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Deciphering the Dichotomy:

Different NCLTs have contrasting views on dispensation of shareholders meeting

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March 10, 2017

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Background

The constitution of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) is a paradigm shift with the intention of establishing a specialized forum to adjudicate all disputes/issues pertaining to companies in India. The primary objective of constituting these tribunals is to provide a simpler, speedier and more accessible dispute resolution mechanism. While the tribunals have been set up to deal with all company related disputes (except any criminal prosecution for offences under the Companies Act), the powers currently provided to the NCLT and the NCLAT are limited as compared to that of high courts and supreme court, for obvious reasons.

The jurisdiction of matters pertaining to mergers, amalgamations, compromise and arrangements, reconstructions also lay in the annals of NCLT. In the last few years, India had witnessed a substantial growth in the mergers and acquisitions ("M&A") activity. Sectors such as information technology, healthcare, energy, pharma, e-commerce and banking and financial services were the key sectors in 2015. Section 230 - 240 of the Companies Act, 2013 deals with such transactions.

One of the most sought after relaxation sought in such reconstructions is dispensation of meeting of creditors or shareholders of the company. While the position under Section 391 of the erstwhile Act and its corresponding rules allowed the high court(s) with the power to dispense the meeting of members / creditors, upon being satisfied – however, the Companies Act, 2013 and its allied rules are silent on the aforesaid matter.

In the extant article, we are covering the orders passed by NCLT benches of Delhi and Mumbai vis-à-vis the orders passed by benches of Chennai and Bengaluru.

Let us analyse the order passed by the aforesaid benches:

Position under the erstwhile Act

Under the 1956 Act, matters used to vest under the ambit of high court(s) and the same was governed by the provisions of section 391 read with section 394A and Company (Court) Rules, 1959. The text of the relevant section(s) is produces below:

Section 391 of the Companies Act, 1956:

“391. (1) Where a compromise or arrangement is proposed-

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*(a) between a company and its creditors or any class of them; or
(b) between a company and its members or any class of them; the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company, which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, **to be called, held and conducted in such manner as the Court directs.**"*

If we read the same in conjunction with that of order passed by Hon'ble High Court of Calcutta in the matter of Singhal Enterprises P. Ltd¹ wherein para 61 of the order quotes:

"The language and intent of the Act is that a meeting of shareholders or creditors has to be held and cannot be dispensed with. Particularly so, when sub-section 5 of Section 391 and sub-section 4 of Section 393 provide for penalty for any failure. Therefore, in my considered opinion, the Court has no power of dispensing with meetings altogether. The authority for this view is in Miheer H. Mafatlal - v - Mafatlal Industries Ltd.(supra) and I would respectfully follow it. However, I notice that section 391 provides that such meeting may be "held and conducted in such manner as the court directs."

From reading of the above it becomes imperative that high court(s) do not have the power to dispense the meeting of members. The used of the highlighted words in section 391 as stated above cites that court has the power to relax the procedure for convening and holding meetings provided in the Companies (Court) Rules, 1959, without dispensing with them, altogether.

Further, In the case of Callidora Merchantiles Pvt. Ltd. & Anr.² decided on 1st July 2010 the judge had said the following:

"The Court: - The application No.1 submits that the holding of the meeting of its Equity Shareholders may be dispensed with as there are only two shareholders who have signified their consent, which is appended to the petition. I have considered Section 391, which empowers the Court to convene a meeting in such manner as the Court thinks fit. Thereafter, sub-Section (2) provides for a procedure to hold such a meeting. I have also considered Rule 6 of the Company Court Rules, 1959 which recognizes the practice or procedure followed by the Court or by the Code of Civil Procedure. Rule 9 retains the inherent power to the Court to prevent an abuse of process. Chapter XL Rule 3 of the Original Side Rules of our Court says that the practice followed by the Court,

¹ <https://indiankanoon.org/doc/189903365/>

² <https://indiankanoon.org/doc/3232127/>

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which is not provided by or contrary to the Rules be continued. Our court on its Original Side does follow the practice of dispensing with the formalities in appropriate cases, when the facts of the case so demand or when justice so requires. We often dispense with the formalities in getting an appeal ready for hearing. In winding up applications we ask the parties to serve a copy of the petition upon the Company, thus dispensing with service by Court; we dispense with drawing up and service of Writ Rules, and so on. Therefore, on a reading of Section 391 with the aforesaid provisions the Court has the power in appropriate cases to dispense with some formalities prescribed in the Rules. However, the Court does not have the power to dispense with the mandate of the statute. The meeting cannot be dispensed with as it is a statutory requirement. A meeting has to be held, even if informal under Section 391 for the purpose of adopting the scheme.

I am inclined to dispense with all formalities regarding convening e.g. notice and advertisements, in this case, as there are only two shareholders. Such dispensation is necessary in the interests of justice to and avoid unnecessary costs, delay and hardship."

NCLT orders mandating meeting of members

In the matter of JVA Trading Private Limited and C&S Electric Limited³, the NCLT bench of Delhi declined the prayer of the petitioner seeking relaxation from convening members meeting. The reason for denial given by NCLT is that there is no extant provision under the Act or the relevant rules granting NCLT with the power to exempt members meeting for deciding upon matters like merger and amalgamation. The justification given by the bench members has reference to Section 230(1) and Rule 5 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 - it becomes imperative that NCLT does not have the power to dispense the meeting of members. There were instances under the erstwhile Act wherein the high court was conferred with the power of dispensing such meeting wherein the court deemed it fit. However, the curveball comes wherein under section 230(9) of the Act, wherein NCLT may dispense calling of meeting of creditor or their class where 90% of such creditors, have agreed and confirmed, by way of affidavit, to the scheme of such compromise or arrangement.

Within 7 days from NCLT having passed its order, NCLT Bombay, in the matter of Gauss Networks Private Limited and Delta Corp Limited⁴, ordered for a meeting of the equity shareholders along with a prior notice with the quorum as prescribed under section 103 of

³ http://nclt.gov.in/Publication/Principal_Bench/2017/Others/JVA%20Trading%20Pvt%20Ltd..pdf

⁴ http://nclt.gov.in/interim_orders/mumbai/23.01.2017/Delta%20Corp%20Ltd..pdf

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the new Act. No such explanation was provided by NCLT as to why it did not agree to petitioner's prayer from dispensation of meeting of creditors. Here, no such relaxation was given by NCLT and the petitioners were asked to carry on the complete process as mandated under the applicable provisions of Companies Act, 2013.

NCLT orders dispensing meeting of members

The NCLT of Chennai under a 2 member bench made an order that was eloquently contrasting to the order that passed by the NCLT Mumbai and Delhi. In the matter of *L&T Ship Building Limited and Marine Infra Structure Development Private Limited*⁵ (being the transferor and transferee company respectively), NCLT in its order noted the fact that members of L&T Ship Building Limited have accorded their unconditional consent and approval to the scheme of demerger. In the extant case, as NCLT satisfied itself that since the members of the L&T Ship Building Limited have accorded their unconditional consent, it thought prudent that there is no need to convene the meeting of members and ordered dispensation of the same accordingly.

Following a similar path as enshrined by the Chennai Bench, NCLT Bangalore in the matter of *Coffee Day Overseas Private Limited and Coffee Day Enterprises Limited*, being the transferor and transferee company respectively, ordered for a dispensation of the shareholders meeting as the application made by the transferor company already included the consent received from the two shareholders of the company. We would also like to mention that the matter was transferred from the erstwhile Act to the new Act.

Conclusion

With the enactment of the Companies Act, 2013 and constitution of NCLT, new theories have come into the public fore. The previous position under the high Court regime has acted as a precedent in many matters pertaining to mergers and amalgamations. For completion pertaining to mergers, amalgamations and reconstruction wherein the approval of the High Court was necessitated, it has been observed that lot of time was consumed in completion of such transactions thereby leading to non accomplishment of desired results in many cases.

The prima facie reason behind that was supposedly the elaborative and exhaustive process that took place, the NCLT has now been allowed to take matters on summary proceedings basis. Also the order pertaining to dispensation of the meeting of members may have been

⁵http://nclt.gov.in/interim_orders/chennai/01.02.2017/L%20&T%20SHIP%20BUILDING%20LTD%20MARINE%20INFRA%20STRUCTURE.pdf

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given keeping in mind the “*ease of doing business*” agenda that the recent regulators have been working hard on.

However, we hope that the position under the current law settles soon while also keeping in mind that the principle of natural justice is taken due care of.

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