

# PART XXXIV

## NATIONAL COMPANY LAW TRIBUNAL

### Chapter 1

#### Constitution of National Company Law Tribunal

##### Synopsis

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23. Appeal against decision or order of the Appellate Tribunal shall be filed with Supreme Court

### Important provisions at a glance

| <i>Sl. No.</i> | <i>Sections</i> | <i>Matters dealt with</i>                                                                                                          | <i>Form No.</i> |
|----------------|-----------------|------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| 1.             | 2(1B)           | Definition of "Appellate Tribunal".                                                                                                |                 |
| 2.             | 2(49A)          | Definition of "Tribunal".                                                                                                          |                 |
| 3.             | 10FA(1)         | Dissolution of the Company Law Board.                                                                                              |                 |
| 4.             | 10FA(3)         | All matters, proceedings and cases pending with the Company Law Board shall be transferred to the Tribunal.                        |                 |
| 5.             | 10FB & 10FR     | The Tribunal and the Appellate Tribunal shall commence their function from such date as may be notified by the Central Government. |                 |
| 6.             | 10FM            | Orders of the Tribunal.                                                                                                            |                 |
| 7.             | 10FQ            | Appeal from the orders of the Tribunal shall be made with the Appellate Tribunal.                                                  |                 |
| 8.             | 10GE            | Applicability of the Limitation Act, 1963.                                                                                         |                 |
| 9.             | 10FZA           | Procedures and powers of the Tribunal and the Appellate Tribunal.                                                                  |                 |
| 10.            | 10GD            | Right to represent before the Tribunal & the Appellate Tribunal.                                                                   |                 |
| 11.            | 10GB            | Civil court shall not have jurisdiction on a matter on which the Tribunal or the Appellate Tribunal is empowered.                  |                 |
| 12.            | 10GA            | Appeal on the Court decision or order of the Appellate Tribunal shall be filed with the Supreme Court.                             |                 |

Looking into the latest developments and innovations in corporate laws, it was considered that the Companies Act, 1956 and other related laws concerning winding up of companies should be remodelled in line with the international practices in this field. The Government appointed a committee of experts under the chairmanship of Justice V. Balakrishna Eradi, retired Supreme Court Judge to examine the law relating to insolvency and winding up of companies.

The Committee recommended that a National Company Law Tribunal should be set up, because the powers and jurisdiction presently being exercised by various bodies viz, CLB or BIFR or Appellate Authority for Industrial and Financial Reconstruction or the High Courts needs to be consolidated and entrusted to the Tribunal to avoid multiplicity of litigation before various courts or quasi-judicial bodies or forums regarding revival or rehabilitation or merger or amalgamation or winding-up and all these matters should be heard and decided by the proposed National Company Law Tribunal. On the basis of the recommendation by the Committee, the Government of India has amended the several provisions of the Companies Act, 1956 by the Companies (Second Amendment) Act, 2002.

### STATUS OF IMPLEMENTATION OF THE PROVISIONS OF THE TRIBUNAL

#### **1. Commencement of function by the Tribunal and the Appellate Tribunal**

In terms of the provisions of section 10FB and section 10FR the Tribunal and Appellate Tribunal shall commence their functions from such date as may be notified by the Central Government.

Notification for implementation of the provisions relating to the National Company Law Tribunal is yet to be issued, till then the existing provisions of the Companies Act, 1956 are applicable.

#### **2. Definition of 'Tribunal'**

Sub-section (49A) of section 2 of the [inserted by the Companies (Second Amendment) Act, 2002] which defines "Tribunal" means the National Company Law Tribunal constituted under sub-section (1) of section 10FB.

New section 10FB provides that the Central Government shall, by notification in the Official Gazette, constitute a Tribunal to be known as the "National Company Law Tribunal" to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

### **3. Definition of 'Appellate Tribunal'**

A new sub-section (1B) has been inserted by the Companies (Second Amendment) Act, 2002 in section 2 of the Companies Act, 1956, which says that the Appellate Tribunal means the National Company Law Appellate Tribunal constituted under sub-section (1) of section 10FR of the Act.

Sub-section (1) of section 10FR [inserted by the Companies (Second Amendment) Act, 2002] provides that the Central Government shall, by notification in the Official Gazette, constitute with effect from such date as may be specified therein, an Appellate Tribunal to be called the "National Company Law Appellate Tribunal" consisting of a chairperson and not more than two members, to be appointed by that Government, for hearing appeals against the orders of the Tribunal under this Act.

### **4. Dissolution of the Company Law Board**

New section 10F(1) inserted by the Companies (Second Amendment) Act, 2002 provides on and from the commencement of the Companies (Second Amendment) Act, 2002, the Company Law Board constituted under sub-section (1) of section 10E shall stand dissolved.

### **5. Dissolution of the Board for Industrial Financial Reconstruction**

On and from the commencement of the Companies (Second Amendment) Act, 2002 the BIFR shall stand dissolved. Any reference, inquiry or proceedings pending before the BIFR or appeal preferred to AAIFR will terminate on commencement of the Sick Industrial Companies (Special Provisions) Repeal Bill, 2001. The repeal of the SICA will, however, not affect any order already made by the BIFR/AAIFR regarding preparation and sanction of any scheme.

The provisions relating to revival and rehabilitation of sick industrial units have been inserted in the Companies Act, 1956, and, therefore, in respect of lapsed cases, a fresh reference, if necessary, will have to be made to the Tribunal.

### **6. All matters, proceedings and cases pending with the Company Law Board shall be transferred to the Tribunal**

New section 10FA(3) has provided that all matters or proceedings or cases pending before the Company Law Board on or before the constitution of the Tribunal under section 10FB, shall, on such constitution, stand transferred to the National Company Law Tribunal and the said Tribunal shall dispose of such cases in accordance with the provisions of this Act.

## **NATIONAL COMPANY LAW TRIBUNAL**

### **7. Salient Features of the Company Law Tribunal**

- (a) The National Company Law Tribunal (NCLT) working in benches all over the country and having its Principal Bench at New Delhi.
- (b) It shall abolish the existence of Company Law Board and replace its wider powers and jurisdiction by NCLT.
- (c) In majority of the sections of the principal Act, for the words 'Company Law Board/Court', wherever they occur, the word 'Tribunal' has been substituted.
- (d) Appeal against the orders of the Tribunal shall be heard by the Appellate Tribunal (NCLAT) at New Delhi.
- (e) The orders of the NCLT and the NCLAT are binding on parties to the issue and appeal against them in Court of Law is not maintainable.
- (f) The Supreme Court can be reckoned to hear an appeal against an order only on a moot question of law.
- (g) The employees of the NCLT and the NCLAT are to be treated as public servants. Therefore, no suit against order of the NCLAT or its staff for any action in good faith is maintainable.

- (h) The NCLT and the NCLAT are not to be bound by Code of Civil Procedure, 1908 but guided by principles of natural justice.
- (i) Applicant, can appear before the Tribunal or the Appellate Tribunal in person or can authorise a chartered accountant, company secretary, cost and works accountant or a lawyer to appear before NCLT, NCLAT.
- (j) Any appeal against the order of Company Law Board before the commencement of Companies (Second Amendment) Act, 2002 to be made to the High Court of competent jurisdiction.
- (k) All matters pending before the CLB on or before constitution of the NCLT shall be transferred to the NCLT.
- (l) The cases which remain pending before District Court or High Court, for any compromise, arrangement or winding up of company (not being winding up under supervision of Court) under the Companies Act, 1956, or any other law for the time being in force other than Banking Regulation Act, 1949, if already started, shall be transferred to the NCLT, from such date as notified by Central Government. Provided that where winding up of companies subject to supervision of Court has commenced before the Court it shall continue in the same manner as was before the commencement of the Companies (Second Amendment) Act, 2002.
- (m) The Tribunal may either *de novo* proceed with such cases transferred, or may continue it from the stage it was so transferred.

#### **8. Benefits of the National Company Law Tribunal**

The efforts of the Government to review the multiplicity of judicial bodies and consolidate them into one shall have far reaching impact on all facets of corporate life, not only the companies but also the investors as well as the professional community shall gain by such consolidation. Some of the benefits are noted as under:

- (a) Since the plurality of agencies is avoided, not much of reporting is required from various other agencies. It shall serve as single window settlement of cases related to the corporate affairs. Hence, the time required for any restructuring will be reduced as multiplicity of work will be reduced.
- (b) Individual affidavits are required to be filed to the Tribunal by the directors while filing a petition under the Companies Act and other laws. The Tribunal is also entrusted with powers of contempt of court. This provides a built-in seriousness in the entire procedure of appearing before the NCLT.
- (c) Reduction in time for completion of proceedings leads to increase in savings of cost.
- (d) The NCLT and the NCLAT shall be formulated as judicial body and hence, decisions of the NCLT are binding on all parties concerned.
- (e) The powers of Court are delegated to the NCLT and no appeals are preferred in court of law. This saves time of High Court as well.
- (f) Appearance of CAs, CSs, ICWAs and Lawyers before the Tribunal and Appellate Tribunal provides better professional opportunity. Also the time and cost to the clients declines. Also, first hand information can be really made available to the NCLT.
- (g) A Rehabilitation and Revival Fund proposed to be set up to make:—
  - (i) interim payment of dues of workmen of company declared sick;
  - (ii) protection of assets of sick company;
  - (iii) revival and rehabilitation of sick companies.
- (h) Multiplicity of judicial bodies and litigation avoided.
- (i) The NCLT and the Appellate Tribunal not to be bound by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice. The NCLT and the NCLAT have the power to regulate their own proceedings within the framework of the Act.

## **9. Constitution of the National Company Law Tribunal**

The Central Government shall, by notification in the Official Gazette, constitute a Tribunal to be known as the National Company Law Tribunal to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force. [Section 10FB]

## **10. Composition of the Tribunal**

The Tribunal shall consist of a President and such number of judicial and technical members not exceeding sixty-two, as the Central Government deems fit, to be appointed by the Government, by notification in the Official Gazette. [Section 10FC]

The Central Government has decided to fill up the post of President, 13 Judicial Members and 16 Technical Members in Tribunal and the post of Chairperson and 2 members in Appellate Tribunal (Department Circular dated 28<sup>th</sup> October, 2003).

## **11. Qualifications for appointment of president and members**

New section 10FD gives powers to the Central Government for appointment of the President and judicial or technical members. As per provisions of the Companies (Second Amendment) Act, 2002 for appointment on the said office, a person shall have the minimum qualifications as under:

### ***11.1. Qualification for appointment of the president***

A person who is, or has been, or is qualified to be, a judge of a High Court as the president of the Tribunal.

### ***11.2. Qualification for appointment of judicial member***

A person shall not be qualified for appointment as judicial member of the Tribunal unless he—

- (a) has, for at least fifteen years, held a judicial office in the territory of India; or
- (b) has, for at least ten years been an advocate of a High Court, or has partly held judicial office and has been partly in practice as an advocate for a total period of 15 years; or
- (c) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a State Government (including at least three years of service as a member of the Indian Company Law Service (Legal Branch) in senior administrative grade in that service); or
- (d) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government (including at least three years of service as a member of the Indian Legal Service in Grade I of that service).

### ***11.3. Qualification for appointment of Technical member***

A person shall not be qualified for appointment as technical member of the Tribunal unless he—

- (a) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a State Government (including at least three years of service as a member of the Indian Company Law Service (Accounts Branch) in senior administrative grade in that service); or
- (b) is, or has been, a Joint Secretary to the Government of India under the Central Staffing Scheme, or any other post under the Central Government or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India for at least 5 years and has adequate knowledge of, and experience in, dealing with problems relating to company law; or
- (c) is, or has been, for at least 15 years in practice as a chartered accountant under the Chartered Accountants Act, 1949; or
- (d) is, or has been, for at least 15 years in practice as a cost accountant under the Costs and Works Accountants Act, 1959; or
- (e) is, or has been, for at least 15 years working experience as a secretary in whole-time practice as defined in clause (45A) of section 2 of this Act and is a member of the Institute of Companies Secretaries of India constituted under the Company Secretaries Act, 1980;

- (f) is a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty 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 in, which would be in the opinion of the Central Government useful to the Tribunal; or
- (g) is, or has been, a Presiding Officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947; or
- (h) is a person having special knowledge of, and experience of not less than 15 years in, the matters relating to labour.

The President and every other member of the Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office, but shall be eligible for re-appointment. Provided that no President or other member shall hold office as such after he has attained:—

- (a) in the case of the President, the age of sixty-seven years;
- (b) in the case of any other Member, the age of sixty-five years.

## **12. Benches of the Tribunal**

New section 10FL provides that the powers of the Tribunal may be exercised by benches, constituted by the President of the Tribunal for the disposal of any case relating to rehabilitation, restructuring or winding up of the companies.

The benches will consist of a Judicial Member and another shall be a Technical Member referred to in clauses (a) to (f) of sub-section (3) of section 10FD.

It shall be competent for the Members authorised in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President of the Tribunal may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member of the Tribunal that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President of the Tribunal or, as the case may be, referred to him for transfer to such Bench as the President may deem fit.

For the disposal of any case relating to rehabilitation, restructuring or winding up of the companies, the President of the Tribunal shall, constitute one or more Special Benches consisting of three or more Members, each of whom shall necessarily be a Judicial Member, a Technical Member appointed under any of the clauses (a) to (f) of sub-section (3) of section 10FD, and a Member appointed under clause (g) or clause (h) of sub-section (3) of section 10FD:

Provided that in case a Special Bench passes an order in respect of a company to be wound up, the winding up proceedings of such company may be conducted by a Bench consisting of a single Member.

Where the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Tribunal for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members of the Tribunal who have heard the case, including those who first heard it. [Section 10FL]

### **12.1. Process to constitute Benches of the Tribunal**

The Central Government has issued Circular dated 28<sup>th</sup> October, 2003 according to which ten Benches of the Tribunal is to be set up at New Delhi, Allahabad, Ahmedabad, Bangalore, Chennai, Noida, Hyderabad, Indore, Jaipur, Kolkata and Mumbai.

### **12.2. Appointment of selection committee for the Tribunal and Appellate Tribunal**

In terms of the provisions of section 10FX of the Companies (Second Amendment) Act, 2002, the Central Government have appointed the selection committee of the following—

- |                                                                                                          |             |
|----------------------------------------------------------------------------------------------------------|-------------|
| (a) Chief Justice of India or his nominee                                                                | Chairperson |
| (b) Secretary in the Ministry of Finance and Company Affairs                                             | Member      |
| (c) Secretary in the Ministry of Labour                                                                  | Member      |
| (d) Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department) | Member      |
| (e) Secretary in the Ministry of Company Affairs                                                         | Member      |

The Selection Committee shall recommend within one month a panel of three names for every vacancy referred to it.

Before recommending any person for appointment as the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal, the Selection Committee shall satisfy itself that such person does not have financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member of the Appellate Tribunal or President Member of the Tribunal, as the case may be.

No appointment of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be invalidated merely by reason of any vacancy or any defect in the constitution of the Selection Committee.

The Central Government had invited application for appointment of the members of the Tribunal before 15<sup>th</sup> December, 2003.

### **13. Transfer of proceedings from one Bench to another**

The Principal Bench of the Tribunal shall have powers to transfer proceedings from one bench to another bench of the Tribunal in the event of inability of any bench from hearing any such proceedings for any reason:

Provided that no transfer of any proceedings shall be made under this sub-section except after recording the reasons for so doing in writing.

### **14. Orders of the Tribunal**

Provisions relating to the proceedings and issuance of orders by the Tribunal has been given in new section 10FM inserted by the Companies (Second Amendment) Act, 2002, which provides that:—

- (1) The Tribunal may, after giving the parties to any proceeding before it, an opportunity of being heard, pass such orders thereon as it thinks fit.
- (2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the parties.
- (3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

Section 10FN states that the Tribunal shall have power to review its own orders.

### **15. Delegation of power by the Tribunal**

The Tribunal may, by general or special order, delegate, subject to such conditions and limitations, if any, as may be specified in the order, to any member or officer or other employee of the Tribunal or other person authorised by the Tribunal to manage any industrial company or industrial undertaking or any operating agency, such powers and duties under this Act as it may deem necessary. [Section 10FO]

### **16. Powers of the Tribunal to seek assistance**

Section 10FP(1) provides that the Tribunal or any operating agency, on being directed by the Tribunal may, in order to take into custody or under its control all property, effects and actionable claims to which a sick industrial company is or appears to be entitled, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any property, books of account or any other document of such sick industrial company, be situate or be found, to take possession thereof, and the Chief

Metropolitan Magistrate or the District Magistrate, as the case may be, shall, on such request being made to him,—

- (a) take possession of such property, books of account or other documents; and
- (b) cause the same to be entrusted to the Tribunal or the operating agency.

For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use or cause to be used such force as may, in his opinion, be necessary.

No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority on any ground whatsoever.

## **APPELLATE TRIBUNAL**

### **17. Constitution of the Appellate Tribunal**

Section 10FR has empowered the Central Government to constitute an Appellate Tribunal under the Companies Act, 1956. The section provides that—

- (1) The Central Government shall, by notification in the Official Gazette, constitute with effect from such date as may be specified therein, an Appellate Tribunal to be called the "National Company Law Appellate Tribunal" consisting of a chairperson and not more than two members, to be appointed by that Government, for hearing appeals against the orders of the Tribunal under this Act.
- (2) The Chairperson of the Appellate Tribunal shall be a person who is, or has been, a Judge of the Supreme Court or the Chief Justice of a High Court.
- (3) A member of the Appellate Tribunal 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 in which, would be in the opinion of the Central Government useful to the Appellate Tribunal.

### **18. Appeal from the order of the Tribunal**

Section 10FQ provides an opportunity for appeal on the decision or order issued by the Tribunal. It provides that—

- (1) any person aggrieved by an order or decision of the Tribunal may prefer an appeal to the Appellate Tribunal;
- (2) no appeal shall lie to the Appellate Tribunal from an order or decision made by the Tribunal with the consent of parties;
- (3) every appeal under sub-section (1) shall be filed within a period of 45 days from the date on which a copy of the order or decision made by the Tribunal is received by the appellant and it shall be in such form and accompanied by such fee as may be prescribed:  
Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 days from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from not filing the appeal in time;
- (4) on receipt of an appeal preferred under sub-section (1), the Appellate Tribunal shall, after giving parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against;
- (5) the Appellate Tribunal shall send a copy of every order made by it to the Tribunal and parties to the appeal;
- (6) the appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within 6 months from the date of the receipt of the appeal.

## **19. Applicability of the Limitation Act, 1963**

The provisions of the Limitation Act, 1963 shall, as far as may be, apply to an appeal made to the Appellate Tribunal. [Section 10GE]

## **20. Procedures and powers of the Tribunal and the Appellate Tribunal**

The Companies (Second Amendment) Act, 2002 has described the procedures and powers of the Tribunal and the Appellate Tribunal to discharge their functions. Section 10FZA inserted under the Companies Act, 1956 provides that:

- (1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.
- (2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:—
  - (a) summoning and enforcing the attendance of any person and examining him on oath;
  - (b) requiring the discovery and production of documents;
  - (c) receiving evidence on affidavits;
  - (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;
  - (e) issuing commissions for the examination of witnesses or documents;
  - (f) reviewing its decisions;
  - (g) dismissing a representation for default or deciding it *ex parte*;
  - (h) setting aside any order of dismissal of any representation for default or any order passed by it *ex parte*; and
  - (i) any other matter which may be prescribed by the Central Government.
- (3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send in case of its inability to execute such order, to the court within the local limits of whose jurisdiction,—
  - (a) in the case of an order against a company, the registered office of the company is situate; or
  - (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.
- (4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code and the Tribunal and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

## **21. Right to represent before the Tribunal or Appellate Tribunal**

The applicant or the appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any officer to present his or its case before the Tribunal or the Appellate Tribunal, as the case may be.

For the purposes,—

- (a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

- (b) "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Companies Secretaries Act, 1980 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (d) "legal practitioner" means an advocate, a vakil or any attorney of any High Court, and includes a pleader in practice. [Section 10GD]

**22. Civil court shall not have jurisdiction to entertain in respect of any matter for which the Tribunal or the Appellate Tribunal is empowered**

Section 10GB has provided exclusive powers to the Tribunal or the Appellate Tribunal and no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate 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.

**23. Appeal against decision or order of the Appellate Tribunal shall be filed with Supreme Court**

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such decision or order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days. [Section 10GF]

## Chapter 2

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### **Applications and Petitions before the National Company Law Tribunal**

#### **Synopsis**

##### *Appellate Tribunal*

1. Appeal against the order of CLB/Tribunal should be in the form of Memorandum of Appeal stating question of law
2. Whether CLB (Tribunal) can review its earlier order?
3. Civil court not to have jurisdiction
4. Appeal to the Supreme Court
5. Powers and functions of Benches
6. Language of the Tribunal/Bench

##### *Petitions/applications before the tribunal*

7. Petitions, etc., to be in writing
8. Procedure for filing petition
9. Contents of petition
10. Documents to accompany petition
11. Presentation and scrutiny of petition
12. Rights to appear before Bench
13. Service of notice and process issued by the Bench
14. Procedure to be followed by the Bench, where any party does not appear
15. Order of Bench
16. Guidance by principles of natural justice
17. Fees on applications and petitions

#### **APPELLATE TRIBUNAL**

Any person aggrieved by an order or decision of the Tribunal may prefer an appeal to the Appellate Tribunal. No appeal shall lie to the Appellate Tribunal from an order or decision made by the Tribunal with the consent of parties.

Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order or decision made by the Tribunal is received by the appellant and it shall be in such form and accompanied by such fee as may be prescribed. Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, if it is satisfied that the appellant was prevented by sufficient cause from not filing the appeal in time.

The Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of itself as the High Court has and may exercise, for this purpose under the provisions of the Contempt of Courts Act, 1971, shall have the effect subject.

#### **1. Appeal against the order of CLB/Tribunal should be in the form of Memorandum of Appeal stating question of law**

There is a clear distinction between a petition and an appeal. By its very nature an appeal had to be in the form of memorandum clearly indicating the ground of appeal. The appeal under section 10F lay on only question of law arising from the order and hence the question of law will have to be stated. Failure to do so would be against the very letters and spirit of section 10F. Right of appeal under section 10F is a valuable statutory right and it could not be withheld down for the mistake in the form. [*Minoo H. Mody v Hemant D. Vakil* (1993) (Bom.)].

## **2. Whether CLB (Tribunal) can review its earlier order?**

In *Smt. Pushpa Katoch v Manu Maharani Hotels Ltd.* case decided on 30<sup>th</sup> August, 2001 (CLB), it was held that the CLB (now Tribunal) has no power to review its own orders. However, section 10FN clearly provides that the Tribunal shall have powers to review its own orders.

## **3. Civil court not to have jurisdiction**

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate 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.

The applicant or the appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any officer to present his or its case before the Tribunal or the Appellate Tribunal, as the case may be.

The provisions of the Limitation Act, 1963 shall, as far as may be, apply to an appeal made to the Appellate Tribunal.

## **4. Appeal to the Supreme Court**

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such decision or order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

## **5. Powers and functions of Benches**

The Tribunal may, by order in writing, form one or more Benches from among its members and authorise each such Bench to exercise and discharge such of the Tribunal's powers and functions as may be specified in the order; and every order made or act done by a Bench in exercise of such powers or discharge of such functions shall be deemed to be the order or act, as the case may be, of the Tribunal.

Every Bench shall have powers, which are vested in a court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:—

- (a) discovery and inspection of documents or other material objects producible as evidence;
- (b) enforcing the attendance of witnesses and requiring the deposit of their expenses;
- (c) compelling the production of documents or other material objects producible as evidence and impounding the same;
- (d) examining witnesses on oath;
- (e) granting adjournments;
- (f) reception of evidence on affidavits.

## **6. Language of the Tribunal/Bench**

1. The proceedings of the Tribunal shall be conducted in English or Hindi.

2. No petition, application, reference, document or other matter contained in any language other than English or Hindi shall be accepted by the Tribunal unless the same is accompanied by a true translation thereof in English or Hindi.

3. All documents required to be translated into English or a person appointed or approved by the Tribunal shall translate Hindi:

Provided that the Tribunal in appropriate case as a true translation may accept any translation, which is agreed to by the parties to the proceedings.

4. All final and interlocutory orders of the Tribunal shall be in English or Hindi.

## PETITIONS/APPLICATIONS BEFORE THE TRIBUNAL

It is expected that the Central Government shall issue necessary Regulations regarding the proceedings before the National Company Law Tribunal and the National Company Law Appellate Tribunal and the existing Company Law Board Regulations, 1991 will be substituted in due course.

### 7. Petitions, etc., to be in writing

Every affidavit, application, reference or petition shall be written, typewritten, cyclostyled or printed, neatly and legibly, on one side of the substantial paper of foolscap size in double space and separate sheets shall be stitched together and every page shall be consecutively numbered.

### 8. Procedure for filing petition

The Central Government is to notify the Regulations for filing of petition before the Tribunal. The existing regulation 14 of the Company Law Board Regulations, 1991 provides as under:

- (1) Subject to the provisions of regulations 35 and 37, a petition to the Bench shall be prepared in Form No.1 in Annexure II and presented by the petitioner in person or through authorised representative to the office of the Bench or be sent by registered post with acknowledgement due addressed to the Secretary or Bench Officer of the Bench concerned as the case may be.
- (2) The petitioner shall serve a copy of the petition, reference or application on the respondent or respondents, as the case may be, and produce evidence of such service.
- (3) The petitioner shall serve a copy of the reference or petition other than petitions under sections 49, 79, 80A, 111, 113, 118, 144, 163, 188, 196, 219, 225, 284, 304, 307, etc., of the Act, as may be notified under the regulations, upon the concerned Registrar of Companies having jurisdiction over the company and shall attach to and present with his petition, reference, an acknowledgement from the office of the Registrar of Companies receiving a copy of the petition or reference so served:

Provided that, in the case of a petition under section 17 by a company licensed under section 25 of the Act, the copy of the petition shall also be served upon the Regional Director:

Provided further that, in case of a petition or complaint under sections 235, 237, 250, 397, 398, 408, 409, etc., of the Act, as may be notified under the regulations, a copy thereof shall also be served upon the Central Government.

Notwithstanding anything contained the Bench may permit more than one person to join together and file a single petition if it is satisfied, regard to the cause of action and the nature of relief prayed for, that they have a common interest in the matter. Such permission shall be granted where the joining of the petitioners by a single petition is specifically permitted by the Act.

- (4) Every petition other than an application under section 58A(9) of the Act shall be accompanied by an affidavit verifying the same and shall be drawn upon the first person and shall state the full.
- (5) Name, age, occupation and complete residential address of the deponent and shall be signed by the deponent and sworn before the person specified in section 558 of the Act.
- (6) Where the person before whom the affidavit is sworn does not personally know the deponent, a person who is known to the person before whom the affidavit is sworn shall identify him.
- (7) Every affidavit shall clearly and separately indicate the statements which are true to the—
  - (i) Knowledge of the deponent;
  - (ii) Information received by the deponent;
  - (iii) Belief of the deponent; and
  - (iv) Information based on legal advice.
- (8) Where the statement referred the affidavit is stated to be true to the information received by the deponent, the affidavit shall also include the name and complete residential address of the person from whom the information has been received by the deponent and whether the deponent believes that information to be true.

## **9. Contents of petition**

Every petition, other than an application filed under regulation 37, shall set forth the name of the company, with its status, date of incorporation, the address of its registered office, authorised capital, paid-up capital with division of different classes of shares and terms of issue, if any, in the case of preference shares, main objects in brief for which the company was formed, present business activities of the company, and shall also set forth concisely under distinct heads the grounds for such petition and the nature of relief(s) prayed for.

## **10. Documents to accompany petition**

A petition shall be made with the Tribunal in accordance with the Regulations as may be notified by the Central Government. The existing regulation 18 of the Company Law Board Regulations, 1991 provides as under:

- (1) A petition shall be accompanied by documents as prescribed in Annexure III and shall be accompanied by an index of documents.
- (2) Documents may be attested by the party or the authorised representative or the advocate and the documents shall be marked serially as Annexure A-1, A-2 and so on.
- (3) Where the authorised representative files the petition, Memorandum of Appearance shall be appended to the petition as in Form No. 5 in Annexure II:

Provided that where an advocate files the petition, it shall be accompanied by a duly executed *vakalatnama*.

## **11. Presentation and scrutiny of petition**

- (1) The Officer of the Bench shall endorse on every petition the date on which it is presented.
- (2) If, on scrutiny, the petition is found to be in order, it shall be duly registered and given a serial number.
- (3) If the petition, on scrutiny, is found to be defective and the defect noticed is formal in nature, the Secretary or Bench Officer may allow the party to rectify the same in his presence.
- (4) If the said defect is not formal in nature, the Secretary or Bench Officer may allow the petitioner such time to rectify the defect as he may deem fit.
- (5) Where the petitioner is aggrieved by the order made by the Secretary or Bench Officer, the matter shall be placed before the Bench for its order and it shall be competent for a single member of the Bench to issue necessary direction, which shall be deemed to be the direction of the Bench.

## **12. Rights to appear before Bench**

- (1) Every party may appear before a Bench in person or through an authorised representative.
- (2) A party may, in writing, authorize an advocate or a secretary in whole-time practice or a practicing chartered accountant or practising cost and works accountant, to function as a representative of such party. A company may appoint and authorize its director or company secretary to appear, in its behalf, in any proceeding before the Bench. The Central Government, the Regional Director or the Registrar may authorise an officer to appear in its behalf.

## **13. Service of notice and process issued by the Bench**

- (1) Any notice or process to be issued by the Bench may be served by any of the following modes directed by the Bench, namely:—
  - (a) Service by the party itself;
  - (b) By hand delivery through a messenger of the office of the Bench;
  - (c) Under certificate of posting;
  - (d) By registered post with acknowledgement due if so required by an order of the Bench;
  - (e) Where the Central Government is a party, through the Secretary of the concerned Ministry or Department or through Branch Secretariat of the Ministry of Law or through Standing Counsel of the Central Government;

(f) Where the State Government is a party, through the Chief Secretary or the Standing Counsel of the State Government.

(2) Where a notice is required to be served on a company, it shall be served in the manner specified in section 51 or, in the case of a foreign company, in the manner specified in section 596, and may also be served in such other manner as the Secretary or the Bench Officer may direct.

(3) Notices and other documents, which are required to be served on any person, other than a company, shall be served by delivering or tendering a copy thereof to such person or his authorised representative, where he appears by such representative or by prepaid registered post, acknowledgement due, addressed to the last-known address of such person.

(4) Where a notice is served by registered post, the Secretary or Bench Officer may, if the acknowledgement is not received, determine the question as to the sufficiency of the service of the notice.

(5) Where the notice sent by registered post is returned by the post office with the remark "refused", the notice may be presumed to have been duly served.

(6) Every notice of the petition or reference issued by the Bench shall, unless otherwise ordered, be accompanied by a copy of the petition or reference, as the case may be.

(7) Where, for any reason whatsoever, it is not reasonably practicable to serve notice of petition on all the respondents, the notice may be served by public advertisement, as the Bench may in each case direct.

(8) The Bench shall, in such cases, determine who shall bear the cost of the public advertisement.

#### **14. Procedure to be followed by the Bench, where any party does not appear**

(1) Where, on the date fixed for hearing of the petition or any application or on any other date to which such hearing may be adjourned, the petitioner or the applicant as the case may be does not appear when the petition or the application is called for hearing, the Bench may, in its discretion, either dismiss the petition or the application for default or hear and decide the same *ex parte*.

(2) Where a petition or application has been dismissed for default and the petitioner or the applicant files an application within thirty days from the date of dismissal and satisfies the Bench that there was sufficient cause for his non-appearance when the petition or the application was called for hearing, the Bench may pass an order setting aside the order dismissing the petition or the application and restore the same. Provided, however, where the case was disposed of on merit, the decision shall not be recalled.

(3) Where, on the date fixed for hearing or any other date to which such hearing may be adjourned, the petitioner appears but the respondent does not appear when the petition is called for hearing, the Bench, may, in its discretion, adjourn the hearing or hear and decide the petition *ex parte*.

(4) Where the petition has been heard *ex parte* against the respondent or respondents, such respondent or respondents may apply to the Bench within thirty days for an order to set aside and if the respondent or respondents satisfy the Bench that the notice was not duly served on him or them or that he or they were prevented by any sufficient cause from appearing when the petition was called for hearing, the Bench may make an order setting aside the *ex parte* order against him or them on such terms as it thinks fit and shall appoint a date for proceeding with the petition:

Provided that where the *ex parte* order is of such nature that it cannot be set aside as against one respondent only, it may be set aside as against all or any of the other respondents also the Bench shall not set aside the *ex parte* order merely on the ground that a shareholder or a creditor did not have the notice of the petition.

#### **15. Order of Bench**

(1) Every order of the Bench shall be in writing, and shall be signed by the member or members constituting the Bench, which pronounces the order.

(2) In case of difference of opinion among the members of the Bench, the opinion of the majority shall prevail and the opinion or orders of the Bench shall be expressed in terms of the views of the majority: Provided that where a matter is heard by a Bench consisting of an even number of members and such

members are divided equally in their opinion, it shall be placed before the chairman who may himself deal with the matter or nominate any other member to deal with the same.

(3) Any order of the Bench deemed fit for publication in any journal, authoritative report or the Press might be released for such publication on such terms and conditions as the Board may specify by general or special order.

(4) A copy of every interim order granting or refusing or modifying interim relief and final order passed on any petition or reference shall be communicated to the petitioner or the applicant and to the respondents and other parties concerned free of cost: In the case of an order under section 17 confirming change of registered office, two copies of the order shall be supplied to the petitioner company free of cost.

(5) If the petitioner or the applicant or the respondent to any proceeding requires a copy of any document or proceeding, the same shall be supplied to him on such terms and conditions and on payment of such fee as may be fixed by the Bench by general or special order.

(6) The Bench may make such order or give such direction, as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.

(7) It shall be lawful for a Bench to fix, and award, costs to any of the parties before it where it is of opinion that the award of such costs is necessary.

#### **16. Guidance by principles of natural justice**

The Tribunal shall, in the exercise of its powers and the discharge of its functions under this Act, or any other law be guided by the principles of natural justice and shall act in its discretion.

#### **17. Fees on applications and petitions**

Every petition made to the Tribunal shall be accompanied by appropriate fee as may be specified by the Central Government under the rules as may be notified by the Central Government:

Provided that no fee shall be payable on applications or petitions made by the Regional Director, Registrar of Companies, or by the Central Government, or by any officer on behalf of the Government or by the Government of a State.