CASE LAW ANALYSIS

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Compulsory amalgamation in public interest—Conditions precedent for order by Central Government

Section 237(1) of the Companies Act, 2013 empowers the Central Government to order amalgamation of two or more companies, where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order.

According to section 237((5) the order of the Central Government under this section must fulfil the following requirements :

(a) a copy of the proposed order has been sent in draft to each of the companies concerned ;

(b) the time for preferring an appeal under sub-section (4) has expired, or where any such appeal has been preferred, the appeal has been finally disposed of ; and

(c) the Central Government has considered, and made such modifications, if any, in the draft order as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof.

Under sub-section (6), the copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.

This section corresponds to section 396 of the Companies Act, 1956. In *63 Moons Technologies Ltd.* v. *Union of India* [2019] 217 Comp Cas 181 (SC), the Supreme Court considered this section and held that the order of the Central Government ordering amalgamation of two companies, cannot lead to arbitrary or unreasonable results—order being administrative order and not legislative order must conform to fundamental rights guaranteed by articles 14 and 19(1)(g) of the Constitution.

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The Supreme Court held that, the fact that, under section 396(5) of the Act, the order of the Central Government has to be laid before the Houses of Parliament does not detract from the fact that this order is administrative and not legislative in character. A Central Government order passed under section 396 directly impacts the rights and liabilities of the companies sought to be amalgamated under the order, their shareholders and creditors. Such order is not an order in general which applies to all such companies, but only to the particular companies sought to be amalgamated. There is no general rule of conduct, without reference to the particular case that is laid down by such an order. The Central Government order, ultimately, makes a specific direction qua two specific companies which are to be amalgamated. Such an order is not in the nature of legislation or delegated legislation. The order passed under section 396 is qua particular companies and does not lay down any general rule of conduct by itself, but in fact, it follows the general rule of conduct laid down by section 396. Thus, the Central Government order, made under section 396, must conform to the fundamental rights guaranteed under articles 14 and 19(1)(g) of the Constitution of India. It is the substance of what is affected that counts when it comes to infraction of a fundamental right, and not the form.

The Central Government has to be "satisfied", meaning thereby, that it must, on certain objective facts, come to a conclusion that amalgamation between two or more companies is necessary. This can only be done if the Central Government finds it "essential", i. e., necessary to do so. Also, this can only be done in "public interest" (the section originally contained the expression "national interest". The Central Government's satisfaction must be as to the conditions precedent mentioned in the section as correctly understood in law, and must be based on facts that have been gathered by the Central Government to show that the conditions precedent exist when the order of the Central Government is made. There must be facts on which a reasonable body of persons properly instructed in law may hold that it is essential in the public interest to amalgamate two or more companies. The formation of satisfaction cannot be on irrelevant or imaginary grounds, as that would vitiate the exercise of power. The Central Government's mind has to be applied to whether a compulsory amalgamation under section 396 is indispensably necessary, important in the highest degree, and whether such amalgamation is both basic and necessary.

Whether a sole property of the company under winding up constitutes "undertaking" under section 180(1)(a) of the Companies Act, 2013

Section 180(1)(a) of the Companies Act, 2013, provides as follows :

"(1) The board of directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely :—

(a) to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

Explanation.—For the purposes of this clause,—

(i) 'undertaking' shall mean an undertaking in which the investment of the company exceeds twenty per cent. of its net worth as per the audited balance-sheet of the preceding financial year or an undertaking which generates twenty per cent. of the total income of the company during the previous financial year ;

(ii) the expression 'substantially the whole of the undertaking' in any financial year shall mean twenty per cent. or more of the value of the undertaking as per the audited balance-sheet of the preceding financial year."

Section 180(1)(a) of the Companies Act 2013 (corresponding to section 293(1)(a) of the Companies Act, 1956) comes into operation where a company wants to sell, lease or otherwise dispose of its *undertaking*, or one of them, if there are more than one, or substantial part of any undertaking. "Substantial" means of real importance or value ; of large size or amount ; relatively great in size, value or importance.

To attract section 180(1)(a), two conditions must be fulfilled :

• First, what is proposed to be sold, leased or otherwise disposed of must be an "undertaking" ; and

• Second, the undertaking must fall within the ambit of either of the two clauses of the *Explanation* appended to sub-section (1) of section 180.

If either of these two conditions is fulfilled, the provision in section 180(1)(a) cannot apply. In particular, if what is proposed to be sold or disposed of is not an undertaking as explained below. The provision cannot apply even if the second condition is fulfilled. In other words, it is essential for the applicability of the provision that what is proposed to be sold or disposed of is not an undertaking as explained below.

In accordance with the *Explanation* appended to section 180(1)(a), the criteria which must be satisfied to attract the provision of section 180(1)(a), are as follows :

Such undertaking—

(i) must have the investment of the company exceeding 20 per cent. of its net worth as per the audited balance-sheet of the preceding financial year ; or

(ii) must be generating 20 per cent. of the total income of the company during the previous financial year ; or

(iii) must have 20 per cent. or more of the value as per the audited balance-sheet of the preceding financial year.

Although the *Explanation* appended to section 180 lays down the criteria to determine whether and in which cases approval of members by a special resolution is required when a company wants to dispose of an undertaking, or whether such a decision can be taken, the section or the Act does not define the word "undertaking". The criteria specified in the *Explanation* to section 180(1)(a) cannot be attracted unless what a company proposes to sell or dispose of is an undertaking. In other words, in order to attract the said criteria a company must propose to sell or dispose of an undertaking. Once it is confirmed that what the company is proposing to sell or dispose of is an undertaking, then it will have to be determined whether the said criteria is attracted or not and if the answer is in the affirmative, it will mean that the proposal will require approval of the shareholders by special resolution. But, as noted before, since there is no definition of "undertaking" in the Act, we have to ascertain its meaning as in common parlance with the help of the relevant case and definition, if any given in other statutes which is of relevance in the context of the provision in section 180(1)(a).

It may be noted in this regard that if an Act does not define a word used in the Act, the Legislature must be taken to have used that word in its ordinary, dictionary meaning[1]. In the absence of definition, the meaning of the words used in the statute should be gathered from the context in which they were used[2]. It was held by the Supreme Court that in the absence of any statutory definition, the term "relative" must be assigned a meaning as is commonly understood[3]. In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute ? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the Legislature, that it is proper to look for some other possible meaning of the word or phrase[4].

1. *Union of India* v. *Delhi Cloth and General Mills Ltd.*, AIR 1963 SC 791 and *South Bihar Sugar Mills Ltd.* v. *Union of India*, AIR 1968 SC 922.
2. *Regional Executive, Kerala Fishermen's Welfare Fund Board* v. *Fancy Food*, AIR 1995 SC 1620 ; [1995] 4 SCC 341 ; [1995] 3 Scale 273 : [1995] 4 JT 394.
3. *Qazi Noorul* v. *Deputy Director, ESI Corporation*, AIR 2009 SCW 5490.
4. *Pinner* v. *Everett* [1969] 3 All ER 257 (HL), per Lord Reid.

The ordinary meaning of the word "undertaking" in the context of the provision in section 180(1)(a), is : an enterprise ; a business ; a project ; a venture ; a going concern. Any business or project or unit of a company would amount to an undertaking of the company (*CDS Financial Services (Mauritius) Ltd.* v. *BPL Communications Ltd.* [2004] 121 Comp Cas 374 (Bom)). The word "undertaking" must be defined as "any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade."[1]

The term "undertaking" has been used in some statutes and defined in some, and used but not defined in some of them. For instance, in section 3(d) of the Industries (Development and Regulation) Act, 1951, the expression "industrial undertaking" is defined as any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including "Government", but the word "undertaking" is defined in this Act. Section 2(v) of the MRTP Act, 1969, defined, prior to August 1, 1984 the expression "undertaking" thus :

> "'undertaking' means an undertaking which is engaged in the production supply, distribution or control of goods of any description or the provision of service of any kind."

In *Yallamma Cotton, Woollen and Silk Mills Co. Ltd., In re* [1970] 40 Comp Cas 466 (Mysore), it was held (page 485) :

> "The word 'undertaking' is not defined in the Act. one has, therefore, necessarily to depend upon the dictionary meaning or such secondary meaning the term might have acquired by commercial usage or long practice governing the workings of and borrowings by companies . . .
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> It is not in its real meaning anything which may be described as a tangible piece of property like land, machinery or the equipment ; it is in actual effect an activity of man which in commercial or business parlance means an activity engaged in with a view to earn profit. Property, movable or immovable, used in the course of or for the purpose of such business can more accurately be described as the tools of business or undertaking, i. e., things or articles which are necessarily to be used to keep the undertaking going or to assist the carrying on of the activities leading to the earning of profits."

The above decision was upheld, on appeal, with the following observation :

1. *Secretary Madras Gymkhana Club Employees' Union* v. *Management of the Gymkhana Club,* AIR 1968 SC 554 ; *D. N. Banerji* v. *P. R. Mukhrejee,* AIR 1953 SC 58 ; *Baroda Borough Municipality* v. *Workmen,* AIR 1957 SC 110.

"The business or undertaking of the company must be distinguished from the properties belonging to the company. In this case, it is only the properties belonging to the company that have been dealt with by the board of directors under the deeds of hypothecation and mortgage in favour of the bank. Hence, the learned company judge was right in holding that no part of the undertaking of the company was disposed of in favour of the bank." (See *International Cotton Corporation P. Ltd.* v. *Bank of Maharashtra* [1970] 40 Comp Cas 1154, 1157 (Mysore)).

A somewhat similar question arose in a different context in the case of *Rustom Cavasjee Cooper* v. *Union of India* [1970] 40 Comp Cas 325 (SC), necessitating discussion of the meaning of the word "undertaking" as interpreted in judicial decisions, Indian and English. Hon'ble A. N. Ray J., in his judgment, observed that the expression "undertaking" meant a going concern ; that an undertaking meant the entire organisation ; that it was an amalgam of all ingredients of property and was not capable of being dismembered. It was further held on this aspect as under (page 417) :

"In reality the undertaking is a complete and complex weft and the various types of business and assets are threads which cannot be taken apart from the weft."

In *P. S. Offshore Inter Land Services P. Ltd.* v. *Bombay Offshore Suppliers and Services Ltd.* [1992] 75 Comp Cas 583 (Bom) a learned judge of the Bombay High Court held (page 596) :

"The expression 'undertaking' used in this section means as the unit, the business as a going concern, the activity of the company duly integrated with all as components in the form of assets and not merely some asset of the undertaking. Having regard to the object of the provision, it can at the most embrace within it all the assets of the business as a unit or practically all such constituents. If the question arises as to whether the major capital assets of the company constitutes the undertaking of the company while examining the authority of the board to dispose of the same without authority of the general body, the test to be applied would be as to whether the business of the company could be carried on effectively even after disposal of the assets. The test to be applied would be whether the capital assets to be disposed of constitute substantially the bulk of the assets so as to constitute the integral part of the undertaking itself in the practical sense of the term."

In *IDBI Bank Ltd.* v. *Administrator, Kothari Orient Finance Ltd.* [2009] 152 Comp Cas 282 (Mad), the only immovable property of a company was proposed to be sold, and the Madras High Court held that the provision in

section 293(1)(a) was applicable. This decision was affirmed by the Supreme Court in *IDBI Bank Ltd.* v. *Official Liquidator, Office of the Official Liquidator of Companies* [2019] 217 Comp Cas 302 (SC) and it was held that, this provision was applicable in the present case, in view of the categorical finding by both the courts below that the subject property was the only immovable property of the company.

Remedy against wrongful withholding of company's property by its employees or directors

Section 452 of the Companies Act, 2013 corresponds to, and is substantially identical with, section 630 of the Companies Act, 1956. It provides as follows :

> "452. *Punishment for wrongful withholding of property.*—(1) If any officer or employee of a company—
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> (a) wrongfully obtains possession of any property, including cash of the company ; or
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> (b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act,
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> he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.
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> (2) The court trying an offence under sub-section (1) may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to two years."

There have been a number of decisions of the Supreme Court and the High Courts on section 630 of the Companies Act which seeks to provide a speedy remedy for recovery of any property of a company which has been wrongfully held by its officer or employee. Since this provision has been enacted to prevent an abuse by the officers and employees of the company, it has been consistently interpreted liberally having regard to its purpose. For example, in *Amrit Lal Chum* v. *Devoprasad Dutta Roy* [1988] 63 Comp Cas 839 (SC), the apex court clarified that the beneficent provision contained in section 630, no doubt, penal has been purposely enacted by the Legislature with the object of providing a summary procedure for retrieving the property of the company : (a) where an officer or employee of a com-

pany wrongfully obtains possession of property of the company ; or (b) where having been placed in possession of any such property during the course of his employment, wrongfully withholds possession of it after the termination of his employment.

In *Automobile Products India Ltd.* v. *Das John Peter* [2010] 158 Comp Cas 69 (SC), the Supreme Court, following this line of hypothesis, pointed out that the section makes it clear that a criminal complaint seeking possession of the servant quarter at the instance of the company against the accused was maintainable and cognisance thereof was rightly taken by the Magistrate but he committed a grave error in rejecting it on technical grounds, instead of deciding it on the merits. Accordingly the Supreme Court held that even after taking into consideration all the defences taken by the accused, their eviction from the servant quarter is inevitable. Since he had committed default of his own promise of vacating the accommodation, they were directed to vacate the premises by or before October 1, 2010 and to hand over its peaceful vacant possession to the company. "Under the web of hyper technicalities justice has taken a back seat as is projected in the order dated November 22, 2006 passed by the Additional Chief Metropolitan Magistrate, Girgaum, Mumbai", is a revealing observation by the Supreme Court in this case.

Where an officer or employee has been entrusted with a company's premises, the moment the employment ceases, the officer or employee ceases, the officer or employee is no longer entitled to remain in possession of the premises allotted to him and the withholding of the premises, after cessation of the employment, amounts to wrongful withholding punishable as an offence by the criminal court, besides his being required to vacate and hand over possession to the company which allotted the premises to him. It is thus clear that the offence of wrongful withholding of the premises becomes complete the moment there is cessation of employment.

Object of section 630

In *Baldev Krishna Sahi* v. *Shipping Corporation of India Ltd.* [1988] 63 Comp Cas 1 (SC), the Supreme Court explained the object of this provision as follows :

> "It provides speedy relief to a company when its property is wrongfully obtained or wrongfully withheld by an ex-officer or ex-employee. The court clarified that the beneficent provision contained in section 630, no doubt penal, has been purposely enacted by the Legislature with the object of providing a summary procedure for retrieving the property of the company : (a) where an officer or employee of a company wrongfully obtains possession of property of

the company ; or (b) where having been placed in possession of any such property during the course of his employment, wrongfully withholds possession of it after the termination of his employment. It is the duty of the court to place a broad and liberal construction on the provisions in furtherance of the object and purpose of the legislation which would suppress the mischief and advance the remedy."

Section 630 seeks to dispossess the occupant of the property in a relatively shorter time than in a civil suit. One other, and perhaps more important, feature of this remedy is that it frightens the occupant as it is criminal in nature. A man, especially a gentleman, is normally scared of criminal proceedings in a magistrate's court. Section 630 remedy has the frightening impact on the mind of the person who is wrongfully holding on to the company's property, since the case is filed and tried in a criminal court according to the criminal law codified in the Criminal Procedure Code.

The section provides for a quicker and relatively effective remedy for the retrieval of any property of a company from its officer or employee who is in possession thereof. Two conditions precedent for resorting to the remedy provided by the section are : firstly, the person holding the property must be an officer or employee of the company ; and secondly, he must have wrongfully obtained the possession of the property or having obtained possession of any property, he must have wrongfully withheld it or knowingly applied it for purposes other than those expressed or directed in the articles and authorised by the Act. If these conditions are satisfied, the officer or employee concerned would render himself liable for the consequences stated in sub-section (2) of the section.

Whether section covers past employees

One vital aspect of section 630, which underwent extensive controversy and court battles and which eventually got settled by a Supreme Court ruling, is as to whether the section 630 remedy could be pressed into action against a past or retired employee of the company. There was a divergence of opinion between the Bombay High Court and the Calcutta High Court, the former taking the view that the section did cover an ex-officer and ex-employee who had in his possession any property of the company, but the latter had taken the contrary view. A fine law point that gave rise to the controversy was the interpretation of the phrase "any officer or employee of a company (who) wrongfully withholds any property" occurring in the section.

It is often said that the court should interpret a provision in law so as to advance the remedy contemplated therein and not to render it inefficacious, especially in the case of a penal provision. It is this canon of interpretation of statutes that weighed with the Supreme Court in interpreting the above phrase in *Baldev Krishna Sahi* v. *Shipping Corporation of India*

Ltd. [1988] 63 Comp Cas 1 (SC). The controversy was set at rest by the Supreme Court by holding that the term "officer" or "employee" of a company applies not only to the existing officers or employees. If such officer or employee either : (a) wrongfully obtains possession of any property, or (b) having obtained possession of such property during his employment, wrongfully withholds the same after the termination of his employment, it was pointed out that wrongful obtainment of possession would attract section 630. It provides speedy relief to a company when its property is wrongfully obtained or wrongfully withheld by an ex-officer or ex-employee.

In a later case, *Amrit Lal Chum* v. *Devoprasad Dutta Roy* [1988] 63 Comp Cas 839 (SC), the apex court clarified that the beneficent provision contained in section 630, no doubt penal, has been purposely enacted by the Legislature with the object of providing a summary procedure for retrieving the property of the company : (a) where an officer or employee of a company wrongfully obtains possession of the property of the company ; or (b) where having been placed in possession of any such property during the course of his employment, wrongfully withholds possession of it after the termination of his employment.

Whether section 630 covers relatives of employees

The question whether the provisions of section 630 covers the cases of relatives of an officer/employee of a company where any property of the company had been obtained by the concerned officer/employee but was in possession of his relatives, was answered in the negative by the Indore Bench of the Madhya Pradesh High Court in *Beharilal Gupta* v. *Binod Mills Ltd.* [1988] 64 Comp Cas 117 (MP). In this case, an executive director of the applicant-company was allotted bungalow in question by the company in his capacity as such director. After he resigned, a criminal complaint was made against his relatives who were in possession of the bungalow. The court held that section 630 does not contemplate criminal proceedings against relatives of an erstwhile director.

However, the Bombay High Court took a broader view and, liberally interpreting the provisions of section 630, held in *Abdul Quayaum Ansari* v. *State of Maharashtra* [1991] 70 Comp Cas 368 (Bom) that if section 630 obliges an officer or an employee of a company who has been allotted residential accommodation by the company to return the property of the company upon termination of his services, there is no reason why after his death, his heirs and legal representatives who continue to be in possession of the property of the company by virtue of their being the heirs and legal representatives of the officer or employee should be absolved of their liability to return the property to the company. If the property of the company which was wrongly held by its officer or the employee is in possession of

his heirs and legal representatives, they are as much in wrongful possession of such property in their capacity as the heirs of the employee. They are as much liable to return the property to the company as the officer or employee, and even if the officer or the employee dies before the institution of the complaint, they would be liable for prosecution and punishment under section 630 of the Act.

Smt. Abhilash Vinodkumar Jain v. *Cox and Kings (India) Ltd.* [1995] 84 Comp Cas 28 (SC) is the decision of the Supreme Court on this issue. There the apex court held that since section 630 provides speedy relief to the company where its property is wrongfully obtained or withheld by an "employee or an officer" or a "past employee or an officer" or "legal heirs and representatives", the words "officer or employee" derive their colour and content from such "employee or officer" in so far as the occupation and possession of the property belonging to the company is concerned. The term "officer or employee" of a company in section 630 would, by a deeming fiction, include the legal heirs and representatives of the employees continuing in occupation of the property after the death of the employee or officer. Failure to deliver property back to the employer on termination, resignation, superannuation or death of an employee would render the "holding" of the property wrongful and actionable under section 630. The Supreme Court held that a petition under section 630 is maintainable against the legal heirs of the deceased officer/employee for retrieval of the company's property wrongfully withheld by them after the demise of the employee concerned. It upheld the High Court's order dismissing the petitions filed by the appellants under section 482 of the Code of Civil Procedure, 1908 and declined to quash the proceedings initiated by the employer of the deceased employee for retrieval of the company's property under section 630 of the Act. This ruling was followed by the Madhya Pradesh High Court in *Gajra Gears Ltd.* v. *Smt. Ashadevi* [2001] 103 Comp Cas 489 (MP).

However, in *J. K. (Bombay) Ltd.* v. *Bharti Matha Mishra* [2001] 104 Comp Cas 424 (SC) in the above case, the Supreme Court held that the family of members of the officer or employee not connected with the family who come into possession of the property through such officer or employee would not be covered by section 630.

In *Hooghly Mills Co. Ltd.* v. *State of West Bengal* [2019] 217 Comp Cas 339 (SC), the Supreme Court emphasized that given that the primary object of section 630 of the Companies Act, 1956 is to provide a speedy mechanism for restoration of wrongfully withheld property to companies, the provision should be construed as far as possible to facilitate a remedy in favour of the aggrieved company and to prevent the wrongful retention of

the property for an unduly long period by the accused. There is no stipulation in section 630(2) that an order for delivery of wrongfully withheld property must be made only after the accused has been convicted under section 630(1). Rather, it says the court "trying" the offence may direct the delivery of such property, which indicates that such an order may be passed at any stage by the trial court.

Furthermore, section 630 of the Act nowhere stipulates that the property should have been allotted by the company to the accused as a perquisite of service. There may be a number of purposes for which the accused may be given lawful possession of the company's property during the course of employment for example, for safe custody of the property or for maintenance thereof. The purpose for which and the time at which possession was given is irrelevant. What is sufficient is that the accused was put into possession of the property in his capacity as an officer or employee of the company and continued to withhold such property without having any independent right, title or interest thereto even after cessation of his employment.

Offence of failure to pay dividend

Under section 127 of the Companies Act, 2013, a dividend declared by a company but not paid or a dividend warrant has not been posted within 30 days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company who is knowingly a party to the default is punishable with imprisonment up to two years and with a fine of a minimum of Rs. 1,000 per day for the period during which the default continues and the company is liable to pay simple interest at 18 per cent. per annum during such period.

But no offence under this section is deemed to have been committed in the following situations :

(a) the dividend could not be paid by reason of the operation of any law ;

(b) a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him ;

(c) there is a dispute regarding the right to receive the dividend ;

(d) the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder ; or

(e) for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company.

This section requires, though implicitly, payment of a dividend within thirty days from the date of declaration. As noted before, the word

"declaration" must be understood as referring to both final dividend declared at an annual general meeting and an interim dividend declared at a board meeting. In either case, the dividend must be paid within 30 days from the date of declaration.

The failure to pay a declared dividend within 30 days is an offence and every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues and the company shall be liable to pay simple interest at the rate of eighteen per cent. per annum during the period for which such default continues.

By virtue of clause (c) of the proviso, permits withholding payment of a dividend where there is a dispute regarding the right to receive the dividend. There must exist on the date of payment of a dividend a dispute regarding the right to receive the dividend, but the dispute need not be in a court or a Tribunal and there need not be an injunction against payment of the dividend.

In *Man Industries (India) Ltd.* v. *State of Maharashtra* [2019] 217 Comp Cas 384 (Bom), it has been held that failure to pay dividend to the shareholder is an offence, which invites penal action under section 127 of the Companies Act, 2013. However, under clause (c) of the proviso, non-payment of dividend to the shareholder will not be an offence if the payment is not made because a dispute between the parties exists. In other words, the act of non-payment of dividend by the directors of the company can be justified because according to them, a particular shareholder is not entitled to receive dividend. This can be ascertained on the basis of the facts and circumstances of each case. Accordingly, since a dispute existed between the shareholder and the directors and it was pending in the National Company Law Tribunal and the National Company Law Appellate Tribunal, and also pending before an arbitrator, it was apparent from the order that the judge was aware of the history of the dispute between the parties and therefore, he had mentioned the word "dispute". The judge under such circumstances, in view of the deeming provision in the section should not have issued process when the proviso was attracted and hence the offence was not constituted.

Can a legal representative of the deceased member of a company file a petition under section 241 ?

A person who has "standing" (locus standi[1]) can petition under section 241. In other words, a person who has no standing according to the eligibility

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standard, cannot file a petition under section 241. The basic eligibility criterion laid down in section 244 is that the complainant must be a "member" of the company in relation to which the petition is to be made. Therefore, only a member of a company can petition in relation to the company.

Section 244 (as well as section 241) entitles only a "member" of a company to petition the Company Law Board under section 241 to claim relief against oppression of the member and/or mismanagement of the affairs of the company. Therefore, the petitioner must be a member of the company.

A petition under section 241, for relief against oppression or mismanagement in the conduct of the affairs of a company can only be maintained by a person or persons who are shown as members in the register of the company. If the persons who wish to file such a petition are not shown as members, rightly or wrongly, they must first have the register rectified before they can bring a petition (*Ved Prakash* v. *Iron Traders P. Ltd.* [1961] 31 Comp Cas 122 (Punjab)).

A member of a company means a shareholder who holds one or more shares in the company and whose name is entered in the register of members of the company. A shareholder is the owner of the shares held by him. A shareholder becomes a member of the company upon his name being entered in its register of members. But a company, which does not have a share capital, also has members. For example, in the case of a guarantee company not having a share capital, there are members who do not hold shares in the company. Therefore, a member is a person whose name is entered in the register of members of the company regardless of whether the company has share capital or not.

These three terms are used interchangeably in the Act. The words "holder of a share" are really equal to the word "shareholder" and the former denotes, in so far as the company is concerned, only a person who, as a shareholder, has his name entered on the register of members. The expression "shareholder" or "holder of a share" denotes no other person except a member (*Howrah Trading Co. Ltd.* v. *CIT* [1959] 29 Comp Cas 282 (SC) ; [1959] 36 ITR 215 (SC) and *Hindustan Investment Corporation Ltd.* v. *CIT* [1955] 25 Comp Cas 57 (Cal)). These expressions are used as synonyms to indicate the person who is recognised by a company as its owner for its purposes (*Balkrishan Gupta* v. *Swadeshi Polytex Ltd.* [1985] 58 Comp Cas 563 (SC)).

However, in *World Wide Agencies P. Ltd.* v. *Mrs. Margaret T. Desor* [1990] 67 Comp Cas 607 (SC), the Supreme Court held that in some situations and contingencies, a "member" may be different from a "holder". A member may be a holder of shares, but a holder may not be a member.

Section 2(55) of the Act (corresponding to section 41 of the 1956 Act) defines the term "member" as follows :

> "(55) 'member', in relation to a company, means—
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> (i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members ;
>
> (ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company ;
>
> (iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository."

As will be seen later, one of the essential statutory conditions for a person being a member of a company is that the name of the person must be on the register of members of the company. A person whose name does not appear on the register of members is not a member and hence has no locus standi to make a petition under section 244, although (as discussed below) a person claiming to be a member of a company but whose name is not the register of members may, in certain circumstances, be allowed by the National Company Law Tribunal to maintain a petition.

The word "member" in section 287(3) of the English Companies Act, 1948[1] was construed as extending to the legal personal representative of the deceased member[2]. In *Bayswater Trading Co. Ltd., In re* [1970] 40 Comp Cas 1196 (Ch D), it was held that having regard to the context in which the word "member" is found in section 353(6) of the English Companies Act, 1948[3], it ought to be so construed as to include a legal representative of the deceased member although not on the register of members, for it would not be unlikely that in the course of the 20 years allowed by the sub-section that his personal representative should not be a person entitled to ask the court to restore the name of the company to the register. Applying the ratio of the case cited above, Pennycuick J. held in *Jermyn Street Turkish Baths Ltd., In re* [1971] 41 Comp Cas 735 (Ch D) that personal representatives of a deceased member must be regarded as members of a company for the purposes of section 210 of the English Companies Act, 1948 (section 397 of the Companies Act, 1956). This ruling has been applied by the Supreme Court in *World Wide Agencies P. Ltd.* v. *Mrs. Margaret T. Desor* [1990] 67 Comp Cas 607 (SC) in which it has been held

1. Section 494(3) of the Companies Act, 1956.
2. *Llewellyn* v. *Kasintoe Rubber Estates Ltd.* [1914] 2 Ch D 670.
3. Section 560(6) of the Companies Act, 1956.

that legal representatives of a deceased member are entitled to petition under sections 397 and 398. If the term "member" under sections 397 and 398 is construed to exclude all persons who have parted with the beneficial interest in the shares, there will be a large number of members who would be deprived of remedies provided by those sections (*Killick Nixon Ltd.* v. *Bank of India* [1985] 57 Comp Cas 831 (Bom)).

But where a legal representative of the deceased member who held shares jointly with another person claimed to be a shareholder and, as such, contributory, it was held that his claim could not sustain in view of a regulation in the company's articles which provided that on the death of a member, the survivor(s) where the deceased member was a joint shareholder shall be the only person(s) recognised by the company as having any title to his interest in the shares (see regulation 25 of Table A) (*Ram Govind Misra* v. *Allahabad Theaters P. Ltd.* [1989] 66 Comp Cas 358 (All)).

In *Oswal Greentech Ltd.* v. *Pankaj Oswal* [2019] 217 Comp Cas 520 (NCLAT), the first respondent filed a petition under sections 241, 242 and 244 of the Companies Act, 2013, alleging certain acts of oppression and mismanagement in the affairs of the appellant-company. The appellant challenged the maintainability of the petition on the ground that the petitioner was not a shareholder. The Tribunal held that the petitioner was eligible in terms of section 244 of the Act. On appeal contending that in view of the nomination filed by the late A during his lifetime and the registration of the name of AO pursuant to such nomination after the death of the original shareholder, the first respondent could not claim to be entitled to exercise rights in respect of the shares standing in the name of the late A at the time of his death.

The National Company Law Appellate Tribunal held that the application under sections 241, 242 and 244 of the Act was maintainable at the instance of the first respondent. Even otherwise, his claim relating to the shares of A was pending in a suit before the court of competent jurisdiction. This was a fit case for waiver under sub-section (4) of section 244 of the Act and the application under sections 241, 242 should be heard on the merits.

Limit on the number of directorships

Overall limit

Section 165 limits the number of directorship a person can hold at a time. According to sub-section (1), no person shall hold office as a director in more than twenty companies at the same time. This limit is inclusive of directorships in private companies as well as alternate directorships. Out of twenty, a person can hold directorship in maximum ten public companies.

According to the *Explanation* appended to sub-section (1), for reckoning the limit of public companies in which a person can be appointed as director, directorship in a private company that is either a holding or a subsidiary company of a public company, shall be included.

The intention of the *Explanation* is unclear. It creates confusion as to whether it seeks to exclude directorships in private companies other than holding or subsidiary companies of public companies. But sub-section (1) does not seem to support this view. On the contrary, reading sub-section (1) and the proviso together it is clear that directorships in private companies are not excluded from the limit of twenty.

For reckoning the limit of directorships of twenty companies, the directorship in a dormant company shall not be included (*Explanation II* to sub-section (1) of section 165 of the Act, introduced by section 53 of Companies (Amendment) Act, 2017, notified with effect from February 9, 2018. MCA Notification No. S. O. 630(E)). In *Yashoda Special Metals P. Ltd., In re* [2019] 217 Comp Cas 559 (NCLT). The applicant on August 1, 2018 resigned as director from Y and with this resignation, he was a director in 19 companies only. But Y failed to file Form DIR-12 with the Registrar of Companies, informing of the resignation of the applicant as director. The applicant contended that he was under the impression that Y had intimated the Registrar of Companies about his resignation and therefore he became a director in W on August 6, 2018. On application under section 441 of the Companies Act, 2013, for compounding the violation of provisions of section 165 of the Act. The National Company Law Tribunal held that, since no prosecution was launched against the applicant and the application was filed for compounding of the violation on his own, the Tribunal could take a lenient view in imposing compounding fee of Rs. 2,000 per day which was just and reasonable in the circumstances of the case. As the compounding fee had been remitted by the applicant, the offence stated in the application was to be compounded.