A critical study of Companies Act 2013 and its implications in India

DISSERTATION

Submitted in the partial fulfilment for the degree of

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PREFACE

The Companies Act, 2013 which consolidates and amends the law relating to companies has attempted to reduce the content of the substantive portion of the related law in the Companies Act, 2013 as compared to the Companies Act, 1956. The 2013 Act has introduced several new concepts such as One Person Company, Small Company, Key-managerial Personnel, Class action Suits, CSR spending and Insider Trading. This Act is landmark legislation and is likely to have far-reaching consequences on all companies operating in India.

It is my pleasure to present this dissertation on Company Law incorporating all the amendments introduced by Companies (Amendment) Ordinance, 2018, Companies (Amendment) Act, 2017, amendments to relevant rules under Companies Act, 2013 and provisions of Insolvency and Bankruptcy Code, 2016 as applicable to companies. Case laws and illustrations have been given to enable an easy comprehension for the readers. I wish to dedicate my efforts to my professors.

This project is designed primarily to serve as a dissertation on 'Company Law'. The dissertation contains introduction, the basic concepts and kinds of companies, it seek to give a legal framework in which companies operate vi z. memorandum of association, article of association, corporate social responsibility, prospectus including book building, shares including dividend, general meetings, management of companies and powers of directors. Last part contains the implication of companies Act 2013 in India.

Feedback from readers is solicited and would be thankfully acknowledged.

LITERATURE REVIEW

Max. references are taken from the 'Company Act, 2013: Rules, Circulars & Notifications' published by Ministry of Corporate Affairs, India, which emphasizes the all aspect of company rule & regulation.

Reports of various agencies like PWC, India's report on ' Company Act,2013, Key highlights and analysis', Nov 2013,Deloitte's 'Company Act, 2013, Fresh thinking for a new start', Oct 2013, Assoc ham's, 'Mergers and acquisitions in the era of Company Act, 2013' Feb 2014, Ernst & Young LLP's report on 'India Inc Company Act 2013 an overview', Sep 2013 and KPMG India's analysis on 'Company Act 2013, New Rules of the game', Oct 2013, which were emphasize on the business friendly corporate regulation, improved CG norms, enhance accountability, raise levels of transparency and protect int of investors.

Definition:

- To Define: The Act of making something definite, distinct or clear.

- Definition: An exact statement or description of the nature, scope, or meaning of something.

ABBREVIATIONS

Max	Maximum
Cr	Creditors
Inv	investment
RBI	Reserve Bank of India
Sec	Securities
Int	Interest
Min	minimum
Sr.	Special resolution
NCLT	National company law tribunal
CA 2013	Companies act 2013

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INTRODUCTION

The awaited new company Act 2013 has replaced the companies Act 1956 Act with prime objective to counter the present day challenges and in line with rapid developments, integrations, globalization of financial markets and growing economy of the world by Lok sabha on 18 Dec 12 and in Rajya sabha on 08 Aug 13, has been received Hon'ble president assent on 29 Aug 13. The new act emphasized changes and improvised governance structure business-friendly corporate regulations, modification of e-management, enforcement, share holder protection, enhanced accountability, improved institutional structure, enhanced disclosure norms, efficient merger & acquision, introduce the role of whistle blowers, one Person Company, and corporate social responsibility (CSR) changes. The Companies Act, 2013 not only simplifies the mergers, acquisitions and restructuring process but also modifying the previous constraint, regulatory body like National Company Law Tribunal (NCLT)and facilitates an effective impact on world business environment.

This paper is analysis of the Company Act 2013 regarding modification and new initiative taken in the field of M&A framework and trying to prove that the new M&A structure is in line with global context and in improving the efficiency and smoothness of doing business in India.

Objectives

1. The prime objective of this is to establish a healthy comparison between Companies Act, 2013 and Company Act 1956 regarding M&A process.
2. To evaluate the new initiative taken and its impact.
3. To find out the possible measures or necessary step to overcome the existing lapses.
4. To develop the economy by encouraging entrepreneurship.
5. Creating flexibility and simplicity in the formation and maintenance of companies.
6. To encourage transparency and high standards of corporate governance.
7. To recognize new concepts and procedures to facilitate ease of doing business while protecting int of all the stakeholders.
8. To enforce strict action against fraud.
9. To set up institutional structure in the form of various authorities, bodies and panels.
10. To carter to the need for more effective and time bounds approval and compliance requirements.

Structure of the companies Act

The company's act 2013 consists of 470 sections (covered in 29 chapters) and 7 schedules as against 658 sections (covered in 13 parts) and 15 schedules of the companies act 1956.

RESEARCH METHODOLOGY

This topic is an exploratory type research and based on the secondary data & information from the following sources, Research journal available online, Article published in magazine & various websites & blogs, media reports and personal interaction & interview of professional on media.

Historical background of companies Act

The recent change in companies act is a historical change in the corporate world. It brings many new provisions and concept as well as redefines many. Share Capital is one of the crucial aspects which acts as a growth driver as well as helps companies to maintain liquidity and long run survivability. This study mainly focuses on regulatory framework of companies in India along with different aspects of share capital as per new companies act. Hence it will immensely help to many researchers, corporate entities, individuals, practitioners, and professional in their respective fields.

REGULATIONS OF COMPANIES BEFORE INDEPENDENCE:
Company law is that branch of law which deals exclusively with all aspects relating to companies,such as incorporations of company's allotment of shares and share capital membership in company's management and administration of companies, winding up of companies etc.

Joint stock companies Act 1850: Companies legislation in India owes its origin to the English Company law. The companies act passed from time to time in India have been following the English companies act with certain modifications to suit Indian conditions. The first legislative enactment for "Registration of Joint stock companies" was passed in the year 1850. This Act was based on the English companies Act, 1844 (known as the Joint stock companies Act 1844) which recognized company as a distinct legal entity but did not grant to it the privilege of limited liability.

Joint Stock Companies Act 1857: The Joint stock companies act of 1850 was replaced by the Joint stock companies act of 1857. This act of 1857 conferred, for the first time in India the benefit of limited liability on the members of companies. But this act did not extend the benefit of limited liability to the members of banking companies and insurance companies.

Joint Stock Companies Act 1860: The Joint stock companies act of 1857 was replaced by the Joint stock companies act of 1866. The Joint stock companies act of 1860 extended the benefit of limited liability to the members of Banking companies and insurance companies.

TheCompanies Act 1866: The Joint stock companies Act of 1860 was replaced by the companies Act of 1866. The companies Act of 1866 was the first comprehensive companies Act passed in India. The companies Act of 1866 was based on the English companies Act of 1862. The companies Act of 1866 was intended to consolidate and amend the law relating to the incorporation, regulation and winding up of trading companies and other associations.

Companies Act of1913: The Indian Companies Act, 1913did not take into account the peculiar features of the Indian trade and commerce and some peculiar institution such as "managing agency".
The Act was, therefore, found to be highly unsatisfactory in the course of its operation. As such, this Act was subjected to a large number of amendments from time to time.

REGULATIONS OF COMPANIES AFTER INDEPENDENCE
After independence there is a remarkable change in companies' regulation, a new act came into existence i.e. – companies act 1956. This is detailed below.

Companies Act 1956: After the end of World War II, the need for a further revision of the company law was felt. Many changes had taken place in the organization and management of Joint stock companies. The government of India, therefore, appointed on 25th October 1950. A committee of 12 members representing various fields under the chairmanship of Shri.H.C.Bhabha for a comprehensive review of the Indian companies Act 1913. The committee submitted its report on all aspects of company law in April 1952. Based on the recommendation of the Bhabha Committee companies Act of 1956 was passed. The companies Act of 1956 was based on the English companies Act of 1948, with some modifications to suit the Indian conditions. The companies Act of 1956 came into force from 1st April 1956. This act contains 658 sections and 15 schedules.

Companies Act 2013: The new Companies Act (hereinafter referred as CA2013) is replacing old Companies Act, 1956 (hereinafter referred as CA1956). The CA2013 makes comprehensive provisions to govern all listed and unlisted companies in the country. The CA2013 is partially made effective w.e.f. 12th September2013.It contains 29 Chapters divided into 470 sections and 7 schedules95 definitions. However, the new law also makes extensive reference to sub-ordinate legislation in the form of rules, which form an integral part of the new law governing companies in India. Pursuant to the powers vested under the CA 2013, the MCA has also finalized the rules under each chapter, most of which have been notified.

RATIONALE BEHIND NEW COMPANIES ACT:

1)Immense increase in number of Companies from about 30,000(approx.) in 1956 turn early 8lakhs;

2) Recognition of good corporate practices & technological improvements;

3) Simplification of law by locating related provisions under one clause/section;

4) Insertion of new provisions to meet the current economic environment.

The 2013 Act has introduced several new concepts and has also tried to streamline many of the requirements by introducing new definitions. This chapter covers some of these new concepts and definitions in brief. A few of these significant aspects have been discussed in detail in further chapters.

Types of Companies

One-person company: The 2013 Act introduces a new type of entity to the existing list i.e. apart from forming a public or private limited company, the 2013 Act enables the formation of a new entity a 'one-person company' (OPC). An OPC means a company with only one person as its member [section 3(1) of 2013 Act].

Private company: The 2013 Act introduces a change in the definition for a private company, inter-alia, the new requirement increases the limit of the number of members from 50 to 200. [Section 2(68) of 2013 Act].

Small company: A small company has been defined as a company, other than a public company.

(i) Paid-up share capital of which does not exceed 50 lakh INR or such higher amount as may be prescribed which shall not be more than five crore INR.

(ii) Turnover of which as per its last profit-and-loss account does not exceed two crore INR or such higher amount as may be prescribed which shall not be more than 20 crore INR:
As set out in the 2013 Act, this section will not be applicable to the following:
• A holding company or a subsidiary company
• A company registered under section 8
• A company or body corporate governed by any special Act [section 2(85) of 2013 Act]

Dormant company: The 2013 Act states that a company can be classified as dormant when it is formed and registered under this 2013 Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction. Such a company or an inactive one may apply to the ROC in such manner as may be prescribed for obtaining the status of a dormant company [Section 455 of 2013 Act]

*https://www.pwc.in/assets/pdfs/publications/2013/companies-act-2013-key-highlights-and-analysis.pdf

MAJOR HIGHLIGHTS OF COMPANIES ACT (CA) 2013:

Strengthening Women Contributions through Board Room:

The CA2013 stipulates appointment of at least one woman Director on the Board of the prescribed class of Companies so as to widen the talent pool enabling big Corporate to benefit from diversified backgrounds with different viewpoints.

There is a bias to keep board meetings "peaceful" and "happy", says Ameera Shah, CEO of Metropolis Healthcare. Shah, a director in many Indian and global companies, agrees there is an "alpha dog" problem in boardrooms in India. This prevents difficult topics or differing views from being heard. Women directors become hesitant and often raise issues by asking questions rather than making strong statements. **

The boards of directors of Indian companies are possibly one of the last bastions of male domination in the country's business landscape. Directors often deferred to the most powerful man in the corporate boardroom and coteries could easily shut down dissenting voices. Women board members, who were mostly relatives of the powers that be, usually remained silent. This institution, however, has now been shaken up.

Regulatory push has made it mandatory for companies to have at least one independent woman director on boards. While most of the top 1,000 listed companies have complied with the directive from the Securities and Exchange Board of India (SEBI), boards still have a long way to go before they become more inclusive. Self-made billionaire and founder chairman of Biocon, Kiran Mazumdar-Shaw, recounts her experience of being a board member of a company that was dealing with a sexual harassment complains.

The men on the board, she says, described the complaint as "silly", "rubbish" or "an exaggeration". Mazumdar-Shaw says it took her, a woman director, to object to this "flippant" approach, put her foot Men often show an "authoritarian" attitude and a "command and control" approach in situations that need a little "consultative reach-out" for resolution, Mazumdar-Shaw says. Many senior women directors echo her views, and add that walking into a boardroom as the sole woman independent director can.

***:
https://economictimes.indiatimes.com/news/company/corporate-trends/the-push-to-appoint-women-directors-has-brought-diversity-to-an-all-boys-club/articleshow/74034033.cms?utm_source=contentofint&utm_medium=text&utm_campaign=cppst

Corporate Social Responsibility:

The CA2013 stipulates certain class of Companies to spend a certain amount of money every year on activities/initiatives reflecting Corporate Social Responsibility. There may be difficulties in implementing in the initial years,but this measure would help in improving the Under-privileged & backward sections of Society and the Corporate would in fact gain in terms of their reputation and image in the Society.

Corporate Social Responsibility refers to the management is a management model according to which business firms take care of the society and environment as their social responsibility. The society pay the price in terms of pollution and other difficulties for business to run smoothly. Even the human society suffered with a number of new diseases because of the environmental changes coming because of the industrial pollution. However, in the present era companies are using as most of a business strategy to take competitive advantage over others as well as to enhance the profit to the companies. A properly executed CSR concept can result as huge competitive advantages, such as better access to capital and markets, boosted sales and profits, operational cost reserves, enhanced productivity and quality, competent
can be defined as a Company's sense of responsibility towards the community and environment (both ecological and social) in which it operates. Companies can fulfil this responsibility through waste and pollution reduction processes, by contributing educational and social programs, by being environmentally friendly and by undertaking activities of similar nature. CSR is not charity or mere donations. CSR is a way of conducting business, by which corporate entities visibly contribute to the social good. Socially responsible companies do not limit themselves to using resources to engage in activities that increase only their profits. They use CSR to integrate economic, environmental and social objectives with the company's operations and growth. CSR is said to increase reputation of a company's brand among its customers and society.

The Companies Act, 2013 has formulated Section 135, Companies (Corporate Social Responsibility) Rules, 2014 and Schedule VII which prescribes mandatory provisions for Companies to fulfil their CSR. This article aims to analyse these provisions (including all the amendments therein).

Applicability of CSR Provisions:

On every Company including its holding or subsidiary having:

Net worth of Rs. 500 Crore or more, or
Turnover of Rs. 1000 crore or more, or
Net Profit of Rs. 5 crore or more
during the immediately preceding financial year

A foreign company having its branch office or project office in India, which fulfills the criteria specified above

However, if a company ceases to meet the above criteria for 3 consecutive financial years then it is not required to comply with CSR Provisions till such time it meets the specified criteria.

"The Companies Act is well crafted; the CSR clause urges corporates to go beyond the spirit of the Act and I believe corporate houses and NGOs will find the space within the Act to support projects to bring about a substantial social change. Corporates today can play a huge role in strengthening the capacity of the NGOs, governance through knowledge sharing, technical partnerships much like business incubators that we see today" **

** Mamta Saikia
COO, Bharti Foundation

CSR amendments under the Companies (Amendment) Act, 2019

Until now, if a company was unable to fully spend its CSR funds in a given year, it could carry the amount forward and spend it in the next fiscal, in addition to the money allotted for that year.

The CSR amendments introduced under the Act now require companies to deposit the unspent CSR funds into a fund prescribed under Schedule VII of the Act within the end of the fiscal year. This amount must be utilized within three years from the date of transfer, failing which the fund must be deposited in to one of the specified funds.

The new law prescribes for a monetary penalty as well as imprisonment in case of non-compliance. The penalty ranges from INR 50,000 (US$700) to INR 2.5 million (US$35,000) whereas the defaulting officer of the company may be liable to imprisonment for up to three years, or a fine up to INR 500,000 (US $7,023), or both.

The government, however, is reviewing these rules after the industry objected to the strict provisions, especially with respect to the jail terms for CSR violations, and is yet to operationalize them.

Moil Ltd. v. CIT (2017) 81 taxmann.com 420 (Bombay)

wherein it has been observed as under:-

On a perusal of the orders passed by the Authorities, it appears that before the assessment order was passed, a notice was served on the assessee under Section 142 (1) of the Act and 20 queries pertaining to different heads were made therein. The ninth query in the notice under Section 142 (1) of the Act pertains to the expenditure for the (20 of 23) [ITA-114/2015] Corporate Social Responsibility. By the said query, the assessee was directed to give a detailed note of expenditure for the Corporate Social Responsibility along with bifurcation of the expenses under different heads. An exhaustive reply was submitted by the assessee to the notice under Section 142 (1) of the Act. In paragraph 8 of the reply, the assessee gave the detailed note pertaining to the expenditure for the Corporate Social Responsibility under different heads that runs into several pages. The heads under which the expenses were made towards the Corporate Social Responsibility were specifically mentioned as health, environment, sports, education etc. and for each of the different heads, particulars were given in respect of every minor or major expenses. A detailed note on the expenditure on the Corporate Social Responsibility claim was given in paragraph 8 which runs into more than five pages. It is not disputed that the appellant - assessee is a Government of India undertaking and the Government has a control over the expenses of the undertaking. It is pertinent to note that during the previous assessment years, similar claims were made by the assessee - Company and the assessment orders allowing the claims have attained

finality. We have minutely perused the assessment order. The claims for deductions were made by the assessee at least under 20 heads and queries were made in the notice under Section 142 (1) of the Act to the assessee in respect of nearly all of them. We, however, find from the assessment order that the Assessing Officer has dealt with nearly nine claims of deductions. These claims have been specifically mentioned in the assessment order and they have been discussed therein because the Assessing Officer appears to have disallowed those claims either partially or totally. In respect of the claim for the Corporate Social Responsibility and some other claims that were allowed by the Assessing Officer, the Assessing Officer has not made a specific reference in the assessment order. It is apparent from the assessment order that the Assessing Officer has expressed in detail about the claims that were disallowable. Where the claims were allowable, as we find from the reading of the assessment order, the Assessing Officer has not referred to those claims. The Corporate Social Responsibility claim is one of them. It is apparent from the notice under Section 142 (1) of the Act that a specific query in (21 of 23) [ITA-114/2015] regard to the claim pertaining to the Corporate Social Responsibility was made and a detailed note after giving bifurcation of the expenses under different heads was sought. We have perused the response in respect of this query which is exhaustive. We find that the assessee has given the details, as are sought under query No. 9 in the notice under Section 142 (1) of the Act. If that is so, the judgments, reported in (2015) 372 ITR 303 (Bom.) and (2016) 138 DTR 81 (Bom.) and on which the learned Counsel for the assessee has placed great reliance would come into play. It is held in the judgments referred to herein above by relying on the judgment in the case of Idea Cellular Ltd. (Supra) that if a query is raised during the assessment proceedings and the query is responded to by the assessee, the mere fact that the query is not dealt with in the assessment order would not lead to a conclusion that no mind has been applied to it. In the case of Fine Jewellery (India) Ltd. (Supra) this Court found that from the nature of the expenditure as explained by the assessee in that case the Assessing Officer took a possible view and therefore, it was not a case where the provisions of Section 263 of the Act could have been resorted to. Considering the explanation of the assessee in this case, we are also of the view that the Assessing Officer had taken a possible view. In the case of Nirav Modi (Supra) this Court held that the Tribunal was justified in that case in cancelling the order under Section 263 of the Act as the assessee had responded to the query made to it during the assessment proceedings and merely because the assessment order did not mention the same, it would not lead to a conclusion that the Assessing Officer had not applied his mind to the case. In the instant case, we find that the Assessing Officer has applied his mind to the claims made by the assessee and wherever the claims were disallowable they have been discussed in that assessment order and there is no discussion or reference in respect of the claims that were allowed. In view of the law laid down in the judgments in the case of Fine Jewellery (India) Ltd. (Supra) and Nirav Modi (Supra) it would be necessary to hold that in the circumstances of the case, it cannot be said that merely because the Assessing Officer had not specifically mentioned about the claim in respect of the Corporate Social Responsibility, the Assessing Officer had passed the (22 of 23) [ITA-114/2015] assessment order without making any enquiry in respect of the allowability of the claim of Corporate Social Responsibility. In our view, the provisions of Section 263 of the Act could not have been invoked by the Commissioner of Income Tax in the circumstances of this case. The Tribunal was not justified in holding that the query under Section 142 (1) of the Act was very general in nature and the reply of the assessee was also very general in nature. In our considered view, the query pertaining to Corporate Social Responsibility was exhaustively answered and the appellant - assessee had provided the data pertaining to the expenditure under each head of the claim in respect of Corporate

Social Responsibility, in detail. The Tribunal was not justified in holding that the reply/explanation of the assessee was not elaborate enough to decide whether the expenditure claim was admissible under the provisions of the Income Tax Act. The Assessing Officer is not expected to raise more queries, if the Assessing Officer is satisfied about the admissibility of claim on the basis of the material and the details supplied. In the facts and circumstances of the case, we answer the question of law in the negative and against the revenue."

Vigil Mechanism(Whistle-blowing)

The term "whistle-blowing" originated from the practice of the British policemen who blew their whistles, whenever they witnessed the commission of a crime and wanted the public at large to take notice of such committee.

On a corporate note, whistleblowing means calling the attention of the top management to wrongdoings and frauds occurring within an organization. The term is now being heard more than ever before, as the media, corporates and the public are now becoming increasingly aware of the concept, but unfortunately up till the New Companies Act, 2013, there were no safeguards provided to a whistleblower.

Now, it is pertinent to note that under Section-177(9)of the New Companies Act, it has been made mandatory for all listed companies or such class of companies to establish a vigil mechanism for directors and employees to report genuine concerns, wrongdoings in a manner as may be prescribed.

"Most frauds result in some form of business disruption as well as reputation and financial losses. Whistleblowing is still at a nascent stage in India and most Indian companies do not use it as an effective tool against fraud."[viii]Thus, it is of utmost importance that Indian corporates introduce such a mechanism to avoid any such losses in the future.

As with other new provisions, The vigil mechanism to comes across as a half-hearted attempt as it has major lacunas. The Section does not define 'genuine concerns' but going by global practices, vigil mechanisms normally have a wide scope ranging from conflict of interest to financial reporting. Also, generally it has been seen that it is the former employees of a company who end up taking the role of whistleblowers but there is no safeguard provided to them under Section 177(9) of the New Act.

Therefore, with ambigious or no definitions, it leaves scope for the company to makes the vigil mechanism function at their suitability and take up grievances which conveniently come under their purview.

Adding to the criticism, the draft rules do not specify the activities of the audit committee. Surely, one cannot expect the audit committee to receive calls or emails containing concerns. In other countries, the leading practice is to outsource such activity to a service provider for reasons of confidentiality, objectivity and the perceived 'low-end/ mechanical' nature of these tasks among others.

The same holds for preliminary evaluation, investigation, corrective action and reporting, which cannot possibly be handled by the audit committee for all the genuine concerns received by it.

*ASSOCHAM and Ernst & Young, Whistle-blowing not used often by corporates for fraud prevention, says ASSOCHAM-E&Y study (Press Release), August 05, 2013

National Company Law Tribunal:

The CA2013 introduced National Company Law Tribunal and the National Company Law Appellate Tribunal to replace the Company Law Board and Board for Industrial and Financial Reconstruction. They would relieve the Courts of their burden while simultaneously providing specialized justice.
With the start of June, came a pleasant surprise.

In the evening of 1st June 2016, National Company Law Tribunal and National Company Law Appellate Tribunal were finally constituted by the Central Government. NCLT has already started operating in Delhi and it is quite likely that by next month many of the other benches will start. The first class action case is filed in Mumbai and thus, the action in NCLT begins. This article tries to delve into the concept, nature and scope of powers of NCLT.

Background of NCLT

NCLT was conceptualized by Eradi Committee. It was initially introduced in Companies Act, 1956 in 2002 but the provisions of Companies (Second Amendment) Act, 2002 were never notified as they got mired in litigation surrounding constitutionality of NCLT. 2013 Act was enacted and the concept of NCLT was retained. However, the powers and functions of NCLT under 1956 Act and 2013 Act are different. The constitutionality of NCLT related provisions were again challenged and this case was finally decided in May 2015. The Apex Court upheld the constitutionality of the concept of NCLT but some of the provisions on constitution and selection process were found defective and unconstitutional.

Powers vested in NCLT

Some of the important powers that are presently vested with NCLT are as follows:

1. Class Action:

Protection of the int of various stakeholders, especially non-promoter shareholders and depositors, has always been the concern of company law. There were several frauds and improprieties that were noticed where the key losers were the shareholders and depositors. The shareholders who invested in listed companies saw their inv.s and savings drying up when the companies that they invested in cheated the investors.

The Companies Act, 2013 has provided a very good combination of remedies where the offender will be punished and the people who are involved (whether it is the company or directors or auditor or experts or consultants) will be liable even for a civil action (namely

class action), wherein they have to compensate the shareholders and depositors for the losses caused to them on account of the fraudulent practices or improprieties.

A class action is a procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or "class". It is in the nature of a representative suit where the int of a class is represented by a few of them. A huge number of geographically dispersed shareholders/depositors are affected by the wrongdoings. It is a useful tool where a few may sue for the benefit of the whole or where the parties form a part of a voluntary association for public or private purposes and may be fairly supposed to represent the rights and ints of the whole.

Section 245 has been introduced in the new company law to provide relief to the investors against a large set of wrongful actions committed by the company management or other consultants and advisors who are associated with the company.

Class action can be filed against any type of companies, whether in the public sector or in the private. It can be filed against any company which is incorporated under the Companies Act, 2013 or any previous Companies Act. The Act provides only one exemption i.e. banking companies.

2. Deregistration of Companies:

The procedural errors at the time of registration can now be questioned at any time. The Tribunal is empowered to take several steps, including cancellation of registration and dissolving the company. The Tribunal can even declare the liability of members unlimited. Sec 7(7) provides this new way for de- registration of companies in certain circumstances when there is registration of companies is obtained in an illegal or wrongful manner. Deregistration is a remedy that is distinct from winding up and striking off.

3. Oppression and Mismanagement:

The remedy of oppression and mismanagement is retained in 2013 Act. The nature of this remedy has however changed to certain extent and it needs to be seen in light of the changes made to the Companies Act, 2013. The 2013 Act has reset the bar for oppression to a little lower level but has set the bar of mismanagement a little higher by applying the test "winding up on just and equitable grounds" even to mismanagement matters. The Act permits dilution of the eligibility criteria with the permission of Tribunal, where a member below the eligibility criteria can apply in deserving cases.

Mohanlal Ganpatram vs Shri Sayaji Jubilee Cotton And ... on 18 February 1964

Showing the contexts in which oppression and mismanagement appears in the document
Change context size Current
28. Sections 397 and 398 are part of a fascicles of sections commencing from section 397 and ending with section 407 and this fascicle of sections occurs in section A dealing with powers of court under Chapter VI headed "Prevention of oppression and mismanagement". Under section 397 any members of a company who complain that the affairs of the company are being conducted in a manner oppressive to any member or members including any one or more of themselves, may petition the court which, if satisfied that the company's affairs are being conducted in a manner oppressive to any member or members and that the facts justify the making of a winding-up order on the ground that it is just and equitable to do so but that this would unfairly prejudice such member or members, may make such order as it thinks fir with a view to bringing to an end the matters complained of. This section corresponds to section 210 of the English Companies Act, 1948. Section 398 considerably enlarges the scope of the remedy by providing that any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial t the interests of the company or that a material change has taken place in the management or control of the company and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interests of the company, may apply to the court and the court may, if it is of the opinion that the affairs of the company are being conducted 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 make such order as it thinks fir with a view to bringing to an end or preventing the matters complained of or apprehended. It is obvious that this remedy provided by section 398 is of a much wider nature than the remedy under section 397, since unlike the remedy under section 397, it is not limited by the requirement that the facts must be such as justify the making of the winding up order against the company on the ground that it is just and equitable to do so. The question of construction which arises for determination on these provisions is as to what the extent of the power of the court under is sections 397 or 398. Does the power of the court extend to the making of an order, setting aside or interfering with past and concluded transactions between a company and a third party which are no longer continuing wrongs or is the power of the court confined to the making of an order preventing future oppression or mismanagement ? Mr. S.B. Vakil, learned advocate appearing on behalf of the petitioners, pleaded for the former construction on the ground that such construction would enlarge the power of the court rather than limit it and in support of this plea he relied on the well-known rule of interpretation that in the case of provisions of a remedial nature, which sections 397 and 398 undoubtedly were, the construction to be made should be such as will suppress the mischief and advance the remedy and add force and life to the cure and remedy according to the true intent of the makers of the Act, pro bono publico. Now Mr. S.B. Vakil is certainly right in his submission that sections 397 and 398 being designed to suppress an acknowledge mischief, they should receive liberal interpretation and the court should give such construction as will advance the remedy, but even applying this principle of interpretation, it is not possible to accept the construction contended for on behalf of the petitioners. The reasons are as follows :

29. Prior to the enactment of the Companies Act, 1956, the statute relating to companies was the Indian Companies Act, 1913. There was in the Indian Companies Act, 1913, section 153C which corresponded to sections 397 and 398 of the Companies Act, 1956. This section was introduced in the Indian Companies Act, 1913, by Act LII of 1951 following the enactment of section 210 in the English Companies Act, 1948. The genesis of the provisions contained in section 397 and 398 of the Companies Act, 1956, is therefore, to be found in section 210 of the English Companies Act, 1948. Now the position which obtained prior to the enactment of section 210 of the English Companies Act, 1948, was that even if the affairs of a company were being conducted in a manner oppressive to some part of the shareholders or in a manner prejudicial to the interests of the company, the aggrieved shareholders had no effective remedy to put an end to such conduct, for unless the case fell within any of the three recognized exceptions to the rule in Foss v. Harbottle (1) (1843) 2 Hare 461., the court had not jurisdiction to interfere with the internal management of the company and even in a case falling within any of the three recognized exceptions to the rule in Foss v. Harbottle (1) (1843) 2 Hare 461., all that the aggrieved shareholders could do was to challenge an act already done by the controlling shareholders as part of such conduct and they could not take any effective steps to prevent the continuance of such conduct. The only remedy which the aggrieved shareholders had was just and equitable to do so. That remedy was however totally inadequate for it meant killing the company for the purpose of putting an end to the oppression and mismanagement. But killing the company would be a singularly clumsy method of ending oppression and mismanagement and such a course might well turn out to be against the interests of the minority shareholders. The liquidation of the company may result in the sale of its asset at break-up value which may be small and the minority who, urged by the oppression of the majority, petitions for a winding up order may in effect play its opponent's game, for the only available purchaser of the assets of the company may be the very majority whose oppression has driven the minority to seek redress. Hence, the Cohen Committee recommended an alternative and less drastic expedient for bringing to an end oppressive conduct on the part of those in control of the company and this expedient is now embodied in section 210 of the English Companies Act, 1948. Following the enactment of this section the legislature introduced section 153C in the Indian Companies Act, 1913, providing an alternative remedy for putting an end to oppression or mismanagement on the part of the controlling shareholders. The remedy given by section 153C was a more effective and less drastic remedy then the remedy of winding up for if there was oppression or mismanagement, the aggrieved shareholders could, instead of applying for winding up the company in order to put an end to such oppression or mismanagement, apply for relief under the section and the court could make such order as it thought necessary with a view to putting an end to such oppression or mismanagement and preventing its recurrence. When the Companies Act, 1956, was enacted, what was originally section 153C was split up into sections 397 and 398 and the scope of the remedy was expanded by removing in cases covered by section 398 the requirement that the aggrieved shareholders must make out a case for winding up under the just and equitable clause before they can apply for relief under that section. The object and purpose of the remedy, however, remained the same, namely, to curse the mischief of oppression or mismanagement on the part of controlling shareholders by bringing to an end such oppression or mismanagement so that it does not continue in future. The remedy was intended to put an end to a continuing state of affairs and not to afford compensation to the aggrieved shareholders in respect of acts already done which were no longer continuing wrongs. It is in the light of this background that the principle of interpretation relied on by

Mr. S.B. Vakil must be applied and applying that principle of interpretation the widest power may be inferred for the court to interfere in the internal management of a company with a view of putting an end to oppression or mismanagement on the part of controlling shareholders so as to advance the remedy and suppress the mischief. But no power, I am afraid, can be inferred by the application of that principle of interpretation to set aside or interfere with past and concluded transactions between a company and third parties which are no longer continuing wrongs, unless the sections by use of clear and unambiguous language confer such power on the court.

30. During to sections 397 and 398, I find that the language of these sections also far from conferring any power on the court to set aside or interfere with past and concluded transactions between a company and third parties which are no longer continuing wrongs, confines the power of the court to making an order for the purpose of putting an end to oppression or mismanagement on the part of controlling shareholders. It is undoubtedly true that the power of the court under sections 397 and 398 is very wide-- it is conferred in terms of the widest amplitude--and the court and make such order as it thinks fit, but this power is conditioned by the purpose for which it can be exercised, namely, "with a view to bringing to an end the matters complained of" in a case under section 397 and "with a view to bringing to an end or preventing the matters complained of or apprehended" in a case under section 398. These words indicate the confines within which the power of the court under sections 397 and 398 must operate. Now what are these confines ? The answer is clear from the language of sections 397 and 398. The remedy under section 397 can be invoked only when the affairs of the company are being conducted in a manner oppressive to a shareholders or shareholders and similarly the remedy under section 398 can be invoked only when the affairs of the company are being conducted in a manner prejudicial to the interests on the company. Of course when I say this I am referred only to the first part of section 398 and leaving out of consideration the second part to which I shall refer a little later. Sections 397 and 398 thus clearly postulate that there must be at the date of the application a continuing course of conduct of the affairs of the company which is oppressive to any shareholder or shareholders or prejudicial to the interests of the company and it is this course of oppressive or prejudicial conduct which would form the subject-matter of the complained in the application. Now the purpose for which an order can be made under sections 397 and 398 being to bring to an end the matters complained of and the matters complained of in an application under these sections being a course of conduct on the part of controlling shareholders in the management of the affairs of the company which is oppressive to any shareholder or shareholders or prejudicial to the interests of the company, it is clear that an order can be made under these sections only for the purpose of bringing to an end such course of oppressive or prejudicial conduct, that is, for the purpose of putting an end to oppression or mismanagement on the part of controlling shareholders so that there may not be in future such oppression or mismanagement. The language of sections 397 and 398 leaves no doubt as to the true intendment of the legislature and it is transparent that the remedy provided by these sections is of a preventive nature so as to bring to an end oppression or mismanagement on the part of controlling shareholders and not to allow its continuance to the detriment of the aggrieved shareholders or the company. The remedy is not intend to enable the aggrieved shareholders to set at naught what has already been done by controlling shareholders in the management of the affairs of the company. If such were the intention of the legislature, which as I will presently show it could never have been, the language of sections 397 and 398 would have been different and the legislature would not have confined the power of the court by limiting the purpose for which

it can be exercised under the sections. That the remedy provided by sections 397 and 398 is essentially preventive in character is also borne out by the second part of section 398 which applies when a material change has taken place in the management or control of a company and by reason of such change it is likely that the affairs of the company would be conducted in a manner prejudicial to the interests of the company and empowers the court in such a case to make an order with a view to preventing the matter apprehended, namely, the prejudicial conduct of the affairs of the company, so that such prejudicial conduct may not at all result from such change and may be totally prevented. Whereas the first part of section 398 applies to a case where the affairs of the company are being conducted in a manner prejudicial to the interests of the company and it is required to put an end to such existing course of prejudicial conduct, the second part of the second applies where there is not existing course of prejudicial conduct but prejudicial conduct is apprehended by reason of a material change in the management or control of the company and what is, therefore, required is the presentation of occurrence of such prejudicial conduct. These then are the confines within which the remedy provided by sections 397 and 398 operates. But it must be remembered that within these confines the remedy is a very potent and effective remedy, since the power it confers on the court is extremely wide and the court can pass such order as it thinks necessary for the purpose of putting an end to oppression or mismanagement on the part of controlling shareholders. The nature of the order would depend on the state of affairs prevailing in the company and the nature of the restrictions required to put an end to such state of affairs. The necessity of interference under these section may arise in an infinite variety of circumstances and the legislature has, therefore, left the discretion of the court unfettered in the matter of making an appropriate order. Such power can, however, be exercised by the court only for the purpose of bringing to an end oppressive or prejudicial conduct in the management of the affairs of the company.

31. This, in my opinion, is the true import of sections 397 and 398 and it is amply supported by the heading under which the sections occur. It is now well settled that heading of this kind can be referred to for the purpose of construction of the sections ranged under the headings. In Inglis v. Robertson (1) [1898] A.C. 616., Lord Herschell, called upon to construe section 3 of the Factors Act, 1889, relied upon the fact that the section appeared in a group of sections headed "Dispositions by Mercantile Agents" and after referring to the headings of different parts of the Act, observed: "These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them." Lord Collins also said much to the same effect in Toronto Corporation v. Toronto Railway (1) [1907] A.C. 315, 324., when he observed : "This clause is the last of the fasciculus, of which the heading is `Track, & C., and Railways' and, as was held in Hammersmith Ry. Co. v. Brand (2) (1869) L.R. 4 H.L. 171., such a heading is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation." These observations of Lord Herschell and Lord Collins were relied upon by the Court of Appeal in a recent decision in Qualter Hall & Company v. Board of Trade (3) [1961] 3 W.L.R. 825 ; [1962] 32 Comp. Cas. 591. It is, therefore, clear that the heading under which a section occurs can be referred to as throwing light on the interpretation of the section unless the language of the section is plainly contrary to such interpretation. The fasciculus of sections comprising sections 397 and 398 occurs in a chapter headed "Prevention of oppression and mismanagement", the sub-heading being "Powers of Court". The heading read with the sub- heading clearly shows that sections 397 and 398 deal with powers of courts for prevention of oppression and mismanagement in the affairs of the company and that the remedy given by these sections

is, therefore, of a preventive nature intended to prevent occurrence or continuance of oppression or mismanagement in the affairs of the company and is not intended to set at naught what has already been done by controlling shareholders in the course of such oppression or mismanagement which is past and concluded and no longer a continuing wrong.

4. Refusal to Transfer shares:

The power to hear grievance of refusal of companies to transfer securities and rectification of register of members under Section 58 and 59 of the new Act were already notified and were being taken up by CLB. Now. The same are transferred to NCLT. The remedy for refusal to transfer or transmission were restricted only to shares and debentures under 1956 Act. The provisions for refusal to transfer and transmit under Companies Act, 2013 Act extends to all securities.

5. Deposits:

Chapter V dealing with deposits was notified in phases in 2014 and powers to deal with the cases under it were assigned in CLB. Now the said powers will be vested in NCLT. The law on deposits is quite distinct under the Companies Act, 2013 as compared to the Companies Act, 1956. The provision for deposits under 2013 Act were already notified. Aggrieved depositors also have the remedy of class actions for seeking redressal for the acts/omissions of the company which hurt their rights as depositors.

6. Reopening of Accounts & Revision of Financial Statements:

Several instances of falsification of books of accounts were noticed under the Companies Act, 1956. To counter this menace, several measures have been provided in the Companies Act, 2013. One such measure is the insertion of Section 130 and 131 read with sec 447, 448 in the new Act. Section 130 read with sec 131 are newly inserted provisions that prohibit the company from suo motu opening its accounts or revising its financial statements. This can be done only in the manner provided in the Act. Section 130 and 131 provides the instances where financial statements can be revised/reopened. Section 130 is mandatory, where the Tribunal or Court may direct the company to reopen its accounts when certain circumstances are shown. Section 131 allows company to revise its financial statement but do not permit reopening of accounts. The company can itself approach the Tribunal under sec 131, through its director for revision of its financial statement.

7. Tribunal Ordered Investigations:

Chapter XIV provides several powers to the Tribunal in connection with investigations. The most important powers that are conferred to the Tribunal are:

a) power to order investigation: Under the Companies Act, 2013, only 100 members (as against 200 members required under the Companies Act, 1956) are required to apply for an investigation into the affairs of a company. Further, the power to apply for an investigation is given to any person who is able to convince the Tribunal that circumstances exist for initiating investigation proceedings. An investigation can be conducted even abroad.

Provisions are made to take as well as provide assistance to investigation agencies and courts of other countries with respect to investigation proceedings.

b) power to investigate into the ownership of the company

c) power to impose restriction on securities: The restriction earlier could be imposed only on shares. Now, the Tribunal can impose restrictions on any security of the company.

d) power to freeze assets of the company: The Tribunal is given the power to freeze assets of the company which can not only be used when the company is under investigation, but can also be initiated at the insistence of a wide variety of persons in certain situations.

8. Conversion of public company into private company

Sections 13, 14, 15 and 18 of the Companies Act, 2013 read with rules regulate the conversion of public limited company into private limited company. It requires approval from the NCLT. Approval of the Tribunal is required for such conversion. The Tribunal may at its discretion impose certain conditions subject to which approvals may be granted (sec 459).

Cyrus Investments Pvt. Ltd. & Anr vs Tata Sons Ltd. & Ors on 6 January 2020

Showing the contexts in which Conversion of public company into private company companies act 2013 appears in the document

186. As regards the conversion of the company from 'Public Company' to 'Private Company', as action taken by the Registrar of Companies is against the provisions of Section 14 of the Companies Act, 2013 and 'prejudicial' and 'oppressive' to the minority members and depositors etc., conversion of the 'Tata Sons Limited' from 'Public Company' to 'Private Company' by Registrar of Companies, is declared illegal.
187. In view of the findings aforesaid, we pass the following orders and directions:

(i) The proceedings of the sixth meeting of the Board of Directors of 'Tata Sons Limited' held on Monday, 24th October, 2016 so far as it relates to removal and other actions taken against Mr. Cyrus Pallonji Mistry (11th Respondent) is declared illegal and is I.A. Nos. 4331 & 4336 of 2019 IN Company Appeal (AT) Nos. 254 & 268 of 2018 set aside. In the result, Mr. Cyrus Pallonji Mistry (11th Respondent) is restored to his original position as Executive Chairman of 'Tata Sons Limited' and consequently as Director of the 'Tata Companies' for rest of the tenure.

9. Tribunal Convened AGM:

General meetings are required to assess the opinion of shareholders from time to time. The Act mandatorily requires one meeting to be called, which is termed as the ‘‘annual general meeting’’ or ‘AGM’. Any other general meeting is termed as ‘‘extra ordinary general meeting’’ or ‘EOGM’. If the AGM or EOGM cannot be held, called or convened in the manner provided under the Act or the Rules by the Board or the Member due to certain extraordinary circumstances, then the Tribunal is empowered under Section 97 and 98 of 2013 Act to convene general meetings under the Companies Act, 2013.

Limit on Max Partners:

The max number of persons/partners in any association/partnership may be up to such number as may be prescribed but not exceeding one hundred. This restriction will not apply to an association or partnership, constituted by professionals like lawyer, chartered accountants, company secretaries, etc. who are governed by their special laws.

One Person Company:

The CA2013 provides new form of private company, i.e., one person company is introduced that may have only one director and one shareholder. The CA1956 requires min two shareholders and two directors in case of a private company.

It's a Private Company having only one Member and at least One Director. This concept is already prevalent in the Europe, USA, China, Singapore and in several countries in the Gulf region. It was first recommended in India by an expert committee (headed by Dr. J.J. Irani) in 2005. The one basic pre-requisite to incorporate an OPC is that the only natural-born citizens of India, including small businessmen, entrepreneurs, artisans, weavers or traders among others can take advantage of the ‘One Person Company’ (OPC) concept outlined in the new Companies Act. The OPC shall have min paid up capital of INR 1 Lac and shall have no compulsion to hold AGM (Annual General meeting).

Amarjit Singh Sidhu vs State Of Punjab & Ors on 9 June, 2016

"Clause 2.14

i) It is necessary for the applicant for this licence to have an authority/consent letter from the manufacturing unit.

ii) Any manufacturing company cannot issue the authority/consent letter to more than one person/company/firm/organization.

iii) The manufacturing company will give this consent letter to that person/company/firm/organization who is at Arms Length Distance from the manufacturing company provided there is no promoter, director, partner in the manufacturing company or there is no holding, subsidiary, closely held company, fully/partially owned/financed/managed firm/company.

(b) The licensee shall obtain consent/authority letter from concerned manufacturing unit/company;

(c) The manufacturing unit/company shall not give/issue authority/consent letter to more than one person/company/firm/institution;

(d) The manufacturing unit/company shall issue consent letter to such person/company/firm/institution who/which is at arms length distance from the manufacturing unit/company i.e. he should not be the promoter/Director/partner etc. in the liquor manufacturing unit/company or not its holding, subsidiary, closely held company fully/partially 31 of 56 owned/financed / managed firm/company; (Emphasis supplied).

. Whether Clause 2.14 of the Excise Policy for the year 2016-17 is valid or not, it would be imperative to extract the relevant portion of Clause 2.14 as contained therein:-

"Clause 2.14

It is necessary for the applicant for this licence to have an authority/consent letter from the manufacturing unit.

Any manufacturing company cannot issue the authority/consent letter to more than one person/company/firm/organization.

It is proposed that the licence fees for the L-1A (IMFL) for the year 2016-17 is fixed at ` 2.50 crores and it is proposed to have the security amount of this licence fixed at ` 25 lacs."

28. The grievance of the petitioners is relating to sub clause (ii) as noticed above whereby any manufacturing company has been authorized to issue the authority/consent letter to one person/company/firm/organization for the issuance of license L-1A by the competent authority. According to the petitioners, sub clause (ii) of Clause 2.14 of the Excise Policy for the 42 of 56 year 2016-17 prescribes that the manufacturing company cannot issue the consent letter to more than one person/company/firm/organization, but in the entire policy, no criteria or parameters have been laid down for the manufacturers for issuing the consent letter. Even no parameters or criteria have been laid down for cancellation of the consent/authority letter issued by the manufacturing unit and, therefore, ultra vires.

In the present case, no doubt the Financial Commissioner in exercise of power conferred under Section 59(d) of the Act had amended the category of Licence L-1A by issuing notification dated 23.3.2016 in conformity with the Excise Policy for the year 2016-17. However, sub-clause (ii) of clause 2.14 of the Excise Policy nowhere prescribes the manner or method for the distillery or the competent authority to be adopted for issuing authority/consent letter to one person/company/firm/organization only. It does not satisfy the requirement of being transparent, objective and very importantly gives "Level Playing

Field" to all applicants. The procedure does not eliminate the vices of unfairness, unreasonableness, discrimination, non-transparency, favouritism or nepotism in the award of authority/consent letter to an applicant. Thus, sub clause (ii) to that extent would not satisfy the mandate of reasonableness as enshrined under Articles 14 and 19(1)(g) of The Constitution of India.

Articles of Association-

In the next General Meeting, it is desirable to adopt Table F as standard set of Articles of Association of the Company with relevant changes to suite the requirements of the company. Further, every copy of Memorandum and Articles (MOA) issued to members should contain a copy of all resolutions / agreements that are required to be filed with the Registrar of companies (ROC).

CONTENTS OF ARTICLES

The articles set out the rules and regulations framed by the company for its own working. The articles should contain generally the following matters:

Exclusion wholly or in part of Table F.

Adoption of preliminary contracts.

Number and value of shares.

Issue of preference shares.

Allotment of shares.

Calls on shares.

Lien on shares.

Transfer and transmission of shares.

Nomination.

Forfeiture of shares.

Alteration of capital.

Buy back.

Share certificates.

Dematerialization.

Conversion of shares into stock.

Voting rights and proxies.

Meetings and rules regarding committees.

Directors, their appointment and delegations of powers.

Nominee directors.

Issue of Debentures and stocks.

Audit committee.

Managing director, Whole-time director, Manager, Secretary.

Additional directors.

Seal.

Remuneration of directors.

General meetings.

Directors meetings.

Borrowing powers.

Dividends and reserves.

Accounts and audit.

Winding up.

Indemnity.

Capitalization of reserves.

Utmost caution must be exercised in the preparation of the articles of association of a company. At the same time, certain provisions of the Act are applicable to the company "notwithstanding anything to the contrary in the articles". Therefore, the articles must contain provisions in respect of all matters which are required to be contained therein so as not to hamper the working of the company later.

Actis Consumer Grooming Products ... vs Tigaksha Metallics Private ... on 10 January 2020

Showing the contexts in which **Articles of Association- company act 2013** appears in the document

Vivek Singh Thakur, Judge Instant petition has been filed, under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act' for short), against the alleged Arb.Case No.8 of 2018 threatened and apprehended illegal actions by respondents No.1 to 6, in violation of:

(a) the Companies Act, 2013;

(b) the Articles of Association; and

(c) Subscription and .

9. Petitioner, disputing the manner of removal of .

respondent No.7 and respondent No.8, and appointment of respondents No.4 to 6 as Directors of respondent No.1 and also questioning right of respondent No.2 (RM) to do so without consent of petitioner, in violation of: (a) the Companies Act, 2013; (b) the Articles of Association; and (c) Subscription and Shareholders' Deed dated November, 4, 2010 (as amended), executed inter alia between the petitioner and respondents No.1 to 3; and also proposed invocation of arbitration under SSD and before making request for arbitration in London Court of International Arbitration ("LCIA" in short), petitioner has preferred present petition under Section 9 of Arbitration Act, seeking interim relief.

Commencement of business –

For all the companies (public/private Company) registered under Companies Act 2013 needs to file the following with the Registrar of Companies (ROC) in order to commence their business –

A declaration by the director in prescribed form stating that the subscribers/ promoters to the memorandum have paid the value of shares agreed to be taken by them

A confirmation that the company has filed a verification of its registered office with the Registrar of companies (ROC)

In the case of a company requiring registration from any sectoral regulators such as RBI, SEBI etc., approval from such regulator shall be required prior to starting the business.

Under Companies Act 2013, the date of incorporation of a company cannot be the date of commencement of business. From the point of commencement of Business companies may be divided into 2 categories:

1. Public and Private Companies not having Share Capital

2. Public and Private Companies having Share Capital

Public and Private Companies not having Share Capital

A private company and a public limited company not having share capital are not required to comply with any other formalities and may commence its business activities immediately after obtaining the certificate of incorporation from the concerned Registrar of Companies.

Public and Private Companies having Share Capital

As per section 11 of Companies Act, 2013, now all newly incorporated Public and Private Companies having Share Capital would be required to obtain certificate of commencement of business from concerned Registrar of Companies before commencing the business or exercise of borrowing powers.

Through this write up we shall discuss another topic i.e. Procedure for commencement of Business under Companies Act, 2013. For statutory provisions related to commencement of Business one should refer the following sources:

1. Section 11 of Companies Act, 2013

2. Rule 24 of Companies (Incorporation) Rules, 2014

"Relevant" Text of Section 11 and Rule 24 are reproduced below for ready reference

Financial Year -

The Companies Act 1956 Act provided companies to elect financial year. The Companies Act 2013 Act eliminates the existing flexibility in having a financial year different than 31 March. The 2013 Act provides that the financial year for all companies should end on 31 March, with certain exceptions approved by the National Company Law Tribunal. Companies should align the financial year to 31 March within two years from 01 April 2014.

Eligibility age to become Managing Director or whole time Director -

The eligibility criteria for the age limit have been revised to 21 years as against the existing requirement of 25 years.

Number of directorships held by an individual -

Section 165 provides that a person cannot have directorships (including alternate directorships) in more than 20 (twenty) companies, including ten (ten) public companies. It provides a transition period of one year from 1 April 2014 to comply with this requirement

Board of Directors and Disqualifications for appointment of director -

The 2013 Act requires that the company shall have a max of 15 (fifteen) directors (earlier it was 12) and appointing more than 15 (fifteen) directors will require sr. by shareholders.

Further, it requires appointment of at least one woman director on the board for prescribed class of companies. It also requires that company should have at least 1 (one) resident director i.e. who has stayed in India for a total period of not less than 182 (hundred and eighty two days) in the previous calendar year.

All existing directors must have Directors Identification Number (DIN) allotted by central government. Directors who already have DIN need not take any action. However, Directors

not having DIN should initiate the process of getting DIN allotted to him and inform the respective companies on which he is a director. The Company, in turn, has to inform the registrar of companies (ROC).

Independent Directors -

The 2013 Act defines the term "Independent Director" . In case of listed companies, one third of the board of directors should be independent directors. There is a transition period of 1 (one) year form 01 April 2014 to comply with this requirement. The 2013 Act also provides additional qualifications/ restrictions for independent directors as compared to the 1956 Act.

Section 150 enables manner of selection of independent directors and maintenance of databank of independent directors and enables their selection out of data bank maintained by a prescribed body

Ratan N. Tata and Ors vs The State Of Maharashtra And Anr on 22 July, 2019

Showing the contexts in which independent directors appears in the document

The roots of the present dispute between the aforesaid parties could be traced back to 24.10.2016 when the Chairman of the Tata Sons Ltd., by name Mr.Cyrus Mistry came to be removed by the Board of Directors of Tata Sons Ltd. In the wake of his removal, the independent Directors of Tata Chemicals Ltd., met at Bombay House on 10.11.2016 to review the recent events and the subsequent media reports which could impact the Management of the business of the company, both on domestic and international front and the meeting was convened to enable the independent Directors to review the situation which had developed on account of removal of the N.S. Kamble page 5 of 83 wp-1238-2019-Tata judgment.doc Chairman of the Tata Sons Ltd. It is this meeting which is core of the dispute between the parties. Both the parties have their own version as to what transpired in the said meeting. However, at present it would be only necessary to refer to the undisputed outcome of the fact that the independent Directors unanimously affirmed their confidence in the Board, it's Chairman and the Management in the conduct of the business. The independent Directors after due discussion which, according to the respondent No.2 was unanimous whereas according to the petitioners it was an attempt on part of the respondent No.2 to galvanize the independent Directors and met with an allegation that he has not conducted himself independently and acted as an interested party. As an outcome of the said meeting dated 10.11.2016, a statement was issued by the independent Directors of Tata Chemicals to the stock exchanges affirming their confidence in the Board, Chairman and the Management of the Tata Chemicals and it also re- assured all the stake holders, Management of the company and its subsidiary where ever located of their full confidence and support. The said statement was issued by one Mr.Rajiv N.S. Kamble page 6 of 83 wp-1238-2019-Tata

judgment.doc Chandan, General Counsel and Company Secretary on behalf of the independent Directors of Tata Chemicals Ltd. It is this conduct of the respondent No.2 which was perceived as unfavourable and prompted the Tata Sons Ltd., which is a shareholder of Tata Chemicals Ltd., to requisition the Board of Directors of Tata Chemicals for convening an Extraordinary General Meeting of its shareholders in the manner prescribed under the law to pass two resolutions. Accordingly, on 10.11.2016 itself the Chief Operating Officer and the Company Secretary of Tata Sons Ltd., i.e. petitioner No.11 issued notice to the Board of Directors of Tata Chemicals Ltd., in its capacity as shareholder of Tata Chemicals Ltd. The Circular Resolution came to be passed by the Board of Directors of Tata Sons Ltd., which included the petitioner Nos.1 to 10 to submit requisition for convening Extraordinary General Meeting of the shareholders of the Tata Chemicals and communication came to be addressed informing that pursuant to Section 100(2)(a) and other applicable provisions of the Companies Act, 2013 and the Rules framed thereunder, a requisition has been forwarded to the holding company for convening an Extraordinary N.S. Kamble page 7 of 83 wp-1238-2019-Tata judgment.doc General Meeting of the shareholders of Tata Chemicals Ltd., to pass two resolutions. Item No.1 related to removal of Mr.Cyrus P. Mistry as Director where as Item No.2 pertain to "Removal of Mr.Nusli Wadia as Director". The similar communications were addressed by Tata Sons Ltd., to the other two holding companies and the Special Notices issued to the Company included the resolution seeking removal of Mr.Nusli Wadia as Director of the Relevant Tata Companies. The resolution which was contemplated to be passed as an ordinary resolution in pursuant to the provisions of section 169 and other provisions of the Companies Act and the Rules was accompanied with a brief background about the conduct of Mr.Nusli Wadia and it is the reflection of this conduct contained in the special notice issued under Section 169(2) read with Section 115 of the Companies Act which is the bone of contention between the parties. According to the petitioners, the narration contained in the Special Notice issued under Section 169(2) read with 115 of the Companies Act by Tata Sons Ltd., was a statutory requirement before taking action of removal of a Director and fall completely within the four corners of the Companies Act N.S. Kamble page 8 of 83 wp-1238-2019-Tata judgment.doc and the Rules framed thereunder, whereas according to the respondent No.2, the said Special Notice containing the allegations is per se defamatory and no due diligence was shown by the petitioner by ascertaining whether the allegations are true or false before issuance of the said Notice containing the imputation. The contention of the respondent No.2 is that this Special Notice contained the defamatory statement and the statement being per se defamatory, the respondent No.2 followed up with the petitioners by asking them to seek legal advise and withdraw the said Special Notice as the same is alleged to be defamatory. But instead of doing the needful, it is the grievance of the respondent No.2 that the notices containing the defamatory material came to be further circulated to the shareholders of the operating companies, again without verification of the statements contained therein and this amounted to an irresponsible behavior. It is in the backdrop of this fact we have heard the submissions advanced on behalf of the petitioners as well as the respondents and we would be making reference to the rival contentions of the respective parties by making reference to the

voluminous N.S. Kamble page 9 of 83 wp-1238-2019-Tata judgment.doc documents placed before us.

8. In support of the petition, we have heard the learned senior counsel Shri.Abhishekh M. Sanghvi. After inviting our attention to the sequence of events, Shri.Sanghvi would submit that by no imagination the provisions of Section 500 of Indian Penal Code can be invoked and applied against the present petitioners. He would submit that the existence of the prima-facie case is a pre-requisite of issuance of process and before exercising power the Magistrate has to satisfy himself, upon due application of mind that there exists sufficient ground for proceeding against the present accused and committing an offence. Shri.Sanghvi would submit that the complaint alleges defamation in respect of the Special Notices issued by the Tata Sons Ltd to the three operating companies promoted by it on 10.11.2016 under the provisions of the Companies Act seeking removal of the independent Director of the Relevant Tata Companies. Shri.Sanghvi has invited our attention to the statutory power contained in Section 169 of the Companies Act N.S. Kamble page 15 of 83 wp-1238-2019-Tata judgment.doc which authorizes the company to remove a director including an independent director by following the procedure set out in the said section. He would submit that Board of Tata Sons took a decision to replace Mr.Cyrus Mistry as its Chairman on 24.10.2016 and the proceedings came to be initiated to remove him from the operating companies and notices came to be issued for removal of Mr.Cyrus Mistry as Director of all the companies in which he was the Director. In this process on 10.11.2016, the meeting of the Tata Chemicals was being held and in the evening, one of the non-executive Director of the Tata Chemicals Mr.Bhaskar Bhat submitted his resignation as Director of the Tata Chemicals and the various events which transpired in the meeting, came to be documented through the affidavits which included the affidavit of Mr.Rajiv Chandan- Company Secretary, Mr.Mukund-Manging Director and Mr.Bhaskar Bhat-Non-executive Director who resigned. This affidavits came to be tendered in suit filed by one Mr.Janak Mathura Das seeking stay of the EGM's of the Tata Companies on account of the resolution proposed for removal of the respondent No.2. Mr.Sanghvi invited our attention to the N.S. Kamble page 16 of 83 wp-1238-2019-Tata judgment.doc affidavit reflecting the conduct of the respondent No.2 in the meeting held on 10.11.2016. Shri.Sanghvi, would submit that in the light of the events that took place on 10.11.2016, Board of Tata Sons in its fiduciary duty as shareholders and promoters of the relevant Tata Companies decided to issue the Special Notices to seek removal of the respondent No.2 along with Mr.Cyrus Mistry. As a part of the Special Notices, according to Shri.Sanghvi, some background material came to be alluded and it was only with an intention to assist the board of the Relevant Tata companies in the deliberation of the request of the requisitioning of the meeting for removal of the respondent No.2. He would submit that the communication of the Tata Sons was a confidential communication in accordance with the provisions of the Companies Act and the only purpose of the said notice was to request the Relevant Tata Companies to requisition meeting of its shareholders and propose resolution at the behest of the promoter company for removal of Mr.Nusli Wadia as an independent director. This was sought to be done strictly in conformity with the mechanism

prescribed in Section 169 of the Companies Act. He would submit that perusal of the N.S. Kamble page 17 of 83 wp-1238-2019-Tata judgment.doc contents of the said notice can by no sense be construed as per se defamatory and rather provisions of the Companies Act contemplate that the notice of the business to be transacted in a meeting should be accompanied with a statement setting out the material fact concerning each item of special business to be transacted in the meeting including the facts or any other information that may enable the members to understand the meaning, scope and implication of the items and to take decision thereon. He would thus submit that the notice contained the relevant background so that the Board of Directors of the relevant companies would have a brief idea of the purpose of holding a meeting. Shri.Sanghvi has also submitted that when the procedure contemplated under Section 169 was sought to be followed, the respondent No.2 actively and consciously consented to the circulation of the Special Notice of the Tata Sons including the background material to the shareholders of the Tata Companies as an annexure to the explanatory statement and that the relevant Tata companies were duty bound to issue notice in terms of the Section 102 of the Companies Act. Shri.Sanghvi would submit N.S. Kamble page 18 of 83 wp-1238-2019-Tata judgment.doc that the sole intention of the Special Notices containing the brief factual material was necessary since the meeting was to be held for removing a director in whom the Tata Sons as shareholder had lost confidence and any such comment made for achieving the objective, in any case cannot constitute the defamation. The learned senior counsel further submits that if it leads to a criminal offence of a defamation, it would have a disastrous effect as those who are expected to take an independent and objective decision in an institution would be stalled in exercise of their duty if such a course is permitted. He would further submit that the power of removal of a person including an independent director is vested in the Board of Directors of the company cannot be stultified through threats of criminal prosecution. Shri.Sanghvi has placed reliance on the judgment of the Hon'ble Apex Court in case of Subramanian Swamy V/s. Union of India, Minstry of Law & Ors.1 to support to his submission that there has to be imputation and it must have been made in the manner as provided in the Section 499 of the Indian Penal Code with the intention to cause harm to the reputation of a person about whom it is made. He 1 (2016-7-SCC-221) N.S. Kamble page 19 of 83 wp-1238-2019-Tata judgment.doc would submit that the said judgment in unequivocal terms has held that the complainant has to show that the accused has intended or had reason to believe that such imputation will harm the reputation of the complainant. He would also place reliance in the judgment of this Court in the matter of Ramchandra Venkataramanan V/s. Shapoorji Pallonji & Company Ltd & Anr.2 where certain yardsticks have been set out to find out whether the statement is defamatory or not and it has been held that the statement has to be read in its entirety and while determining the question whether the statement is defamatory or not, it will have to be ascertained whether the averments in the complaint and the statement made are capable as a matter of law being defamatory. Shri.Sanghvi would submit that if the statutory powers, has been exercised by a company and the process contemplated under statute is followed to achieve the end result which is within the four corners of the statute, then whether the defamation can be attracted. He would submit that when the petitioners as a Board of Directors of the Tata Sons had lost confidence in one of its independent director

and it proceeded to follow the 2 (2019-SSC-Online-Bom-524) N.S. Kamble page 20 of 83 wp-1238-2019-Tata judgment.doc statutory procedure for his removal and circulated the Special Notice giving a brief backdrop of the material, the provisions of Section 499 cannot be attracted in any case. He has also relied upon the judgment of the Hon'ble Apex Court in case of S. Khushboo V/s. Kanniammal & Anr.3 .

In support of the impugned order justifying issuance of the process against the present petitioners, we have heard learned counsel Shri.Abad Ponda. According to Shri.Ponda the statements contained in the Special Notices to which he has exhaustively referred to, are per se defamatory in nature and he would further submit that having regard to the respondent No.2's eminent stature and reputation it was incumbent upon the petitioners before levelling any allegation to ascertain the truthfulness of the same and there ought to have been some care shown on their part to find out whether the allegations are true or false. He would submit that when an independent Director is alleged to be acting in consonance with another, it is a direct affront on his independence and this is no short of questioning his integrity as any independent Director. He would place reliance on the judgment of the Hon'ble Apex N.S. Kamble page 25 of 83 wp-1238-2019-Tata judgment.doc Court in case of Shiv Narayan Laxmi Naryan V/s. State of Maharashtra10 to submit that a conclusion derived by the petitioners that on account of the act of the respondent No.2 as the company is in jeopardy and this has desired effect of harming and tarnishing his reputation. Shri.Ponda is therefore extremely critical about the phraseology used in the Special Notices including the word "Galvanizing independent Directors" and according to him this projects a picture in the eyes of the right thinking persons that the conduct of respondent No.2 is deplorable. Further, the allegation in the Special Notices that the action of the respondent No.2 makes his continuation on the Board untenable and that the principal shareholder have lost confidence in his independence, suitability and bona fides are also nothing but statements attempting to lower his reputation. He would emphasize on the fact that the respondent No.2 was acting as an independent Director and would submit that at no point of time, prior to 10.11.2016, the respondent No.2's independence and integrity has been questioned and doubted. He would further submit 10 1980-2-SCC-465 N.S. Kamble page 26 of 83 wp-1238-2019-Tata judgment.doc that the allegation that he was acting in concert with Mr.Cyrus Mistry is not only per se defamatory but palpably false. He would also invite our attention that in the explanatory statement to the notice convening the Extraordinary General Meeting, it is recorded that "The Board has been informed by the independent Directors individually that they have not been approached by Mr.Nusli Wadia that may be considered as influencing their independence in the Company". He would also rely upon the Minutes of meeting of the independent Directors of the Tata Motors Ltd., held on 14.11.2016 whereas unanimous decision of the independent Director was recorded in the following effect.

Resident Director:

Every Company must have atleast one director who has stayed in India for a total period of 182 days or more in previous calendar year. For existing companies, the compliance need to be made before 31st March 2015.

Loans to director –

The Company cannot advance any kind of loan / guarantee / security to any director, Director of holding company, his / her partner/s, his/ her relative/s, Firm in which he or his relative is partner, private limited in which he is director or member or any bodies corporate whose 25% or more of total voting power or Board of Directors is controlled by him.

Appointment of managing director, whole time director or manager [section 196 of 2013 Act] -

The re-appointment of a managerial person cannot be made earlier than one year before the expiry of the term instead of two years as per the existing provision of section 317 of the 1956 Act. However, the term for which managerial personnel can be appointed remains as five years. Further, the 2013 Act lifts the upper bar for age limit and thus an individual above the age of 70 years can be appointed as key managerial personnel by passing a sr..

Key Managerial Personnel (KMP) –

Companies Act, 2013 (Act) has introduced many new concepts and Key Managerial Personnel is one of them. While the Companies Act, 1956 recognised only Managing Director, Whole Time Director and Manager as the Managerial Personnel, the Companies Act, 2013 has brought in the concept of Key Managerial Personnel which not only covers the traditional roles of managing director and whole time director but also includes some functional figure heads like Chief Financial Officer and Chief Executive Officer etc.

These inclusions are in line with the global trends. "Company Secretary" has also been brought within the ambit of Key Managerial Personnel giving them the long deserved recognition of a Key Managerial Personnel of the Company. Another noteworthy feature of this concept is that it combines the important management roles as a team or a cluster rather than as independent individuals performing their duties in isolation to others

Who IS A KEY MANAGERIAL PERSONNEL?

The definition of the term Key Managerial Personnel is contained in Section 2(51) of the Companies Act, 2013. The said Section states as under:

"key managerial personnel", in relation to a company, means—

(i) the Chief Executive Officer or the managing director or the manager;

(ii) the company secretary;

(iii) the whole-time director;

(iv) the Chief Financial Officer; and

(v) such other officer as may be prescribed;

.

Attending Board Meetings -

As per section 167 of the Act, a Director shall vacate his/her office if he/she absents himself from all the meetings of the Board of Directors held during a period of 12 (twelve months) with or without seeking leave of absence of the Board. Simply speaking, attending at least one Board Meeting by a director in a year is a must else he has to vacate his/her office.

Financial statements –

Financial Statements are now defined under the Act as comprising of the following. All companies (except one person Company, small company and dormant company)are now mandatorily required to maintain the following, which may not include the cash flow statement) –

A balance sheet as at the end of the financial year

A profit and loss account / an income and expenditure account for thefinancial year, as the case may be

Cash flow statement for the financial year

A statement of changes in equity (if applicable)

Any explanatory note annexed to, or forming part of, any document referredto in sub-clause (i) to sub-clause (iv)

Appointment of Statutory Auditors-

Every Listed company can appoint an individual auditor for 5 years and a firm of auditors for 10 years. This period of 5 / 10 years commences from the date of their appointment. Therefore, those companies who have reappointed their statutory auditors for more than 5 / 10 years, have to appoint another auditor in their Annual General Meeting for year 2014.

HIGHLIGHTS OF COMPANIES (AMENDMENT) BILL, 2016

I. Introduction: As part of efforts to address difficulties faced by stakeholders and facilitate the ease of doing business in the country, The Companies (Amendment) Bill, 2016 to further amend the Companies Act, 2013 has been introduced in Lok Sabha on 16th March, 2016 by Hon'ble Minister of Finance, Corporate Affairs and Information and Broadcasting - Shri Arun Jaitley. The Companies (Amendment) Bill, 2016 has been framed on the basis of recommendations of Companies Law Committee (CLC), the report of which was submitted on February 01, 2016. II. Statement of Objects and Reasons: •addressing difficulties in implementation owing to stringent compliance requirements;

•facilitating ease of doing business in order to promote growth with employment;

•harmonisation with accounting standards, the Securities and Exchange Board of India Act, 1992 and the regulations made thereunder, and the Reserve Bank of India Act, 1934 and the regulations made thereunder;

•rectifying omissions and inconsistencies in the Act, and

•carrying out amendments in the provisions relating to qualifications and selection of members of the National Company Law Tribunal and the National Company Law Appellate Tribunal in accordance with the directions of the Supreme Court.

III. Key Highlights: 1.Name reservation/approval- Section 4(5) The period of name reservation is proposed to be reduced to 20 days from sixty days. Accordingly, upon receipt of an application, the Registrar may reserve the name only for a period of 20 days from the date of approval or such other period as may be prescribed.

2.Objects Clause (c) of Sub-Section (1) of Section 4 It is proposed that instead of specific objects in the Memorandum of Association of the Company, the Memorandum may state that the company may engage in any lawful act or activity or business, or any act or activity or business to pursue any specific object or objects, as per the law for the time being in force. Provided that in case a company proposes to pursue any specific objects or restrict its objects, the Memorandum shall state the said object or objects for which the company is incorporated and any matter considered necessary in furtherance thereof and in such case the company shall not pursue any act or activity or business, other than specific objects stated in the Memorandum.

3.Registered office of the company- Section 12(1) The period of fifteen days is increased to thirty days. Therefore, the time limit for a newly incorporated company to have its Registered office ready is proposed to be increased from fifteen days to thirty days.

4.Effect of number of members falling below the minimum requirement (New Insertion of Section 3(A)) If at any time the number of members of a company is reduced, in the case of a public company, below seven, in the case of a private company, below two, and the company carries on business for more than six months while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

5.Deposit Insurance - Section 73 (2)(d) The requirement for deposit insurance is omitted.

6.Re-opening of accounts of companies- Section 130 (sub- section (3) has been inserted after sub-section (2) of the section 130.) Accordingly, a period of eight years is proposed for reopening of accounts of a company. With this proposed amendment, Companies would be relieved from the burden of maintaining their accounts forever or beyond a reasonable time limit.

7.Signing of financial statements- Section 134(1) The amendment proposes that the Chief Executive Officer shall sign the financial statements irrespective of whether he is a director or not because Chief Executive Officer is a Key Managerial Personnel and responsible for the overall management of the company.

8.Performance evaluation of Directors- Sections 134 & 178 The proposed amendment removes the criteria for Every listed company to have Nomination & Remuneration Committee (NRC), the requirement is proposed to be tweaked to be followed by only PUBLIC listed companies. The amendment also proposes that the NRC or an external independent agency can also conduct the evaluation of Board's performance.

9.Corporate Social Responsibility –Section 135

i.Definition of 'any financial year' It is proposed that the words "any financial year" be replaced by the words 'preceding financial year'.

ii.CSR Committee constitution A new proviso is inserted in Section 135 (1) as below- "Provided that where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors."

iii.CSR Activities It is proposed that instead of providing that CSR policy has to indicate the activities to be undertaken by the company as specified in Schedule VII, it should indicate the activities to be undertaken in areas or subjects specified in Schedule VII.

iv.Net Profit Central Government has been empowered to prescribe sums which shall not be included for calculating net profit of a company under Section 135.

10.Ratification of Auditors - Section 139(1) The requirement related to annual ratification of auditors by members is proposed to be omitted.

11.Appointment of Independent Directors - Section 149(6)(c) The Amendment bill proposes to specify limits in relation to pecuniary relationship of a director with respect to eligibility of a director to be appointed as an independent director.

12.Calling of meeting at shorter notice - Section (101) Copies of audited financial statements and other documents can be sent at shorter notice if ninety-five percent of members entitled to vote at the meeting agree for the same.

13.Annual Return / Disclosures under Board's Report The Bill seeks to amend section 92 of the Act to omit the requirement of sub-section (3) with respect to extract of annual return forming as part of Board's report and provide disclosure of web address/web-link of the annual return in Board's report. It also seeks to omit requirement of clause (c) of sub-section (1) regarding disclosure of indebtedness, and modify clause (j) of that sub-section regarding disclosure of names, addresses, countries of incorporation, registration and percentage of shareholding of Foreign Institutional Investors. This will reduce the burden of companies in preparing bulky Board's Report and reduce the paper work. Further it also seeks to insert a new proviso in sub-section (1) to provide that Central Government may provide abridged form of Annual Return for one person companies and small companies. It is also proposed that web address link of annual return should be disclosed in Boards Report's

14.Participation through video-conferencing It is proposed to allow participation of directors on certain items which are presently restricted at Board meetings through video conferencing or other audio visual means if there is quorum through physical presence of directors.

15.Disclosures in the prospectus The Bill seeks to amend sub-section (1) of section 26 of the Act to provide that contents of the prospectus with respect to information and reports on financial information shall be specified by SEBI in consultation with Central Government. The clause also provides for applicability of existing requirements on such matters specified by SEBI.

16.Managerial Remuneration —Section 197(11) Approval of the Central Government for Managerial remuneration will not be required instead of it is to be replaced by approval through special resolution by shareholders only. It also seeks to provide that prior approval of bank or public financial institution or non-convertible debenture holder or secured creditor shall be obtained where any term loan is subsisting, before approval of shareholders. It also requires auditor of the company in his report under section 143 to make

a statement as to whether the remuneration paid by the company is accordance with the provisions of section 197.

17.Private Placement — Section 42 The Private Placement process is proposed to be simplified by doing away with separate offer letter and reducing number of filings to Registrar etc.

18.Restrictions on layers of subsidiaries and investment companies- Section 186

a.It is proposed to omit the restriction on layers of investment companies.

b.It also provides to exclude employees from the word "person" used in sub-section (2).

c.It also seeks to provide for aggregation of loan and investments so far made and guarantees so far provided, for the purpose of calculating the limits of loans and investments

d.It is proposed that shareholder's approval will be required where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company.

e.it also seeks to clarify when the company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities.

19.Rationalising Penal provisions

a.The Bill seeks to amend section 76A, 132, 140, 147 and 180 etc. to reduce the quantum of fine.

b.It is proposed to relax the minimum penalty by linking this with the amount of deposits accepted, accordingly, the minimum fine proposed as Rupees One Crore, or twice the deposit accepted, whichever is lower. Maximum penalty remains unchanged.

20.Constitution of NCLT The Bill also proposes to align with Supreme Court directions with respect to constitution of Selection Committee in respect of NCLT.

21.Definitions The Bill also proposes for modifying the definitions of associate company, cost accountant, debentures, financial year, holding company, key managerial personnel, net worth, related party, small company, subsidiary company and turnover, and to omit the definition of interested director.

22.Others

a.The wholly owned subsidiary of company incorporated outside India is allowed to hold its extra ordinary general meeting outside India.

b.It is proposed that the items required to be passed mandatorily by postal ballot may be transacted at a general meeting where the facility of electronic voting is provided by the company.

c.With a view to facilitate ease of doing business and for reducing the burden of One Person Company and Small Company, it is proposed to empower the Central Government to prescribe an abridged Board's Report instead of complete report.

d.The Central Government is also proposed to be empowered to recognise any other universally accepted identification number as an identification document similar to director identification number.

e.To address the difficulties being faced in genuine transactions due to the complete embargo on providing loans to subsidiaries with common directors, the companies are permitted to give loans to entities in which directors are interested after passing special resolution and adhering to disclosure requirements. This would give big relief to the companies.

f.The Bill also proposes to provide abridged form of Annual Return for one person companies and small companies.

g.The requirement of deposit of rupees one lakh with respect to nomination of directors u/s 160 shall not be applicable in case of appointment of independent directors or directors nominated by nomination and remuneration committee.

Corporate Governance System in India

Abstract

The root of the word corporate governance is from 'gubernate' which means to steer. Corporate governance would mean to steer an organization in the desired direction. Corporate governance is a system by which organization is directed and controlled, it is a process by which company objectives are established, achieved and monitored. So, it is concerned with relationship and responsibilities between the boards, management and stake holders within a legal and regulatory frame work. The primary objective of this paper is to study the corporate governance policies and practices and system in India .Goodness of corporate governance is checked on the basis of five basic parameters i.e. transparency, ownership structure, board procedure, investor rights and governance strategies. During the study it was observed that, in India the legislative and regulatory framework for the corporate governance is sound but the implementation part is poor. There is a huge gap between what is de-jure and de-facto.The state is still lagging behind when it comes to particularly private sector small and medium size industries. Major part of industrial set up is just their production units. The government has also set up various committees, passed various regulations for the development of the industries in the country. There is a further need to strengthen the existing governance policies

The Companies Act, 2013 has now been amended twice in the three years since it came into force. The second amendment bill received presidential assent on Jan. 3 and is expected to be notified soon.

t is a process set up for the firms based on certain systems and principles by which a company is governed. The guidelines provided ensure that the company is directed and controlled in a way so as to achieve the goals and objectives to add value to the company and also benefit the stakeholders in the long term.

The high profile corporate governance failure scams like the stock market scam, the UTI scam, Ketan Parikh scam, Satyam scam, which was severely criticized by the shareholders, called for a need to make corporate governance in India transparent as it greatly affects the development of the country.

To understand the scope of the legal framework and study the amendments, proxy advisory firms analyze the role of directors and how they are impacted by changes in the amendments. Proxy firms offer analytical data for the shareholders and corporate advisory services to companies.

Relief for Creditors of Distressed Companies

The first proposed change brings relief to cr. hoping to convert their debt into equity during insolvency or restructuring process. Cr. will be able to convert debt to equity of distressed companies at a discount to face value. Currently, company law mandates that such conversion has to happen either at par or premium.

Section 53 that provides for issuance of shares at a value not below face value, had raised concerns in the lender community

For financially distressed companies where the lenders have triggered either the insolvency and bankruptcy code or some other restructuring mechanism, the book value of the company is typically lower than the face value of the shares of the company owing to accumulated losses incurred by the company,

In such a situation, if the lenders are allowed to convert their loan into equity only at face value then this would lead to a breach of the borrowing company's contractual commitment which pertains to conversion of debt at the lowest possible price. This condition is found in most financing documents but due to Section 53, the commercial objective between the parties failed to be met,

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: https://www.bloombergquint.com/law-and-policy/companies-act-sees-another-makeover-the-top-5-changes-and-their-impact-on-india-inc

The Indian Companies Act, 2013 ("2013 Act") marks a paradigm shift in India's corporate law regime and has far reaching implications for both domestic Indian companies and overseas investors with a presence in India. This article provides a brief analysis of some of the key changes that have been brought about by the 2013 Act which became largely effective on April 1, 2014. Some provisions, however, continue to remain inoperative and are likely to be made effective by the Indian government in due course. This piece makes it easier to understand the changes in the 2013 Act that affect multinational corporations having Indian companies or those looking to make inv.s in India.

Constitution of the Board

The 2013 Act has made a significant change in the manner in which boards of companies must be constituted. It is mandatory that at least one director must be a resident in India for a min period of 182 days during the preceding calendar year. Moreover, all listed companies and certain other classes of companies as prescribed under delegated legislation would also need to have at least one woman director on their boards.

All listed Indian companies and unlisted companies satisfying certain conditions are now required to have at least one third of their board comprising of "independent directors". In this context, the 2013 Act prescribes stringent criteria for qualification of persons as independent directors and makes it explicitly clear that a nominee director would not be considered "independent". In the context of legal responsibility, the 2013 Act has enlarged the scope of the expression "officer in default", which now includes directors of boards who do not object to decisions taken at board meetings. Therefore, existing and potential foreign investors would need to significantly restructure their board compositions and bring about a higher degree of care in order to comply with provisions of the 2013 Act.

Decision-Making Power of the Board

Unlike under the Indian Companies Act 1956 ("1956 Act"), where an ordinary resolution (requiring a simple majority of shareholders) was sufficient, under the 2013 Act, certain powers of the board of directors can now only be exercised subject to a favourable sr. (requiring a three-fourth majority of shareholders) being passed. These include important subjects such as the right to sell a substantial part of the undertaking or borrow money above certain specified thresholds. Sr.s may also include conditions and the applicability of the provision has been extended to private companies as well. Further, there have been several important additions to the list of powers which are to be exercised by board of directors only at a meeting of the board and cannot therefore be delegated. These include things such as the approval of financial statements, diversification of business and the approval of mergers and takeovers. Additionally, although the 2013 Act recognizes and permits board meetings to be conducted via video conference, certain decisions, including those relating to the approval of financial statements and mergers, cannot be made via video conference. Foreign investors ought to be wary of these changes, as they significantly

curtail the decision-making power of the board and require increased shareholder support for positive company outcomes.

Related Party Transactions

The range of related party transactions under the 2013 Act has been significantly widened compared to the provisions of the 1956 Act. Under the 2013 Act, a shareholder of the company, who is a related party vis-à-vis a counter party in such a transaction, is not permitted to vote while approving the transaction. However, "arm's length transactions" entered into by the company in its "ordinary course of business" are exempt from the related party rule. "Arm's length transaction" is defined to mean "a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of int".

The expression "ordinary course of business" has not been defined in the 2013 Act, and will have to be determined on a case-to-case basis. The 2013 Act importantly now includes an "associate company" within the ambit of the term related party. An associate company in relation to a company is a company, other than a subsidiary, in which the first mentioned company has "significant influence", i.e., controls at least 20 percent of the share capital or business decisions under an agreement, and it specifically includes a joint venture company. Given that the 2013 Act mandates that no related party can vote on several important company resolutions, it is possible that in certain cases, the "majority" related party shareholders could be prevented from voting and minority shareholders would in effect get decision-making power. An inted director cannot be present at the company's board meeting when a related party transaction is under discussion and vote. Further, the exemption under the 1956 Act for inted directors of private companies has been done away with, thereby extending the application of the provision to all private companies as well.

The 2013 Act also specifically prohibits forward contracts and put or call options between the directors/key managerial personnel of a company and the company or any holding, subsidiary or associate company.

Corporate Social Responsibility

The 2013 Act has ushered in certain innovative provisions relating to corporate social responsibility. A company that has a net worth of at least Rs 5 billion or a turnover of at least Rs 10 billion or a net profit of at least Rs 50 million during any financial year will be required to constitute a "Corporate Social Responsibility Committee" with three or more directors to

frame and oversee the company's general policy and specific corporate social responsibility activities.

The 2013 Act mandates that every such company must spend at least two percent of its average net profits in every financial year on corporate social responsibility activities. However, any profits arising from overseas operations conducted through foreign branches or subsidiaries and dividend received from other companies in India will be excluded. In the event that a company does not comply with its corporate social responsibility, the board of directors of the company will be required to explain their reasons for this along with the company's yearly financial statements.

The law does not prescribe any sanctions for non-compliance with the obligation to spend the two percent as long as the board records reasons for this. For foreign companies present in India, the corporate social responsibility obligations become directly relevant, because delegated legislation under the 2013 Act has mandated that the provisions will also apply to foreign companies having a place of business in India or having any business connection with India in any form. While it is unlikely that this would include foreign companies other than those in which more than 50 percent of the total paid up share capital is held by Indian citizens or Indian companies, in the absence of a clarification, all foreign companies with any presence in India would be required to comply.

Inter-Corporate Loans

The 2013 Act has imposed several onerous conditions for inter-corporate loans. Under the 2013 Act, a sr. (requiring a three-fourth majority of shareholders) is required for a loan exceeding the prescribed threshold of 60 percent of the paid-up share capital, free reserves and securities premium account of the company, or 100 percent of free reserves and securities premium account of the company, whichever is higher. Further, now unanimous approval of all directors present at the board meeting is required. This will apply to private companies as well, and therefore, make it more cumbersome for a private company to give loans to its affiliate companies. The 2013 Act also prescribes some enhanced disclosure requirements for loans, inv.s, guarantees and securities.

Capital Raising

For new businesses in India, private companies used to be the preferred business vehicle due to a lesser compliance burden. However, several of those advantages have been obliterated by the 2013 Act. For instance, there were no restrictions on private companies issuing shares with differential rights and creating multiple classes. However, under the 2013 Act, they must now comply with certain statutory requirements. Further, in the earlier regime, as long as there was enough headroom in the authorised share capital, private companies' boards could themselves issue shares (regardless of whether it was a rights' issue or a preferential allotment). However, now other processes have been prescribed.

Under the 1956 Act, in the case of preferential allotment, unlisted public companies needed shareholder sanction and private companies needed board sanction, and there were scant other compliances. However, under the 2013 Act, these companies must also prepare an offer letter which will require some financial and other information to be included. In the context of the rights issue process, the pricing of resultant securities would need to be determined upfront even in the case of private companies. There is ambiguity over this pricing, which appears to be in conflict with current Indian foreign exchange laws.

Insider Trading

Foreign investors must be cautious that the 2013 Act introduces a fresh provision relating to insider trading, a concept that was previously dealt with by a separate regulation for listed Indian companies enacted by the Securities and Exchange Board of India and not under the 1956 Act. Under the 2013 Act, all persons, including any director or key managerial personnel of a company, are prohibited from indulging in insider trading. "Insider trading" has been broadly defined to include the acts of subscribing, buying, selling or dealing in securities, or procuring or communicating non-public price sensitive information. Punishment for contravention includes imprisonment for up to five years, with or without a fine.

The provision also proscribes communication of unpublished price sensitive information. However, the enactment provides a carve-out for communication required in the ordinary course of business or profession or employment or under any law. Despite the prior existence of a specific regulation on insider trading, the new provision has been inserted in the 2013 Act for completeness. However, this has led to some confusion as expressions used in the provision such as "insider trading" are defined differently from those seen in the specific regulation. Moreover, unlike the specific regulation for listed Indian companies, under the 2013 Act, the provision extends to public unlisted companies as well.

Buy-Back of Shares

Under the 1956 Act, companies could do multiple buy-backs of shares in the same financial year except in certain specific facts where there was a cooling off period of one year. However, now the 2013 Act requires a mandatory one-year time period between any type of buy-back, even if the buy-back was achieved through a scheme approved by an Indian court. The 2013 Act also stipulates that a buy-back is not possible if the company has made any default in the repayment of deposits or int, or redemption of debentures, or preference shares, or payment of dividend, or in the repayment of a term loan to a bank or financial institution. However, the buy-back may be possible if the defect is remedied, and a three-year time period has elapsed.

The earlier common practice of a back-to-back shareholder-approved buy-back following a board mandated buy-back is no longer possible under the 2013 Act, and this is likely to significantly delay and adversely impact investor exit options. It is noteworthy that with the introduction of a non-creditable tax on buy-back distributions under tax law, this route had already become less attractive.

Minority Squeeze-Out

The 2013 Act now explicitly deals with the issue of buying out the minority shareholders of a company. In a situation where an acquisition results in the acquirer holding 90 percent of the issued share capital of the company, it shall be obliged to inform the company of its desire to purchase the minority shareholding of that company at a price determined according to the provisions of the 2013 Act. This is a key change and significant departure from the 1956 Act, which did not have such a provision. From a minority protection perspective, it is welcome that the minority buy out is not limited to the dissenting shareholders, but available to the minority as a whole. This means that a minority might be able to share the upside of a deal and the entire process of squeeze out could take place without intervention by the court. Further, the 2013 Act also makes the formula to determine the exit price clear and removes the ambiguity that existed under the 1956 Act.

Layered Investments through Subsidiaries

The 2013 Act makes a significant departure from the 1956 Act by specifically mandating that inv.s can no longer be made through more than two layers of inv. companies, except in certain specified circumstances. Although this appears to have been enacted with a view to prevent convoluted structures and diversion of financial assets, this provision is likely to affect complex cross border merger and acquisition activity. Two specific exemptions have been provided in the 2013 Act, i.e.,

(i) an offshore acquisition is possible if the offshore target has inv. subsidiaries of more than two levels as per the local laws of such foreign country; and

(ii) an inv. subsidiary may exist in order to comply with regulatory requirements or other laws in force at the time.

An "inv. company" has been defined as a company whose principal business is the acquisition of shares, debentures or other securities, and it remains unclear whether or not the two layer restriction is meant to apply only to inv. "subsidiaries". The two layer restriction takes away some structuring flexibility and genuine special purpose vehicles for a large corporation's varying business ints may become a thing of the past. Compliance costs of ensuring the existence of operating companies between inv. companies is also expected to be weighty.

Mergers

The 2013 Act significantly alters the manner in which mergers may be effected, with an objective of making them less time-consuming and providing more flexibility. In this context, the 2013 Act has introduced two concepts novel to Indian law, i.e., "fast track mergers" and "cross border mergers". A fast track procedure for mergers involving certain types of companies is now possible. For instance, this would apply in a merger between a holding company and its wholly-owned subsidiary, subject to certain conditions such as approval of 90 percent of the shareholders of the company and no objections being raised by the Registrar of Companies and other authorities.

The 1956 Act permitted the mergers of foreign companies into Indian companies, but did not allow the converse. The 2013 Act now permits "cross border mergers", i.e., both mergers of foreign companies into Indian companies and mergers of Indian companies into foreign companies; however, the practical utility will depend on yet-to-be-enacted by RBI. regulations on this topic and necessary changes to India's foreign direct inv. policy. Currently, such a merger would require prior RBI approval. In the case of a company listed on an Indian stock exchange that seeks to merge with an unlisted Indian company, the transferee company can elect to remain unlisted, providing the shareholders of the listed company a consequent right to receive the value of their shares and then elect to stay out of the transferee company.

Class Action Suits

Though arguments have been made in the past that class action suits have always been permissible under India's Code of Civil Procedure, 1908, the 2013 Act now specifically provides for class action suits brought by: (i) members; or (ii) depositors of a company, where they are of the opinion that the management or conduct of the affairs of the company is being conducted in a manner prejudicial to the ints of the company or its members or depositors. The Indian understanding still appears to be narrower than a US view on class action where groups of similarly aggrieved persons institute suits with a primary objective of recovering damages from a defendant. However, foreign investors will still be required to play a more active day-to-day role in their Indian inv.s to ensure Indian companies do not violate corporate governance norms and respect member and depositor ints alike.

Enforcement of Shareholders Agreement and Entrenchment

Under the 1956 Act, the articles of association of a company could only be altered by a resolution passed by three-fourth of its shareholders. In practice, however, in order to attract foreign investors, existing Indian shareholders would still grant investors higher rights in the form of veto rights for amending important provisions in a company's articles. The 2013 Act has now specifically validated the idea of entrenchment, and therefore, all such contractual agreements by shareholders now have legislative recognition. This will provide much-needed flexibility for investors to specify that certain provisions of the articles of a company may only be altered if special conditions or procedures are complied with.

Similarly, while under the 1956 Act share transfer restrictions in investor agreements between shareholders of a public company were not expressly permitted, the 2013 Act has now legitimatized arrangements in respect of the transfer of sec., which shall be enforceable

as a contract. The change finally settles the position on enforceability of agreements with investors providing for pre-emptive rights inter-se shareholders of a public company such as the lock-in period, right of first refusal and tag-along and drag-along rights. This importantly takes these issues out of potential litigation in Indian courts

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CONCLUSION & SUGGESTIONS

On a concluding note we can say that as time passes & corporate sector becomes more & more integrated with the society there is need to incorporate necessary changes in corporate laws governing this sector & the companies. No doubt the introduction of a very comprehensive Companies Act, 2013 is a milestone but the concern is about its implementation. No act is helpful if it is not implemented in its spirit; similarly, there is also a need to have unified laws for corporate sectors to remove ambiguities due the existence of multiple acts & statutes. Companies Act, 2013 overcomes some of the major loopholes of Companies Act, 1956 but there might be some loopholes with companies Act 2013 as well specially when in the areas where it does not provide for punitive or penal actions like in the case of Section 135. So there is a need to have a re look at some of the parts of the newly introduced Act.

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