

Companies Act

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Companies (Amdt.) Bill, 2001

Companies (Amendment) Bill, 2001 : A Bird's Eye-view

The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was enacted to tackle the problem of industrial sickness, but because of various deficiencies in it, it failed to achieve its objective. To remedy the situation, the Government has decided to repeal the SICA and incorporate fresh provisions in the Companies Act, 1956 by amending it through the Companies (Amendment) Bill, 2001. In this article, the author takes a look at the proposed new provisions, especially those relating to the establishment of the National Company Law Tribunal (NCLT) which will be the central body empowered to deal with the issues of recognition of industrial sickness, revival/rehabilitation/winding up sick industrial companies and related matters. The author gives a fairly detailed account of the procedural steps involved in the proceedings to be conducted by the NCLT. His presentation clearly brings out the way in which the new provisions are an improvement upon the old provisions and are expected to bring in better results - EDITOR

Introduction

1. After seeing the dark clouds of sickness hovering over the industry, it seems that the Central Government has decided not to remain a silent spectator any more and search for new remedies for curing industrial sickness. Till now, the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was being used as a remedy to cure industrial sickness; however not much headway was made. Therefore, it was imperative to find new remedies to cure industrial sickness. A step has been taken in this direction by the Government by introducing two bills in Parliament, namely, the Companies (Amendment) Bill, 2001 (the Bill) and the Sick Industrial Companies (Special Provisions) Repeal Bill, 2001 (the Repeal Bill). The repeal bill seeks to repeal SICA and abolish the Board for Industrial and Financial Reconstruction (BIFR) and the Appellate Authority (AAIFR) established thereunder whereas the bill seeks to amend the Companies Act, 1956 ('the Act') and also proposes to establish a new quasi-judicial body, namely, the National Company Law Tribunal which will have the powers and jurisdiction of the BIFR and the AAIFR. Thus, the bill, once enacted into law, is expected to accelerate the process of revival/rehabilitation of sick industrial companies by transferring such functions and responsibilities from the BIFR to the proposed Tribunal.

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Establishment of National Company Law Tribunal

2. As per the proposed section 10FB of the Act, the Central Government shall, by notification in the Official Gazette, constitute a Tribunal to be known as National Company Law Tribunal (the Tribunal). In addition to having the powers and jurisdiction of the BIFR and the AAIFR, the proposed Tribunal will also be the competent authority for winding up, compromises or arrangements with members or creditors and also for mergers, amalgamations and reconstruction of companies which is so far under the purview of High Courts. Therefore, all proceedings under the Companies Act, pending before any High Court before the commencement of the Companies (Amendment) Act, 2001 shall stand transferred to the Tribunal on such commencement. Moreover, from the commencement of the Companies (Amendment) Act, 2001 the Board of Company Law Administration constituted under section 10E(1) of the Act (CLB) shall also stand dissolved and all the functions of the CLB shall be performed by the Tribunal. As such all the matters or proceedings pending before the CLB shall stand transferred to the Tribunal that shall dispose of such cases in accordance with the provisions of the Act. Thus, multiplicity of litigation before various courts or quasi-judicial bodies will be avoided.

Composition of the Tribunal

3. The Tribunal proposed to be set up shall consist of a President and such number of judicial and technical members not exceeding 62, as the Central Government may deem fit.

The President of the Tribunal shall be a person who is, or has been, or is qualified to be a judge of a High Court and he shall be appointed by the Central Government in consultation with the Chief Justice of India or his nominee. The President and other members of the Tribunal shall hold office for a term of three years from the date of joining. However, the President shall not hold the office in case he attains the age of 67 years and no member shall hold office after attaining the age of 65 years.

A person shall not be qualified for appointment as a Judicial Member unless he :—

- (a) has held a judicial office for at least 15 years; or
- (b) has been an advocate of a High Court for at least 10 years or partly held the judicial office and has been partly in practice as an advocate for a total period of 15 years; or
- (c) is or has been a member of the Indian Company Law Service (Legal Branch) and is holding or has held a post in Senior Administrative Grade for at least 5 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 for at least 5 years.

Similarly, a person shall not be qualified for appointment as a Technical Member unless he :—

- (a) is or has been a member of the Indian Company Law Service (Accounts Branch) in Senior Administrative Grade for at least 5 years; or
- (b) is or has been a Joint Secretary to the Government of India for at least 5 years; or
- (c) is or has been in practice as a chartered accountant for at least 15 years; or
- (d) is or has been in practice as a cost accountant for at least 15 years; or
- (e) is or has been a company secretary in practice for at least 15 years; or
- (f) is a person of ability, integrity and standing having special knowledge of and professional experience of not less than 15 years in science, technology, economics, banking, industry, law, matters relating to finance, industrial management, industrial reconstruction, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in, which would be useful to the Tribunal, in the opinion of the Central Government; or
- (g) is or has been, a Presiding Officer of a Labour Court, Tribunal or the National Tribunal constituted under the Industrial Disputes Act, 1947; or
- (h) is a person having special knowledge and experience of not less than 15 years in matters relating to labour.

Working of the Tribunal

4. The proposed Tribunal will operate through various benches to be constituted by the President of the Tribunal. Each bench shall consist of two members - One judicial and the other technical, provided that the members authorised by the President may function as a single member bench and exercise the jurisdiction, powers and authority of the Tribunal in respect of the class of cases as the President may by general or special order specify. However, if at any stage of the hearing, it appears to the single member bench that the matter ought to be heard by a two-member bench, then the case may be referred to the President for transfer to such bench as he may deem fit. Under the proposed section 10FL(2), the President of the Tribunal shall for the disposal of any case relating to rehabilitation, restructuring or winding up of companies constitute at least ten special benches consisting of three or more members. The number of benches to be constituted shall be notified by the Central Government. In addition to the other benches, there shall be a Principal

Bench at New Delhi to be presided over by the President. The other benches shall be presided over by judicial members.

The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice. Moreover, subject to the provisions of the Act and any rules made by the Central Government, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure. This is likely to help a lot in achieving the objective of reaching speedy decisions as cumbersome civil court procedures will not have to be followed.

Right to appeal against order of Tribunal

5. Any person aggrieved by an order or decision of the Tribunal may prefer an appeal to the Appellate Tribunal, to be called the 'National Company Law Appellate Tribunal', within a period of 45 days from the date on which a copy of the order or decision made by the Tribunal is received by him. The provisions of the Limitation Act, 1963 shall, as far as may be, apply to an appeal made to the Appellate Tribunal. It may be noted here that no appeal shall lie to the Appellate Tribunal in case the order or decision was made with the consent of the parties concerned. The Appellate Tribunal shall consist of a Chairperson and not more than two members to be appointed by the Central Government. As the Appellate Tribunal shall endeavour to dispose of the appeal within six months from date of the receipt of the same, it is hoped that long delays resulting from the cumbersome civil court procedures will be avoided, which will ultimately lead to quick final decisions.

It has been specifically provided under the proposed section 10GB of the Act that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine. Similarly, no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any of the powers conferred upon the Tribunal under the Act. This will not only be very helpful in avoiding multiplicity of litigation in respect of the same matter but will also avoid conflicting decisions and delay. However, any person aggrieved by the order or decision of the Appellate Tribunal may file an appeal with the Supreme Court within 60 days, from the date of communication of the decision to him, on any question of law arising out of such decision or order. The aforesaid period of 60 days can be extended by a further period of 60 days if the Supreme Court is satisfied that the appellant was prevented by sufficient cause to file the appeal within the prescribed time limit.

Enforcement of orders of Tribunal

6. Any order made by the Tribunal or the Appellate Tribunal may be enforced in the same manner as if it were a decree made by a Court in a

suit pending therein. In any case of inability to execute the order, it shall be lawful to send the same to the Court within local limits of whose jurisdiction :—

- (a) in the case of an order against a company, the Registered office of the company is situated;
- (b) in the case of an order against any other person, the concerned person voluntarily resides or carries on business or personally works for gain.

Repeal of SICA and consequential amendments in Companies Act

7. Besides insertion of provisions relating to the constitution and working of the aforesaid Tribunal, the bill seeks to insert such provisions in the Companies Act, 1956 which will ensure protection of interests of workers of sick industrial companies as well as revival/rehabilitation of these companies. As already stated, at present the provisions relating to revival of sick industrial companies are contained in the Sick Industrial Companies (Special Provisions) Act, 1985. Although the SICA was enacted in 1985 with the objective of tackling industrial sickness and amendments were made therein from time to time and various steps were also taken to strengthen the BIFR during the last 15 years, yet there are a number of deficiencies which have led to a dismal situation. Some of the deficiencies in the existing system are :—

- (a) restrictive definition of sickness and belated cognizance thereof;
- (b) slow pace of BIFR intervention;
- (c) excessive protection to sick industries under section 22 of the SICA providing for automatic stay of all legal proceedings;
- (d) lack of monitoring of sanctioned revival schemes; and
- (e) delay in winding-up of sick companies.

All this ultimately leads to the decision to repeal the SICA. In view of these facts, most of the provisions of the SICA have been put in the bill with suitable modifications so as to ensure that the deficiencies in the existing system are removed and the process of revival of sick industrial companies is accelerated. With the repeal of the SICA; the BIFR and the Appellate Authority (AAIFR) will also stand dissolved and as such all proceedings pending before the BIFR and AAIFR, prior to their dissolution, shall stand abated.

Definition of 'Sick company'

8. Section 3(1)(o) of the SICA contains the definition of a sick company. As per this section, a company is deemed to be sick only if it fulfils both the following conditions :—

- (i) it is an industrial company registered for not less than five years; and
- (ii) it has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.

Now, if we go through the preamble of the SICA, then at the very outset, it says, "An act to make, in the public interest, special provisions with a view to securing timely detection of sick and potentially sick companies owning industrial undertakings".

From the foregoing, one can make out that to some extent there exists a contradiction between the preamble of the SICA and the definition of a 'sick industrial company' contained therein, inasmuch as if a company is deemed to be sick only after erosion of its entire net worth, then it cannot be termed as timely detection of sickness because there is virtually nothing left with the company at this stage which leaves any scope for revival of the company.

Moreover, although section 23 of the SICA recognises a company to be potentially sick if at the end of any financial year, the accumulated losses have resulted in erosion of 50 per cent or more of its peak net worth during the immediately preceding four financial years, yet at this stage only a report of the fact of such erosion has to be made to the BIFR and a general meeting of the shareholders of company has to be held for considering such erosion and nothing more than that needs to be done. In other words, no steps/measures are taken by the BIFR in order to prevent further deterioration of the financial health of the company, whereas, this would be probably the best stage when a number of measures can be taken to bring the company back on the path of profitability.

The aforesaid anomaly is sought to be rectified by introducing an altogether new definition of 'sick industrial company' in the Companies Act, 1956 by the Companies (Amendment) Bill, 2001. As per the proposed clause 46AA, in section 2 of the Act a "sick industrial company" means an industrial company which has :—

- (i) accumulated losses in any financial year equal to 50 per cent or more of its average net worth during four years immediately preceding such financial year; or
- (ii) failed to repay its debt within any three consecutive quarters on demand for its repayment by a creditor or creditors of such company.

New clauses 19AA and 19AB are proposed to be inserted in section 2 of the Act after the existing clause 19A. The proposed clause 19AA defines an 'industrial company' as a company which owns one or more industrial undertakings and the proposed clause 19AB defines 'industrial undertaking' as any undertaking, pertaining to any industry carried on in one or more factories or units by any company, as defined in clause (aa) of section 3 of the Industries (Development and Regulation) Act, 1951 but does not include a small-scale industrial undertaking as defined in clause (j) of that section.

As per the proposed clause 29A in section 2 of the Act, 'net worth' means the sum total of the paid-up capital and free reserves.

Explanation : For the purposes of this clause, 'free reserves' means all reserves created out of the profits and share premium account but does not include reserves created out of revaluation of assets, write-back of depreciation provisions and amalgamation.

It is worthwhile to note here that the concept of potentially sick industrial company contained in section 23 of the SICA is proposed to be done away with.

Reference to the Tribunal

9. The proposed section 424A provides that if a company meets the aforesaid criteria of industrial sickness, its board of directors shall make a reference to the Tribunal along with a scheme for revival and rehabilitation of the company within 180 days of coming to know the relevant facts giving rise to causes of such reference. However, the period of 180 days may be extended by the Tribunal by another 90 days for reasons to be recorded in writing.

The reference shall be made along with an application containing the prescribed particulars, which shall be accompanied by an auditor's certificate stating the reasons of the net worth of the company being less than 50 per cent or the default made in repayment of debt, as the case may be. Besides the board of directors of the company, reference can also be made to the Tribunal by the Central Government or any State Government or the RBI or any public financial institution or State Government institution or any scheduled bank if it has sufficient reasons to believe that the company has become a sick industrial company. Where the Tribunal deems it fit to make an enquiry or to cause an inquiry to be made, it may appoint one or more special directors on the Board of such industrial companies for safeguarding its financial and other interests or in the public interest.

Inquiry by the Tribunal

10. After receiving the reference, the Tribunal may make such enquiry as it may deem fit in order to determine whether the company has become sick or not. For the purpose of expeditious disposal of the inquiry, the Tribunal may order any operating agency to inquire into the scheme for revival and make a report with respect to such matters as may be specified in the order. The inquiry shall be completed within 21 days of the date of the order which can be extended upto 40 days by the Tribunal. The inquiry shall be completed by the Tribunal within 60 days, which can be extended by 30 days.

After the completion of the inquiry, the Tribunal shall decide whether it is practicable for the company to make its net worth exceed the accumulated losses or make the repayment of debt, as the case may be, within a reasonable time. If in the Tribunal's opinion the above objective can be achieved by the company on its own, it may, by order, in writing and subject to such restrictions as may be specified in the order, give such

time to the company as it may deem fit. However, if, in the opinion of the Tribunal, it is not practicable for the company to achieve the aforesaid objective, it may direct any operating agency to prepare a scheme for revival of the company.

The Tribunal shall conclude its inquiry as expeditiously as possible and pass final orders within 60 days (extendable upto 90 days) of the commencement of the inquiry. The inquiry shall be deemed to have commenced upon the receipt by the Tribunal of any reference or information or upon its own knowledge.

Preparation and sanction of Scheme for revival

11. The operating agency shall, as expeditiously as possible and within a period of 60 days (extendable upto 90 days) from the date of order by the Tribunal, prepare a scheme providing for any one or more of the following measures :—

- (a) the financial reconstruction of industrial company;
- (b) change in management or takeover of management of the company;
- (c) the amalgamation of—
 - (i) such industrial company with any other company;
 - (ii) any other company with such industrial company;
- (d) the sale or lease of a part or whole of any industrial undertaking of the company;
- (e) the rationalisation of managerial personnel, supervisory staff and workmen;
- (f) such other preventive, ameliorative and remedial measures as may be appropriate;
- (g) repayment of debt;
- (h) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified above.

The scheme shall be sanctioned by the Tribunal within 60 days (extendable upto 90 days) and shall come into force on such date as the Tribunal may specify. A copy of the sanctioned scheme shall be filed with the registrar of companies.

Incorporation of provisions of SICA in the Companies Bill

12. The following provisions of SICA have been imitated in the Companies Bill without any modification except that the word 'Board' has been replaced with the word 'Tribunal' :—

<i>S.No.</i>	<i>Subject-matter</i>	<i>Provision of SICA</i>	<i>Proposed section of Companies Act</i>
(i)	Rehabilitation by giving financial assistance	Section 19	Section 424E
(ii)	Arrangement for continuing operations etc. during inquiry	Section 19A	Section 424F
(iii)	Operating Agency to prepare complete inventory	Section 21	Section 424H
(iv)	Direction not to dispose of assets	Section 22A	Section 424-I
(v)	Power to call for periodic information	Section 23B	Section 424J
(vi)	Misfeasance Proceedings	Section 24	Section 424K

It is worthwhile to note here that the most horrible provision of the SICA, contained in section 22, which is a nightmare for investors and creditors of sick industrial companies, has not been incorporated in the Companies Bill. The said section provides for suspension of all legal proceedings against the company if any enquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation. As this section provides excessive immunity to sick companies, it has been misused by a number of companies and the investors have raised their demand from time to time to rescind this provision. In view of this, non-inclusion of this provision of the SICA in the Companies (Amendment) Bill, 2001 will be a great relief to investors and creditors of sick industrial companies in years to come.

Winding up

13. At present the work relating to the winding up of companies is under the jurisdiction of High Courts but after establishment of the Tribunal, all the functions relating to winding up of companies will be performed by

the Tribunal. Section 433 of the Act, speaks of circumstances in which a company may be wound up by the Tribunal. Three new grounds for winding up are proposed to be included in section 433 of the Act by substituting the existing section with a new section. The new grounds for winding up are as follows :—

- (i) If the company fails to file the Balance Sheet and the Profit and Loss Account or the Annual Return with the ROC for any five consecutive financial years.
- (ii) If the company has acted against the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality.
- (iii) If the Tribunal is of the opinion that the company should be wound up under the circumstances specified in section 424G.

As per the proposed section 424G of the Act, if, after making the enquiry and after considering all the relevant facts, the Tribunal is of the opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time and the company is not likely to become viable in future, it may pass an order for winding up the company. The winding up of the company, as far as may be, shall be concluded within one year from the date of the order.

As per the existing section 433(e) of the Act, a company may be wound up by court if it is unable to pay its debts and as per section 434(1) any sum exceeding Rs. 500 is a debt for the purpose of provisions of section 433. As the sum of Rs. 500 is very small, it is proposed to raise this limit to Rs. 1,00,000.

Levy of cess

14. As per the proposed section 441A of the Act, there shall be levied a cess on every company at such rate as may be specified by the Central Government, by notification in the Official Gazette, being not less than 0.005 per cent and not more than 0.1 per cent of the value of annual turnover or annual gross receipts of a company. The cess will have to be paid within three months of the close of the financial year along with the details of turnover or gross receipts, as the case may be, in the prescribed form.

The proceeds of the said cess shall first be credited to the Consolidated Fund of India and thereafter the Central Government may, if Parliament by appropriation made by law in this behalf so provides, pay to the Tribunal such sum as it may deem fit. The amount paid to the Tribunal shall be credited to a fund, to be formed for the purpose, namely, the 'Rehabilitation and Revival Fund', which shall be utilised for the purpose of :—

- (a) making payments of dues of workmen of sick industrial companies;
- (b) protection of assets of sick industrial companies;
- (c) revival or rehabilitation of sick industrial companies.

If the cess payable by a company is not paid, the same shall be deemed to be in arrears and shall be recovered by the Tribunal in the manner as may be prescribed. A penalty of up to ten times of the amount in arrear may be imposed.

Conclusion

15. It is expected that if the aforesaid provisions of the bill, after its enactment, are implemented properly and the time-frame prescribed therein is adhered to strictly, it will help a lot in speeding up the process of revival/rehabilitation of sick industrial companies, which will be in the overall national interest.

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