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Casus Omissus for Cross-Breeding of Entities-NCLAT Conundrum

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ABSTRACT

In Regional Director, Southern Region, MCA & Anr. Vs. Real Image LLP & Anr., NCLAT played the role of big Brother and created extra-ordinary hurdle for Domestic Businesses. It is a known fact that many MSMEs in India initially operate as Proprietorship or LLP and subsequently, for securing investments, they cover themselves under the Companies Act, 2013 either by merging or converting their firms into Limited Companies. But with this Judgement of NCLAT, the path has become much more tenuous. It is no wonder that the Domestic Industry is up in arms and is strenuously lobbying the Ministry of Corporate Affairs to make appropriate amendments in the Companies Act, 2013.

The uniqueness of this matter is that both the NCLT and the NCLAT have based the ratio of their respective judgements in the underlying rule of interpretation being "principle of casus omissus". Such is unprecedented in the nascent history of the Tribunal.

This paper analysis such matter by extrapolating the rationale behind both the NCLT and the NCLAT's decision. The Author begins by providing the context in which the matter came up before the NCLAT and thereafter analysis the principle of Casus Omissus by providing a historical background and its current application. This is followed by analysis of the facts and merits of the case and it correlation with the Casus Omissus. The Paper concludes by highlighting the shortfall in the NCLATs decision and provides the road ahead for respective Litigants and the Domestic Industry.

Casus Omissus, as a rule of interpretation, does not usually appear in statutory tribunal orders pertaining to amalgamation matters. But recently, the National Company Law Appellate Tribunal, in ***Regional Director, Southern Region, MCA & Anr. Vs. Real Image LLP & Anr***.,[2] negated the merger of a Limited Liability Partnership with a Private Limited Company initially approved by the National Company Law Tribunal, Chennai[3] on the ground that the same does not merit the invocation of the principle of *Casus Omissus*. Since the coming of

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[2] *Regional Director, Southern Region, MCA & Anr. Vs. Real Image LLP & Anr.* ,Company Appeal (AT) No. 352 of 2018 (NCLAT New Delhi, 04/12/2019)
[3] *M/s Real Image LLP with M/s Qube Cinema Technologies Private Limited*, CP/123/CAA/2018 (NCLT Chennai, 11/06/2018)

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Companies Act, 2013, NCLT and NCLAT has subsumed almost all major roles regarding company matters of not only the High Court's but also of regulatory bodies like the Registrar of Companies[4]. However, being a judicial body and inculcating the principle of Natural Justice, the process for mere pro-forma regulatory work has slowed down in the judicial churn. This churn has become more strenuous as the major duty (attributable as "*dictat"*) of this Tribunal set forth by the Legislation was to insolvency of Companies[5], especially in light of the non-stop media coverage of large scales NPAs of Public Banks[6]. Thus, it is inevitable that the NCLTs and NCLAT, in its short span of existence, has dislodged the principle of *stare decisis*[7] in both insolvency as well as company matters. This has been well evident from the Tribunal's multi-dimensional rulings on home-buyers inclusion into committee of creditors[8]; application of par-passu rule on creditors during liquidation[9] and even to share- holder and creditors meeting in private company mergers despite of NOCs[10]. Most of these dislodgments are followed vide amendment by the legislation out of a necessity. Under the usual logic of s*tare decisis*, it should take special force to dislodge precedents in similar matters but it seems the Tribunal and its Appellate Body have taken turn to the other side and the *Real Image LLP* decision only amplifies this path.

In *Real Image LLP*, the compliance of the procedures laid down in Section 230 -232 for the Companies Act, 2013 by both the Transferee Company and by the Transferor LLP was not in dispute and was affirmed by both the NCLT as well as the Appellate Tribunal. The divergence of the Appellate Tribunal essentially came on three aspects:- (a) the definition of Company under the Companies Act, 2013 (b) dichotomy with respect to amalgamation of a foreign LLP vis-a-vis an Indian LLP with an Indian Company; and (c) the application of *Casus Omissus.*

Justice Jain, presiding the Appellate bench, initially drew comparison of the definition of

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[4] Chapter XXVII , The Companies Act, 2013.

[5] S. 60, Insolvency and Bankruptcy Code, 2016.

[6] Sameer Bhardwaj, *Insolvency & Bankruptcy Code to helpaddress NPA issue in banking sector* ,Business Today (04/05/2018), available at https://www.businesstoday.in/current/economy-politics/insolvency-and-bankruptcy-code-ibc-npa-banking-sector/story/264686.html, last seen on 19/10/2020.

[7] The phrase "stare decisis" is it self short of the Latin phrase "stare decisis et non quiet a movere". This phrase means "to stand by decisions and not to disturb settled matters".

[8] *Pioneer Urban Land and Infrastructure Limited vs. Union of India,* Writ Petition(s)(Civil) No. 43/2019 (Supreme Court of India, 09/08/2019)

[9] *Precision Fasteners V. EPF*, MA 576&752 of 2018,CP No.1339/2017(NCLT Mumbai, 12/09/2018) *AnujBajpai vs. State Bank of India*, MA 1123/2018 in CP No. 172/IBC/NCLT/MB/MAH/2017 (NCLT Mumbai, 08/04/2109)

[10] *C&S Electric Limited Basis Point Commodities Private Limited*, Transfer Company Scheme Application No. 58 of 2017,(NCLT Mumbai, 20/01/2017) vis-à-vis *Coffee Day Overseas Private Limited*, T.P. No. 265/2017 inC.A. No. 738/2016,(NCLT Bangalore, 02/02/2017), *Altair Engineering India Private Limited*, T.P. No. 272/2017 in C.A. No. 760/2016, (NCLT Bangalore 03/02/2017) and *Altisource Business; Solutions Private Limited*, T.P. No. 276/2017 in C.A. No. 768/2016, (NCLT Bangalore 06/02/2017)

“***Company***” in the Companies Act of 2013 and 1956[11] respectively which are somewhat similar as both are neither inclusive in nature nor provide any positive restriction. Thereafter, he expounds on the language of Section 230 to 234 of the Companies Act 2013 which provides for Amalgamation amongst Companies. Specifically section 230 to section 233 provides for the substantive right of merger; amalgamation amongst various companies registered in India along- with the procedure to be followed by such companies. It is pertinent to mention here that in the title head of section 231 to 234, the word *company/ies* is expressly mentioned. Section 234 provides for the process of amalgamation with respect to foreign company as mentioned in its titular head[12]. Section 234 includes two sub-sections in one of which the principle of mutatis mutandis is inculcated, and further has an explanation to the term “*foreign company”* in which it is expressly mentioned “*any company or body corporate incorporated outside India whether having a place of business in India or not.*” This creates a dichotomy between the strict definition of a Company registered in India and a broadly defined *Foreign Company* with respect the amalgamation scheme which was also noted by Justice Jain in the Judgment. Similarly, he also took note of the dichotomy between the merger scheme provided in the 2013 Companies Act and the erstwhile 1956 one in which Section 394(4)(b) allowed a domestic LLP to be merged into a company. But oddly enough such divergences are not part of the ratio which is the application of the principle of *Casus Omissus*.

Casus Omissus is the application of the principle that *‘what should have been, but has not been provided in the statue, thus ought to be supplied by courts’*. It is a canon of construction, requiring the court to draw up principles of statutory construction, which are then going to be followed by subsequent judges in their judicial decisions.[13] This principle is articulated in ***Maxwell[14], Crawford[15]*** as well as in ***Craies[16]***. The earliest known reference, however in negative, of casus omissus was in ***Abel v. Lee***, where Justice Willes ‘*utterly repudiated*’ the notion that “*it is competent for a judge to modify the language of an Act of Parliament in order to bring it in accordance with his views as to what is right or reasonable....*”[17] Plethora of judgments thereafter came up to support this notion[18] till Lord Denning went on a different

[11] Ss. 2(20), 2(10), The Companies Act, 2013, S. 3, The Companies act, 1956
[12] S234, The Companies Act, 2013
[13] Arani Chakrabarty ,*Construction, Interpretation and Ambiguity*, Something about the law, Available at: http://www.somethingaboutthelaw.com/2010/05/17/construction-interpretation-and-ambiguity
[14] Peter S Aint John Hevery Langan & Peter Benson Maxwell, *Maxwell on the Interpretation of Statutes*, 33(12th Ed. 1969)
[15] Crawford’s Interpretation of Laws, (Page 271, 1989 Reprint)
[16] S.S.G Edgar, *Craies on Statute Law*, 71 (7th Ed. 1971)
[17] *Abel v. Lee*, LR 6 CP 365, 371(1870-71, House of Lords).
[18] *London & India Docks Co. v. Thames Steam Tug and Lighterage Co. Ltd*., AC 15 (1909, House of Lords); *Thomson v. Goold& Co*. AC 409 (1910, House of Lords); *McDermott v. Owners of SS Tintoretto* AC 35 (1911,

path on the subject and held in ***Seaford Court Estates v. Asher***[19]: "*When a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written word so as to give 'force and life' to the intention of the legislature… A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.*"[20] In another subsequent matter, he observed in a new form: "*We sit here to find out the intention of the Parliament and of ministers to carry it out, and we so this better by filling in up gaps and making sense of enactment than by opening it up to destructive analysis.*"[21] However, both these observations of Lord Denning were severely criticized by the House of Lords.[22]

In India, the earliest application of *Casus Omissus* post Independence by the Supreme Court was In ***Tirath Singh v. Bachittar Singh & Others***[23] wherein, quoting the passage from Maxwell[24], the Apex Court expressed the opinion that *Casus Omissus* is a well established rule of interpretation. In ***State of Madhya Pradesh v. M/s. Azad Bharat Finance Co. & another***[25], interpreting Section 11 of the Opium Act, 1878 (as applicable to M.P.), Supreme Court referred to Tirath Singh's case and observed *"It is well recognized that if a statute leads to absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which ,modifies the meaning of the words, and even the structure of the sentence."*

Similarly, the Supreme Court in ***Bangalore Water Supply v. A. Rajappa***[26] approved this rule of construction favoured by Lord Denning while dealing with the definition of *"Industry"* in the Industrial Disputes Act, 1947. The definition was so vague and ambiguous that Beg, CJI said that the situation called for *"some judicial heroics to cope with the difficulties raised."*[27] This was despite the fact that Justice Iyer, delivering the leading majority judgment, referred to both Lord Denning's view in ***Seaford Court Estates v. Asher***[28] and simultaneously cited Lord Simonds opinion regarding the limitation on the power and duty of the court to travel outside the words of the Legislature.[29]

House of Lords); *Astor v. Perry*, AC 398 (1935, House of Lords); Niranjan V., Was the Death of the Casus Omissus Rule 'Undignified' ?, 30, Statute Law Review 1 and 73, (Vol. 30, 2009)

[19] *Seaford Court Estates v. Asher,*[1949] 2 KB 481 (1949, House of Lords)

[20] Ibid

[21] *Magor& St. Mellons Rural District Council v. Newport,* (1950) 2 All ER 1226, p. 1236 (CA), (1950, House of Lords)

[22] *Magor& St. Mellons Rural District Council v. Newport*, (1951) 1 All ER 839 (HL), (1951, House of Lords)

[23] *Tirath Singh v. Bachittar Singh & Others,* AIR 1955 S.C. 830

[24] Supra 11

[25] *State of Madhya Pradesh v. M/s. Azad Bharat Finance Co. & another*, AIR 1967 S.C. 276

[26] *Bangalore Water Supply v. A. Rajappa*, AIR 1978 SC 548

[27] Ibid. p. 552.

[28] Supra16

[29] Supra19

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In 2008, Justice Katju in ***Rajbir Singh Dalal v. Chauhari Devi Lal University***[30], applied *Casus Omissus*by relying not upon Maxwell or Craies but on the indigenous ***Mimansa Principles of Interpretation*** and observed "*In Mimansa, casus omissus is known as adhyahara. The adhyahara principle permits us to add words to a legal text. However, the superiority of the Mimansa Principles over Maxwell's Principles in this respect is shown by the fact that Maxwell does not go into further detail and does not mention the sub-categories coming under the general category of casus omissus. In the Mimansa system, on the other hand, the general category of adhyahara has under it several sub-categories, e.g., anusanga, anukarsha, vakyashesha, etc. Since in this case we are concerned with the anusanga principle, we may explain it in some detail.*" And concluded "*In our opinion, in the present case, the Anusanga principle (Casus Omissus) of Mimansa should be utilized and the expression `relevant subject' should also be inserted in the qualification for the post of Reader after the words "at the Master's degree level".*"

However, in recent past, the India Courts have mostly followed against such view as evidenced from ***Padmasundara Rao v. State of Tamil Nadu***[31]***, Union of India v. Dharmendra Textile Processors***[32]***, Nagar Palika Nigam v. Krishi Upaj Mandi Samiti & Ors.***[33]***, Sangeeta Singh v. Union of India***[34]***, State of Kerala & Anr. v. P.V. Neelakandan Nair & Ors.***[35]***, UOI v. Priyankan Sharan and Anr.***[36]***, Maulavi Hussein Haji Abraham Umarji v. State of Gujarat***[37] ***, Unique Butyle Tube Industries Pvt. Ltd. v. U.P.Financial Corporation and Ors.***[38]***, UOI v. Bani Singh***[39]***, Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers and Ors***.[40]***, Prakash Nath Khanna and Anr. v. Commissioner of Income Tax and Anr.***[41]***, State of Jharkhand &Anr. v. Govind Singh***[42]***, Trutuf Safety Glass Industries v. Commissioner of Sales Tax,***[43] to ***UOI v. Rajiv Kumar***[44].

In *Real Image LLP,* Justice Jain solely considered the *Rajiv Kumar case* and quoted para. 23 and 24 to draw the inference that no ambiguity or absurdity or anomalous results from the

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[30] *Rajbir Singh Dalal v. Chauhari Devi Lal University*, (2008) 9 SCC 284
[31] *Padmasundara Rao v. State of Tamil Nadu* ,2 (2002) 3 SCC 533
[32] *Union of India v. Dharmendra Textile Processors*, (2008) 13 SCC369
[33] *Nagar Palika Nigam v. Krishi Upaj Mandi Samiti & Ors*, (2008) 12 SCC364
[34] *Sangeeta Singh v. Union of India* ,(2005) 7 SCC484
[35] *State of Kerala &Anr. v. P.V. Neelakandan Nair &Ors* ., (2005) 5 SCC561
[36] *UOI v. Priyankan Sharan and Anr.* , (2008) 9 SCC 15
[37] *Maulavi Hussein Haji Abraham Umarji v. State of Gujarat* , (2004) CriLJ3860
[38] *Unique Butyle Tube Industries Pvt. Ltd. v.U.P.Financial Corporation and Ors.*, (2003) 2 SCC455
[39] *UOI v. Bani Singh,*(2003) SCC (LS) 928
[40] *Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers and Ors.* , (2003) 6 SCC 659
[41] *Prakash Nath Khanna and Anr. v. Commissioner of Income Tax and Anr.*,(2004) 9 SCC 686
[42] *Stateof Jharkhand &Anr. v. Govind Singh* , (2005) 10 SCC 437
[43] *Trutuf Safety Glass Industries v. Commissioner of Sales Tax* ,U.P. (2007) 7 SCC 242
[44] *UOI v. Rajiv Kuma*r, (2003) 6 SCC 516

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relevant provisions of Companies Act, 2013 and thus the principle of *Casus Omissus* cannot be applied. However, the NCLAT order is silent on the exact intention and the effect of the present language in the relevant section and the boundaries of Companies Act disallowing this rule of interpretation.

In 2012 when the Companies Bill[45] was introduced in the Lower House of Parliament, the introducing member stated that the objective of the bill is to make it self-regulatory and entrepreneurial and corporate centric with minimum hurdles for the private sector.[46] Post the change in government in 2014, various amendments have also been introduced to the Companies Act including the compounding of offences; all with the objective of "*ease of doing Business*" in India. This intention was observed by the NCLT[47] but negated by NCLAT without providing any reasons. Thus, the *Real Image LLP* case, is an odd and ominous development in the regulatory framework of merger and acquisition in India. Ominous because the said decision goes against the very intention of the legislative intent and that of "*Ease of doing business*" as propagated by the current dispensation.

NCLAT did drew a path for domestic LLPs registered in India to merge with Companies vide first converting to a Company as provided in Section 55 to Section 57 of Chapter X of Limited Liability Partnership Act, 2008 and then subsequently take the benefit of Chapter XXI of the Companies Act 2013. However, as evidenced from the recent trend in merger schemes approved by the Tribunal[48], this would double the time for a merger from a minimum of 6-7 months to about 2 years. The NCLAT also did not take into account that merging of domestic LLP with Companies was already prevalent[49] and the MCA never challenged the same. It will be seen in the coming days of how would all such mergers be effected and whether the MCA would challenge all the same on the back of *Real Image LLP* decision with an additional application on Limitation.[50] It would have been appropriate that the MCA had approached the Finance Ministry to address this issue and the latter ought simply pass a Notification or directive allowing for such mergers. But after this NCLAT decision, an '*absurd'* and '*ambiguous*' situation has arisen which can now only perhaps be rectified, apart from appeal

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[45] The Companies Bill, 2011(passed by LokSabha, 18/12/2012)

[46] Ibid, para 5 to 10 of Minister of Corporate Affairs, Mr. Sachin Pilot while introducing the Companies Bill

[47] Supra 2, para. 15

[48] Shrimi Choudhary, *Over 1,600 merger cases pile up before NCLT as insolvency takes precedence*, Business Standard ,May 16, 2018. ; Fast Track mergers: MCA keen to extend facility to more classes of companies; Business Line, (25/05/2020) available at: https://www.business-standard.com/article/companies/over-1-600-merger-cases-pile-up-before-nclt-as-insolvency-takes-precedence-118051600270_1.html; Shardul Amarchand Mangaldas& Co. "Cometh the hour, cometh the fast-track merger" India Business Law Journal (2020); available on https://www.vantageasia.com/fast-track-merger/.

[49] VertisMicrosystemsLtd.merger,TCSP190and191of2017[23/03/2017]

[50] S. 5, The Limitation Act, 1963

to a higher Court (improbable as the Applicant has dropped the merger[51]), by legislative action of adding "LLPs" vide an amendment to section 230 of the Companies Act, 2013.

Till then, this new analysis by the Appellate Tribunal has made it more harder for corporate restructuring. This ruling will surely just add to the burden and test the patience of both the regulators as well as the Corporate Community.

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[51] *NCLATsetsasideNCLTorder,butUFOMoviez-QubeCinemasmergernotonthecards*, Moneycontrol,available on: https://www.moneycontrol.com/news/business/companies/nclat-sets-aside-nclt-order-but- ufo-moviez-qube-cinemas-merger-not-on-the-cards-4588081.html, last seen on 19/10/2020.

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