH COMPANY MAY BE WOUND UP BY TRIBUNAL

A company may be wound up by the Tribunal in the following cases:

- if the Company has, by special resolution, resolved that the Company be wound up by the Tribunal;
- if default is made in delivering the Statutory Report to the Registrar or in holding the Statutory Meeting;
- if the Company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- if the number of members is reduced, in the case of a Public Company, below seven, and in the case of a Private Company, below two;
- if the Company is unable to pay its debts. Presently, a creditor can file a Winding Up petition if the Company is indebted in a sum exceeding Rs.500. This limit has been increased to Rs.1 lakh.
- if the Tribunal is of the opinion that it is just and equitable that the Company should be wound up;
- if the Company has made a default in filing with the Registrar its Balance Sheet and Profit and Loss Account or Annual Return for any five consecutive financial years;
- if the Company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
- if the Tribunal is of the opinion that the Company should be wound up under the circumstances specified in section 424G

The Tribunal shall make an order for winding up of a Company under clause (h) on an application made by the Central Government or a State Government. Clauses 7, 8 and 9 have been added by the Companies (Second Amendment) Act, 2002.

### SOME DISTINCTIVE FEATURES OF WINDING UP PROCEDURES UNDER NCLT AND BY HIGH COURT:

1. A new Section 647A has been inserted which provides that all proceedings pending before the commencement of the Companies (Second Amendment) Act 2002, before any District Court or High Court, under this Act or the Insurance Act, 1938 or any other law other than the Banking Regulation Act, 1949 shall be transferred to the Tribunal from the date to be notified by the Central Government in the Official Gazette and the Tribunal may proceed with the matter either de novo or from the stage it was so transferred. Proviso to this Section provides that where the winding up of a company has commenced subject to the supervision of the District Court or the High Court, before the commencement of the Companies (Second Amendment) Act, 2002, such winding up shall continue to be under the supervision of the District Court or the High Court and the Company shall be wound up in the same manner and in the same incidents as if the Companies (Second Amendment) Act, 2002, had not been passed.
2. Section 439A(2) ordains that the Statement of Affairs is required to be filed by the Company at the beginning itself, when opposing any winding up petition. The said statement is very elaborate and if any creditor files any frivolous petition the Company has to incur a lot of time, money and energy.
3. So far only the Government employees can be appointed as the Official Liquidator. Now professionals like CA, CS & ICWA or a body corporate of professionals can also be appointed.
4. Views of the creditors and workmen will be taken into consideration before appointing the Official Liquidator.
5. Practicing CA, CS & ICWA can appear before the Tribunal on behalf of the creditor, contributory or Official Liquidator.

6. New rules regarding winding up are yet to be framed by the Central Government. Till then the existing rules framed by the Supreme Court will apply, subject to one exception, as to reference to the High Court will be construed as a reference to the NCLT.

In sum and substance the effectiveness of the NCLT & NCLAT would depend in the first place upon the intention of those in the Government who would be entrusted with the constitution of the Bench and appointment of its Members.

Appendix A						
Board for Industrial & Financial Reconstruction						
Year Wise Performance						
As on 31.12.2002						
Year	Total Cases Registered During the Year	Cases Disposed off during the Year				Bench Month*
		Cases under Revival	Cases Revived	Winding up Recommended	Dis-missed	
1	2	3a	3b	3c	3d	4
1987	311	0	0	0	8	24
1988	298	0	1	12	29	36
1989	202	0	1	31	78	42
1990	151	3	3	43	44	48
1991	155	4	4	47	28	42
1992	177	8	7	30	42	36
1993	152	9	13	64	59	36
1994	193	10	37	79	48	45
1995	115	22	25	64	29	48
1996	97	29	93	85	25	38
1997	233	13	36	85	22	25
1998	370	13	21	50	36	11
1999	413	13	10	65	70	27
2000	429	10	37	153	158	36
2001	463	50	47	133	118	36
2002	559	74	34	143	252	36
	3759	258	369	1084	1046	566

Note-

1. Format earlier adopted was indicating cases revival in the year of registration. As a company normally takes 5/7 years to be revived, the new format indicates companies revived in the year in which Net Worth becomes positive and companies were discharged from the purview of SICA.
2. Figures of the Companies revived after the successful implementation of the scheme as well as those where Net Worth becomes positive at the inquiry stage itself have been clubbed together,
3. The above figures are according to the English Gregorian Calendar Year.

\*Bench Months is arrived at on the basis of the number of Benches functioning in each year.