BLIND FOLD LEGAL JOURNAL

VOLUME 3 ISSUE 1
[JUN. 2023 – AUG. 2023]

E-mail: blindfoldjournal@gmail.com
Website: www.blindfoldjournal.com

"Corpus of NCLAT judgements (2019) pertaining to Chapter XV of The Companies Act, 2013 and its analysis"

-Author: Paul Priyadarshan R

Abstract:

For the execution of a merger/amalgamation, there are a number of laws to be complied with, they are as follows: 1) The Companies Act, 2013: Chapter XV covering sections 4) to 240 deals with 'Compromises, Arrangements and Amalgamations'. 2) The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. 3) Companies Court Rules, 1959: The procedure for implementing a compromise or arrangement, including amalgamation or reconstruction, is covered by Rules 67–87. 4) Income Tax Act, 1961. 5) SEBI (Listing Obligation & Disclosure Requirements) Regulations, 2015. 6) The Indian Stamp Act, 1899. 7) Competition Act, 2002. The above-mentioned laws cover majority of compliance requirements. However, the list is not exhaustive as there are some more aspects of compliance requirement such as intellectual property due diligence.

Apart from statutory compliance, judicial precedents are significant, to understand the character of the multitude of legal issues that arise regarding a particular subject matter of law (in the given instance legal issues arising from mergers and amalgamations) & to understand how those issues are resolved by the judiciary in reference to the ratio decidendi. This becomes peculiar as judicial decisions act as precedents.

Since the central legislative framework governing companies, and therefore, mergers and amalgamations, is The Companies Act, 2013 and especially the provisions of The Companies Act i.e., Chapter XV (section 230 to 240) specifically deals with 'Compromises, Arrangements and Amalgamations', this research work analyses NCLAT decisions in relation to Chapter XV (section 230 to 240) of the Companies Act in the year 2019.

Joint Commissioner of Income Tax (OSD), Circle (3)(3)-1, Mumbai v. Reliance Jio Infocomm Ltd. & Ors. (National Company Law Appellate Tribunal, New Delhi, Company Appeal (AT) No. 113 of 2019) and Income Tax Officer, Ward 3(3)-1, Mumbai v. M/s. Reliance Jio Infratel Pvt. Ltd. & Ors. (National Company Law Appellate Tribunal, New Delhi, Company Appeal (AT) No. 114 of 2019)

Facts:

Three companies namely Reliance Jio Infocomm Limited, Jio Digital Fibre Private Limited and Reliance Jio Infratel Private Limited moved joint petition under Sections 230 to 232 of the Companies Act, 2013, seeking sanction of the composite scheme of arrangement.

Appeal:

The National Company Law Tribunal by order directed Income Tax Department to file representation and thereby The Joint Commissioner of Income Tax (OSD), Circle (3)(3)-1, Mumbai and the Income Tax Officer, Ward 3(3)-1, Mumbai have preferred the appeals.

From the judgement, ratio specific to section 230 to 240:

The Joint Commissioner of Income Tax (OSD), Circle (3)(3)-1,Mumbai and the Income Tax Officer, Ward 3(3)-1, Mumbai have preferred the appeals and the crux of the appeal was with respect to conversion of preference shares by cancelling them and converting them into loan, and so as the resultant effect of reduced profitability of demerged Company 'Reliance Jio Infocomm Limited' would act as a tool to avoid and evade taxes. This objection was examined in detail by the NCLAT(which is not covered in this case analysis as the case analysis deals specifically with section 230 to 240 of the Companies Act and not Income Tax Act and other provisions of Companies Act which was looked into by the NCLAT in its detailed analysis) and the NCLAT observed that just because a scheme may result in reduction of tax liability, it does not furnish a basis for challenging the validity of the same. Thereby NCLAT did not interfere into the scheme that was approved. However, the request on part of Income tax department to allow the Income Tax Department to examine the aspect of any tax payable as a result of the Scheme and in case it is found that the scheme of arrangement ultimately results in tax avoidance or is not in accordance to the demerger provisions of the Income Tax Act, then the department will be at the liberty to initiate the appropriate course of action as per law was allowed by the NCLAT by stating that any sanction to the scheme of arrangement under Sections 230 to 232 of the Companies Act, 2013 shall not adversely impact the rights of the Income Tax Department for any past, present or future proceedings. The department shall be at liberty to take appropriate action as per law in case of an event of any tax-avoidance or violation of Income Tax Law or any other similar issue.[1]

[1] Joint Commissioner of Income Tax (OSD) v. Reliance Jio Infocomm Ltd. & Ors, Company Appeal (AT) Nos. 113 of 2019.
Income Tax Officer, Ward 3(3)-1, Mumbai v. M/s. Reliance Jio Infratel Pvt. Ltd. & Ors, Company Appeal (AT) Nos. 114 of 2019.

Flipkart Logistics Pvt. Ltd. & Ors v. Regional Director & Ors

(National Company Law Appellate Tribunal, New Delhi, Company Appeal (AT) No. 124 of 2019)

Background:

This case is an appeal which has been filed by the appellants challenging the order dated 16th January, 2019 passed by the National Company Law Tribunal (NCLT), Bengaluru Bench in C.P. (CAA) No. 07/BB/2018.

Before NCLT:

The Appellants Jointly filed petition for amalgamation u/s 230 to 232 of the Companies Act. It is stated that the NCLT solely because there was an enquiry pending against group company "Flipkart Internet Private Limited" has rejected the Petition and consequently the Scheme of Amalgamation of the Appellants was not sanctioned. It is stated that one of the group companies of the appellants is undergoing an inquiry although the Appellants are not party to any such inquiry. It is stated that the said group company, relating to which inquiry is going on is not party to Amalgamation and thus, according to the learned counsel for the Appellants, the objection was unfounded.

Observations of Regional Director:

"The group company M/s Flipkart Internet Private Limited is under inquiry and all the petitioner companies are having related party transactions with the said entity. Hence, the Transferee Company be directed to give an undertaking that it shall get the offences arising out of inquiry compounded by filing necessary compounding applications or liable for prosecution for all the violations of the Transferor as well as Transferee Company."

Before NCLAT:

The scheme takes care to ensure that the liability of the Petitioner Companies to remain if the inquiry against Flipkart Internet Private Limited has findings proved against them but NCLT did not say anything about it.

In the present appeal the prayer is to set aside part of the impugned Judgment dated 16th January, 2019 that rejects the Scheme of Amalgamation of the Appellants and allow the scheme of amalgamation of the Appellants.

NCLAT set aside the impugned order and allowed the prayer of the Company Appeal by stating that Appellant Nos. 1, 2 and 3, their Promoters and Directors and Shareholders shall remain

responsible for any liability, if any, getting attracted against them due to the enquiry against "Flipkart Internet Pvt Ltd".[2]

Regional Director, Southern Region, MCA & Anr v. Real Image LLP & Anr (National Company Law Appellate Tribunal New Delhi, Company Appeal (AT) No.352 Of 2018)

National Company Law Tribunal, Chennai through order dated 11.06.2018 allowed the company petition filed by respondents and permitted amalgamation of the Limited Liability Partnership firm into Private Limited company against which the appellant Regional Director Southern Region, Ministry of Corporate Affairs and Registrar of Companies, Chennai have preferred an appeal under Section 421 of The Companies Act, 2013.

Before NCLT:

NCLT after considering the scheme found that all the statutory compliances have been complied as under Section 230 to 232 of The Companies Act, 2013. NCLT further found that as per Section 394(4)(b) of The Companies Act, 1956, LLP can be merged into company but there is no such provision in The Companies Act, 2013.

However, explanation of sub section (2) of Section 234 of The Companies Act 2013 permits a foreign LLP to merge with an Indian company, then it would be wrong to presume that The Companies Act, 2013 prohibits of a merger of an Indian LLP with an Indian company. Thus, there does not appear any express legal bar to allow merger of an Indian LLP with an Indian company. Therefore, NCLT applying the principal of Casus Omissus, by the impugned order allowed the amalgamation of Transferor LLP with transferee company.

Ld. Counsel for the respondents supports the impugned order and submitted that:

It is also submitted that in LLP Act and The Companies Act, 2013 the amalgamation scheme has to be sanctioned by the same authority i.e., NCLT. Hence there is no utility that LLP first convert into company then apply for merger.

It is further submitted that the right to re-structure a business or corporate structure is implicit in the fundamental right to trade. Any restriction on a such right must be expressly provided by legislation.

Learned counsel for the appellants submits that:

As per Section 232(i)(a) of The Companies Act, 2013 a company can be merged with another company. It means that if Indian LLP is proposed to merge in an Indian company, then firstly

[2] Flipkart Logistics Pvt. Ltd. & Ors v. Regional Director & Ors, Company Appeal (AT) No. 124 of 2019.

the LLP has to apply for registration under Section 366 of The Companies Act, 2013 and when LLP registered as a company then that company can be merged in to another Indian company. It is also submitted that Section 55 and 57 of Chapter X of LLP Act, 2008 provides for conversion from firm, private company and unlisted public company to limited liability partnership. Thus, it is not correct that there is no provision for merger of Indian LLP into Indian Company in the Act, 2013.

Before NCLAT:

We found on reading of the provisions of The Companies Act, 2013 as a whole in reference of conversion of Indian LLP into Indian company there is no ambiguity or absurdity or anomalous results which could not have been intended by the legislature.

The principal of casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. There is no such occasion to apply the principal of casus omissus. Thus, we are unable to convince with the interpretation of NCLT.

The legislature has enacted provision in The Companies Act, 2013 for conversion of Indian LLP into Indian Company and vice versa in the Limited Liability Partnership Act, 2008. Thus, there is no question infringement of any constitutional right of the Respondent. Hence, we find no substance in the arguments of Learned counsel for the respondent.

The impugned order is not sustainable in law and set aside.[3]

Shriram Chits (Karnataka) Pvt. Ltd & Ors v. Registrar of Co-operative Societies & Chits (National Company Law Appellate Tribunal, New Delhi, Company Appeal (AT) No. 86 Of 2019)

Before NCLT:

The Appellant – 'Shriram Chits (Karnataka) Private Limited' filed an application under Section 230 to 232 of The Companies Act, 2013 for amalgamation of the companies, which has been disposed of by the National Company Law Tribunal, Bengaluru Bench and observed:

The ordinary public is involved in the business of the Company and the interest of those ordinary public has to be taken care of while sanctioning the scheme.Where the business lies with ordinary public, it is necessary for the Company to take permission/approval from the appropriate authorities.

[3] Regional Director, Southern Region, MCA & Anr v. Real Image LLP & Anr, Company Appeal (AT) No.352 Of 2018.

Registrar of Chits is the concerned authority to examine the issue in light of the terms and conditions proposed in the Scheme. Therefore, in the interest of justice, we are not inclined to sanction the Scheme subject to condition that approval can be taken from the Registrar of Chits after the sanction of Scheme.

The Appellant sought dispensing of the meeting of the shareholders and creditors of the Transferee Company specifically stating that insofar as the subscribers to the chits were concerned, they were not the creditors of the company and, therefore, a meeting of the subscribers was not required to be called to consider the scheme.

The Tribunal, Bengaluru Bench dispensed with the requirements of convening and holding the meeting of the equity shareholders in view of consent affidavits of the 2 shareholders who held 100% of the paid-up capital.

The Regional Director/Registrar of Companies filed a detailed affidavit where the following stand was taken and the following observations was made:

"(7) ROC has observed that since the chit companies are controlled by registrar of chits of the concerned state, necessary approvals, may be obtained from the concerned authorities to the scheme in the interest of public/chit holders. However, the chit fund Act does not contemplate any requirement of prior approval."

The petition for sanction of the scheme was taken up by the Tribunal and on hearing the parties, the order was passed by the Tribunal, Bengaluru Bench on 17th December, 2018 rejecting the scheme of amalgamation as observed aforesaid.

Before NCLAT:

This Appellate Tribunal on hearing the Appellant noticed that the Appellant has followed all the procedure as prescribed under Section 230 to 232 of The Companies Act, 2013 and read with Companies (Compromise, Arrangements and Amalgamations) Rules, 2016.

In spite of the same, it was not made clear as to why in spite of following all the procedure and no objection by any of the party, except the observation made by the Regional Director/Registrar of Companies, it was not made clear as to why and under which clause company is required to take permission / approval from the appropriate authority, we allowed the Appellant to implead 'Registrar of Chit Funds, Karnataka, Bangalore as party respondent to the appeal to know whether there is any requirement to take prior permission of Registrar of Chits for the purpose of amalgamation or merger scheme under Section 230 to 232 of The Companies Act, 2013.

Notices were issued to the 'Registrar of Co-operative Societies and Chits', Bangalore but in spite of the said notice 'Registrar of Co-operative Societies and Chits', Bangalore have not appeared nor brought on record any provision of law or circular or guidelines issued by the competent authority to suggest that for merger of 'transferor companies' with 'transferee company', that there is a need of prior permission from the chit funds.

And so, on appeal the NCLAT set aside the impugned order.[4]

Jindal Steel and Power Limited v. Arun Kumar Jagatramka and Anr

(National Company Law Appellate Tribunal, New Delhi, Company Appeal (AT) No. 221 of 2018)

Background/Facts:

The appeal is against order dated 15th May, 2018 passed by National Company Law Tribunal, Kolkata Bench in C.A. (CAA) No.198/KB/2018. The appeal is by Jindal Steel and Power Limited, an unsecured creditor of Corporate Debtor (Gujarat NRE Coke Limited).

The order against which appeal has been made is as follows:

In an application made by the promoter of the corporate debtor which is Gujarat NRE Coke Limited under Section 230 to 232 of The Companies Act, the tribunal ordered for taking steps for Financial Scheme of Compromise and Arrangement between Applicant (Promoter) and Corporate Debtor (Gujarat NRE Coke Limited) through the 'Liquidator', after holding the debts of shareholders, creditors etc. in terms of Section 230 of The Companies Act.

Issues:

Whether in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016 the scheme for compromise and arrangement can be made in terms of Sections 230 to 232 of The Companies Act, 2013?

If so permissible, whether the Promoter is eligible to file application for Compromise and Arrangement, while he is ineligible under Section 29A of the Insolvency & Bankruptcy Code, 2016, (I&B Code) to submit a 'Resolution Plan'?

Judgement:

NCLAT answered to the first issue in affirmative holding that in a Liquidation proceeding under I&B Code, a petition under Section 230 to 232 of The Companies Act is maintainable. The primary focus of the legislation is to ensure revival and continuation of the corporate debtor by

[4] Shriram Chits (Karnataka) Pvt. Ltd & Ors v. Registrar of Co-operative Societies & Chits, Company Appeal (AT) No. 86 Of 2019.

protecting the corporate debtor from its own management and from a corporate death by liquidation.

The aforesaid judgment makes it clear that even during the period of Liquidation, for the purpose of Section 230 to 232 of The Companies Act, the 'Corporate Debtor' is to be saved from its own management, meaning thereby the Promoters, who are ineligible under Section 29A, are not entitled to file application for Compromise and Arrangement in their favour under Section 230 to 232 of The Companies Act.[5]

State Bank of India and Anr. v. Visa Steel Limited and Anr.
(National Company Law Appellate Tribunal, New Delhi, Company Appeal (AT) No. 240 of 2019)

Facts:

A Joint Petition for sanctioning of the scheme of arrangement of Visa Steel Limited (Transferor Company) and Visa Special Steel Limited (Transferee Company) was filed under sections 230 to 232 of The Companies Act, 2013. Later on, in view of Section 434 of The Companies Act, 2013 it was transferred before the National Company Law Tribunal, Cuttack Bench, Cuttack. Subsequently, when the matter was taken up by the National Company Law Tribunal, Cuttack Bench, by order, the Tribunal sanctioned the scheme of demerger of the companies. The said order of Demerger is challenged by State Bank of India, one of the creditors.

The main plea taken by the appellant and other 'Financial Creditor' is that the appellant has already moved a petition under Section 19 of the Debts Recovery Tribunal (DRT)-1, Kolkata.

Issue:

All the pending matters before the DRT, Kolkata will be affected, if the company is allowed to demerge.

Judgement:

In spite of impugned order of demerger passed by National Company Law Tribunal, Cuttack Bench, the proceedings pending before different DRTs, including the Cuttack and Kolkata will continue against both the companies.

If so necessary, the concerned applicants may ask for impleading them as party respondents. It is also made clear that interest of both the parties including the appellants and other creditors will not be affected because of the impugned order of demerger. All those rights are kept open for determination by the respective DRT.[6]

[5] Jindal Steel and Power Limited v. Arun Kumar Jagatramka and Ors, Company Appeal (AT) No. 221 of 2018
[6] State Bank of India and Anr. V. Visa Steel Limited and Anr, Company Appeal (AT) No. 240 of 2019

Ad2Pro Global Creative Solutions Private Limited v. Regional Director, (SER), Ministry of Corporate Affairs & Ors (National Company Appellate Tribunal, New Delhi, Company Appeal (AT) No. 98 of 2019)

The issue raised in these appeals is whether the Tribunal could impose a condition to make payment of alleged tax liabilities when the same are disputed by the Company before the concerned authorities and make it a precondition to sanctioning of the scheme of amalgamation, more so, when no such demand has been made by the concerned/ relevant authorities and no objection has been raised before the Tribunal.

The further issue for consideration raised in these appeals is whether the Tribunal could direct the transferor company to make payment of alleged tax despite an express undertaking by the transferee company to make such payment on behalf of transferor company if found due and payable after adjudication.

Once a scheme has been sanctioned by a Tribunal in accordance with law, as admittedly in the instant case it is and the same goes unassailed, nothing precludes the Tax Authorities from recovering its legitimate and recoverable outstanding tax dues from the transferor or the transferee company, as provided in the scheme. Where in a given case, the liability has arisen or would arise or the demand would be raised against the transferor company for the relevant period after due scrutiny, assessment, review or determination through a due judicial process and the transferee company undertakes to make payment of all outstanding tax dues as determined in the aforesaid manner, the scheme cannot be refused and has to be allowed.

Therefore, in the given case NCLAT observed that Compliance in regard to the outstanding income tax liability shall not be treated as a condition precedent for implementation of approved scheme of arrangement and such compliance shall be subject to determination of liability by the Income Tax Appellate Tribunal (ITAT), Bengaluru in appeal proceedings. Pending conclusion of appeal proceedings, the approved scheme of arrangement shall be implemented without insisting upon compliance of demands raised for the afore stated period subject to any interim directions given by ITAT in this regard.[7]

[7] Ad2Pro Global Creative Solutions Private Limited v. Regional Director, (SER), Ministry of Corporate Affairs & ors, Company Appeal (AT) No. 98 of 2019