All you need to know about the NCLT & NCLAT

Introduction

India has had a range of Company Laws starting from 1600, The East India Company under the Royal Charter, the Joint Stock Company Act, 1857, Companies Act passed in the year 1866 followed by Indian Companies Act, 1913. The Indian Companies Act, 1913 was replaced by Indian Companies Act, 1956 and saw various amendments in the years to come. In the recent year, 2015, the Supreme Court issued the **National Company Law Tribunal** (**NCLT**) and **National Company Law Appellate Tribunal (NCLAT)** as valid. This decree thus formed the foundation of the constitutionalized NCLT & NCLAT, by the Central Government on June 1st, 2016.

Evolution of the NCLT and NCLAT

NCLT, National Company Law Tribunal, is a quasi-judicial structure to regulate and resolve civil corporate disputes. Whereas NCLAT is the higher forum where appeals

from the Tribunal are dealt with, i.e. Appellate Tribunal. The power to establish NCLT and NCLAT has been derived from Article 245 of the Constitution of India.

The Tribunal, the outcome of the *Eradi Committee,* is institutionalized under the Constitution and practices both authority and power like that of the court of law. At its centre, the Tribunal is required to be objective and pass orders based on natural justice by close scrutiny of facts provided in the cases that are heard.

The transfer of authority from CLB to NCLT was the first among the many steps towards the independent jurisdiction of the latter. Further procedures to forward the transfer included the pending cases under the CLB to be shifted to the NCLT, under *Section 434* of the Companies Act. The Central Government passed legal proceedings by which the powers of the High Court, the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) and Board of Industrial and Financial Reconstruction (BIFR) to be vested upon the Tribunal along with other new powers and functions. Thereby encompassing the governance of every company registered under the Companies Act, except for banking institutions. Thus NCLT became legally active on June 1st, 2016 with ten benches and one principle bench.

Jurisdiction of the NCLT

Both the Tribunal and Appellate Tribunal follow the Code of Civil Procedure and are subject to any rules formed by the Central Government. The former two entities hold the authority to direct and make-do their own procedural methods.

The jurisdiction of NCLT includes the following:

Class Action

Class Action comes under *Section 245* of the Indian Companies Act, takes action against frauds and improprieties where the shareholders and depositors are the main victims. There has been a long chain of cheating where the companies registered under the law drain dry the investments and savings of their investors and shareholders. The *Companies Act, 2013* has presented measures to effectively bring down the

offenders by subjecting the guilty to punishment, wherein they ought to give compensations to the victims for the losses on account of the fraudulent practices.

One or more plaintiffs can file a lawsuit on behalf of a large group and accelerate the procedure. Thereby representing a whole group of, perhaps, geologically dispersed class of people: shareholders or depositors, who are being wronged. *Section 245* has brought great relief to the investors, protecting their assets and safeguarding their rights. Class Action can be filed against both private and public run companies with an exception for banking companies.

Refusal to Transfer Shares

Under *Sections 58* and *59,* if a company refuses to register a transfer or does any malpractices leading to dissatisfactory of the transferor or transferee, the latter is entitled to appeal to the National Company Law Tribunal, after a period of two months. The two *Sections*, in effect, give importance to contracts or arrangements for transferring securities entered into by two or more people with respect to valid conditions.

Oppression and Management

Under *Section 397* of *the Companies Act, 1956* a member could file a complaint only about ongoing instances of oppression and mismanagement. Unlike its predecessor, the Tribunal, under *Section 241* grants any member permission to find justice for past and present instances of oppression and mismanagement. Thus, setting forth remedies for any member or ex-member of a company or Central Government subjected to the crime under scrutiny.

A member can file an application to the Tribunal upon the grounds that the affairs of the company are run in a way prejudicial to public interest, prejudicial and oppressive towards members of the company or prejudicial to the very interest of the company. *Section 397* permits the dissolving of the eligibility criteria the condoning of the Tribunal, thus a member not within the eligibility criteria can apply in deserving cases.

Reopening of Accounts and Revision of Financial Statements

The one too many cases of falsification of books of accounts in plain sight during the Companies Act, 1956 led to the addition of several procedures to counter this malfunctioning in the Companies Act, 2013. *Section 130* and *131* read along with *Section 447* and *448* in the new Act is a measure taken against this menace. These Sections act as provisions that refrain companies from *suo muto* opening their accounts and revising their financial statements. *Section 130* gives the Tribunal power to hold the authority to direct a particular company to reopen its accounts under certain given circumstances. The company is allowed to revise its financial statement under *Section 131* but not allowed the reopening of any accounts.

Deregistration of Companies

Section 7(7) under the new Act preserves power upon the Tribunal to deregister or dissolve companies that are found to have attained ‘registered’ status through illegal and wrongful manner. In essence, the procedural errors of registration of companies can be investigated or questioned by the Tribunal, if found suspicious. Also, the court can declare the liability of members unlimited.

Deposits

Deposits under the Companies Act, 2013 includes any receipt of money in the form of loan or deposit in any other form by a company. It is also to be noticed that deposits are not inclusive of such categories of amounts that may be prescribed in consultation with the Reserve Bank of India (RBI). Chapter V of the 2013 Act and the Companies (Acceptance of Deposits) Rules, 2014 deals with deposits and defines the regulations of deposits. Deposit Rules provide aggrieved depositors with the remedy of class actions so that they can seek justice for the omissions of the companies which hurt their depositor rights.

Power to Investigate

Chapter *XIV* of the Companies Act, 2013 instils upon the Tribunal the power of investigation. The Tribunal can authorize an investigation into the affairs of any company if or when an application is filed against the particular company by 100 members. The investigation can be extended to the ownership of companies. Also, if a person outside the company is able to provide conditions acceptable to NCLT, the latter holds power to authorize an investigation. The court can in course of action freeze company assets under given conditions and place restriction orders on securities, unlike before.

Conversion of Public Company to Private Company

The Tribunal in accordance with *Section 13-18* has a say in the conversion of public companies to private companies. This authority not only includes the consent and confirmation for the conversion, it goes further. *Section 459* of the Act maintains that NCLT can impose certain terms and restrictions or grand approval along with certain conditions.

Tribunal Convened General Meetings

‘Annual general meetings’ (AGM) or ‘extraordinary general meetings’ (EOGM) are to be held to revise the opinions of shareholders and provide a general outline of the company workings. These meetings ought to follow procedures provided under the Companies Act, 2013. If for some extraordinary reasons the AGM or EOGM cannot be called, the Tribunal under the provisions of *Sections 97* and *98* is empowered to convene a general meeting.

Financial Year

NCLT exercises power to change the financial year of companies registered in India. Under *Section 2 (41)* the companies in existence should have a uniform financial year ending on 3ist of March.

Jurisdiction of NCLAT

The National Company Law Appellate Tribunal is headed by the Chairperson and consists of not more than eleven members. It is a higher law governing forum than NCLT. The Appellate Tribunal hears appeals filed against the Tribunal court orders. The appeal can be placed within 45 days from the date on which NCLT announces its decisions. The Appellate Tribunal court goes through the evidence transferred from the Tribunal, making changes or confirming the order given by the latter. This process happens within a time span of six months.

Dissatisfaction with Tribunal Orders

If a group or an individual is to be dissatisfied with the orders passed by the Tribunal Court it is obvious to move on to the next, only, option, that is filing an appeal to the Appellate Court where the decisions of NCLT are reviewed and checked from the point of law and facts. The Tribunal Court is in charge of finding and gathering evidence while the Appellate Court decides cases based on the already collected evidence. If the outcome is not satisfactory even then, one should approach the Supreme Court.

Conclusion

The merits of establishing NCLT and NCLAT include exclusive jurisdiction, a decrease in the multiplicity of litigation before courts and the time efficiency with which the cases are heard and decisions passed. Although this is true in theory, the practical side has not entirely been a success since its implementation. From the data collected on the jurisdictive exercising of power, it is safe to say that NCLT has not succeeded, if not laid back, in upholding the fulcrum of concern.

THE ECONOMIC TIMES wealth

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SC upholds IBC amendments giving financial creditor status to homebuyers

NEW DELHI: The Supreme Court Friday upheld the constitutional validity of amendments made to the Insolvency and Bankruptcy Code (IBC) which conferred the 'financial creditors' status to homebuyers and entitled them to be a part of the Committee of Creditors (CoC) to safeguard their interest.

The apex court's verdict came as a big relief for lakhs of harassed homebuyers who are facing difficulties due to delayed possession and incomplete real estate projects.

As financial creditors now, they will have a say in the resolution process of a cash-strapped realtor.

A three-judge bench headed by Justice R F Nariman held as "constitutionally valid" the amendments made to the IBC in August 2018 and said it "does not infringe" upon the rights of real estate developers and neither "arbitrary" nor "discriminatory".

It can be seen that the Insolvency Law Committee found, as a matter of fact, that delay in completion of flats/apartments has become a common phenomenon, and that amounts raised from home buyers contributes significantly to the financing of the construction of such flats/apartments, said the bench, also comprising Justices Sanjiv Khanna and Surya Kant.

"This being the case, it was important, therefore, to clarify that home buyers are treated as financial creditors so that they can trigger the code under section 7 and have their rightful place on the CoC when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be housed," the bench said.

As per section 7 of the IBC, a home buyer, who is now a financial creditor, may trigger the insolvency proceedings against the real estate developer.

The bench said that since home buyers give advances to the real estate developer and finance the project, they are really the "financial creditors".

The top court said the Real Estate (Regulation and Development) Act (RERA), 2016, which regulates the real estate sector, is to be "read harmoniously" with the IBC and in case of conflict, the IBC would prevail.

"The fact that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies," it said.

The bench said that even by a process of harmonious construction, RERA and the IBC must be held to "co-exist".

"RERA, therefore, cannot be held to be a special statute which, in the case of a conflict, would override the general statute, viz. the code (IBC)," it said.

The bench also dealt with the arguments advanced by the real estate developers that any "trigger happy" allottee, who may himself being a defaulter, could initiate the insolvency proceedings before the National Company Law Tribunal (NCLT).

The bench noted that in such cases, the home buyer would have to make out a prima facie case of default relating to amounts due and payable to him in his or her application under section 7 of the IBC.

"Once this prima facie case is made out, the burden shifts on the promoter/real estate developer to point out in their reply and in the hearing before the NCLT, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief including payment of compensation and/or refund, entailing a dismissal of the said application," it said.

The apex court said it is "absolutely necessary" that the NCLT and the National Company Law Appellate Tribunal (NCLAT) are manned with sufficient members to deal

with litigation that may arise under the IBC, particularly from real estate sector.

"For this purpose, an affidavit be filed by the Union of India within three months from today as to the steps taken in this behalf. Copy of this judgment be sent to the Ministry of Law and Justice, Government of India immediately. To come up with the compliance report by states and union territories as aforesaid in the second week of January, 2020," it said.

It noted that most of the states and union territories have established or appointed adjudicating officers, the Real Estate Regulatory Authority as well as the appellate tribunal under the RERA.

"Yet, despite the fact that May 1, 2017 has long gone, some recalcitrant states and union territories have yet to do the needful," it said.

The bench directed those states and union territories, where the needful has not been done yet, to appoint permanent adjudicating officers, a Real Estate Regulatory Authority and appellate tribunal within three months.

The top court asked the chief secretaries of states and union territories to file compliance affidavits within three months.

The verdict came on a batch of pleas filed by builders who have argued that remedies to home buyers were available under the RERA Act and the amendments to IBC only enables duplication.

ET Realty.com
From The Economic Times

In another interesting development, the insolvent companies will now be allowed to file for insolvency against another corporate debtor.

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NEW DELHI: The much hailed accreditation as financial creditors to home buyers now comes with riders. Home buyers, willing to take the developer to an insolvency court, will now have to ensure that a minimum of 100 home buyers or 10 per cent of the total home buyers file for bankruptcy against the developer.

The government on Thursday tabled the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019, in the Lok Sabha, which among other amendments, also provides for the protection of buyers from criminal proceedings against previous promoters of the bankrupt firm.

"An application for initiating corporate insolvency resolution process shall be filed jointly by not less than 100 of such creditors in the same class or not less than 10 per cent of the total number of such creditors in the same class, whichever is less," the bill said, referring to the class of home buyers.

"Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process shall be filed jointly by not less than 100 of such allottees under the same real estate project or not less than 10 per cent of the total number of such allottees under the same real estate project, whichever is less."

As per the bill, all the pending applications by home buyers against the developers, which have not been admitted will have to meet the new requirements within 30 days of the commencement of the Act, failing which the application shall be deemed to be withdrawn before its admission.

In another interesting development, the insolvent companies will now be allowed to file for insolvency against another corporate debtor. This will enable promoters of companies facing insolvency to initiate similar proceedings against any entity that may

have been responsible for its current state or otherwise.

Another significant move is the protection against criminal proceedings against the eventual buyers of a bankrupt company under investigation.

The decision will have a major impact on cases such as the Bhushan Power and Steel insolvency process whereby JSW Steel emerged the successful bidder, but its transaction was halted by the National Company Law Appellate Tribunal (NCLAT) after the Enforcement Directorate (ED) attached the properties of the bankrupt BPSL.

The NCLAT had in October put JSW Steel's Rs 19,700 crore payment to acquire Bhushan Power and Steel (BPSL) on hold and asked the ED to release BPSL's attached properties worth about Rs 4,000 crore. Last week, the NCLAT directed the ED to file an affidavit on developments related to the attachment of BPSL assets.