

## Supreme Court gives green signal to constitution of independent Company Law Tribunal

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The Supreme Court of India on 11 May 2010, gave a ruling holding as valid the provisions of Companies (Second Amendment) Act 2002 pertaining to transfer of several judicial and quasi-judicial powers under the Act to an independent tribunal, called the National Company Law Tribunal (NCLT).

The constitutional validity of the amendment effected to the Companies Act by Companies (Second Amendment) 2000 was challenged in *Thiru R. Gandhi v. Union of India* (2004) 120 Com Cases 210 (Mad). The question was decided in affirmative by the Madras High Court on 30<sup>th</sup> March 2004. The matter was appealed in the Supreme Court which referred the same to Constitution Bench.

The constitution of the NCLT and NCLAT was pending litigation pending before the Constitution Bench of the Supreme Court. Now the Supreme Court by upholding the constitutional validity of the amendments proposed in Companies (Second Amendment) Act 2002 has paved the way for setting up of NCLT subject to certain conditions.

The SC while delivering its judgement has discussed the provision of Part IB and IC in length. The Apex Court has accepted the recommendations made by the Union Government for amendment in the impugned provision and further added its own recommendations to cure the defects in Part IB and IC. We are presenting herein Section-wise effect of Supreme Court Order relating to NCLT:

Section No	Particulars	Changes directed by the Supreme Court in CA 3067/04 (Note: Changes already accepted by the CG during hearing are indicated in brackets)
10FD (1)	<i>The Central Government shall appoint a person who has been, or is qualified to be, a Judge of a High Court as the President of the Tribunal.</i>	(The Government agreed in part and proposes to amend the Act for appointment of a retired or serving High Court Judge alone as the President of the Tribunal.)
10FD (2)	<i>A person shall not be qualified for appointment as Judicial Member unless he—</i> <div style="margin-left: 40px;"> <i>(a) has, for at least fifteen years, held a judicial office in the territory of India; or</i>  <i>(b) has, for at least ten years been an advocate of a High Court, or has partly held judicial office and has</i> </div>	<b>Clauses (c) and (d) of sub-section (2) of section 10FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in Central or State Government, being qualified for appointment as Members of Tribunal is invalid.</b>

	<p><i>been partly in practice as an advocate for a total period of fifteen years; or</i></p> <p>(c) <i>has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a State Government [including at least three years of service as a member of the Indian Company Law Service (Legal Branch) in Senior Administrative Grade in that service]; or</i></p> <p>(d) <i>has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government (including at least three years of service as a Member of the Indian Legal Service in Grade I of that service).</i></p>	<p>Only Judges and Advocates can be considered for appointment as Judicial Members of the Tribunal. Only the High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practiced as a Lawyer for ten years can be considered for appointment as a Judicial Member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and Indian Legal Service (Grade-1) cannot be considered for appointment as judicial members as provided in sub-section 2(c) and (d) of Section 10FD. <b>The expertise in Company Law service or Indian Legal service will at best enable them to be considered for appointment as technical members.</b></p>
10FD (3)	<p>A person shall not be qualified for appointment as Technical Member unless he—</p> <p>(a) <i>has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a State Government [including at least three years of service as a Member of the Indian Company Law Service (Accounts Branch) in Senior Administrative Grade in that service]; or</i></p> <p>(b) <i>is, or has been, a Joint Secretary to the Government of India under the Central Staffing Scheme, or any other post under the Central Government or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India for at least five years and has adequate knowledge of, and experience in, dealing with problems relating to company law; or</i></p> <p>(c) <i>is, or has been, for at least fifteen years in practice as a chartered accountant under the Chartered Accountants Act, 1949 (38 of 1949); or</i></p> <p>(d) <i>is, or has been, for at least fifteen years in practice as a cost accountant under the Costs and Works Accountants Act, 1959 (23 of 1959); or</i></p> <p>(e) <i>is, or has been, for at least fifteen years working experience as a Secretary in whole-time practice as</i></p>	<p><b>Clauses (a) and (b) of sub-section (3) of section 10FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in Central or State Government, being qualified for appointment as Members of Tribunal is invalid.</b></p> <p>A 'Technical Member' presupposes an experience in the field to which the Tribunal relates. <b>A member of Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of Company Law cannot be considered as 'experts' qualified to be appointed as Technical Members.</b> Therefore Clauses (a) and (b) of sub-section (3) are not valid.</p> <p><b>The first part of clause (f) of sub-section (3) providing that any person having special knowledge or professional experience of 15 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as Technical Members in Company Law Tribunal, is invalid.</b></p> <p>Persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having</p>

	<p>defined in clause (45A) of section 2 of this Act and is a member of the Institute of the Companies Secretaries of India constituted under the Company Secretaries Act, 1980 (56 of 1980); or</p> <p>(f) is a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty years in, science, technology, economics, banking, industry, law, matters relating to industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in, which would be in the opinion of the Central Government useful to the Tribunal; or</p> <p>(g) is, or has been, a Presiding Officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947 (14 of 1947); or</p> <p>(h) is a person having special knowledge of, and experience of not less than fifteen years in, the matters relating to labour.</p>	<p>expertise in rehabilitation/ revival of companies and therefore, eligible for being considered for appointment as Technical Members.</p> <p>In regard to category of persons referred in <b>clause (g) of sub-section (3)</b> at least five years experience should be specified.</p> <p>As the NCLT takes over the functions of High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. <b>Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as Technical members of the National Company Law Tribunal.</b></p> <p><u>Only Clauses (c), (d), (e), (g), (h), and later part of clause (f) in sub-section (3) of section 10FD and officers of civil services of the rank of the Secretary or Additional Secretary in Indian Company Law Service and Indian Legal Service can be considered for purposes of appointment as Technical Members of the Tribunal.</u></p>
10FE	<p><b>Term of office of President and Members.—</b><i>The President and every other Member of the Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office but shall be eligible for re-appointment:</i></p> <p><i>Provided that no President or other Member shall hold office as such after he has attained,—</i></p> <p>(a) <i>in the case of the President, the age of sixty-seven years;</i></p> <p>(b) <i>in the case of any other Member, the age of sixty-five years.</i></p> <p><i>Provided further that the President or other Member may retain his lien with his parent cadre or Ministry or Department, as the case may be, while holding office as such.</i></p>	<p>The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the concerned field. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as post- retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service.</p> <p>The second proviso to Section 10FE enabling the President and members to retain lien with their parent cadre/ministry/department while holding office as President or Members will not be conducive for the independence of</p>

		<p>members. Any person appointed as members should be prepared to totally disassociate himself from the Executive. The lien cannot therefore exceed a period of one year.</p> <p>(It may be noted that the Union Government has accepted to amend the proviso and delete the reference to the President in the second proviso)</p>
10FF	<p><b>Financial and administrative powers of Member Administration.</b>—<i>The Central Government shall designate any Judicial Member or Technical Member as Member Administration who shall exercise such financial and administrative powers as may be vested in him under the rules which may be made by the Central Government:</i></p> <p><i>Provided that the Member Administration shall have authority to delegate such of his financial and administrative powers as he may think fit to any other officer of the Tribunal subject to the condition that such officer shall, while exercising such delegated powers, continue to act under the direction, superintendence and control of the Member Administration.</i></p>	<p>The administrative support for all Tribunals should be from the Ministry of Law &amp; Justice. Neither the Tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or concerned Department.</p> <p>(The Union Government has accepted the decision and has agreed to drop the provision for Member Administration. It was stated that the Act would be amended to provide that the administration and financial functions would be discharged under the overall control and supervision of the President. It was stated that the Act would be further amended to provide for creation of the posts of Vice-Presidents.)</p>
10FK	<p><b>Officers and employees of Tribunal.</b>—(1) <i>The Central Government shall provide the Tribunal with such officers and other employees as it may deem fit.</i></p> <p>(2) <i>The officers and other employees of the Tribunal shall discharge their functions under the general superintendence of the Member Administration.</i></p>	Same as above
10FJ	<p><b>Removal and suspension of President or Member.</b>—(1) <i>The Central Government may, in consultation with the Chief Justice of India, remove from office the President or any Member of the Tribunal, who—</i></p> <p>(a) <i>has been adjudged an insolvent; or</i></p> <p>(b) <i>has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or</i></p> <p>(c) <i>has become physically or mentally incapable of acting as such President or Member of the Tribunal; or</i></p> <p>(d) <i>has acquired such financial or other</i></p>	<p>To maintain independence and security in service, sub-section (3) of section 10FJ and Section 10FV should provide that suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.</p>

	<p><i>interest as is likely to affect prejudicially his functions as such President or Member of the Tribunal; or</i></p> <p><i>(e) has so abused his position as to render his continuance in office prejudicial to the public interest:</i></p> <p><i>Provided that no such President or a Member shall be removed on any of the grounds specified in clauses (b) to (e) without giving him reasonable opportunity of being heard in respect of those charges.</i></p> <p><i>(2) The President or a Member of the Tribunal shall not be removed from his office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court in which such President or a Member had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.</i></p> <p><i>(3) The Central Government may suspend from office the President or Member of the Tribunal in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (2) until the Central Government has passed orders on receipt of the report of the Judge of the Supreme Court on such reference.</i></p> <p><i>(4) The Central Government may, by rules, regulate the procedure for the investigation of misbehaviour or incapacity of the President or a Member referred to in sub-section (2).</i></p>	
<p>10FL</p>	<p><b><i>Benches of Tribunal.</i></b>—<i>(1) Subject to the provisions of this section, the powers of the Tribunal may be exercised by Benches, constituted by the President of the Tribunal, out of which one shall be a Judicial Member and another shall be a Technical Member referred to in clauses (a) to (f) of sub-section (3) of section 10FD:</i></p> <p><i>Provided that it shall be competent for the Members authorised in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President of the Tribunal may, by general or special order, specify:</i></p> <p><i>Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member of the Tribunal that the case or</i></p>	<p>Two-Member Benches of the Tribunal should always have a judicial member. Whenever any larger or special benches are constituted, the number of Technical Members shall not exceed the Judicial Members.</p> <p>(The Union Government has accepted the finding and has agreed to amend the proviso to section 10FL(2) to provide that a winding up proceedings will be conducted by a Bench which would necessarily include a judicial member.)</p>

	<p><i>matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President of the Tribunal or, as the case may be, referred to him for transfer to such Bench as the President may deem fit.</i></p> <p><i>(2) The President of the Tribunal shall, for the disposal of any case relating to rehabilitation, restructuring or winding up of the companies, constitute one or more Special Benches consisting of three or more Members, each of whom shall necessarily be a Judicial Member, a Technical Member appointed under any of the clauses (a) to (f) of sub-section (3) of section 10FD, and a Member appointed under clause (g) or clause (h) of sub-section (3) of section 10FD.</i></p> <p><i>Provided that in case a Special Bench passes an order in respect of a company to be wound up, the winding up proceedings of such company may be conducted by a Bench consisting of a single Member.</i></p> <p><i>(3) If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Tribunal for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members of the Tribunal who have heard the case, including those who first heard it.</i></p> <p><i>(4) There shall be constituted, such number of Benches, as may be notified by the Central Government.</i></p> <p><i>(5) In addition to the other Benches, there shall be a Principal Bench at New Delhi presided over by the President of the Tribunal.</i></p> <p><i>(6) The Principal Bench of the Tribunal shall have powers of transfer of proceedings from any Bench to another Bench of the Tribunal in the event of inability of any Bench from hearing any such proceedings for any reason:</i></p> <p><i>Provided that no transfer of any proceedings shall be made under this sub-section except after recording the reasons for so doing in writing.</i></p>	
10FX	<b>Selection Committee.</b> —(1) <i>The Chairperson and Members of the Appellate Tribunal and</i>	Instead of a five-member Selection Committee with Chief Justice of India (or his nominee) as

<p><i>President and Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of—</i></p> <p>(a) <i>Chief Justice of India or his nominee</i></p> <p>(b) <i>Secretary in the Ministry of Finance and Company Affairs.....</i></p> <p>(c) <i>Secretary in the Ministry of Labour.....</i></p> <p>(d) <i>Secretary in the Ministry of Law (Department of Legal Affairs or Department).....</i></p> <p>(e) <i>Secretary in the Ministry of Finance and Company Affairs (Department of Company Affairs).....</i></p> <p>(2) <i>The Joint Secretary in the Ministry or Department of the Central Government dealing with this Act shall be the Convenor of the Selection Committee.</i></p> <p>(3) <i>The Central Government shall, within one month from the date of occurrence of any vacancy by reason of death, resignation or removal of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal and six months before the superannuation or end of tenure of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal, make a reference to the Selection Committee for filling up of the vacancy.</i></p> <p>(4) <i>The Selection Committee shall recommend within one month a panel of three names for every vacancy referred to it.</i></p> <p>(5) <i>Before recommending any person for appointment as the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal, the Selection Committee shall satisfy itself that such person does not have financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member of the Appellate Tribunal or President or Member of the Tribunal, as the case may be.</i></p> <p>(6) <i>No appointment of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be invalidated merely by reason of any vacancy or any defect in the constitution of the Selection Committee.</i></p>	<p>Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and Secretary in the Ministry of Law and Justice as members mentioned in section 10FX, the Selection Committee should broadly be on the following lines:</p> <p>(a) Chief Justice of India or his nominee - Chairperson (with a casting vote);</p> <p>(b) A senior Judge of the Supreme Court or Chief Justice of High Court - Member;</p> <p>(c) Secretary in the Ministry of Finance and Company Affairs - Member; and</p> <p>(d) Secretary in the Ministry of Law and Justice - Member.</p>
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The order of Supreme Court in NCLT Matter has also discussed some other important points which is presented in the table below:

<p><b>On Differences between Court &amp; Tribunals</b></p>	<p>There are certain well-recognized differences between courts and Tribunals. They are :</p> <ul style="list-style-type: none"> <li>(i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are Tribunals. But all Tribunals are not courts.</li> <li>(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an `expert' in the field to which Tribunal relates. Some highly specialized fact finding Tribunals may have only Technical Members, but they are rare and are exceptions.</li> <li>(iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and Evidence Act, requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of Evidence Act.</li> </ul>
<p><b>On formation of Tribunals and Transfers of Powers to and constitution of Tribunals</b></p>	<ul style="list-style-type: none"> <li>(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.</li> <li>(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have</li> </ul>

the independence and security of tenure associated with Judicial Tribunals.

(c) Whenever there is need for 'Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

(d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the Court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any

	<p>encroachment, intentional or unintentional, by either the legislature or by the executive.</p>
<p><b>On Wholesale Transfer of Powers to Tribunals</b></p>	<p>The argument that there cannot be 'whole-sale transfer of powers' is misconceived. It is nobody's case that the entire functioning of courts in the country is transferred to Tribunals. The competence of the Parliament to make a law creating Tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed. When a Tribunal is constituted under the Companies Act, empowered to deal with disputes arising under the said Act and the statute substitutes the word 'Tribunal' in place of 'High Court' necessarily there will be 'whole-sale transfer' of company law matters to the Tribunals. It is an inevitable consequence of creation of Tribunal, for such disputes, and will no way affect the validity of the law creating the Tribunal.</p>
<p><b>On violations of Principle forming basic part of structure</b></p>	<p>Though the challenge by MBA is on the ground of violation of principles forming part of the basic structure, they are relatable to one or more of the express provisions of the Constitution which gave rise to such principles. Though the validity of the provisions of a legislative act cannot be challenged on the ground it violates the basic structure of the constitution, it can be challenged as violative of constitutional provisions which enshrine the principles of Rule of Law, separation of power and independence of Judiciary.</p>