

5 Sept. 2003

ॐ श्री गणेशाय नमः

Imp
Sec 397 - 408 → Applicable to all Co.(s) Ankur Gang
Sec 409 → Applicable only to Pub Co.

PREVENTION OF OPPRESSION AND MISMANAGEMENT

Oppression means an act of majority which is harsh and burdensome on minority. It shall be present and continuing, and not just an isolated event in past.

Mismanagement refers to gross negligence or gross mismanagement. Mere un-wise conduct of business cannot be considered as mismanagement.

→ Present + continuous and could also be a future possibility.

Sec.397 - Application to Company Law Board in cases of Oppression

Present + Continuous

(1) Any member(s) of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member(s) (including any one or more of themselves) may apply to CLB for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If CLB is of opinion -

- (a) that the company's affairs are being conducted in aforesaid manner ; &
- (b) the facts justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up, but winding up would unfairly prejudice such member(s);

CLB may, with a view to bringing to an end the matters complained of, make such order as it thinks fit. suitable order by CLB as per Sec 402

Sec.398 - Application to CLB for relief in cases of mismanagement

(1) Any members of a company who complain:

- (a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or
- (b) that a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders of the company) has taken place in the management or control of the company, whether by an alteration in its BOD, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company;

may apply to CLB for an order under this section, provided such members have a right so to apply in virtue of section 399.

See - D.95 (16)

- ✓ (2) If, on any application under SS (1), CLB is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, CLB may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

Sec.399 - Right to apply under Sec. 397 & 398

- ✓ (1) The following members of a company shall have the right to apply u/s 397 or 398:-

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member(s) holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

- ✓ (2) Where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

- ✓ (3) Where any members of a company are entitled to make an application, then any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

This Criteria is to be satisfied at the time of filing of Applⁿ to CLB

- Imp.* ✓ (4) CG may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member(s) of the company to apply to CLB u/s 397 or 398, notwithstanding that the requirements of SS (1)(a) or (b) are not fulfilled. *Prior consent of CG.*

CG may order / CG may not order.

- ✓ (5) CG may, before authorising any member(s) as aforesaid, require such member(s) to give security for such amount as CG may deem reasonable, for the payment of any costs which CLB dealing with the application may order such member(s) to pay to any other person or persons who are parties to the application.

Sec.400 - Notice to be given to CG of applications u/s 397 and 398

CLB shall give notice of every application made to it u/s 397 or 398 to CG, and shall take into consideration the representations, if any, made to it by CG before passing final order.

401. Right of CG to apply u/s 397 and 398

CG may itself apply to CLB for an order u/s 397 or 398, or cause an application to be made to CLB for such an order by any person authorised by it in this behalf.

CG

*2 duty
① Inten^y the Regional Dir.
② Consider the Repⁿ*

402. Powers of CLB on application u/s 397 or 398

- Without prejudice to the generality of the powers of CLB u/s 397 or 398, any order under this section may provide for-

CLB may pass the order to alter MOA or AOA for the purpose of clause (a)

Future (a) the regulation of the conduct of the company's affairs in future;

Past (b) the purchase of the shares or interests of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital. Procedure vis 100-105 will not be applicable for such reduction.

(d) the ^(Permanent) termination, ^(Temporary) setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely:- Termination ⇒ Removal of MD/dir./Manager.

(i) the managing director, (ii) any other director, & (iii) the manager,

upon such terms and conditions as may, in the opinion of CLB be just and equitable in all the circumstances of the case;

(e) the termination setting aside or modification of any agreement between the company and any person not referred to in clause (d) above. **However** no such agreement shall be terminated, set aside or modified except after due notice to the party concerned. **Moreover** no such agreement shall be **modified** except after obtaining the consent of the party concerned; * Consent of concerned Party is compulsory.

If other Party does not give its consent ⇒ CLB still have the option of termination or setting aside.

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application u/s 397 or 398 which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

in relation to individual

+ Sec-531

(g) any other matter for which in the opinion of CLB it, is just and equitable that provision should be made.

List is inclusive.

Sec.403- Interim order by CLB

Pending the making by it of a final order u/s 397 or 398, as the case may be, **CLB may**, on the application of any party to the proceeding, **make any interim order which it thinks fit** for regulating the conduct of the company's affairs, upon such terms and conditions as appear to it to be just and equitable.

Sec.404- Effect of alteration of MOA or AOA by order u/s 397 or 398

- (1) Where an order u/s 397 or 398 makes any alteration in the MOA or AOA of a company, then, notwithstanding any other provision of this Act, the company shall not have power except to

→ 12 transactions specified in other acts. ⇒ made within 3 months before becoming insolvent. DG

Fraudulent Preference :- vis 402(f) :- ~~Sec~~ there is no definition of this term in Co(s) act.

But definition is available in Provincial Insolvency Act or.

→ If future amendment is contradictory, then CLB's Prior approval reqd.

4/6

the extent permitted in the order, to make without the leave of CLB any alteration whatsoever which is inconsistent with the order, either in the MOA or in the AOA.

- ✓ (2) Subject to the provisions of SS (1), the alterations made by the order shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act; and the said provisions shall apply accordingly to the MOA or AOA as so altered.

Time Period

- ✓ (3) A certified copy of every order altering or giving leave to alter a company's MOA or AOA, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.

- ✓ (4) If default is made in complying with the provisions of SS (3), the company, and every officer of the company who is in default, shall be punishable with fine up to Rs. 50,000.

Sec.405- Addition of respondents to application u/s 397 or 398

If the managing director or any other director or the manager, of a company, or any other person, who has not been impleaded as a respondent to any application u/s 397 or 398 applies to be added as a respondent thereto, CLB shall, if it is satisfied that there is sufficient cause for doing so, direct that he may be added as a respondent accordingly.

Sec.406- Application of sections 539 to 544 to proceedings u/ss 397 and 398

In relation to an application u/s 397 or 398, sections 539 to 544, both inclusive, shall apply in the form set forth in Schedule XI.

Sec.407- Consequences of termination or modification of certain agreements

- (1) Where an order made u/s 397 or 398 terminates, sets aside, or modifies an agreement such as is referred to in Sec. 402(d) or (e),-

✓ (a) the order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect, either in pursuance of the agreement or otherwise; No compensation at all (Absolute prohibition)

✓ (b) no managing or other director, or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of CLB be appointed or act, as the managing or other director, or manager of the company.

- (2) (a) Any person who knowingly acts as MD or other director, or manager of a company in contravention of SS (1)(b); → Same Company. [But can be appt. in any other Co.]

✓ (b) Deleted, &

✓ (c) every other director or every director, as the case may be, of the company, who is knowingly a party to such contravention;

Liability is only on directors.

DG

✓ shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to Rs.50,000, or with both.

✓ (3) No leave shall be granted under of SS (1)(b) unless notice of the intention to apply for leave has been served on CG, & CG has been given an opportunity of being heard in the matter.

1st application to CG => then apply to CLB

Sec.408- Powers of Government to prevent oppression or mismanagement

✓ (1) Notwithstanding anything contained in this Act,

*Sec-399
Should overrule
Sec-408
to the extent
this contradicts
exist*

CG may appoint such number of persons, (as CLB may by order specify as being necessary to effectively safeguard the interests of the company, or its shareholders or the public interests), to hold office as directors thereof for such period, not exceeding three years on any one occasion, as it may think fit, if CLB on a reference made to it by CG or on an application of not less than one hundred members of the company or of the members of the company holding not less than one-tenth of the total voting power therein, is satisfied, after such inquiry as it deems fit to make, that it is necessary to make the appointment or appointments in order to prevent the affairs of the company being conducted either in a manner which is oppressive to any members of the company or in a manner which is prejudicial to the interests of the company or to public interest :

total voting power = total Paid up Capi. [it is not the intention of Sec-399] says issued sh Capi.

However in lieu of passing an order as aforesaid, CLB may, if the company has not availed itself of the option given to it u/s 265, direct the company to amend its AOA in the manner provided in that section, and make fresh appointments of directors in pursuance of the AOA as so amended, within such time as may be specified in that behalf by CLB.

✓ (2) In case CLB passes an order for adopting sec. 265, it may direct that until new directors are appointed in pursuance of the order aforesaid, such number of persons as CLB may, by orders specify as being necessary to effectively safeguard the interests, of the company, or its shareholders or the public interest, shall hold office as additional directors of the company and on such directions, CG shall appoint such additional directors.

✓ (3) For the purposes of reckoning two-thirds or any other proportion of the total number of directors of the company, any director or directors appointed by CG under SS (1) or (2) shall not be taken into account.

✓ (4) A person appointed under SS (1) to hold office as a director or a person directed under SS (2) to hold office as an additional director, shall not be required to hold any qualification shares nor his period of office shall be liable to determination by retirement of directors by rotation; but any such director or additional director may be removed by CG from his office at any time and another person may be appointed by that Government in his place to hold office as a director or, as the case may be, an additional director.

✓ (5) No change in BOD made after a person is appointed or directed to hold office as a director or additional director under this section shall, (so long as such director or additional director holds office), have effect unless confirmed by CLB.

✓ (6) Notwithstanding anything contained in this Act or in any other law for the time being in force, where any person is appointed by CG to hold office as director or additional

DC

director of a company in pursuance of SS (1) or (2), CG may issue such directions to the company as it may consider necessary or appropriate in regard to its affairs and such directions may include directions to remove an auditor already appointed and to appoint another auditor in his place or to alter the AOA of the company, and upon such directions being given, the appointment, removal or alteration, as the case may be, shall be deemed to have come into effect as if the provisions of this Act in this behalf have been complied with without requiring any further act or thing to be done.

- ✓ (7) CG may require the persons appointed as directors or additional directors in pursuance of SS (1) or (2) to report to CG from time to time with regard to the affairs of the company.

Pub.Co.

Sec.409- Power of CLB to prevent change in BOD likely to affect company prejudicially

- ✓ (1) Where a complaint is made to CLB by the managing director or any other director or the manager, that as a result of a change which has taken place or is likely to take place in the ownership of any shares held in the company, a change in BOD is likely to take place which (if allowed) would affect prejudicially the affairs of the company, CLB may (if satisfied, after such inquiry as it thinks fit to make that it is just and proper so to do, by order, direct that no resolution passed or that may be passed or no action taken or that may be taken to effect a change in BOD after the date of the complaint shall have effect unless confirmed by CLB, and any such order shall have effect notwithstanding anything to the contrary contained in any other provision of this Act or in the MOA or AOA of the company, or in any agreement with, or any resolution passed in general meeting by, or by BOD of, the company.
- ✓ (2) CLB shall have power when any such complaint is received by it, to make an interim order to the effect set out in SS (1), before making or completing the inquiry aforesaid.
- ✓ (3) Nothing contained in SS(1)&(2) shall apply to a private company, unless it is a subsidiary of a public company.

Sec-250(3)(4) are equivalent to (similar) Sec-409

director of a company in pursuance of SS (1) or (2), CG may issue such directions to the company as it may consider necessary or appropriate in regard to its affairs and such directions may include directions to remove an auditor already appointed and to appoint another auditor in his place or to alter the AOA of the company, and upon such directions being given, the appointment, removal or alteration, as the case may be, shall be deemed to have come into effect as if the provisions of this Act in this behalf have been complied with without requiring any further act or thing to be done.

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