

# *Analytical Speaking*

## **Dharam Godha vs Universal Paper ruling: CLB should go to the earlier practice of 2 member benches**

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The country is depending more and more on quasi judicial forums for dispensation of justice. Courts continue to be over-burdened. The use of quasi judicial bodies for delivery of justice is not just because courts are over burdened – it is primarily because there are lot of matters which are technical in nature and involve combination of judicial analysis as well as technical depth of a particular subject. The tribunals are specialised courts that are supposed to deal with specialised matters.

The Company Law Board (CLB) , Income Tax Authorities Tribunal (ITAT), Debt Recovery Tribunal (DRT), Securities Appellate Tribunal (SAT), commercial taxes appellate tribunals are some examples of such bodies.

Elaborate discussion has been done by the apex court on the nature of these bodies and inherent powers of court under Civil Procedure Court in several rulings including the jurisdiction of various courts and tribunals on several matters. One of the recent cases was *Nahar Industrial Enterprises vs Hongkong Banking Corp* [2009] 8 SCC 646<sup>i</sup> to decide on the fact as to whether the Bank is secured creditor or not has to be decided only by the Company Court under Section 446 of the Act. In the apex court made it clear having regard to the pleadings of the parties as also the purpose and object for which the Tribunal has been constituted, the Tribunal should proceed to dispose of the bank's claims expeditiously. The court further expressed that there was no doubt whatsoever in the mind that while determining the respective claims of the parties and the nature thereof, the tribunal shall comply with all the requirements of law.

In *Nagri Pracharini Sabha v. Vth Addl. Distt. and Sessions Judge*, [1991 Supp (2) SCC 36] it was held that a litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in the civil court unless its cognizance is either expressly or impliedly barred. The position is well-settled that exclusion of jurisdiction of the civil court is not to be readily inferred and such exclusion must be either expressly or implied;

In *Harinagar Sugar Mills v. Shyam Sundar Jhunjunwala*<sup>ii</sup> (Equivalent citations: 1961 AIR 1669, 1962 SCR (2) 339, AIR p. 1680, para 32) the apex Court held:

*“By ‘courts’ is meant courts of civil judicature and by ‘tribunals’, those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power*

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*to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State."*

### **The ruling in Dharam Godha vs Universal Paper<sup>iii</sup> decided on April 19, 2012 by the Hon'ble Calcutta High Court**

In a daring ruling, Justice Sanjib Banerjee of the Calcutta High court detected that the member of CLB Principal Bench had actually cut pasted the member's own ruling in a completely unconnected case rendered in *Chiranjit Khanna vs Khanna Paper Mills* (rendered on 24<sup>th</sup> November 2010 in CP No.61 of 2007) which was actually set aside by the Delhi High Court on an appeal under section 10F long back.

The judge made scathing comments on the order, including contemptuous comments on the quality of language, understanding of legal principles, no application of mind, mixing of legal pronouncements and facts with a different case altogether, moreover inability to state proper reasons in support of the judgment made etc.

While these comments might paint the CLB members or the member in particular, in a poor light, but one of the points that J Banerjee strongly made is that the lack of legal knowledge of members of CLB. The statement made by the judge is cited below:

*"The impugned judgment betrays a total non-application of mind and worse. The CLB was not aware of the tools that were available to it or the tools that were necessary for the assessment. Both the method and methodology appear to be awry. It is here that the larger question indicated in the opening paragraph of this judgment arises. Many eminent lawyers have spent their entire professional careers trying to fathom the width of the spectrum that is indicated in the "just and equitable" clause that figures in Section 397 of the Act. "*

It can be seen that the judge has not lamented but instead strictly commented and criticized the situation and the lack of knowledge on part of the CLB Member. The judge has very sharply indicated that before passing any order in any matter the concerned judicial authority should make itself well aware of the case and of the legal provisions that may pertain to a particular case rather than relying on past judgments without any application on one's own mind and jurisprudence. Moreover, the judgment in the present case explains the reasons which are totally unconnected with the present case and which only highlight the fact that the CLB

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Member not even once thought of what all reasoning was being given to support the judgment rendered. The judgment is perverse in every sentence as dealt more fully in the order by Justice Banerjee and betrays inability on the part of the relevant Member in adjudicating a matter of a particular type.

One of the principle issues which led to such sharp observations and comments of Justice Banerjee was that:

*It is that the CLB misdirected itself and that it would be apparent from the face of the order impugned that the principles as to res judicata, issue estoppel and abuse of process were either foreign to the concerned member of the CLB or the considerations relevant for assessing the applicability of such principles were unknown to such member.*

*Further, the CLB paid lip service to the principles of res judicata (curiously written as 'rs judicata' in at least one place), constructive res judicata and issue estoppel without attempting to assess how such principles were applicable to the facts of the matter before it.*

From the above it is crystal clear that the order was passed without any cogent reasons thereof and moreover without application of relevant principles and logic on part of the CLB Member who seemed to be even unaware of all methods and tools available with him before passing any such order without consideration of facts.

The judge has beyond doubt indicated that there was no application of mind at all even if was a copy paste job done by the member. Surely, this judgment is to invite lot of views from the critics. However, what is to be seen is that in what spirit this will be taken and whether at all there will be an inclination for a better scenario and whether such a remark on the judicial pronouncements will again get us back to the double bench.

Justice Banerjee seemed to lament the fact that members without judicial background are being appointed on to the CLB. He stated:

*“The outsourcing of judicial work which has become the fashion of the day has resulted in several classes of matters that were previously before the Court now being parked with tribunals manned by bureaucrats or non-judicial members with no legal training or acumen.”*

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He further tried to indicate the effects of such assessment and lack of application of mind and his concerns towards the systemic flaw stating:

*“What is evident from the impugned judgment is bound to follow if matters as to justice and equity that many have spent their lives without fully comprehending are left to tribunals manned by the uninitiated to pronounce upon; justice then becomes the casualty and inequity the order of the day.”*

What follows from the above is that should CLB get back to the earlier system of a Judicial and a Technical member?

### **CLB Members: Judicial and Technical**

CLB was constituted/established vide Companies (Amendment) Act, 1988 to exercise quasi-judicial functions effectively and independently, which matters were previously dealt with and managed by the Executive Authority of the Central Government.

Company Law Board Regulations, 1991 (CLB Regulations) defines a Member in sub-Regulation 1 of Regulation 2 clause (m) as:

*“**Member** means a member (whether judicial or technical) of the Board and includes the Chairman and Vice Chairman;”*

From the above definition it follows that the CLB members are of two types – Judicial and Technical. Clause 3 of Company Law Board (Qualifications, Experience and Other Conditions of Service of Members) Rules, 1993 (Qualification Rules) lays down the qualification for both a Judicial and a Technical Member.

Sub-Clause (1) of Clause 3 lays that a judicial member is considered to be a person having following qualifications:

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(c) is, or has been, a Member of the Central Company Law Service (**Legal Branch**)/Indian Company Law Service (**Legal Branch**) and is holding or has held a post in Senior Administrative Grade in that service for at least three years; or

(d) is, or has been, a member of the *Indian Legal Service* and is holding, or has held a post in Grade-I of that service for at least three years;]

**[Emphasis Supplied]**

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Further, sub-clause (2) lays that a Technical Member is to have the following qualifications:

(a) is, or has been, a Member of the Central Company Law Service (**Accounts Branch**)/Indian Company Law Service (**Accounts Branch**) and is holding, or has held, a post in Senior Administrative Grade in that service for at least three years; or

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(b) 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

(c) 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

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### **[Emphasis Supplied]**

From the above cited it is evident that the regulations and Rules made thereunder were framed keeping in mind the necessity of both a legal and a technical expert.

### **Earlier constitution of Benches**

As originally envisaged, CLB Benches used to constitute of 2 members each – a judicial member and Technical member. Except for purely routine matters, most matters went to 2 (two) member benches.

Thereafter several amendments were made in the CLB Regulations in the year 1994 onwards transferring certain matters to single member Bench. Thereafter the amendments in 2002 brought in the amendment to regulation 4 of CLB Regulations substituting the requirements of “not less than two members” to “one or more members”

The possible reasons one can think of for such amendment is that purely because of shortage of such competent people to manage and run the show and practically there were even times when there were only 2 or 3 members all over the country while there are 4 regional benches besides a Principal Bench. Therefore it is obvious that such a situation demanded amendment but it possible did not take cognizance of the Qualification Rules framed or that the Members in-charge did not realize that

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such a scant situation would lead to something like this of a comment on the quasi judicial bodies. Even today lots of cases are pending before CLB due to lack of manpower in certain situations and due to lack of time for handling the matters flowing in, for some cases.

It would not be incorrect to say that such a comment will not only affect the system of CLBs but also of the other quasi judicial bodies and Tribunal which though are in a better position than CLB, but should be cautioned and alarmed after such observations and comments on the quasi judicial bodies of the country.

### **Why Technical member needed:**

While the point that Justice Banerjee makes about legal depth in dealing with matters that come to CLB, it cannot be ignored that there are several matters where accounting knowledge is equally important.

For instance, if there is a matter pertaining to acquisition of shares, there is an issue of valuation of shares. This is surely not something where legal knowledge will suffice. Valuation of shares is a complex accounting and financial issue, involving complexities such as discounting rates, present values, dealing with uncertainty and so on.

If matters relating to merger and restructuring are passed on to the CLB, there might be complex issues of exchange ratio etc to be dealt with.

In essence, it is necessary to understand that the CLB is not a civil court but a special tribunal. It is not merely meant for dealing with civil disputes between parties. If at all it is any more than a civil court, it has to demonstrate special understanding of corporate law and corporate governance issues.

Hence, pure judicial background is not sufficient for CLB members. It is important that the CLB goes back to the earlier system of a technical member and a judicial member.

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<sup>i</sup> <http://www.indiankanoon.org/doc/1155272/>

<sup>ii</sup> <http://www.indiankanoon.org/doc/1531171/>

<sup>iii</sup> <http://indiankanoon.org/doc/74652084/?type=print> (htt)