THIS WEEK'S **COMPANY CASES–ONLINE** VOLUME 10

CONTENTS

REPORTS OF CASES : 239—306

SUBJECT INDEX

NATIONAL COMPANY LAW APPELLATE TRIBUNAL ORDERS

Insolvency resolution—Application by operational creditor—Failure to produce invoices, purchase orders or any documents to prove claim—Application incomplete—Order admitting application to be set aside—Insolvency and Bankruptcy Code, 2016, s. 9—Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, form 3—NEERAJ JAIN *v.* CLOUDWALKER STREAMING TECHNOLOGIES P. LTD.

... 266

NATIONAL COMPANY LAW TRIBUNAL ORDERS

Insolvency resolution—Application by operational creditor—Existence of default—Application to be admitted—Insolvency and Bankruptcy Code, 2016, s. 9—CLOUDWALKER STREAMING TECHNOLOGIES P. LTD. *v.* FLIPKART INDIA P. LTD.

... 239

CASES JUDICIALLY NOTICED IN THIS PART

CloudWalker Streaming Technologies P. Ltd. *v.* Flipkart India Ltd. [2020] 10 Comp Cas-OL 239 (NCLT) **set aside** in Neeraj Jain *v.* Cloudwalker Streaming Technologies P. Ltd. [2020] 10 Comp Cas–OL 266 (NCLAT)

COMPARATIVE TABLE OF CASES REPORTED IN THIS VOLUME

Asterisks indicate cases which have not been reported in other journals.

Page	Court	Other Journals		
		PART 1 — 3-7-2020		
1	NCLT	*	*	*
5	NCLT	*	*	*
9	NCLT	*	*	*
26	NCLT	*	*	*
51	NCLAT	*	*	*
55	NCLT	*	*	*
57	NCLT	*	*	*
62	NCLAT	*	*	*
72	NCLT	*	*	*
82	NCLAT	*	*	*
		PART 2 — 10-7-2020		
99	NCLT	*	*	*
122	NCLAT	[2019] 152 SCL 10 ; 102 taxmann.com 63		
131	NCLT	*	*	*
139	NCLAT	*	*	*
148	NCLT	*	*	*
153	NCLAT	*	*	*
180	Bom	*	*	*
		PART 3 — 17-7-2020		
221	NCLT	*	*	*
240	NCLT	*	*	*
248	NCLT	*	*	*
253	NCLAT	*	*	*
262	NCLAT	*	*	*

272	NCLAT	[2019] 112 taxmann.com 264 ; [2020] 154 CLA 47 ; 157 SCL 360
		PART 4 — 24-7-2020
364	NCLAT	* * *
374	SC	* * *
394	NCLT	* * *
402	NCLAT	* * *
408	NCLT	* * *
		PART 5 — 31-7-2020
424	NCLAT	* * *
432	NCLAT	* * *
438	NCLAT	* * *
448	NCLT	* * *
459	NCLT	* * *
466	NCLT	* * *
477	NCLT	* * *
489	NCLT	* * *
501	NCLAT	* * *
506	NCLT	* * *
520	Mad	* * *

CONTENTS OF THIS PART

REPORTS OF CASES : 417—528

High Court Cases :

National Company Law Appellate Tribunal Orders :

SUBJECT INDEX TO CASES REPORTED IN THIS PART

HIGH COURTS

Winding up—Inability to pay debts—Petition by trustee of bond holders—Failure to pay interest under terms of bond and trust deed—Liability admitted in balance-sheet filed prior to filing of winding up petition—Petition to be admitted—Companies Act, 1956, s. 434—BANK OF NEW YORK MELLON *v.* INDOWIND ENERGY LTD.
(Mad) ... 520

NATIONAL COMPANY LAW APPELLATE TRIBUNAL ORDERS

Offences and prosecution—Powers of Tribunal—Compounding of offences—Tribunal has no jurisdiction to reduce fine to sum less than minimum fine prescribed for offence—Companies Act, 2013, ss. 165, 441—REGISTRAR OF COMPANIES, WEST BENGAL *v.* SABYASACHI BAGCHI ... 432

Oppression and mismanagement—Oppression—Operation of bank account within domain of board of directors—Decision of board of directors to write off bad debt, a commercial decision—Not a case of mismanagement—Tribunal dismissing petition finding acts complained of not falling within purview of oppression and mismanagement—Proper—Companies Act, 2013, ss. 241, 242—S. P. VELUMANI *v.* MAGNUM SPINNING MILLS INDIA P. LTD. ... 424

——Petition for relief—Necessary parties—Tribunal impleading parties since huge sum transferred to their account despite restrain order—Finding that their presence would enable court to effectively and adequately adjudicate matter involved in case—Justified—Companies Act, 2013, ss. 241, 242—MRS. ASHA KIRAN *v.* UNION OF INDIA ... 501

——Petition for relief—Non-speaking order by Tribunal—Matter remanded—Companies Act, 1956, ss. 397, 398, 399, 402, 406, 407—YAMINI BIPINCHANDRA SHAH *v.* TRIMBAK ESTATE P. LTD. ... 438

NATIONAL COMPANY LAW TRIBUNAL ORDERS

CASES JUDICIALLY NOTICED IN THIS PART

Aakansha Bawa (Ms.) *v.* Union of India [2020] 221 Comp Cas 489 (NCLT) **affirmed** in Mrs. Asha Kiran *v.* Union of India [2020] 221 Comp Cas 501 (NCLAT)

Amalgamated Commercial Traders P. Ltd. *v.* Krishnaswami (A. C. K.) [1965] 35 Comp Cas 456 (SC) **relied on** in Bank of New York Mellon *v.* Indowind Energy Ltd. [2020] 221 Comp Cas 520 (Mad)

Madhusudan Gordhandas and Co. *v.* Madhu Woollen Industries P. Ltd. [1972] 42 Comp Cas 125 (SC) **relied on** in Bank of New York Mellon *v.* Indowind Energy Ltd. [2020] 221 Comp Cas 520 (Mad)

Mediqup Systems P. Ltd. *v.* Proxima Medical System GmbH [2005] 124 Comp Cas 473 (SC) **relied on** in Bank of New York Mellon *v.* Indowind Energy Ltd. [2020] 221 Comp Cas 520 (Mad)

Registrar of Companies-cum-Official Liquidator *v.* Gyan Chandra Agarwal (Company Appeal (AT) No. 249 of 2018, dated September 12, 2018) **relied on** in Registrar of Companies, West Bengal *v.* Sabyasachi Bagchi [2020] 221 Comp Cas 432 (NCLAT)

Union of India, Ministry of Corporate Affairs *v.* Infrastructure Leasing and Financial Services Ltd. [2020] 221 Comp Cas 477 (NCLT) **affirmed** in Mrs. Asha Kiran *v.* Union of India [2020] 221 Comp Cas 501 (NCLAT)

Velumani (S. P.) *v.* Magnum Spinning Mills India P. Ltd. [2020] 221 Comp Cas 408 (NCLT) **affirmed** in S. P. Velumani *v.* Magnum Spinning Mills India P. Ltd. [2020] 221 Comp Cas 424 (NCLAT)

Vijay Industries *v.* NATL Technologies Ltd. [2009] 147 Comp Cas 490 (SC) **relied on** in Bank of New York Mellon *v.* Indowind Energy Ltd. [2020] 221 Comp Cas 520 (Mad)

CUMULATIVE TABLE OF CASES REPORTED

PARTS 1 to 5

(Cases reported in this part are marked with asterisks)

(Contd. on Cover page 3)

refusing to co-operate with the other promoters in jointly operating the bank account. The first petitioner on his own accord has stopped coming to the mills and has written, by his own admission, to the bank to stop operation of the bank account. The respondent has submitted that such stoppage of bank account operation owing to the communication of the petitioner led to default in payment to TNEB. The payment to TNEB could be made only after delay of about a month, after restoration of the bank account, when such is the conduct of the petitioner, he cannot be trusted with power of being a compulsory/mandatory signatory.

31 The respondent has contended that even assuming without admitting that there was any irregularity in the manner in which the meeting was convened or held, the resolution cannot be invalidated since it is bona fide, in the interest of the company and in any event, capable of rectification by the majority.

32 The respondent has denied the allegations that all other directors of the respondent-company are related to each other. It is denied that there is any fraud or act of oppression that has been committed or that there is any intent to sideline the petitioner.

33 The respondent has denied that petitioner had no notice for the annual general meeting or passing of accounts for the year ended March 31, 2016. The accounts were adopted at the board meeting held on August 22, 2016 and general meeting held on September 30, 2016. The respondent has also denied that there is any non-compliance with statutory provisions or that there is any indiscriminate use of funds or property or high handedness in the matter of conducting the affairs of the company. The respondent has denied that there is any oppression or mismanagement. It is also denied that there is any need to reconstitute the board or vest any exclusive authority in the petitioner(s) to operate the bank account of the company.

34 Respondent No. 3 has also filed an additional counter stating that the petitioners want to be one-up on the other promoters/stakeholders and directors of the company, and if such one-upmanship is not conceded, the petitioner goes to the extreme extent of not executing all documents and threatens the very continuance of credit limits by the bank. The respondent has submitted that the petitioners can only claim pro rata right as exercised by other directors/promoters and has to be subject to same level of responsibility. Undue favouritism cannot be a legitimate expectation, nor can denial of such undue favouritism be categorized as oppression.

35 The respondent has further contended that the petitioner through his deliberate conduct of not executing documents for renewal of the credit limits, notwithstanding the sanction advice mandating execution by all

directors, is attempting to strangulate the finances of the company. It is submitted by the respondent that the banker has advised the company that if the documents are not executed by the first petitioner, the bank would freeze the limits. A single shareholder, merely for the purpose of retaining absolute control over the company, notwithstanding his minority shareholding cannot bring about a freeze on the company's finances. It is submitted that owing to this unconscionable conduct, the petitioner is equitably not entitled to continue as a director of the company. In the circumstances the first petitioner has become an oppressor of the company.

36 During the pendency of petition, the petitioners have filed a memo along with affidavit stating therein that some significant event has taken place in the company. The first petitioner deposed in the affidavit as follows : "It has come to the knowledge of the petitioner that the portion of the land which does not belong to the company is known as porampokku land (Kallang Kuthu) is being used for constructing buildings and superstructures using the funds of the company. When the petitioner had met the VAO for some other purpose, it has come to the knowledge of the petitioner that this unauthorized and illegal activity has been going on for some time. The petitioner is aware that there is a portion of land in Survey No. 357/2 which falls within the compound wall of the company but which belongs to the Government. The online information of the land is enclosed as annexure 1. Therefore the petitioner states that the respondents have commenced an activity by spending crores of money to construct a building without any approval of the board of directors and without securing any approval from the competent authorities for constructing industrial or any other building and moreover the respondents would have used the working capital funds of the company for the purpose of such unauthorized and illegal construction".

37 The petitioners have submitted that the item No. 5 in notice for the annual general meeting for the financial year ended March 31, 2018 dated August 17, 2018 relating to approval for remuneration to 6 directors (other than petitioner No. 1) is a special business. However, this subject has been shown as an ordinary business in the notice.

38 The petitioners have also stated therein that no board meeting was held by the company during the 4th quarter of the financial year 2017-18. The last board meeting having been held on December 23, 2017. The petitioners have submitted that this is clear violation of the Secretarial Standard-1 prescribed in section 118(1) of the Companies Act, 2013.

39 The petitioners have referred to sub-section (11) of section 118 of the Companies Act, 2013, which provides that if any default is made in

complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees.

40 The petitioners have also submitted that during the financial year 2017-18 an amount of Rs. 48,41,801 has been written off as bad debts, while in the previous it was nil. The details as to the identity of the party being related party or otherwise is not disclosed. The petitioners have submitted that these serious irregularities and non-compliance with the provisions of law strengthens their prayers.

41 Respondent No. 3 has filed reply to the memo filed by the petitioner. The respondent has submitted that no such construction took place in the porampokku land as alleged. The respondent has further submitted that a portion of the compound wall alone was constructed even in the year 2012, when the petitioner was in active management, since there was huge undulation there and men and cattle were falling and suffering serious injuries. To safeguard against such an accident, the wall was constructed in such manner.

42 In respect of the contention concerning enumeration of subject relating to remuneration to directors under caption ordinary business, the respondent has submitted that it is only an error committed by oversight and is not an act of oppression or mismanagement.

43 The respondent has submitted that writing off the bad debts is only to reflect true view of affairs of the company in the accounts, and the company is still taking steps and following up for recovery of the said sums. The respondent has further submitted that the petitioner had attended the annual general meeting on September 26, 2018 but deliberately refused to sign the attendance register.

44 The respondent has further submitted that there was a subsequent board meeting of the company held on November 22, 2018 for which notice was sent by RPAD to the petitioner(s). However, the petitioner(s) did not attend the meeting. The respondent has also submitted that notices for board meetings on April 21, 2018 and August 17, 2018 were received by the petitioner(s) and he attended the meetings, but did not sign the attendance sheet.

45 From the pleadings of the parties, the issues that need the consideration of this Tribunal are as follows :

(i) Whether the removal of the name of the first petitioner vide resolution passed in the board meeting held on August 22, 2016 who was sole

signatory for operating the bank account of the first respondent-company, constitutes an act of oppression ?

(ii) Whether in the facts and circumstances of the case, this Tribunal can interfere with the management of the first respondent-company by directing to give proportionate representation to the shareholders on the board of the directors ?

(iii) Whether the alleged construction made on the Government land by the respondents without any approval of board and competent authorities constitutes an act of mismanagement ?

(iv) Whether writing-off the bad debts of Rs. 48,41,801 during the financial year 2017-18, by the respondents constitutes an act of mismanagement ?

46 In relation to issue No. (i), the first petitioner would contend that prior to the alleged board meeting conducted on August 22, 2016 the power and authorisation to operate the bank accounts was with him along with any one of the directors of the first respondent-company, but in alleged board meeting the mandate of signing the cheques/operating the bank accounts was modified, by which any two of the directors of the first respondent-company can operate the said bank accounts. For the alleged board meeting he has never received any notice, such a meeting is per se invalid and it is liable to be set aside. The respondent would contend that there is no contractual arrangement or promoter's agreement or any article in the articles of the association mandating that the first petitioner should remain a mandatory signatory to operate the bank accounts of the first respondent-company. It is further explained that on August 11, 2016 the respondents had prepared a written representation seeking a change in mandate to enable any two of the directors of the first respondent-company to operate the bank accounts, the draft of which was given to the statutory auditor of the company, who has given a copy to the first petitioner. Besides this, the petitioners were duly informed about the board meeting proposed to be held on August 22, 2016 through e-mail dated August 19, 2016 because as per the past practice, the company used to send the notice of the board meetings through e-mails. The first petitioner had attended the meeting and signed the incoming and outgoing register. However, he denied to have attended the board meeting, but did not deny the signatures put on the entry register. It is noted that the presence of the first petitioner at the registered office of the first respondent-company, where the board meeting was conducted is sufficient proof of the fact of his participation in the board meeting held on August 22, 2016, as claimed by the respondents. In the case on hand the resolution passed by the majority of the directors is only

to regulate the procedure pertaining the signatories to the bank accounts of the first respondent-company, which in no way can said to be oppressive, as contended by the first petitioner. In this connection reliance is placed upon the judgment of the hon'ble High Court of Madras given in the case of *V. M. Rao* v. *Rajeswari Ramakrishnan* [1987] 61 Comp Cas 20 (Mad), wherein the hon'ble High Court has held that "it must be established that oppression complained of affected a person in his capacity as a member, as harsh and unfair treatment in any other capacity such as director is outside the purview of oppression". It is settled legal position that the Tribunal cannot interfere with the day to day affairs and management of the company. In this regard reliance is placed on the judgment of the hon'ble High Court of Madras given in *K. R. S. Mani* v. *Anugraha Jewellers Ltd.* [2005] 126 Comp Cas 878 (Mad), wherein the hon'ble High Court of Madras held that (page 880) : "As per various decisions rendered by this court (Madras High Court) as well as the Supreme Court, it is the duty of the court to recognise the corporate democracy of a company in managing its affairs. The court should not restrict the power of the board of directors and it shall not interfere with the day-to-day affairs and management and administration of the company". The decision of the board of directors that any two of the directors can operate the bank accounts of the first respondent-company is a commercial decision and it is settled proposition of law that the commercial decision of the company cannot be interfered with by the courts. In *Upper India Steel Manufacturing and Engineering Co. Ltd.* v. *Gurlal Singh Grewal* MANU/NL/0164/2017 the hon'ble National Company Law Appellate Tribunal has held as under :

> "We find no illegality in the finding of the Tribunal (NCLT) in holding that cheque signing power is solely a business decision and cannot be interfered with."

Besides the above, a similar issue has come up before the Company Law Board in the case of *Smt. Sudha M. Singh* v. *Eagle Cones P. Ltd.* [2000] 1 Comp LJ 289 (CLB), wherein it has been observed that the decision relating to operation of the bank account is completely with in the domain of the board. In view of the facts and circumstances, this Tribunal is not inclined to interfere with the decision of the board by which any two of the directors have been authorised to operate the bank accounts of the first respondent-company. Accordingly, issue No. 1 is decided against the petitioners and in favour of the respondents.

In relation to issue No. (ii), the petitioners would contend that proportionate representation to the shareholders on the board of the directors is an appropriate remedy to operate as a check when the majority control 47

showing tendencies to run the management of the affairs of the company according to their whims and fancies excluding the petitioners from the management. It is noted that the respondents have not pleaded anything on the issue under reference. However, in case of a private company, the articles of association can prescribe the method to appoint any and all directors. In case the articles are silent, the directors must be appointed by the shareholders. In the case on hand the articles of the first respondent-company provide that any person whether a member of the company or not, may be appointed as director of the company and no qualification by way of shareholding shall be required from any director. Therefore, in the absence of any provision in the articles of association or shareholders ? agreement, the first respondent-company cannot be forced to have a proportionate representation of the shareholders or their nominees on the board. In this connection, reliance is placed on the judgment of the Company Law Board given in *Dr. Francis Cleetus* v. *Rashtra Deepika Ltd.* reported in [2013] 178 Comp Cas 206 (CLB), wherein the articles of association was containing the same provision as is contained in the articles of the first respondent-company. In the above noted case the prayer made was for making an alteration in the articles of association of the company to provide for proportionate representation on the board. The Company Law Board after examining the issue declined to interfere into the internal affairs of the company. In view of it, the issue stands decided against the petitioners and in favour of the respondents.

48 In relation to issue No. (iii), the petitioners during the pendency of petition, have filed a memo along with affidavit stating therein that it has come to their knowledge that the portion of the land known as porampokku land (Kallang Kuthu), belonging to the Government is being used for constructing buildings and superstructures using the funds of the company, without any approval of the board of directors and the competent authorities. Respondent No. 3 has filed reply to the memo filed by the petitioner(s) and submitted that no such construction is taking place in the porampokku land as alleged. The respondent has further submitted that a portion of the compound wall alone was constructed even in the year 2012 when the petitioner was in active management, since there was huge undulation and men and cattle were falling and suffering serious injuries. To safeguard against such accident the wall was constructed in such manner, which has been certified by chartered engineer/approved surveyor. The petitioners have not placed any evidence on record to prove the construction of buildings or superstructures as contended. Moreover, the act complain of is an

isolated act, which need not be inquired into. Therefore, the issue stands decided against the petitioners and in favour of the respondents.

49 In relation to issue No. (iv), the petitioners would contend that during the financial year 2017-18, an amount of Rs. 48,41,801 has been written off as bad debts, while in the previous it was nil and the details as to the identity of the party, whether a related party or otherwise is not disclosed. The respondents would contend that bad debt written off is in the normal course of business and the tractions are absolutely with unrelated parties and since the recovery was not forthcoming, to reflect a true and fair view in the accounts, these sums were written off. It is noted that the decision of the board of directors to write off the bad debt is a commercial decision, which does not warrant any judicial interference. In this connection reliance is placed on the judgment of the Company Law Board given in *A. Ravishankar Prasad* v. *Prasad Productions P. Ltd.* reported in [2007] 135 Comp Cas 416 (CLB). Further, in *Rutherford, In re* [1994] BCC 876, 879, it was held that commercial mismanagement will not amount to oppression. Moreover, a single act of financial mismanagement does not have the continuous effect, which is necessary for relief under these provisions, though, the same could cause a short-term diminution in share value. Accordingly, issue No. (iv) also stands decided against the petitioners and in favour of the respondents.

50 In view of the facts, circumstances and the legal position stated above, the acts complained of are neither falling within the purview of oppression nor mismanagement. Therefore, Company Petition No. 17 of 2017 is dismissed. Interim order, if any, stands vacated. There is no order as to costs.

51 The order is pronounced in the open court.

[2020] 221 Comp Cas 424 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

S. P. VELUMANI AND ANOTHER

v.

MAGNUM SPINNING MILLS INDIA P. LTD. AND OTHERS

JARAT KUMAR JAIN J. *(Judicial Member),* **BALVINDER SINGH** and **DR. ASHOK KUMAR MISHRA** *(Technical Members)*

June 24, 2020.

HF ▸ Respondent

OPPRESSION AND MISMANAGEMENT—OPPRESSION—OPERATION OF BANK ACCOUNT WITHIN DOMAIN OF BOARD OF DIRECTORS—DECISION OF BOARD OF DIRECTORS TO WRITE OFF BAD DEBT, A COMMERCIAL DECISION—NOT A CASE OF MISMANAGEMENT—TRIBUNAL DISMISSING PETITION FINDING ACTS COMPLAINED OF NOT FALLING WITHIN PURVIEW OF OPPRESSION AND MISMANAGEMENT—PROPER—COMPANIES ACT, 2013, SS. 241, 242.

The petition filed under sections 241 and 242 of the Companies Act, 2013, was dismissed by the Tribunal stating that the acts complained of did not fall within the purview of oppression and mismanagement. On appeal :

Held, *dismissing the appeal, that appellant No. 1 was present at the registered office of the company, where the meeting was conducted. In that meeting the resolution was passed by the majority directors to regulate the procedure pertaining the signatories to the bank accounts of the company, which was in no way oppressive as the decision relating to the operation of bank account was within the domain of the board of directors. No evidence had been brought forth to make the change in authorisation to operate the bank account as a colourable exercise. The appellant had not placed any evidence on record to prove that the construction on Government land was without any approval of the board and the competent authority. An isolated incident was not enough for grant of relief and a continuous course of oppressive conduct on the part of the majority shareholders had to be proved. The Tribunal rightly observed that the decision of the board of directors to write off the bad debt was a commercial decision, which did not warrant any judicial interference.*

Order of the National Company Law Tribunal in S. P. VELUMANI *v.* MAGNUM SPINNING MILLS INDIA P. LTD. [2020] 221 Comp Cas 408 (NCLT) *affirmed*.

UPPER INDIA STEEL MANUFACTURING AND ENGINEERING CO. LTD. *v.* GURLAL SINGH GREWAL MANU/NL/0164/2017 (para 35) *and* VELUMANI (S. P.) *v.* MAGNUM SPINNING MILLS INDIA P. LTD. [2020] 221 Comp Cas 408 (NCLT) (paras 1, 19) *referred to.*

Company Appeal (AT) No. 299 of 2019.

Dr. K. S. Ravichandran, Practising Company Secretary for the appellants.

R. Vidhyashankar and *B. Ragunath*, for respondents Nos. 1 to 8.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

BALVINDER SINGH ***(Technical Member)***.—The present appeal has been filed by the appellants under section 421 of the Companies Act, 2013 against the impugned order passed by National Company Law Tribunal, Chennai in C. P. No. 17 of 2017—(*S. P. Velumani* v. *Magnum Spinning Mills India P. Ltd.* [2020] 221 Comp Cas 408 (NCLT)). 1

The brief facts of the case are that respondent No. 1 is a closely held company incorporated on October 29, 2010, under the name of Magnum Spinning Mills P. Ltd., engaged in the business of running a spinning mill. The company has seven directors. Appellant No. 1 is a founder promoter, director and a shareholder of respondent No. 1 company holding 2,53,730 equity shares aggregating to 19.55 per cent. Appellant No. 2 is the wife of appellant No. 1 who holds 30,000 shares in the same company aggregating 2.31 per cent. of the share capital of the company. Respondent Nos. 2 to 7 are the other directors of the company which are close relatives. Appellant No. 1 pointed out the bogus transactions and siphoning of funds taking place in the company is an act of oppression and mismanagement and filed a company petition in the National Company Law Tribunal, Chennai which is dismissed and hence this appeal. 2

Appellant No. 1 submitted that the respondents had engaged in making bogus vouchers by booking bogus purchases of cotton and siphoning out money of the company in several ways including by showing as though cotton has come from the State of Gujarat and creating records as though cotton has been purchased at a higher price and also by showing and paying a higher transport charges. That there was a quarrel when appellant No. 1 caught that the respondents were purchasing cotton from Andhra Pradesh but were showing as if it is purchased from Gujarat. 3

4 Appellant No. 1 also submitted that when he started questioning, the respondents with an intend to put an end to the intervention of appellant No. 1, decided to change the mandate for operating the bank accounts of the company and concocted a plan as if an alleged board meeting was conducted on August 22, 2016 and resolution were allegedly passed by which any two directors can operate the account.

5 Appellant No. 1 also submitted that from 2010 to 2016, the appellant was signing the cheque mandatorily. Not a single allegation against the appellant. No valid reason was shown to justify the altering the mandate.

6 Appellant No. 1 also submitted that no such board meeting was conducted on August 22, 2016 and no notice was received by appellant No. 1. Such meeting per se invalid and liable to be set aside.

7 Appellant No. 1 also submitted that he raised his objection and he also informed the bank vide his letter dated August 30, 2016, that he was not a party to the said resolution. He further requested the bank not to honour any instruments and instructions until further notice. Thereafter State Bank of India ("the Bank") wrote a letter dated September 8, 2016 to the company asking for certain clarification as to the objection letter dated August 30, 2016 of appellant No. 1.

8 The appellant further submitted that the bank has abruptly closed the issue and sent a letter dated September 9, 2016 in reply to the letter dated August 30, 2016 of appellant No. 1. The bank accepted the alleged board resolution dated August 22, 2016 and closed the issue, advising appellant No. 1 to approach the very same persons who had oppressed appellant No. 1.

9 Appellant No. 1 further submitted that he has given his personal property worth more than 5 crores as collateral security for the credit facilities availed of by the company. He has also given personal guarantee for the loans availed of by the company and he who worked for the betterment of the company was oppressed and sidelined.

10 Appellant No. 1 contended that the respondents have cooked up records to show as if there were board meetings and annual general meeting were held and as if accounts were approved by the board and annual general meeting in the year 2016. Appellant No. 1 being the director cum shareholder never received any notice neither for any of the board meeting nor for the annual general meeting.

11 Appellant No. 1 also contended that presently the stake of respondents Nos. 2 to 7 is 77 per cent., they are the six out of seven directors in board, on an average representing 12.9 per cent. each. However, there are not less than 3 directors who hold 10 per cent. or less and still enjoy a directorship.

In this situation a proportional representative is an appropriate remedy to operate as a check when the majority control showing tendencies to run the management of the affairs of the company according to their whims and fancies excluding the petitioners from the management though they are rightfully entitled to the same. The company being in the nature of partnership, a proportional representation should be introduced in the composition of the board of directors of the company.

12 Appellant No. 1 submitted that after pointing out all these oppressive acts of the respondents before the Tribunal that no notice were received by the appellants and during the pendency of the company petition in C. P. No. 17 of 2017 on August 21, 2017 appellant No. 1 received a notice and agenda for the board meeting scheduled to be held on August 31, 2017 to which he sent a letter on August 25, 2017 to the board of directors of the company raising various objections with regard to the meeting but he did not receive any reply to that letter.

13 Appellant No. 1 further submitted that on August 31, 2017 he received the seventh annual report of the company along with the notice of the annual general meeting proposed to be held on September 30, 2017. To the shock of appellant No. 1 the board's report attached with the annual return showed that the board of directors of the company has met 5 times in the financial year for which no notices of any of the board meetings was given to appellant No. 1 being a director.

14 Appellant No. 1 also submitted that on September 26, 2017, appellant No. 1 sent an e-mail to the board of directors of the company, recording all his objections with respect to the annual general meeting proposed to be held on September 30, 2017. The respondents without considering the objections raised by the appellants conducted the annual general meeting on that date and also filled the Form No. AOC-4(XBRL) with the Registrar of Companies on October 26, 2017.

15 Appellant No. 1 further submitted that since his personal properties have been given as collateral to the credit facilities sanctioned to the company. The State Bank of India sent a letter dated August 29, 2017 to appellant No. 1, requesting him to sign and return the arrangement letter and other documents. Appellant No. 1 in his reply dated September 6, 2017 to the chief and relationship manager of the State Bank of India objected that the board resolution passed on August 22, 2016 is not valid and a case is pending before the National Company Law Tribunal, Chennai Bench challenging the validity of the board meeting held on August 22, 2016 and other allegations against the other directors of the company, thereafter

appellant No. 1 is not inclined to sign the documents until the disposal of the same.

16 Appellant No. 1 further submitted that all the employees including the staff in accounts department have been instructed not to speak to appellant No. 1 and not to pass on any information whatsoever. It is practically a sort of ostracizing the appellant and making his presence in the company's office disgusting for him that he will not attend office.

17 The appellants also raised the questions : no board approval for the construction ; no approval of the local authority ; short-term working capital funds have been diverted and unauthorised construction on poramboke land could result in demolition and waste of funds of the company.

18 It is also contended by appellant No. 1 that for the above stated reasons the affairs of the company are being conducted not only in a manner oppressive to the appellant but also prejudicial to the interests of the company and its shareholder.

19 Having aggrieved by the order of the National Company Law Tribunal, Chennai Bench the appellant prayed for the following relief :

(a) Allow the appeal and set aside the impugned order dated July 11, 2019 passed in C. P. No. 17 of 2017 passed by the National Company Law Tribunal, Chennai in the matter of *S. P. Velumani* v. *Magnum Spinning Mills India P. Ltd.* [2020] 221 Comp Cas 408 (NCLT) and allow the prayers in the company petition.

(b) To pass such other orders which as this hon'ble Appellate Tribunal may deem fit and proper in the circumstances of the case and thus render justice.

20 Respondent No. 1 filed its reply and stated that while the appellant have claimed alleged irregularity in respect of certain payments, the appellant was estopped from challenging the transaction ex facie, as the relevant purchase documents have been pursued and passed for payment only by appellant No. 1 and cheques also issued only by appellant No. 1. The appellant has raised the issue for the first ever time only in 2017 in the company petition and has not raised the issue in any prior correspondence.

21 It is further stated on behalf of respondent No. 1 that there is no contractual arrangement or promoters' agreement or the articles of association mandating that appellant No. 1 should remain compulsory signatory for operating bank account.

22 It is further submitted by respondent No. 1-company that no case is pleaded or made out under the revised mandate of bank account operating, the respondents have misused such power or misappropriated any

funds. On the contrary the performance of the company has significantly improved year to year.

23 It is further pleaded on behalf of respondent No. 1 that the company vide article 1, specifically adopted regulation in Table A of the Companies Act, 1956, regulation 70 of Table A vest power in the board to determine who shall operate the bank account of the company.

24 It is further stated that under the revised mandate any two directors of the company can sign the cheque. This is democratic arrangement. What appellant No. 1 wants is concentration of power and authority in himself and wants to be autocratic. Even in past, there have been instances when the company has authorised directors other than appellant No. 1 to operate accounts. Therefore, the appellant cannot claim any exclusive right to operate bank account. The minority shareholder claiming exclusive right to operate bank account and contending that not allowing such operation, amounts to oppression is in extreme argument.

25 It is also submitted on behalf of respondent No. 1-company that appellant No. 1 attended the meeting, and CCTV footage was also submitted. Appellant No. 1 signed the incoming/outgoing register and also signed various vouchers of the company in the mill premises on the said date. This will also show that he attended the meeting. The decision concerning operation of bank account is a majority decision having an approval of 80 per cent. shareholders and 20 per cent. shareholder seek to override the majority in the said regard.

26 It is argued on behalf of respondent No. 1 that on assuming without admitting, if there was any irregularity concerning the convening or holding of the meeting, the decision of the majority is capable of ratification and so no interference by the Tribunal is warranted.

27 It is also stated by respondent No. 1 company that it is a practice of the company to send notice of meetings through e-mails. The appellant has habit of attending meetings and not signing the attendance register. CCTV footage and photograph of appellant No. 1 attending several meetings are submitted. In fact, on the same date as the meeting was held, appellant No. 1 has signed vouchers at the registered office of the company.

28 It is further stated that notices for the board meeting on November 22, 2018, April 21, 2018 and August 19, 2018 were sent by RPAD. In fact for the board meeting on February 20, 2019 notice was again sent by RPAD. Appellant No. 1 casually asked for an adjournment of the meeting or in the alternative sought for leave of absence. The conduct of the appellant stands further exposed thereby.

29 It is further submitted on behalf of respondent No. 1-company that on the accounts/balance-sheet for the year March 31, 2016 where specific contention is raised that this was not discussed at the board, it is submitted that at the board meeting on August 22, 2016 the balance-sheet was passed and notices for such meeting was issued. Even when the annual report was sent by RPAD, the appellant made a false allegation of non-receipt and so, the balance-sheet was shared again by e-mail. Therefore, appellant is hell-bent on creating nuisance will be apparent.

30 It is further submitted that appellant took the extreme step of writing to the bank and stopping bank account operations resulting in delay/default in paying statutory dues. The appellants themselves admit that appellant refused to sign bank renewal documents and caused serious hardship to the company, leading SBI issuing notice cautioning stoppage of account if renewal documents are not signed. The appellant by his conduct caused SBI to increase interest rate as a penal step owing to non-execution of documents, as evidenced by statement of accounts and eventually company had to move from the SBI to a new banker excluding the petitioner from requirement of personal guarantee and his personal property security and the sanction advice issued in this regard.

31 It is further stated by respondent No. 1 that on alleged construction in poramboke land, confirmation by chartered engineer/approved surveyor that there is no encroachment but only compound wall is constructed and the reason is that there were serious undulation leading to injury to cattle and personnel. And also it is for the appropriate local authority of State Government to take action and no such action is taken till date which would evidence that the respondents are not guilty of any misdeed.

32 The respondents denied the allegations that all other directors or respondent No. 1-company are related to each other. It is denied that there is any fraud or act of oppression that has been committed or that there is any intent to side-line the appellant.

33 The respondents further contended that the appellant has no bona fide case. His grievance is only because the autocratic veto right that he enjoyed was taken away and decision making was made democratic. Appellant No. 1 could have co-operated with other directors and still continued to participate in bank operations, which was not to be the case. In any case if the appellant is restored to veto right in management or any proportionate right in board, he cannot work cohesively with the majority and he will not cooperate for renewing bank limits and day-to-day operations. Without prejudice therefore, even assuming without admitting the appellant is

entitled to any relief, it can only be for a direction for the appellant to exit the company at fair value to be determined by a valuer.

34 After having heard the averments made by the parties the National Company Law Tribunal, Chennai Bench dismissed the company petition stating that the acts complained of are not falling within the purview of oppression and mismanagement. Being aggrieved by the said order of the National Company Law Tribunal the appellant has filed the present appeal.

35 The records of the appellant attending the meeting and the signatures put on the entry register shows that appellant No. 1 was present at the registered office of respondent No. 1 company, where the meeting was conducted. In that meeting the resolution was passed by the majority directors to regulate the procedure pertaining the signatories to the bank accounts of respondent No. 1 company, which is in no way oppressive as the decision relating to the operation of bank account is within the domain of the board of directors. The National Company Law Tribunal has rightly put its reliance on judgment of the National Company Law Appellate Tribunal in *Upper India Steel Manufacturing and Engineering Co. Ltd.* v. *Gurlal Singh Grewal* MANU/NL/0164/2017 where it was held that cheque signing power is solely a business decision and cannot be interfered. Further after the authority to sign the cheques has been revised we do not have any fact whether after the revision of the authority the appellant has been totally excluded or not from the operation of the account. In case a person is excluded positively not to have signed even a single cheque after the revision this could be colourable exercise. No evidence has been brought forth to make the change in authorisation to operate the bank account as a colourable exercise. Therefore, this contention has no weight.

36 The other allegation regarding the construction of buildings and superstructures using the funds of the company, without any approval of the board and the competent authority was also rightly been dealt by the National Company Law Tribunal as appellant had not placed any evidence on record to prove the construction. This is an isolated incident and in order to invoke provisions of oppression and mismanagement the acts of oppression must be harsh and wrongful. An isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, thus, necessary to be proved.

37 The contention of the appellant that during the financial year 2017-18, an amount of Rs. 48,41,801 has been written off as bad debts, while in the previous year it was nil and the details as to identity of the party, whether related party or otherwise is not disclosed. The National Company Law

Tribunal rightly observed that the decision of the board of directors to write off the bad debt is a commercial decision, which does not warrant any judicial interference.

38 In view of the above observation and discussion, we are of the opinion that the National Company Law Tribunal, Chennai has rightly held that the allegations made by the appellants are baseless. We found no merit to interfere in the impugned order dated July 11, 2019 passed by the National Company Law Tribunal, Chennai Bench in Company Petition No. 17 of 2017 and the same is upheld. No order as to costs.

[2020] 221 Comp Cas 432 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

REGISTRAR OF COMPANIES, WEST BENGAL

v.

SABYASACHI BAGCHI

JARAT KUMAR JAIN J. ***(Judicial Member)***,
BALVINDER SINGH and
DR. ASHOK KUMAR MISHRA ***(Technical Members)***

June 24, 2020.

HF ▶ Appellant

OFFENCES AND PROSECUTION—POWERS OF TRIBUNAL—COMPOUNDING OF OFFENCES—TRIBUNAL HAS NO JURISDICTION TO REDUCE FINE TO SUM LESS THAN MINIMUM FINE PRESCRIBED FOR OFFENCE—COMPANIES ACT, 2013, ss. 165, 441.

The Registrar of Companies filed a complaint under section 165(6) of the Companies Act, 2013, against the respondent. During the pendency of the prosecution, the respondent filed an application under section 441(1) of the Act for compounding the offence. The Tribunal allowed the application subject to payment of compounding fees Rs. 25,000 within 15 days from the date of order. On appeal by the Registrar of Companies contending that the Tribunal had ignored the provisions of section 165(6) of the Act, and directed deposit of compounding fees in a sum less than the minimum prescribed for the offence :

Held, *allowing the appeal, that the Tribunal failed to notice the minimum fine prescribed under sub-section (6) of section 165 of the Act, which was applicable at the relevant time, i. e., before the amendment. Therefore the*

order was to be set aside. The respondent had contravened the provisions of section 165(1) of the Act, which was punishable under sub-section (6) of section 165 of the Act. The minimum fine was to be imposed at the rate of five thousand rupees for every day for the period April 1, 2015 to February 21, 2016, i. e., 326 days. The penalty was to be quantified at Rs. 16,30,000.

Registrar of Companies-cum-Official Liquidator *v.* Gyan Chandra Agarwal (Company Appeal (AT) No. 249 of 2018, dated September 12, 2018) *relied on.*

Order of the National Company Law Tribunal set aside.

Cases referred to :

Adjudicating Officer, Securities and Exchange Board of India *v.* Bhavesh Pabari [2019] 213 Comp Cas 439 (SC) (paras 7, 12)

Hindustan Steel Ltd. *v.* State of Orissa [1969] 2 SCC 627 (paras 7, 11)

Registrar of Companies-cum-Official Liquidator *v.* Gyan Chandra Agarwal (Company Appeal (AT) No. 249 of 2018, dated September 12, 2018) (paras 5, 15)

Viavi Solutions India P. Ltd. *v.* Registrar of Companies, NCT of Delhi and Haryana [2017] 203 Comp Cas 165 (NCLAT) (para 9)

Company Appeal (AT) No. 12 of 2019.

Sumit Kumar Jaiswal, Company Prosecutor, for the appellant.

Kunal Chatterji, for the respondent.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

Jarat Kumar Jain J. ***(Judicial Member)***.—The appellant-Registrar Companies, West Bengal filed this appeal under section 421 of the Companies Act, 2013 (in brief "the Act") against the order dated July 11, 2018 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition No. 190/KB/2018. Whereby allowed the compounding application subject to payment of compounding fees Rs. 25,000. 1

Brief facts of this case are that the respondent-Sabyasachi Bagchi was holding directorship of 17 companies on April 1, 2014 when section 165(1) of the Act, came into force. However, he vacated directorship of three companies during the period of April 1, 2014 to March 31, 2015. After receipt of the notice from the appellant, the respondent has resigned from the directorship of four companies on February 22, 2016, thus, the respondent has contravened the provisions of section 165(1) of the Act, for a period of April 1, 2015 to February 21, 2016, i. e., 326 days. The reply of show-cause notice of the respondent found unsatisfactory, therefore, the appellant filed 2

a complaint under section 165(6) of the Act, against the respondent before the Chief Metropolitan Magistrate, Kolkata. During the pendency of the prosecution, the respondent filed an application under section 441(1) of the Act, before the National Company Law Tribunal, Kolkata (in brief Tribunal) for compounding the offence. The appellant, Registrar of Companies, West Bengal, filed his report on compounding application before the Tribunal. After hearing the parties learned Tribunal allowed the application subject to payment of compounding fees Rs. 25,000 within 15 days from the date of order.

3 Being aggrieved with the order the appellant filed this appeal on January 4, 2019 along with application for condonation of delay in filing the appeal.

4 After hearing learned counsel for the parties and being satisfied of the grounds and exercising power keeping in view sub-section (3) of section 421 of the Act, delay of 41 days in preferring the appeal is condoned by this appellate Tribunal vide order dated April 12, 2019. The respondent challenged this interim order in Civil Appeal No. 4543 of 2019 before the hon'ble Supreme Court. However, the appeal has been dismissed vide order dated May 9, 2019. Thus, the order of condonation of delay attained finality.

5 The learned company prosecutor appearing on behalf of the appellant submitted that the respondent has accepted that he contravened the provisions of section 165(1) of the Act, for a period of April 1, 2015 to February 21, 2016, i. e., 326 days. However, in the impugned order the period of default is shown 21 days only and learned Tribunal has imposed compounding fees of Rs. 25,000. The Tribunal has ignored the provisions of sub-section (6) of section 165 of the Act, and directed to deposit compounding fees less than a minimum prescribed for the offence. The Tribunal has no jurisdiction to reduce the fine less than the minimum prescribed for the offence. For this purpose, he placed reliance on the order of this Tribunal in the case of Company Appeal (AT) No. 249 of 2018 *Registrar of Companies-cum-Official Liquidator* v. *Gyan Chandra Agarwal* order dated September 12, 2018. it is further, submitted that the Tribunal should have imposed minimum compounding fees, i. e., Rs. 5,000 per day for default to be continued 326 days amounting to Rs. 16,30,000. Thus, the order is liable to be set aside and the respondent be directed to deposit remaining compounding fees.

6 Learned counsel for the respondent submitted that the Tribunal's power under section 441(1) of the Act, are not restricted to impose minimum fine prescribed for the offence. The Tribunal has taking into consideration

circumstances of the case, exercised its judicial discretion therefore, no interference is called for in the appeal and appeal is liable to be dismissed.

Learned counsel for the respondent submits that even if a minimum penalty is prescribed, the competent authority will be justified in refusing to impose minimum penalty, when there is a technical or venial breach of the provisions of the Act, or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute, for this purpose, he placed reliance on the judgments of hon'ble Supreme Court in the case of *Hindustan Steel Ltd.* v. *State of Orissa* [1969] 2 SCC 627 and *Adjudicating Officer, Securities and Exchange Board of India* v. *Bhavesh Pabari* [2019] 213 Comp Cas 439 (SC) ; [2019] 5 SCC 90. The learned Tribunal considering the mitigating circumstances imposed compounding fees Rs. 25,000 as the offence is technical. Hence, the appeal be dismissed. 7

After hearing learned counsel for the parties we have gone through the record. 8

This Appellate Tribunal in the case of *Viavi Solutions India P. Ltd.* v. *Registrar of Companies, NCT of Delhi and Haryana* [2017] 203 Comp Cas 165 (NCLAT) (C. A. (AT) No. 49 to 53 of 2016 decided on February 28, 2017) held that (page 173) : 9

> ". . . the Tribunal is required to notice the relevant factors while compounding any offence, such as :
>
> (i) The gravity of offence.
>
> (ii) The act is intentional or unintentional.
>
> (iii) The maximum punishment prescribed for such offence, such as fine or imprisonment or both fine and imprisonment.
>
> (iv) The report of the Registrar of Companies.
>
> (v) The period of default.
>
> (vi) Whether petition for compounding is suo motu before or after notice from the Registrar of Companies or after imposition of the punishment or during the pendency of a proceeding.
>
> (vii) The defaulter has made good of the default.
>
> (viii) Financial condition of the company and other defaulters.
>
> (ix) Offence is continuous or one time.
>
> (x) Similar offence earlier committed or not.
>
> (xi) The act of defaulters is prejudicial to the interest of the member(s) or company of public interest or not.
>
> (xii) Share value of the company, etc."

10 Admittedly, in this case, the respondent has violated the provisions under section 165(1) read with section 165(3) of the Act, for a period April 1, 2015 to June 21, 2016, which is punishable under section 165(6) of the Act (before amendment) which reads as under :

> "(6) If a person accepts and appointment as a director in contravention of sub-section (1), he shall be punishable with fine which shall be less than five thousand rupees but which may extend to twenty-five thousand rupees for every day after the first during which the contravention continues."

11 We have considered the arguments of learned counsel for the respondent the hon'ble Supreme Court in the case of *Hindustan Steel Ltd.* v. *State of Orissa* [1969] 2 SCC 627 while dealing the provisions of Sales Tax Act, held that penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. In this case, the respondent was conscious that after coming into force the provisions under section 165(1) of the Act, he cannot hold directorship in more than 20 companies and directorship in more than 10 public companies, at the same time. As per section 165(3) of the Act, till March 31, 2015 the respondent was required to resign from the directorship of the companies more than the limits specified in sub-section (1) of section 165 of the Act, within the specified period. The respondent has vacated the directorship of three companies. However, after receipt of the notice from the appellant the respondent has resigned from the directorship of four companies on February 22, 2016 and there is nothing on record to presume that the respondent violated the provisions on a bona fide belief. The conduct of respondent shows that he acted in conscious disregard of its obligation.

12 The hon'ble Supreme Court, in the case of *Adjudicating Officer, Securities and Exchange Board of India* v. *Bhavesh Pabari* [2019] 213 Comp Cas 439 (SC) ; [2019] 5 SCC 90 dealt with different questions in reference to the Securities and Exchange Board of India Act, 1992, which are as under (page 444 of 213 Comp Cas) :

> "(i) Whether the conditions stipulated in clauses (a), (b) and (c) of section 15J of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the 'SEBI Act') are exhaustive to govern the discretion in the Adjudicating Officer to decide on the quantum of penalty or the said conditions are merely illustrative ?
>
> (ii) Whether the power and discretion vested by section 15J of the SEBI Act to decide on the quantum of penalty, regardless of the manner in which the first question is answered, stands eclipsed by the

penalty provisions contained in section 15A to section 15HA of the SEBI Act ?"

Thus, we are not convinced with the argument of learned counsel for the respondent that the Tribunal while dealing with under section 441(1) of the Act, can impose the compounding fees less than minimum which is prescribed for the offence. **13**

The issue for consideration is, whether Tribunal can impose the compounding fees under section 441(1) of the Act, less than minimum prescribed for the offence under section 165(1) read with section 165(6). **14**

This Appellate Tribunal in the case of *Registrar of Companies-cum-Liquidator* (supra) held as under : **15**

"2. The learned company prosecutor appearing on behalf of the Registrar of Companies, Jaipur referred to sub-section (6) of section 165 of the Companies Act, 2013, which reads as follows :

'165(6). If a person accepts an appointment as a director in contravention of sub-section (1), he shall be punishable with fine which shall not be less than five thousand rupees but which may extend to twenty-five thousand rupees for every day after the first during which the contravention continues.'

3. It is submitted that though the Tribunal had noticed the aforesaid provision and the punishment attributed for the default pursuant to the provision but notwithstanding the minimum quantum of fine imposed, the impugned order has been passed.

4. Mr. Suresh Sharma, practicing company secretary appearing on behalf of the respondent/the petitioner submitted that the penalty provided under sub-section (6) of section 165 of the Companies Act is not mandatory.

5. However, we do not agree with such submission in view of the provision as quoted above, which prescribe minimum penalty. The Legislature having prescribed minimum fine, which shall not be less than five thousand rupees for every day and maximum fine of twenty-five thousand rupees for every day, the Tribunal has no jurisdiction to reduce the fine less than the minimum fine prescribed for the offence."

From the impugned order its manifest and clear that the Tribunal failed to notice the minimum fine prescribed under sub-section (6) of section 165 of the Act, which was applicable at relevant time, i. e., before the amendment. **16**

17 In view of the error apparent in the impugned order dated July 11, 2018 passed by the Tribunal, thus, the order cannot be upheld. It is accordingly, set aside.

18 The respondent has contravened the provisions of section 165(1) of the Act, which is punishable under sub-section (6) of section 165 of the Act. Taking into consideration, the facts and circumstances of the case, we imposed minimum fine at the rate of five thousand rupees for every day for the period April 1, 2015 to February 21, 2016, i. e., 326 days. We quantified penalty to Rs. 16,30,000. The respondent has already paid Rs. 25,000 after adjustment, now he is liable to pay Rs. 16,05,000. Therefore, the respondent is directed to pay such amount within a period of 60 days in the National Company Law Tribunal, Kolkata. The Registrar of Companies will ensure compliance with the order.

Thus, the appeal is allowed. No costs.

The registry is directed to send the copy of judgment to the National Company Law Tribunal, Kolkata and Registrar of Companies, West Bengal for information and compliance.

[2020] 221 Comp Cas 438 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

YAMINI BIPINCHANDRA SHAH AND OTHERS

v.

TRIMBAK ESTATE P. LTD. AND OTHERS

JARAT KUMAR JAIN J. ***(Judicial Member)***,
BALVINDER SINGH and
DR. ASHOK KUMAR MISHRA ***(Technical Members)***

June 24, 2020.

HF ▶ Remanded

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—NON-SPEAKING ORDER BY TRIBUNAL—MATTER REMANDED—COMPANIES ACT, 1956, ss. 397, 398, 399, 402, 406, 407.

The petition filed under sections 397, 398, 402, 406 and 407 of the Companies Act, 1956 and section 59 of the Companies Act, 2013, was dismissed by the Tribunal holding that there was no deficiency in allotment of shares by the company to other respondents and that the petitioners did not hold the

minimum number of shares as prescribed under section 399 of the 1956 Act. On appeal :

Held, *that the order of the Tribunal was a non-speaking order. The questions of oppression and mismanagement, maintainability and limitation were mixed questions of law and fact. Therefore, the Tribunal was required to decide these questions at the time of final hearing of the petition. Thus, the order was not sustainable in law and was to be set aside and the matter was to be remanded to Tribunal to decide afresh on the merits.*

Order of the National Company Law Tribunal set aside.

Cases referred to :

Anup Kumar Agarwal *v.* Crystal Thermotech Ltd. [2017] 204 Comp Cas 141 (NCLAT) (paras 8, 20, 21)

Bhagwati Developers P. Ltd. *v.* Peerless General Finance Investment Co. Ltd. [2013] 178 Comp Cas 1 (SC) (para 21)

Rajahmundry Electric Supply Corporation Ltd. *v.* State of Andhra [1954] AIR 1954 SC 251 (para 21)

Ramesh B. Desai *v.* Bipin Vadilal Mehta [2006] 132 Comp Cas 479 (SC) (para 24)

Saroj Goenka (Mrs.) *v.* Nariman Point Building Services and Trading P. Ltd. [1997] 90 Comp Cas 205 (Mad) (para 16)

World Wide Agencies P. Ltd. *v.* Margaret T. Desor (Mrs.) [1990] 67 Comp Cas 607 (SC) (para 18)

Company Appeal (AT) No. 250 of 2018.

Anirwan with *Varun Singh*, *Gaurav Nair* and *Ms. Pranati Bhatnagar*, for the appellants.

Rakesh Kumar with *Aashish Khattar* and *Ankit Sharma* for the respondents.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

JARAT KUMAR JAIN J. ***(Judicial Member)***.—The appellants being legal heirs of founder shareholder late Mr. Bipin Chandra Shah filed this appeal against the order dated March 26, 2018 passed by the National Company Law Tribunal, Mumbai Bench (in short Tribunal). Whereby, allowed the application (C. A. No. 314 of 2013) filed by the respondents and dismissed company petition C. P. No. 108 of 2013 as not maintainable. 1

Brief facts of this appeal are that M/s. Trimbak Estates P. Ltd. (in brief target company) was incorporated on August 30, 1995 having authorized share capital of Rs. 1 lakh divided into 10,000 equity shares at Rs. 10 each. 2

The founder shareholders and directors, namely, late Mr. Bipin Chandra and Kamal Kumar Bhageria, subscribed 100 equity shares each at Rs. 10 per share and paid-up share capital was 2,000. During the year 2002-03, late Mr. Bipin Chandra suffered recurrence of cardiac problems. He was advised complete bed rest and was not to allow to attend the office. In absence of late Mr. Bipin Chandra, the affairs of the target company, where being controlled by the Kamal Kumar Bhageria alone. Late Mr. Bipin Chandra could not recover from illness and died on February 15, 2004, leaving behind his legal heirs, namely, Yamini (wife), Mr. Bhavik (son) and Arpit (son) the appellants herein. Bhavik vide letter dated March 11, 2006 requested Kamal Kumar Bhageria to transfer the shares hold by his father in the target company in the joint names of legal heirs. It was shocking and surprising to know that the shares hold by late Mr. Bipin Chandra in the target company held disappeared from the register of shareholders maintained by the target company. The inspection carried out during the August to September, 2006, revealed that mismanagement and oppression have been carried out behind the back of late Mr. Bipin Chandra. Kamal Kumar Bhageria being the master mind, indulge into the acts of mismanagement and oppression. The target company on December 11, 2002 without authorization of board meeting allotted 9,800 equity shares at of Rs. 10 each in favour of Rajendra K. N. Permanandka 4,900 and Sushila Rajendra Permanandka 4,900. Thus, the percentage of shareholding of late Mr. Bipin Chandra brought down from 50 per cent. to 1 per cent. of total share capital. Subsequently, during financial year 2005-06 the paid-up capital increased from 10,000 equity shares to 85,000 equity shares at Rs. 10 each. Thus, the shareholding of the appellants (legal heir of late Mr. Bipin Chandra) is brought down from 50 per cent. to 0.12 per cent. of the total paid-up capital. In the financial year 2011-12 paid-up capital again increased from 85,000 shares at Rs. 10 each to 95,800 shares at Rs. 10 each. Thus, the shareholding of the appellants is further brought down from 50 per cent. to 0.10 per cent.

3 It is also alleged that the number of members/shareholders have been increased from 2 to 50 in systematic manner. New shareholders/members are family members of Kamal Kumar Bhageria. They have made shareholders with the sole motive to bring down the shareholding of late Mr. Bipin Chandra Shah from its original half to 1/50th of total numbers.

4 The appellants alleged that aforesaid mismanagement and oppression is ex facie illegal on the face of it and is in contravention of the articles of association. On these allegations the appellants being legal heir of founder shareholder late Mr. Bipin Chandra Shah filed company petition under

sections 397, 398, 402, 406 and 407 of the Companies Act, 1956 and section 59 of the Companies Act, 2013, before the Company Law Board in Mumbai Bench, against the respondents in September, 2013. On October 4, 2016 company petition transferred to the Tribunal, Mumbai Bench.

5 During the pendency of the petition the respondents herein filed an application (C. A. No. 314 of 2013) for dismissal of company petition in limine, on the ground that the appellants do not qualify/fulfilled the criteria under section 399 of the Companies Act, 1956. It is also stated that the appellants have also filed suit in City Civil Court, Mumbai being short causes Suit No. 942 of 2007 on February 23, 2007 against respondents Nos. 1 to 4 herein as a remedy against the oppressive conduct and sought various reliefs, however, the suit was dismissed for default on April 25, 2007. It is also stated that the appellants have filed petition (C. P. No. 16 of 2011) against the respondents on the ground of oppression and mismanagement, the Company Law Board vide order dated March 14, 2012 dismissed the petition holding that the petition is not maintainable. For the same cause of action, the present petition is filed after a delay of nine years.

6 The appellants opposed the application on various grounds including that maintainability under section 399 of the Companies Act, 1956 should be considered the crucial date when the shareholding of the appellants was diluted and reduced from 50 per cent. to 1 per cent. and subsequently, shareholding is brought down to 0.12 per cent. and 0.1 per cent. of the total paid-up capital.

7 After hearing learned counsel for the parties Tribunal by the impugned order held that do not find any deficiency in allotment of shares by the company to other respondents. The appellants do not hold the minimum threshold limit as prescribed under section 399 of the Companies Act, 1956, i. e., either one-tenth of the paid-up equity share capital or one-tenth of the total number of members of the company. The appellants in past had suffered adverse orders from the City Civil Court, Mumbai, in short cases Suit No. 942 of 2007 decided on April 25, 2007 and also in the Company Law Board in C. A. No. 51 of 2011 in C. P. No. 16 of 2011 on March 12, 2012. The appellants have again filed this petition for the same cause of action and that too after a delay of 9 years. Thus allowed the application (C. A. No. 314 of 2013) filed by the respondents and in consequence dismissed C. P. No. 108 of 2013. Being aggrieved with this order the appellants have filed this appeal.

8 Learned counsel for the appellants submitted that learned Tribunal erroneously, ascertain the eligibility under section 399 of the Companies Act, 1956 on the date of filing of the company petition. The Tribunal ought to

have ascertain the eligibility on the date of oppression and mismanagement in-diluting the shareholding and membership of the appellants below one-tenth of the total shareholding or membership in the company. For this principle learned counsel for the appellants cited the judgments of this Appellate Tribunal in the case of *Anup Kumar Agarwal* v. *Crystal Thermotech Ltd.* [2017] 204 Comp Cas 141 (NCLAT) (Company Appeal (AT) No. 17 of 2016) decided on January 24, 2017 and *Ranchi Metal Ispat P. Ltd.* v. *Surjit Singh* (Company Appeal (AT) No. 31 of 2016, decided on February 20, 2017).

9 Learned counsel for the appellants contended that six instances of oppression and mismanagement by the respondents as stated in the petition are as under :

(i) On December 11, 2002 respondent No. 2 without any notice or board meeting allotted 9,800 shares to respondents Nos. 3 and 4.

(ii) On February 10, 2004, respondent No. 2 had appointed his wife respondent No. 8 as director of the company.

(iii) On September 30, 2004 the name of Mr. Bipin Chandra Shah was removed from the list of shareholders.

(iv) On May 19, 2006 respondent No. 2 deliberately, gave false statement that no share stood in the name of Mr. Bipin Chandra Shah.

(v) The authorized share capital increased from Rs. 1 lakh to Rs. 9.58 lakhs and number of shareholders increased to six.

(vi) On March 15, 2012, 10,800 shares allotted to respondents Nos. 8 to 50.

10 Learned counsel for the appellants further submitted that without any notice or board meeting illegally the shares were allotted and authorized share capital was increased. In this case, the question of maintainability is mixed question of fact and law, as the petition was filed on the ground that the shareholding of the appellants has been brought down below one-tenth of the total shareholding of the company by oppression and mismanagement. Therefore, the Tribunal was required to decide the question of maintainability at the time of final hearing of the petition.

11 Learned counsel for the appellants submitted that the counsel for the respondents has not argued anything what so ever, in establishing that the membership of the appellants on the date of oppression and mismanagement was less than one-tenth of the total members of the company.

12 Learned counsel for the appellants further submitted that learned Tribunal without giving any reasoning held that there was no deficiency in allotment of shares to respondent Nos. 8 to 50. Therefore, impugned order

is a non-speaking order and is liable to be set aside and the case may be remanded back to the Tribunal for deciding the case on merit.

13 Learned counsel for the appellants also submitted that the learned counsel for the respondents have restricted their arguments on the question of limitation, whereas the Tribunal has not decided the issue of limitation and has not given a finding that the petition is barred by limitation. Otherwise, also the issue of limitation is a mixed question of law and fact. Therefore, the issue of limitation ought to be decided by the Tribunal at final stage. So far as, the question of limitation is concerned the shares were allotted in favour of appellants on May 8, 2013. Therefore, the right to sue accrued only on May 8, 2013. then, the company petition was filed in September, 2013. Thus, it is within limitation.

14 Learned counsel for the appellants contended that the Tribunal has wrongly, observed that the appellants were suffered adverse order in Company Petition No. 16 of 2011. Actually, this petition was dismissed with liberty to file fresh petition after obtaining succession certificate of the deceased Mr. Bipin Chandra Shah. When the shares were allotted to the appellants then they have filed this company petition. The acts of oppression and mismanagement continued even after the disposal of earlier company petition filed by the appellants. Thus, the cause of action is continuing cause of action. The civil suit of the appellant was dismissed for non-appearance of the parties. Hence, the appellants may bring afresh suit, therefore, the Order 2, rule 2 of the Code of Civil Procedure, 1908 has no application in this case.

15 Learned counsel for the respondents submitted that Mr. Bipin Chandra died on February 15, 2004 after about two years the appellants have for the first time, on March 11, 2006 applied for transferring the shares in their name. On May 29, 2006 respondent No. 2 had categorically denied with respect to the appellant's father having shareholding in the company. Thus the cause of action had accrued at that time, in favour of the appellants. The limitation started in the year 2006, whereas, the company petition was filed in September, 2013. As per section 433 of the Companies Act, 2013. The company petition can be filed within three years from accrual of the cause of action. Thus, the Tribunal has rightly, dismissed the company petition on the ground of maintainability.

16 Learned counsel for the respondents contended that issue of limitation can be considered as a preliminary issue in the petition under sections 397 and 398 of the Companies Act, 1956 if it is not a mixed question of law and fact as held by the hon'ble Madras High Court in the case of *Mrs. Saroj*

Goenka v. *Nariman Point Building Services and Trading P. Ltd.* reported in MANU/TN/0072/1993 ; [1997] 90 Comp Cas 205 (Mad).

17 It is also submitted that this Appellate Tribunal in the case of *Ganesh Jaiswal* v. *Tourist Inn P. Ltd.* in Company Appeal (AT) No. 18 of 2019 held that the period of limitation is three years from the date, when the right to apply accrues unless there is a continuous cause of action. The right to apply will have to be construed as having it accrued when the first violation of the right accrues and it discovered.

18 Learned counsel for the respondents submits that the appellants being legal heirs had filed the petition in February, 2011 before the Company Law Board. Therefore, the appellants cannot contend that since they did not have 100 shares, therefore, they could not file the petition under sections 397 and 398 of the Companies Act, 1956. The hon'ble Supreme Court in the case of *World Wide Agencies P. Ltd.* v. *Mrs. Margaret T. Desor* reported in [1990] 67 Comp Cas 607 (SC) ; [1990] 1 SCC 536 held that even the legal heirs of deceased shareholder can be treated as member of company for the purpose of maintaining petition under sections 397 to 398 of the Companies Act, 1956.

19 After, hearing learned counsel for the parties we have gone through the record.

20 First question for our consideration is that what is the crucial date when the applicant is required to satisfy the requirements under section 399 of the Companies Act, 1956, so as to make the requirement of having an aggregate of 1/10th of shares out of total shareholding of the company, if the applicant alleges oppression in bringing down his shareholding. This Appellate Tribunal while dealing with this issue in the case of *Anup Kumar Agarwal* v. *Crystal Thermotech Ltd.* [2017] 204 Comp Cas 141 (NCLAT) held as under (page 150) :

> "The question of oppression and mismanagement and maintainability in the present case is a mixed question of facts and law. As the petition was filed on the ground that the shareholding of the applicant(s) has been brought down below one-tenth of the total shareholding of a company by oppression and mismanagement, Tribunal was required to decide the question of maintainability at the time of final hearing of the petition. Both the merit and question of maintainability were required to be decided together. On hearing the parties, in case the Tribunal forms opinion that there was no oppression and mismanagement on the date of cause of action as alleged by the applicant then in such case it was open to the Tribunal to dismiss the

petition as not maintainable in view of section 399 of the Companies Act, 1956."

This Appellate Tribunal has again an occasion to deal with this issue in **21** the case of *Ranchi Metal Ispat P. Ltd.* v. *Surjit Singh* after referring the decision of the hon'ble Supreme Court this Appellate Tribunal held as under :

"In *Anup Kumar Agarwal* v. *Crystal Thermotech Ltd.* [2017] 204 Comp Cas 141 (NCLAT) (Company Appeal (AT) No. 17 of 2016), this court considered the crucial date when an applicant is required to satisfy the requirements under section 399 of the Companies Act, 2013 so as to make the requirement of having an aggregate of one-tenth of share out of the total shareholding of the company, if the appellant alleges oppression in bringing down his shareholding. In the said case, this court noticed the hon'ble Supreme Court's decision in *Bhagwati Developers P. Ltd.* v. *Peerless General Finance Investment Co. Ltd.* [2013] 178 Comp Cas 1 (SC) and *Rajahmundry Electric Supply Corporation Ltd.* v. *State of Andhra,* AIR 1954 SC 251 *wherein the apex court held that the requirement of one-tenth of holding of the total share is to be examined in the light of whether such a number is maintained on the actual date of presentation of the company petition in the court* (emphasis[1] added). This court while distinguished the decision of hon'ble Supreme Court in *Bhagwati Developers P. Ltd.* v. *Peerless General Finance Investment Co. Ltd.* [2013] 178 Comp Cas 1 (SC) and *Rajahmundry Electric Supply Corporation Ltd.* v. *State of Andhra,* AIR 1954 SC 251, held that the said principle, which was made applicable in the case of winding up, will not be applicable where the applicant alleges oppression and mismanagement in bringing down the shareholding below one-tenth of the total share of the company. This court further observed that if the principles laid down by Supreme Court in *Bhagwati Developers P. Ltd.* v. *Peerless General Finance Investment Co. Ltd.* [2013] 178 Comp Cas 1 (SC) and *Rajahmundry Electric Supply Corporation Ltd.* v. *State of Andhra,* AIR 1954 SC 251, which related to cases of winding up, is made applicable in the case of alleged 'oppression and mismanagement' bringing down the minimum requirement of shareholding, then the applicant(s) will be remediless. This court thereby held that the crucial date for determination of requirements under section 399 will be the date the alleged date of oppression and mismanagement in bringing down the shareholding below one-tenth of the total shareholding of the company took place."

1. Here printed in italics.

22 Now it is well-settled that the question of oppression and mismanagement and maintainability is a mixed question of fact and law and when the petition is filed alleging that the shareholding of the applicant has been brought down below one-tenth of the total shareholding of a company by oppression and mismanagement the Tribunal was required to decide the question of maintainability at the time of final hearing of the petition and the crucial date of cause of action is when the alleged shareholding of the applicant has been brought down below one-tenth of the total shareholding of the company. In this case the appellants have alleged that on December 11, 2002 without any notice or board meeting. Respondent No. 2 allotted shares to respondents Nos. 3 and 4 and thereby shareholding of late Mr. Bipin Chandra brought down from 50 per cent. to 1 per cent. and subsequently, by increasing paid-up capital from time to time the shareholding of Mr. Bipin Chandra brought down 50 per cent. to 1 per cent. of the total paid-up capital and 1/50th of the total membership. In the impugned order learned Tribunal has considered the question of maintainability on the date of filing of the petition which is not correct and question of maintainability in the case is a mixed question of fact and law. Therefore, it should have been decided at the time of final hearing of the petition.

23 It is interesting fact the respondents have restricted its arguments on the question of limitation only. It means that the respondents are not convinced or not in a position to justify the findings of the Tribunal in regard to maintainability of the petition in view of section 399 of the Companies Act, 1956.

24 So far as the question of limitation is concerned the Tribunal has not given any findings that the petition is time barred. But dismissed the petition on the ground of delay and laches. As the Tribunal has not embarked the issue of limitation, therefore, we restrained ourselves to express any opinion in regard to the arguments advanced by learned counsel for the respondents on the question of limitation. However, we are of the view that as per the allegations in the petition, it is apparent that in this petition issue of limitation is a mixed question of fact and law. Therefore, it should have been decided at the time of final hearing, i.e., when the petition is decided on merit. In this purpose it is useful to refer the judgment of this Appellate Tribunal in the case of *Ganesh Jaiswal* v. *Tourist Inn P. Ltd.* in which held as under :

> "It is well-settled that a plea of limitation is a mixed question of law and fact. Reference in this regard may profitably be made to the judgment of the hon'ble apex court rendered on July 11, 2006 in Civil

Appeal No. 4766 of 2001 titled *Ramesh B. Desai* v. *Bipin Vadilal Mehta* reported in [2005] 5 SCC 638 ; [2006] 132 Comp Cas 479 (SC) (paragraph 19). It is not in dispute that in regard to matters falling within the purview of sections 397 and 398 of the Companies Act, 1956, the Limitation Act does not specifically provide for a period of limitation. In terms of article 137, which is applicable to matters for which no period of limitation is specifically provided, the period of limitation is three years from the date when the right to apply accrues. Unless there is a continuing cause of action, the right to apply will have to be construed as having accrued when the first violation of right occurs or is discovered. Successive violation of right will not give rise to a fresh cause of action."

25 The learned Tribunal without considering the relief and the orders passed by the City Civil Court, Mumbai in short cases Suit No. 942 of 2007 decided on April 25, 2007 dismissed the petition on this ground also. As per the appellants the relief claimed in the suit and in this company petition are different, parties are different and the suit has been dismissed in default and the acts of oppression and mismanagement continued even after the dismissal of suit. Therefore, the learned Tribunal is required to considered the arguments of appellants and should have given a specific finding on this issue.

26 Learned counsel for the appellants also pointed out that a Company Petition No. 16 of 2011 was dismissed on March 12, 2013 with liberty to file the petition afresh after obtaining succession certificate or letter of administration for the estate of late Mr. Bipin Chandra. Thus, the earlier petition was not dismissed on merit. Hence, there is no impediment in maintaining the present petition.

27 The learned Tribunal without discussing evidence gave a finding that the Tribunal do not find any deficiency in allotting the shares to respondents Nos. 8 to 50.

28 With the aforesaid, we are of the view that the impugned order is a non-speaking order. The question of oppression and mismanagement, maintainability and limitation in the present case are mixed question of law and fact. Therefore, the Tribunal was required to decide these questions at the time of final hearing of the petition.

29 Thus, the impugned order is not sustainable in the law. Hence, it is hereby set aside and the matter is remanded to the Tribunal that after hearing both the parties, petition be decided afresh on merit.

No order as to costs.

The registry is directed to send the copy of this judgment to the National Company Law Tribunal, Mumbai Bench and parties are directed to appear before the same Bench on July 15, 2020.

[2020] 221 Comp Cas 448 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — MUMBAI BENCH— SPECIAL BENCH]

KUMAKA INDUSTRIES LTD., *In re*

V. K. RAJASEKHAR *(Judicial Member)* and
V. NALLASENAPATHY *(Technical Member)*

July 6, 2020.

HF ▶ Petitioner

SCHEME OF ARRANGEMENT—SANCTION OF SCHEME—SCHEME FAIR AND REASONABLE AND APPROVED BY SHAREHOLDERS—SCHEME COMPLYING WITH STATUTORY REQUIREMENTS—TO BE SANCTIONED—COMPANIES ACT, 2013, SS. 230, 231, 232.

On a petition filed under sections 230 to 232 of the Companies Act, 2013, to sanction a scheme of arrangement between the petitioner-company and its equity shareholders pursuant to the advice of the Bombay Stock Exchange to the company which had been unanimously approved by the shareholders and creditors of the company :

Held, *that the scheme appeared to be fair and reasonable and did not violate any provisions of law and was not contrary to public policy or public interest. The stock exchange had stated in its letter dated September 15, 2015 that there were no adverse observations. In the absence of anything inherently abhorrent in the scheme, and since all the requisite statutory compliances had been fulfilled, the scheme was to be sanctioned.*

Cases referred to :

Calgary and Edmonton Land Co. Ltd., *In re* [1975] 1 All ER 1046 (Ch D) ; [1975] 1 WLR 355 (Ch D) (para 14)

Miheer H. Mafatlal *v.* Mafatlal Industries Ltd. [1996] 87 Comp Cas 792 (SC) (para 21)

National Bank Ltd., *In re* [1966] 1 All ER 1006 (Ch D) ; [1966] 1 WLR 819 (Ch D) (para 14)

NFU Development Trust Ltd., *In re* [1972] 1 WLR 1548 (Ch D) ; [1973] 1 All ER 135 (Ch D) (para 14)

Q. H. Talbros Ltd., *In re* [2016] 65 taxmann.com 159 (P&H) (para 14)

Savoy Hotel Ltd., *In re* [1981] 3 All ER 646 (Ch D) (para 14)

Securities and Exchange Board of India *v.* Sterlite Industries (India) Ltd. [2003] 113 Comp Cas 273 (Bom) (para 14)

C. P. (CAA) No. 190/MB.I/2017 connected with Company Summons for Directions No. 925 of 2015.

Hemant Sethi, Rajendra Shah with *Imran Karachiwalla* instructed by *Mansukhlal Hiralal and Co.*, for the petitioner.

Ms. Rupa Sutar, Deputy Director for the Regional Director (WR).

Ashish Lalpuria, party-in-person Objector.

ORDER

The order of the Bench was delivered by

V. K. RAJASEKHAR ***(Judicial Member)***.—The court convened by video conference today (July 6, 2020). 1

Heard Mr. Hemant Sethi, learned counsel for the petitioner, Ms. Rupa Sutar, Deputy Director for the Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, and Mr. Ashish Lalpuria, the objecting shareholder of the petitioner. 2

This petition was originally filed before the hon'ble Bombay High Court. By virtue of notification issued by the Ministry of Corporate Affairs (MCA) on December 7, 2016 notifying the Companies (Transfer of Pending Proceedings) Rules, 2016, the above proceedings were transferred to this Bench. 3

The sanction of this Tribunal is sought under sections 230 to 232 of the Companies Act, 2013, to a scheme of arrangement between the petitioner-company and its equity shareholders. Learned counsel for the petitioner states that the scheme of arrangement has been filed by the petitioner-company pursuant to the advice of the Bombay Stock Exchange to the petitioner by its letter dated August 22, 2013. The scheme has been unanimously approved by the shareholders and creditors of the petitioner-company. 4

Learned counsel for the petitioner submits the rationale for the scheme is as follows : 5

(a) The petitioner was incorporated in the year 1973 as Ashok Organic Industries Ltd. It has changed its name to Kumaka Industries Ltd., on March 5, 2011 and is in the business of manufacturing, buying, selling, importing, exporting, distributing, processing, exchange, converting, altering or otherwise handling or dealing, in export of chemicals of any nature and kind whatsoever including organic and inorganic chemicals,

synthetics, solvents, dyes and chemicals, drugs, pharmaceuticals, medicines and chemicals popularly known as laboratory or fine chemicals and by-products.

(b) On January 12, 1995 the petitioner entered into a capital market by a public issue of 37,47,400 equity shares of Rs. 10 each, at a premium of Rs. 150 per share (aggregating to Rs. 160 per share) vide a prospectus dated January 12, 1995. The issue opened on February 16, 1995 and closed on February 20, 1995.

(c) Pursuant to the payment of application monies of Rs. 40 per share (consisting of Rs. 2.50 against the face value of Rs. 10 per share and 37.5 towards the premium of Rs. 150), 37,47,400 shares were allotted to successful applicants by the petitioner. Out of the said 37,47,400 shares, 13,34,400 shares were fully paid-up. However, shareholders of the remaining 24,13,000 shares did not pay the balance amount of Rs. 120 per share despite several calls being made by the board of the petitioner. Counsel for the petitioner submitted that the petitioner-company had an option to forfeit the aforesaid 24,13,000 shares for non-payment of allotment monies. However, since the forfeiture was not an investor friendly measure the Board decided to implement a proposal whereby the 24,13,000 partly paid-up shares would be reduced to 6,03,250 fully paid-up shares in proportion to the amount of monies already paid as application money.

(d) That the aforesaid arrangement was approved by the shareholders in the annual general meeting of the company on August 14, 1997. On August 24, 1997 the shareholders of the company, passed a resolution authorising the company to enter into a scheme of arrangement between the company and its equity shareholders in respect of conversion of the partly paid shares, into fully paid shares, in proportion with the amounts paid by such shareholders of partly paid-up shares. This above arrangement was carried out on the legal opinion of Mr. Justice (Retd.) Y. V. Chandrachud, retired Chief Justice of India, who had opined that such an action did not amount to a reduction of share capital and compliance with the provisions of section 100 of the Companies Act, 1956 was not necessary.

(e) On November 23, 1998 the board of directors of the company, implemented the proposal, whereby the 24,13,000 partly paid-up shares were converted to 6,03,250 fully paid-up shares. During the time of allotment, 406 shareholders had subscribed to 10,375 shares by paying the full subscription amounts of Rs. 160 per share. However, they had applied for less than 100 shares, which was the minimum threshold.

(f) It is further stated that by a letter dated May 6, 1999 the Bombay Stock Exchange (BSE) declined the request of the petitioner to list the

6,03,250 proportionately reduced shares and the 10,375 shares that were issued. The said letter of the BSE was not received by the petitioner due to a change in its address.

(g) The petitioner states that being unaware of the decision of BSE of non-listing of the aforesaid 6,03,250 proportionately reduced shares and the 10,375 shares that were issued, the company's recognised share capital in its audited financial statement, annual returns and other documents of the company and its submission of quarterly and half-yearly financial results made to the BSE, SEBI and other Governmental authorities since then and till date and in absence of any communication to the contrary or non-receipt of any objections from them the company presumed and believed that these authorities have confirmed and accepted the capital status of the company. The capital structure of the company was shown to be as under :

Sl. No.	*Particulars*	*No. of shares*	*Share capital (Rs.)*
1.	Original number of paid-up shares	1,01,37,600	10,13,76,000
2.	Fully paid-up shares	13,34,400	1,33,44,000
3.	Partly paid-up shares converted into fully paid-up shares (as per III(A))	6,03,250	60,32,500
4.	Fully paid-up shares allotted (as per III(B))	10,375	10,37,500
	Total	1,20,85,625	12,08,56,250

(h) It was only in 2012 when the petitioner sought permissions from BSE Ltd., to issue preferential shares to the Bank of Baroda, that the refusal to list the aforesaid shares came to the knowledge of the petitioner.

(i) Following this, and upon the advice of BSE Ltd., the petitioner approached the hon'ble Bombay High Court to for sanction of the present scheme, which is now transferred to this Bench.

6 The scheme of arrangement was ratified by the board of directors of the petitioner-company vide board resolutions dated May 10, 2014, June 6, 2015 and July 6, 2015. Learned counsel for the petitioner submits that BSE Ltd., has issued a letter dated September 15, 2015 wherein it has stated that they had no adverse observations with respect to the scheme. The letter of BSE Ltd., is annexed at exhibit-I page 497 of the company petition.

7 In these circumstances the petitioner filed scheme of arrangement under sections 391-394 of the Companies Act, 1956 before the hon'ble High Court. By order dated December 11, 2015 passed in Company Summons for Directions No. 925 of 2015 meetings of the equity shareholders and unsecured creditors were convened and held on February 8, 2016 and the

scheme was unanimously approved by the shareholders and creditors present at the meetings. The chairman's report of the meetings of the equity shareholders and creditors is annexed to the company petition as exhibits H1 and H2. The report of scrutinisers, viz., M/s. Jayesh Vyas and Associates, practising company secretaries, forms part of the chairman's report.

8 The material provisions of the proposed scheme of arrangement were :

(a) Ratification of reduction of 18,09,750 shares by conversion of 24,13,000 partly paid-up shares to 6,03,250 fully paid-up shares.

(b) Reduction of share capital by cancellation and extinguishment of 10,375 fully paid-up shares allotted to 406 shareholders and transfer of fully paid-up 10,375 by the promoters at the rate of 0.005 paise per share to restore the rights of the said 406 shareholders.

(c) Rearranging and numbering the distinctive numbers of shares to reconcile the same with the paid-up share capital.

(d) Issue and allotment of 21,04,865 fully paid-up shares as bonus shares to the public shareholders of the company other than promoters.

9 The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai (RD) has filed his report dated January 2, 2018 opposing scheme on the following grounds :

(1) As per the scheme and information submitted by the company it is clearly mentioned that approval is sought for as under :

(a) Ratification of reduction of 18,09,750 shares by conversion of 24,13,000 partly paid-up shares to 6,03,250 fully paid-up shares.

(b) Reduction of share capital by cancellation and extinguishment of 10,375 fully paid-up shares allotted to 406 shareholders and transfer of fully paid-up 10,375 by the promoters at the rate of 0.005 paise per share.

(c) To restore the rights of the said 406 shareholders, rearranging and numbering the distinctive numbers of shares to reconcile the same with the paid-up share capital.

(d) Issue and allotment of 21,04,865 fully paid-up shares as bonus shares to the public shareholders of the company out of the free reserves of the company.

(2) Therefore, it is clearly mentioned by the petitioners that the arrangement which is already implemented is placed before the hon'ble court/Tribunal for sanction is not in accordance with law and may not be considered on the following grounds :

(1) The company has acted only on the legal opinion dated November 3, 1997 and not acted on the basis of the letter and spirit of provisions of section 100 of the Companies Act, 1956.

(2) Subscription made by each of the shareholders less than 100 each which is not acceptable.

(3) Letter of Bombay Stock Exchange dated May 6, 1999 not received by the company and only came to know in the year 2012 is also not acceptable since the company was listed in touch with the Bombay Stock Exchange, the reason mentioned above is not justifiable.

(4) The present scheme is made only as per the advice of the Bombay Stock Exchange in the year 2013 which is not acceptable since the company has to comply with the Companies Act, 1956 before the letter received from the Bombay Stock Exchange.

(5) There is no proposed scheme. But it is rectification of action already taken.

(6) In view of above, it is humbly presented that the Regional Director is filing these preliminary observations on the scheme and he is reserving his right to make further observation if need arises.

The RD has submitted that this Tribunal may decide the matter after considering the above observations.

10 In response to the report filed by the RD, the petitioner-company has filed affidavit in reply dated October 22, 2018 broadly reiterating the contents of the petition. It was averred that the objection raised by the RD is too technical.

11 Mr. Ashish Lalpuria, one of the shareholders of the petitioner appears in person. He has filed his objection to the proposed scheme. The only objection is that the if the present scheme is rejected, the petitioner may come out with scheme to buy-back the shares from the public shareholders. He also contends that the scheme in its present form is not a scheme that can fit into sections 230-232 of the Companies Act, 2013.

12 The core contention raised is whether the scheme as presented can be construed as a "scheme of arrangement" under section 391 of the Companies Act, 1956 or under section 230 of the Companies Act, 2013.

13 Mr. Hemant Sethi, learned counsel for the petitioner, submits that the term "arrangement" is not defined in the Companies Act, but as per judicial interpretation, it is of wide amplitude. The arrangement contemplated by way of the present scheme would certainly fall within the ambit of the term "arrangement" as envisaged under sections 391-394 of the Companies Act, 1956 or sections 230-232 of the Companies Act, 2013.

14 In support of his contention Mr. Hemant Sethi relies upon the following judgments :

(a) *Q. H. Talbros Ltd., In re* [2016] 65 taxmann.com 159 (P&H), dated December 10, 2015. The Division Bench of the Punjab and Haryana High Court in paragraph 14, inter alia, observed :

"A merger and a demerger are not the only components of a composite scheme of arrangement. The term arrangement in section 391 is of wide amplitude. It is not defined in the Act. Corporate affairs are often complex involving the interplay of innumerable factors including those relating to policy matters, management and financial aspects and legal issues. The schemes often require considerations of various enactments and adherence to various legal provisions not only under the Companies Act but also under other enactments. Financial aspects are not limited in their nature or in scope. Each component is studied, and the resultant arrangement is arrived at after taking all of them into consideration. There are consequential acts to be performed as an integral part of the scheme. Many of them, therefore, involve other arrangements such as reduction in share capital and the amendment of the memorandum of association and the articles of association of the company. These very components can constitute one composite scheme/arrangement under section 391 of the Act. The Legislature, therefore advisedly did not restrict the scope of the term arrangement by defining it. A view to the contrary would place an unwarranted fetter upon the activities of a company and restrict the choice of its members, creditors, debentures holders and other stakeholders."

(b) *Savoy Hotel Ltd., In re* [1981] 3 All ER 646 (Ch D) (April, 1981) :

". . . there can be no doubt that the word 'arrangement' in section 206 has for many years been treated as being one of very wide import. Statements to that effect can be found in the judgments of Plowman J. in *National Bank Ltd., In re* [1966] 1 All ER 1006 (Ch D) at 1012 ; [1966] 1 WLR 819 (Ch D) at 829, and of Megarry J. in *Calgary and Edmonton Land Co. Ltd., In re* [1975] 1 All ER 1046 (Ch D) at 1054 ; [1975] 1 WLR 355 (Ch D) at 363. That is indeed a proposition for which any judge who has sat in this court in recent years would not require authority and its validity is by no means diminished by what was said by Brightman J. in *NFU Development Trust Ltd., In re* [1972] 1 WLR 1548 (Ch D) ; [1973] 1 All ER 135 (Ch D). All that that case shows is that there must be some element of give and take. Beyond that it is neither necessary nor desirable to attempt a definition of 'arrangement'." (at page 652)

(c) T. C. S. P. No. 151 of 2017 (*Hindustan Unilever Ltd., In re*) in the National Company Law Tribunal, Mumbai Bench, dated August 30, 2018 :

> "In this scheme of arrangement an amount of Rs. 2,187.33 crores standing to the credit of the general reserves of the company was re-classified as and credited to the profit and loss of the company and subsequent thereto, such amounts credited to profit and loss account of the company was reclassified as and constitute accumulated profits of the company for the previous financial years. Further, on the scheme becoming effective, and subsequent to re-classification of the amounts standing to the credit of the general reserves and credit thereof to the profit and loss account, the amount so credited shall be paid out to the members of the company, from time to time by the board of directors at their sole discretion.
>
> The Regional Director, Western Region, MCA, opposed the scheme on various grounds including that the scheme is not an arrangement hence cannot be filed under sections 391-394 or sections 230-232 of the 2013 Act. This Tribunal, after considering various judgments cited, sanctioned the scheme as scheme of arrangement."

(d) *Securities and Exchange Board of India* v. *Sterlite Industries (India) Ltd.* [2003] 113 Comp Cas 273 (Bom), decided on July 15, 2002 :

> "The principal challenge to the scheme was by SEBI and Ministry of Corporate Affairs before the Division Bench of the Bombay High Court on the ground that the court has no power to sanction the scheme of this nature under section 391 of the Companies Act as the company is required to follow the procedure prescribed under section 77A and the SEBI (Buy-Back of Securities) Regulations, 1998. In paragraph 18 of the judgment of the High Court it is stated that . . . It is well-settled that under section 391 of the Companies Act, the court is invested with very wide powers to approve or sanction any scheme of amalgamation, arrangement, compromise or reconstruction. The court has power to sanction all matters which for their effectuation require a special procedure to be followed under the Companies Act."

Mr. Hemant Sethi, learned counsel for the petitioner, further submits **15**
that the proposed scheme is for the benefit of public shareholders. The scheme does not benefit the promoters in any manner. On the contrary, if the scheme is sanctioned, the promoters' shareholding shall be reduced from 87.56 per cent. to less than 75 per cent. as required under the minimum public shareholding requirements stipulated by regulation 38 of the SEBI (LODR) Regulations, 2015, read with rule 19(2) and rule 19A of the Securities Contracts (Regulation) Rules, 1957. Further, the promoters' group shall forego their rights to receive bonus shares.

16 Mr. Hemant Sethi invited our attention is invited to clause 5 of Part-V of the scheme at page 185 which, inter alia, states that the 406 shareholders who shall be get 10,375 shares from the promoters' group, shall also be entitled to get fully paid-up bonus shares as per the scheme proposed hereinafter as non-promoter public shareholders along with other non-promoter shareholders, subject to requisite approvals of all concerned authorities.

17 Learned counsel for the petitioner further submits that in any case, Mr. Ashish Lalpuria, the objecting shareholder, has no locus standi to file any objection as admittedly he does not have the required qualification. Mr. Hemant Sethi also invited our attention to the proviso to section 230(4) of the Companies Act, 2013 which, inter alia, reads as :

> "Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement."

18 Per contra, Mr. Ashish Lalpuria submitted that the issue of locus should be decided only if this Tribunal holds that the scheme as filed by the petitioner in its present form is an "arrangement" within the meaning of the Companies Act, 1956/2013.

19 We have carefully considered the rival contentions of learned counsel for the petitioner and the objecting shareholder. We have also perused the report of the RD objecting to the present scheme on the ground that it is not a scheme at all but only a rectification of the errors on the part of the petitioner.

20 That the term "arrangement" envisaged by sections 391-394 of the Companies Act, 1956 as also sections 230-232 of the Companies Act, 2013, is a term capable of the widest import, is not res integra. The Legislature, in its infinite wisdom, deliberately did not get down to the task of marking delimiters to the term "arrangement", aware as it was that arrangements can take on multiple hues and a bewildering assortment of forms. It is limited only by human ingenuity in finding solutions to corporate problems. Therefore, to make it conform to set parameters would be to do injustice to the statutory provisions, and this is certainly not what the lawmakers intended.

21 Some of the evaluation parameters set out in the judgment of the hon'ble Supreme Court in *Miheer H. Mafatlal* v. *Mafatlal Industries Ltd.* [1996] 87 Comp Cas 792 (SC) ; AIR 1997 SC 506 ; [1997] 1 SCC 579, decided on September 11, 1996 are that the scheme should be fair, just and

reasonable, not contrary to any provisions of law and does not violate any public policy. The fairness of the scheme qua the objecting shareholder has also be kept in view. The hon'ble Supreme Court also cautioned against the court acting like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the nature of compromise or arrangement. It said that the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote has to be kept in view by the court.

22 In the light of settled position in law and judicial pronouncements on the import of the term "arrangement", which is of wide ambit and import, there is no basis to hold that the scheme as filed by the petitioner does not constitute as an arrangement between the petitioner-company and its members within the meaning of sections 391-394 of the Companies Act, 1956 or section 230-232 of the Companies Act, 2013. There are no restrictive covenants built into the language of sections 391-394 of the Companies Act, 1956 or sections 230-232 of the Companies Act, 2013 that would inhibit our considering the present scheme to satisfy the requirements of an "arrangement" within the meaning of those sections. Even if the scheme purports to rectify and regularise the allotments already made by the petitioner, there is no reason why the scheme should not be treated as an arrangement between the company and its shareholders.

Objection by the Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai

23 Having held that the scheme propounded does indeed answer the description of being an "arrangement", we now proceed to examine the objections of the RD and of the shareholder holding 0.00012 per cent. of the paid-up share capital of the petitioner-company. To recapitulate, the RD had submitted that—

(a) The company has acted only on the legal opinion dated November 3, 1997 and not acted on the basis of the letter and spirit of provisions of section 100 of the Companies Act, 1956.

(b) Subscription made by each of the shareholders less than 100 each which is not acceptable.

(c) Letter of Bombay Stock Exchange dated May 6, 1999 not received by the company and only came to know in the year 2012 is also not acceptable since the company was listed in touch with the Bombay Stock Exchange, the reason mentioned above is not justifiable.

(d) The present scheme is made only as per the advice of the Bombay Stock Exchange in the year 2013 which is not acceptable since the company has to comply with the Companies Act, 1956 before the letter received from the Bombay Stock Exchange.

The RD's objection is more on the procedural aspects than anything else. Procedural niceties would not be sufficient to deter us from considering the scheme. The RD has not raised any objection as regards any illegality in the scheme, or that it is against public policy, and therefore we overrule the said objections.

Objection by Mr. Ashish Lalpuria, one of the shareholders holding fifteen shares

24 We next consider the objections of the shareholder holding fifteen shares in the petitioner-company. Having held that the scheme envisaged is an "arrangement" for the purposes of sections 391-394 of the Companies Act, 1956 and sections 230-232 of the Companies Act, 2013, it is now necessary to determine whether the objector has the necessary locus to object to the scheme.

25 The admitted position is that the objector holds fifteen shares, representing 0.00012 per cent. of the paid-up share capital of the petitioner-company. This is below the threshold of ten per cent. stipulated in section 230(4) of the Companies Act, 2013. However, even so, we have proceeded to consider the objections. On being questioned by the Bench as to how rejection of the scheme will benefit him, Mr. Ashish Lalpuria stated that if the present scheme is rejected, then it is possible the petitioner-company may come out with a proposal in the future to buy-back the shareholding from the public. This is purely speculative. We are not inclined to leave any loose ends. Therefore, the objection cannot be sustained even on merits.

26 Having thus repelled the last vestiges of challenge, we notice from the material on record that the scheme appears to be fair and reasonable and does not violate any provisions of law and is not contrary to public policy or public interest. BSE Ltd., has stated in its letter dated September 15, 2015 that there are no adverse observations. In the absence of anything inherently abhorrent in the scheme, we see no reason why the scheme should not have the imprimatur of this Tribunal.

27 Since all the requisite statutory compliances have been fulfilled, C. P. (CAA) No. 190/MB.I/2017 is made absolute in terms of prayer clauses (a) to (c) of the petition.

28 The petitioner is directed to lodge a certified copy of this order and this scheme with the concerned Superintendent of Stamps, within 60 working

days from the date of receipt of certified copy of order, for adjudication of stamp duty payable, if any on the above.

The petitioner is directed to lodge a certified copy of this order along with a copy of the scheme of arrangement with the concerned Registrar of Companies electronically in Form No. INC-28, in addition to physical copy, within 30 days from the date of issue of the order duly certified by the Deputy/Assistant Registrar of this Tribunal. 29

All concerned regulatory authorities to act on a copy of this order duly certified by the Deputy/Assistant Registrar of this Tribunal along with a copy of the scheme. 30

Pronounced today in open court. File be consigned to records. 31

[2020] 221 Comp Cas 459 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — AHMEDABAD BENCH]

PRERNA INFRASTRUCTURE P. LTD.

v.

ADITYA TIMPACK P. LTD.

MS. MANORAMA KUMARI *(Judicial Member)* and
CHOCKALINGAM THIRUNAVUKKARASU *(Technical Member)*

July 2, 2020.

HF ▸ Applicant

SCHEME OF AMALGAMATION—MEETINGS—EQUITY SHAREHOLDERS OF TRANSFEROR AND TRANSFEREE COMPANIES GIVING CONSENT TO SCHEME—MEETINGS TO BE DISPENSED WITH—MEETING OF UNSECURED CREDITORS OF TRANSFEREE COMPANY TO BE CONVENED—DIRECTIONS GIVEN—COMPANIES ACT, 2013, SS. 230, 231, 232.

On a joint application filed under sections 230 to 232 of the Companies Act, 2013, read with rule 3 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, seeking directions for dispensation with meetings of the equity shareholders of both the applicant-companies and convening the meeting of the unsecured creditors of the transferee company for the purpose of considering and if thought fit, approving, with or without modification, the scheme of amalgamation between the transferor and transferee companies :

Held, *that the transferor company was a closely held unlisted private company and had two equity shareholders. The equity shareholders had given*

their consent on affidavit approving the proposed scheme. The transferor company had no secured and unsecured creditors. Since there were no creditors, the question of convening or dispensing with the meeting did not rise. The transferee company was a closely held unlisted private company and had eight equity shareholders. The equity shareholders had given their consent on affidavit approving the proposed scheme. The transferee company had one secured creditor and the consent letter approving the proposed scheme had been obtained. The transferee company had 147 unsecured creditors as on January 31, 2020. Meetings of the equity shareholders and secured creditors of the transferee company were to be dispensed with. The meeting of the unsecured creditors of the transferee company was to be convened and held at the registered office of the transferee company. [Directions given].

C. A. (CAA) No. 38/NCLT/AHM/2020.

Kunjan Dalal, Practising Company Secretary, for the applicants.

ORDER

The order of the Bench was delivered by

1 MS. MANORAMA KUMARI ***(Judicial Member)***.—The instant joint application is filed under sections 230-232 of the Companies Act, 2013 ("the Act") read with rule 3 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("the Rules"), seeking directions of this Tribunal for dispensation of meeting of the equity shareholders of both the applicant-companies and convening the meeting of unsecured creditors of applicant transferee company for the purpose of considering and if thought fit, approving, with or without modification, the scheme of amalgamation between Prerna Infrastructure P. Ltd. ("applicant-transferor company") and Aditya Timpack P. Ltd. ("applicant-transferee company").

2 Applicant-company No. 1, namely, Prerna Infrastructure P. Ltd. ("hereinafter referred as transferor company") is primarily engaged in the business of acquiring, altering, buying, dealing, selling, hire, allow, occupy, control, maintain, operate, any leasehold and freehold lands, movable or immovable properties and applicant-company No. 2, namely, Aditya Timpack P. Ltd. ("hereinafter referred as transferee company") is engaged in the business of manufacturing, importing, exporting, buying, selling, trading, processing, cutting, pressing, finishing, polishing and dealing in all kind of articles foe packing and in particular wooden boxes, teakwood boxes, plastic and rubber boxes industrial and household and consumer goods product in packing.

Both transferor company and transferee company are collectively referred to as the private limited companies.

The registered offices of both the applicant-companies are situated in the State of Gujarat and are under the jurisdiction of the National Company Law Tribunal, Bench at Ahmedabad. 3

It is stated by the applicant-companies that proposed amalgamation of the applicant-transferor company with the applicant-transferee company pursuant to this scheme shall be in the interest of both the applicant-company, viz., transferor company and the transferee company and all their concerned stakeholders including shareholders, creditors, employees and the general public in the following ways : 4

(i) Enable consolidation of the business of transferor company into transferee company which will facilitate in focused growth, operational efficiencies, business synergies and better supervision of the business of the group.

(ii) Pooling of resources (including manpower, management and administration and marketing resources) of the aforesaid companies resulting in, synergies of operations and optimization of logistics, resulting in more productive utilization of said resources, saving in cost and operational efficiencies.

(iii) Strengthening financial position and increased leverage capacity of the merged entity.

(iv) Concentrated management focus, improved organizational capacity, integration rationalization and streamlining of the management structure of the merged entity, seamless implementation of policy changes at a higher level from a management perspective and shall also help enhance the efficiency and control of the entities.

(v) Avoiding duplication of administrative functions, reduction in multiplicity of legal and regulatory compliances.

A copy of the scheme is attached to the application at pages 205-225 of the application. Further the copy of necessary board resolution proposing and considering scheme is annexed at pages 77 and 78 of the application. 5

The applicant-transferor company, namely, Prerna Infrastructure P. Ltd., was originally incorporated on September 16, 2008 as Prerna Infrastructure P. Ltd., and registered with the Registrar of Companies, Gujarat under the provisions of the Companies Act, 1956. The company is a private limited company limited by shares. The applicant-transferor company has annexed with the application, a copy of the memorandum and articles of association of the applicant-transferor company is annexed as annexure 1A colly. The authorised share capital of the applicant-transferor company is Rs. 2,00,000 and the paid-up share capital is Rs. 1,00,000 as on March 31, 2019. 6

The applicant-transferor company has annexed with the application, a copy of the audited balance-sheet as of March 31, 2019 is annexed as annexure 4 at pages 79-89. It is stated by the applicant-transferor company that subsequent to the above date and till the date of filing the scheme, there is no change in the issued, subscribed and paid-up capital of the applicant-transferor company. The board of directors of the applicant-transferor company approved the scheme of amalgamation by passing a resolution in its meeting, a copy of the board resolution dated February 25, 2019 is annexed as annexure 3 at page 77 of the application.

7 The applicant-transferee company was originally incorporated as Registrar of Companies, Gujarat under the provisions of the Companies Act, 1956. The applicant-transferee company has annexed with the application, a copy of the memorandum and articles of association of the applicant-transferee company at pages 53-74. The authorised share capital of the applicant-transferee company is Rs. 3,75,00,000 and paid-up capital is Rs. 3,63,60,000 as on September 30, 2019. The applicant-transferee company has annexed with the application, a copy of the audited balance-sheet as at March 31, 2019 at page 100. It is stated by the applicant-transferee company that subsequent to the above date and till the date of filing the scheme, there is no change in the issued, subscribed and paid-up capital of the second applicant-company. The board of directors of the second applicant-company approved the scheme of amalgamation by passing a resolution in its meeting, a copy of the board resolution dated February 25, 2020 is annexed with the application at page 78 of the application.

8 It is stated by the applicant-companies that the accounting treatment specified in the scheme of amalgamation is in conformity with the Accounting Standards as prescribed by the Central Government in terms of section 133 of the Companies Act, 2013. Certificate dated March 2, 2020 issued under section 133 of the Companies Act, 2013 by the chartered accountant annexed at pages 200 and 201 of the application.

9 It is stated by the applicant-companies that no investigation or proceedings under the Companies Act, 1956, Companies Act, 2013 have been instituted or are pending in relation to the applicant-companies.

10 It is further stated by the applicant-companies that no winding up petition is pending against the applicant-companies.

11 It is stated that both the applicant-companies are empowered by their respective memorandum of association to enter in the scheme of arrangement. Copies of memorandum of association are annexed with the application as annexures 1A and 1B respectively. Similarly, audited financial statements of both the applicant-companies and provisional financial

statements of both the companies as on January 31, 2020 are also annexed with the application as annexures 4, 9 and 15 respectively.

12 It is stated that the scheme of amalgamation has been approved by the respective board of directors of the applicant-companies. The copies of the board resolution are annexed with the application as annexure 3 colly.

13 It is stated that applicant-companies are unlisted private limited companies. The transferor company is wholly owned subsidiary of transferee company. The amalgamation do not involve issue of shares to the shareholders of the transferor company and hence no valuation report is required.

14 It is stated that none of the applicant-companies is registered with Reserve Bank of India (RBI) and none of the shareholders or creditors is a non-resident or Foreign National and RBI Act is not applicable. All the applicant-companies are unlisted entities and Securities and Exchange Board of India (SEBI) Act and Regulations are not applicable to the applicant-companies. The applicant-companies do not meet the threshold limits relating to assets and turnover as mentioned in the Competition Act, 2002 for the purpose of combination and there is no other sectoral regulator regulating the affairs of the applicant-companies.

15 It is stated that proposed amalgamation is in the interest of shareholders, creditors and other stakeholders of both the companies. The rational for the scheme is described in paragraph 24 of the application.

16 It is stated that the transferor company is a closely held unlisted private company and has two equity shareholders. The equity shareholders have given their consent on affidavit approving the proposed scheme. The consent affidavit are annexed with the application and marked as annexure 6. The transferor company has no secured and unsecured creditors and the auditor certificate in this regard is annexed with the application and marked as annexures 7 and 8 respectively. It is prayed that the meeting of equity shareholder be dispensed with. Since there are no creditors, question of convening of meeting and/or dispensation of the meeting does not rise at all.

17 It is submitted that the transferee company is a closely held unlisted private company and has eight equity shareholders. The equity shareholders have given their consent on affidavit approving the proposed scheme. The consent affidavit are annexed with the application and marked as annexure 11. The transferee company has one secured creditor and the consent letter approving the proposed scheme has been obtained and annexed with the application and marked as annexure 13. The transferee company has 147 unsecured creditors as on January 31, 2020. The list of unsecured creditors

duly certified by chartered accountant is annexed with the application and marked as annexure 14. It is prayed that the meeting of equity shareholder and secured creditors of transferee company be dispensed with. It is further prayed that directions be issued for convening meeting of unsecured creditors of transferee company.

18 Having perused the application and the documents annexed therewith, this Tribunal passes the following order :

(i) Meetings of equity shareholders, of the applicant-transferor company are hereby dispensed with. There are no secured and unsecured creditors.

(ii) Meetings of equity shareholders and secured creditors of the applicant transferee company are hereby dispensed with.

(iii) Meeting of unsecured creditors of the applicant-transferee company shall be convened and held at the registered office of the transferee company at Kapdai Faliya, Gandevi Road, Devsar, Taluka-Gandevi, Bilimora District, Navsari-396 380 on August 10, 2020 at 11.00 a.m. for the purpose of considering and if thought fit approving the proposed scheme of amalgamation with or without modifications.

(iv) At the aforesaid meetings of unsecured creditors of the applicant transferee company voting shall be carried out through ballot/polling paper at the venue of the meeting.

(v) At least one month before the date of aforesaid meeting a notice in Form No. CAA-2 convening the aforesaid meeting indicating the day, the date, the place and the time as aforesaid together with the copy of the scheme of the amalgamation, copy of explanatory statement required to be sent under section 102 of the Act read with sections 230 and 232 of the Act and rule 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and the prescribed form of proxy shall be sent to each of the unsecured creditors of the applicant-transferee company at their respective or last known address either by registered post, speed post or by courier or by e-mail. The notice shall be sent to unsecured creditors as per annexure 14 of the application.

(vi) At least one month before the date of meeting publication about convening and holding of the aforesaid meeting indicating the day, the date, the place and the time as aforesaid shall be made once in English daily *Times of India* and Gujarati daily, *Gujarat Mitra* having circulation in the area of registered office of the transferee company. The publication shall also indicate that the statement required to be furnished pursuant to section 102 of the Act, read with sections 230 and 232 of the Act and the

prescribed form of proxy can be obtained free of charge at the registered office of the applicant-transferee company or at the office of Mr. Kunjal Dalal, Practising Company Secretary, 205, Pawanhans Complex, Behind Chamunda Restaurant, Subjail Charrasta, Ring Road, Surat-395 002 in accordance with the second proviso to sub-section (3) of section 230 and rule 7 of the Companies (CAA) Rules, 2016.

(vii) Mr. Parsotambhai Tejalal Patel, or failing him Mr. Vasantkumar Tejabhai Patel, directors of the company shall be the chairman of the meeting of the unsecured creditors of the applicant-transferee company to be held on August 10, 2020 and in respect of any adjournment(s) thereof.

(viii) Mr. Manish Ravjibhai Patel, practising company secretary, having Membership No. A19885 shall act as the scrutinizer of the aforesaid meeting.

(ix) The chairman appointed for the aforesaid meeting shall publish and send out notices of the meeting referred above. The chairman of the aforesaid meeting shall have all the powers under the articles of association of the applicant-transferee company and also under applicable rules, including for deciding any procedural question(s) that may arise at the meeting and to ascertain decision of the meeting.

(x) The quorum for the meeting of unsecured creditors of the transferee company shall be five unsecured creditors present in personal or proxy or by authorized representative.

(xi) Voting by proxy/authorized representative is permitted, provided that proxy in the prescribed form/authorization in duly signed by the person entitled to and vote at the aforesaid meeting is filed with the applicant-transferee company at its registered office not later than 48 hours before the aforesaid meeting.

(xii) The number and value of each unsecured creditor of the applicant-transferee company shall be in accordance with the entries in the books of account of the applicant-transferee company and where the entries in the records are disputed the chairman of the aforesaid meeting shall determine the value for the purpose of the meeting.

(xiii) The chairperson to file an affidavit not less than 7 days before the date fixed for holding of meeting and to report to this Tribunal that directions regarding issuance of notices and advertisements of the meeting have been duly complies with as per rule 12 of the Companies (CAA) Rules, 2016.

(xiv) It is further ordered that chairman shall report to this Tribunal result of the meeting in Form No. CAA-4 verified by his affidavit as per

rule 14 of the Companies (CAA) Rules, 2016 within 7 days after conclusion of the meeting.

(xv) In compliance with sub-section (5) of section 230 of the Act and rule 8 of the Rules, all the applicant-companies shall send a notice under sub-section (3) of section 230 read with rule 6 of the Rules with a copy of the scheme of amalgamation, the explanatory statement and the disclosures mentioned in rule 6 to (1) Central Government through the Regional Director, North Western Region, (2) the Registrar of Companies, (3) the Income-tax Authorities concerned and (4) the official liquidator, only in respect of the applicant-transferor company. The said notices be sent either by registered post or by speed post or by courier or by hand delivery at the offices of the aforesaid statutory authorities as required by sub-rule (2) of rule 8 of the Rules. The aforesaid statutory authorities, who desire to make any representation under sub-section (5) of section 230 shall send the same to this Tribunal within a period of 30 (thirty) days from the date of receipt of such notice, failing which it will be deemed that they have no representation to make on the proposed arrangement.

19 This company application is allowed and disposed of accordingly.

[2020] 221 Comp Cas 466 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — MUMBAI BENCH— COURT NO. 5]

MACROFIL INVESTMENTS LTD., *In re*

SMT. SUCHITRA KANUPARTHI *(Judicial Member)* and
V. NALLASENAPATHY *(Technical Member)*

June 17, 2020.

HF ▸ Applicant

CONSOLIDATION OF SHARES—COMPANY DULY FOLLOWING PROCESS OF LAW AND PASSING RESOLUTION OF CONSOLIDATION OF SHARES—APPLICATION TO BE ALLOWED—COMPANIES ACT, 2013, S. 61(1)(b).

On an application filed by the applicant-company under the provisions of section 61(1)(b) of the Companies Act, 2013 read with rule 71 of the National Company Law Tribunal Rules, 2016 to consolidate its equity shares by increasing the face value of the equity shares from the existing Rs. 10 per equity share to Rs. 5,000 per equity share and resultant increase in the paid-up equity share capital of the company by Rs. 520, i. e., from Rs. 44,29,480 to Rs. 44,30,000 :

Held, *allowing the application, that the company had duly followed the process of law and passed the resolution for consolidation of shares. The two shareholders who had failed to attend the extraordinary general meeting despite receipt of notice had not raised tenable grounds to oppose the proposed consolidation, which was resolved by the members in the extraordinary general meeting dated July 18, 2017 in the best interest of the shareholders and in view of the valuation of the shares carried out by the valuer appointed by the company. The objectors had questioned the valuation report with reference to the fair market value and the offer of Rs. 3,400 to the non-promoter share value being offered by the company. Such objections could not be considered as the company was not a listed company and the shares were not marketable. The shareholders themselves had registered the grievance that they were not able to find buyers and hence the company would justify the consolidation of shares.*

C. P. No. 557 of 2017.

Rajesh Shah, instructed by *Ahmed Chunawala* for the petitioner.

Rakesh Puri and *Mahendra Grindharilal* for the objector.

ORDER

The order of the Bench was delivered by

SMT. SUCHITRA KANUPARTHI ***(Judicial Member)***.—The petitioner-company namely Macrofil Investments Ltd. (hereinafter as the "petitioner") has filed this application under the provisions of section 61(1)(b) of the Companies Act, 2013 read with rule 71 of the National Company Law Tribunal Rules, 2016 to consolidate equity shares by increasing the face value of the equity shares from the existing Rs. 10 per equity share of the petitioner to Rs. 5,000 per equity share and resultant increase in the paid-up equity share capital of the company by Rs. 520, i. e., from Rs. 44,29,480 to Rs. 44,30,000. 1

The petitioner is an unlisted public limited company incorporated on December 3, 1983, having its registered address at Neville House, J. N. Heredia Marg, Ballard Estate, Mumbai-400 001. 2

The authorized share capital of the petitioner is Rs. 50,00,000 consisting of 4,99,000 equity shares of Rs. 10 each and 100, 11 per cent. non-cumulative redeemable preference shares of Rs. 100 each. The issued, subscribed and paid-up share capital is Rs. 44,29,480 consisting of 4,42,948 equity shares of Rs. 10 each. 3

As on September 28, 2017 the petitioner had 13,063 members, out of which 13,053 members belong to the non-promoter group and collectively 4

hold 10.81 per cent. of the share capital, while the remaining 10 members belonging to the promoter group hold the balance 89.19 per cent. of the share capital of the petitioner.

5 The petitioner-company in the past several years received several applications from individual shareholders with the request to purchase their shareholding in the petitioner-company. In view of this request, various methods of exit to the public shareholders were discussed during the board meeting on June 5, 2017 pursuant to which the petitioner-company proposed to reorganize the share capital by way of consolidation of equity shares into larger denomination. The resolution is as follows :

> "Resolved that pursuant to the provisions of section 61(1)(b) and all other applicable provisions, if any, of the Companies Act, 2013 read with Rules made thereunder (including any statutory modification, amendment or re-enactment thereof for the time being in force), read with article 9 of the articles of association of the company and subject to the approval of shareholders, the National Company Law Tribunal and such other approval(s), consent(s), permission(s) and sanction(s) as may be necessary or required from any authority and subject to such conditions as may be agreed to by the board of directors of the company (hereinafter referred as "the board" which term shall be deemed to include any committee thereof or any director of the company as the board may deem fit), approval is hereby accorded to consolidate the existing 4,42,948 issued, subscribed and paid-up equity shares capital of Rs. 10 each in the share capital of the company by increasing the face value of the equity shares from Rs. 10 each to Rs. 5,000 each so that every 500 equity share of the company of face value of Rs. 10 each is consolidated into 1 (one) equity share of the face value of Rs. 5,000 each."

6 The petitioner-company obtained valuation report from an independent and a reputed valuer Mr. M. S. Bansi and Mehta Co. As per the report, the price per equity share of nominal value of Rs. 10 each of the petitioner, calculated on the basis of asset based approach method, shall be Rs. 3,400 per fully paid-up equity share of Rs. 10 each. The copy of the valuation report is annexed to the petition.

7 On July 18, 2017 the extraordinary general meeting was held for reclassification and consolidation of shares. The same is annexed as exhibit-E of the petition. Further the annual general meeting was held on September 28, 2018 in furtherance to the special resolution passed in the extraordinary general meeting with regard to consolidation of equity shares and subject

to the approval of the National Company Law Tribunal. The certified copy of the annual general meeting is annexed as exhibit F.

8 The consolidated fractional equity shares of Rs. 5,000 each will be held by the trustee appointed by the board for the benefits of the fractional shareholders entitled to fractional equity shares. On August 14, 2017, the board of directors of the petitioner has appointed IDBI Trusteeship Services Ltd., who consented to act as a "trustee" to sell/dispose off the consolidated equity shares resulting from consolidation of such fractional entitlements at the sale price of Rs. 3,400 equity shares of Rs.10 each to such person(s) as the trustee may deem fit and distribute the sale proceeds among the fractional shareholders in due proportion of their fractional entitlements. The proceeds will be deposited with an escrow agent appointed by the trustee, who shall be responsible for proportionately distributing the proceeds amongst the shareholders who would otherwise have been entitled to fractional entitlements. The escrow agent shall upon receiving instructions for release from the trustee, release the funds to the fractional shareholders as provided herein.

9 The petitioner submits that proposed consolidation of shares would not cost reduction of share capital and would not cost in any way detrimental to the creditors of the petitioner.

10 The share capital of the petitioner upon consolidation of shares is set out hereinabove :

Particulars	*No. of equity shares of Rs. 5,000 each*	*Amount (Rs.)*
Authorized share capital :	1,000	50,00,000
Issued, subscribed and paid-up capital :	886	44,30,000

11 The below extracted is article 9 of the articles of association of the petitioner which permits the petitioner to consolidate its share capital to a higher face value :

> "Subject to the provisions of section 94 of the Act, the company in general meeting may, from time-to-time, by ordinary resolution subdivide or consolidate its shares, or any of them. Subject as aforesaid, the company in general meeting may also cancel shares which have not been taken or agreed to be taken by any person and diminish the amount of its share capital by the amount of the shares so cancelled."

12 Pursuant to the directions of this Bench, the petitioner has issued a public notice in local newspapers intimating to public about its consolidation of shares on March 28, 2018.

Objector to the proposed consolidation :

13 Two shareholders, one holding 2 shares and another holding 319 shares are objecting this petition raising following objections :

(a) The petition at paragraph 3, contains a statement that the petitioner as on September 28, 2017 had 13,063 members, out of which 13,053 members belong to the non-promoter group holding collectively 10.81 per cent. of the share capital while the remaining 10 members belong to the promoter group holding the balance 89.19 per cent. of the share capital of the petitioner.

(b) The main petition also contains details about the applications received from the individual public shareholders with a request to purchase their shareholding in the petitioner-company. The petitioner has attached eight such requests in its petition from the public shareholders whose holding ranges from 1 to 4 shares. It is quite surprising that the request is from shareholders holding up to 4 shares, but the company is going for increase of face value from Rs. 10 to Rs. 5,000 (500 times).

(c) The main petition also contains details about the various methods for an exit to the public shareholders which were discussed during the board meeting of the petitioner held on June 5, 2017 (exhibit C of petition at page 24) and pursuant to which the petitioner proposed to reorganize the share capital of the petitioner by way of consolidation of equity shares into larger denomination. Further, it was also discussed that the consolidation will also reduce the costs involved in handling and serving the large number of shareholders, more particularly when their holdings are very small.

(d) The main petition also states that the petitioner had obtained a valuation report from an independent and reputed valuer, M/s. Bansi S. Mehta and Co., Chartered Accountants for the purpose of valuation, which was presented before the board of directors meeting held on June 5, 2017. The price per equity share of nominal value of Rs. 10 each of the petitioner, calculated on the basis of asset based approach method was fixed at Rs. 3,400 per fully paid-up equity share of Rs. 10 each. The copy of the valuation report is annexed as exhibit D in its petition by the petitioner.

(e) The petitioner had passed the special resolutions at the extraordinary general meeting held on July 18, 2017 (exhibit E of the petition) for reclassification and for consolidation of shares. The members of the petitioner also passed another resolution for resultant increase in the issued, subscribed and paid-up share capital by Rs. 520 in the annual general meeting held on September 28, 2017 (exhibit E of the petition).

(f) The present market value of the underlying assets of the company (at the time of passing of resolution) was not considered for the purpose of valuation of shares. If the value of the underlying assets was considered, the value per share would have been much higher even than the exit price offered by the petitioner-company.

(g) The non-promoter shareholding was being paid Rs. 3,400 per equity share as share price as per consolidation scheme which is much less than the fair market value. The non-promoter shareholders would have been liable to pay capital gains tax on the difference of fair market value (FMV) being much higher to the aforesaid sale consideration of shares and cost of acquisition as per section 50 of the Companies Act and 56(2)(x) of the Income-tax Act, 1961 read with rule 11 of the Income-tax Rules, 1962. This would lead to an absurd situation of outflow of income-tax more than sale consideration actually received.

(h) It is also to be noted that the valuation report was not submitted to shareholders along with the consolidation scheme in the notice of extraordinary general meeting dated June 5, 2017 nor the basis of arriving at the exit offer price were detailed therein.

(i) The said scheme of consolidation of shares by increase of face value from Rs. 10 to Rs. 5,000 and mandatory acquisition of shares from its shareholders at Rs. 3,400 per share is nothing but improper and forcible exit of public shareholders.

(j) The objector submits that the whole process adopted by the company is against the exit opportunity specified in the Companies Act and the company is trying to obtain an order, without proper disclosures and fairness.

(k) The objector submits that the company has failed to give adequate information and disclosure on shareholding pattern, distribution schedule in the said explanatory statement in gross violation of the provisions of section 102(1) of the Companies Act, 2013. Nor is the exact number of shareholders in different categories of shareholding are mentioned. For example, how many shareholders in public hold up to 50, 100, 200 shares etc.

(l) The scheme of consolidation is in violation of the Companies Act, 2013, prejudicial to the interest of the company, non-promoter shareholders including shares held by the Government through investor education and protection fund (IEPF), if applicable.

(m) That section 61 of the Companies Act, 2013 is being illegally misinterpreted by the company and its directors for the cancellation or extinguishment of shares held by non-promoter shareholders. It is a regressive

step as it may lead to selective cancellation of minority shareholding using the brute majority by the promoter shareholders which is act of oppression and mismanagement and in any case outside the scope of section 61 of the Companies Act, 2013.

(n) The tone and tenure of the resolution 2 and the explanatory statement make it clear that the same is targeting the minority shareholders. The equity interest, justice and good conscience have been totally ignored by the company and its directors in order to protect and enrich the promoter shareholders in the said resolution.

Reply to the objection by the petitioner-company :

14 The petitioner-company made the following objections in reply to the above raised objections by the shareholders :

(a) The petitioner-company has given the detailed distribution of shareholding in the petition which is annexed as exhibit A to the petition. He further submits that for ready reference given below is the shareholding pattern :

Shareholding	*No. of shareholders*	*No. of shares*	*% of shareholding*
Promoters shareholding	8	3,95,076	89.19
Total public shareholding	9,458	47,872	10.81
Total	9,466	4,42,948	100

Public shareholding (other than promoters)	*No. of shareholders*	*No. of shares*
Total public shareholding	9,458	47,872
Shareholders holding less than 50 shares	9,399	24,917

(b) Public shareholding other than promoters, consist of 9,458 shareholders holding 47,872 shares and 10.9 per cent. of the paid-up capital, out of this, those holding 50 shares or less are 9,399 shareholders representing 99.38 per cent. of total public shareholders. After passing of the order by the Tribunal, the consolidation of the equity shares of the company which is more than 99 per cent. of the public shareholders holding 50 shares or less would have to exit as per request by such small shareholders as the shares cannot be sold in the open market and so the current scheme of consolidation being biased and unreasonable as alleged is not correct.

(c) The shareholders have requested to purchase the said shares and most of the public shareholders have also requested orally to purchase the shares. These said shares are not traded on any securities exchange and these shares, being of a closely held company, cannot be traded in market.

(d) The valuer has taken various methods/ approach for valuation and had given crystal clear view and reasons for taking the asset based approach. They further say that the objector questions the integrity of the valuer and his method but has not provided evidence about how the value taken is not within the scope or is with mala fide intention. The objector has not attached any valuation report by any registered valuer supporting his claim. The asset based approach gives significance to the value of the underlying assets of the petitioner-company and it is observed that the petitioner-company is predominantly an investment company and substantially derives its value based on its investments and hence, the valuer find asset based approach as an appropriate approach to arrive at a fair business value of the petitioner-company and have valued the petitioner-company by valuing the underlying investments. The petitioner-company further says that under the earnings approach, the valuer arrived at a fair value of the petitioner-company based on the capitalized value of its further maintainable earnings as the valuation date and an approach based on earnings is relevant in case of companies generating a steady stream of income and however, the petitioner-company is in the business of providing financial services and its assets primarily comprise of investment and financial assets and there is an element of uncertainty attached to the future stream of income as in case of investment, the gains/loss/dividend cannot be ascertained with certainty over future, they further say that under the market value approach, the valuer had arrived at a fair value considering the volume weighted average price of the share over a suitable period of time and however, the equity shares of the petitioner-company are not listed on any stock exchange and therefore the market value approach is not relevant. They further say that the same has been provided in the valuation report.

(e) The valuation report was made available for inspection by the members of the company at the registered office of the company on all working days between 11:00 a.m. to 1:00 p.m. till the date of the extraordinary general meeting. The objector had not requested the valuation report and the objector has also not attended the annual general meeting and extraordinary general meeting and has not voted against the scheme and as such the shareholder has no right to oppose the scheme based on catena of cases.

(f) The objector is making wild and wanton allegation against the petitioner-company and that the said scheme is within the ambit of the Companies Act, 2013 and that the objector has not specified the applicable

section of the code and/or relevant rule of the National Company Law Tribunal Rules under which the consolidation is not permissible or improper.

(g) The petitioner-company has followed the legal process and applicable section of the Code and/or relevant rule of the National Company Law Tribunal Rules under which the consolidation is permissible with proper discloser and fairness.

Findings :

15 This Bench has, through the submissions of the learned advocate for the petitioner and the objections filed by the objector, perused the pleadings of the record. The following questions of law are raised while dealing with the present matter:

(a) Whether the consolidation can be approved in terms of the Act ?

(b) Whether the objections by two shareholders are tenable ?

16 In the present case, it must be considered whether such consolidation is permissible under law. The company is authorized under article 9 to consolidate its shares by passing a valid resolution after following the due process of law. The special resolution to that effect was passed on June 5, 2013 and the petitioner-company carried out valuation of shares.

17 The valuation report was made available for inspection by the members of the company at the registered office of the company on all working days between 11.00 a.m. to 1.00 p.m. till the date of the extraordinary general meeting.

18 The minutes of the extraordinary general meeting record as follows :

(a) The petitioner-company shares are not listed. The promoters are holding 90 per cent. of equity shares of the company. The equity shares of the company are unlikely to be listed on the stock exchange as such the shares of the company are not marketable and the shareholders are unable to find buyers for their shares held in the company. The consolidation will provide an exit option to the shareholders more particularly to the shareholders whose holdings are very small.

(b) Moreover, the cost involved in handling and serving the large number of shareholders is very high, more particularly when their holding in the company is very small.

(c) Due to small shareholding of many shareholders, the dividend amount payable to such shareholders are also small and negligible owing to which, many of them don't encash the dividend amounts.

(d) The proposed share consolidation does not involve any payment to be made by any shareholders.

(e) Each consolidated share will rank pari passu in all respects with each other. There will be no impact on the effective dividend yield of the company's shares.

(f) The shareholders will have good liquidity in their hands and reasonable return on their investments.

The extraordinary general meeting further captured the aspect that the consolidation of the equity shares of the company would require approval of the shareholders and further confirms that this consolidation of the equity shares of the company are in the best interest of the members and recommended the special resolutions to be passed. With the above observations, a special resolution was passed by the members of the petitioner-company at the extraordinary general meeting which was held on July 18, 2017. **19**

The objector having received the notice failed to participate in the extraordinary general meeting and have filed these objections. **20**

The Registrar of Companies report filed on January 9, 2018 has confirmed that the application may be decided on merits and stated that the regulation 3 of the articles of association empowered the company to consolidate its shares. The company has filed MGT-14 vide SRNG56698772 intimating the special resolution passed by the members at the extraordinary general meeting held on October 16, 2017 for consolidation of the share capital. **21**

The Companies Act provides for such consolidation of shares under section 61 which is as follows : **22**

> "61. *Power of limited company to alter its share capital.*—(1) A limited company having a share capital may, if so authorised by its articles, alter its memorandum in its general meeting to—
>
> (a) increase its authorised share capital by such amount as it thinks expedient ;
>
> (b) consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares :
>
> Provided that no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner ;
>
> (c) convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination ;
>
> (d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the

sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived ;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) The cancellation of shares under sub-section (1) shall not be deemed to be a reduction of share capital."

23 The petitioner-company has duly followed the process of law and passed the resolution of the consolidation of shares. Section 61(1)(b) further enables consolidation of company to alter its share capital by consolidation and divide all or any of its share capital into shares of larger amounts than its existing shares. Thus, consolidation can be approved in terms of section 61(1)(b) of the Companies Act, 2013.

24 The objections raised by two shareholders who have failed to attend the extraordinary general meeting despite receipt of notice have not been able to make tenable grounds to oppose such consolidation, which is proposed and resolved by the members in the extraordinary general meeting dated July 18, 2017 in the best interest of the shareholders and in view of the valuation of the shares carried out by the valuer appointed by the petitioner-company. The objector has questioned the valuation report with reference to the fair market value and the offer of Rs. 3,400 to the non-promoter share value being offered by the petitioner-company. Such objections cannot be considered as the petitioner-company is not a listed company and as such the shares are not marketable and that the shareholders themselves registered the grievance that they are not able to find buyers and hence the petitioner-company would justify such shareholders who are unable to find buyers by consolidation of share.

Conclusion :

25 In the light of the corporate structure of the petitioner-company wherein the promoters hold 90 per cent. of the equity shares, some shareholders are not able to find buyers for their shares and hence, consolidation will be the best exit option available to the shareholders more particularly to the small shareholders. Each consolidated share will rank pari passu in all respect of each other, with no impact on effective dividend yield of the company shares and therefore, it can be said that the shareholders will have the more liquidity in their hands and reasonable return on their investment.

The prayer of the petitioner-company to consolidate equity shares by 26
increasing the face value of the equity shares from the existing Rs. 10 per equity share of the petitioner-company to Rs. 5,000 per equity share is approved as provided under section 61(1)(b) of the Companies Act, 2013. Resultantly, the paid-up share capital of the company will be increased from Rs. 44,29,480 to Rs. 44,30,000 and consequential changes in the equity share capital in the records of the company and that of the Ministry of Corporate Affairs can be made.

[2020] 221 Comp Cas 477 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — MUMBAI BENCH]

UNION OF INDIA, MINISTRY OF CORPORATE AFFAIRS[1]

v.

INFRASTRUCTURE LEASING AND FINANCIAL SERVICES LTD. AND OTHERS

V. P. SINGH ***(Judicial Member)*** and
RAVIKUMAR DURAISAMY ***(Technical Member)***

April 26, 2019.

HF ▸ Applicant

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—APPLICATION TO IMPLEAD NECESSARY PARTIES—TRANSFER OF HUGE AMOUNT OF MONEY DESPITE RESTRAINT ORDER—PARTIES TO BE IMPLEADED FOR PROPER ADJUDICATION—COMPANIES ACT, 2013, SS. 241, 242.

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—APPOINTMENT OF INDEPENDENT DIRECTORS—COMPANY FACING PRECARIOUS AND CRITICAL FINANCIAL CONDITION AND MORATORIUM DECLARED—APPOINTMENT OF INDEPENDENT DIRECTORS DISPENSED WITH—COMPANIES ACT, 2013, S. 149—COMPANIES (APPOINTMENT AND QUALIFICATION OF DIRECTORS) RULES, 2014, R. 3.

A petition was filed under sections 241 and 242 of the Companies Act, 2013, inter alia, seeking suspension of the board of directors of the first respondent-company and restraint on alienation of movable and immovable properties of the respondents named therein during the pendency of investigation into the affairs of the company and its subsidiaries, which had been ordered to be carried out by the Serious Fraud Investigation Office.

1. This order has been affirmed by the National Company Law Appellate Tribunal : see [2020] 221 Comp Cas 501 (NCLAT) *infra*.—Ed.

Respondent No. 315 transferred a huge amount to his daughter and wife on December 3, 2018 the day when the application was filed by the petitioner seeking restraint on alienation of movable and immovable properties. On an application to implead them as parties in the petition :

Held, *(i) that since a substantial amount had been transferred from the account of respondent No. 315 to the account of his daughter and wife and the applicant alleged that the amount which had been transferred, had been siphoned off from the company, for proper adjudication of the case, the daughter and wife of respondent No. 315 had to be impleaded in the original petition.*

(ii) That the then existing board of directors of the company was superseded and nominee directors of the Central Government were appointed to take over control of the affairs of the company. Since the company was facing a precarious and critical financial condition and the moratorium order had been passed by the Tribunal, it was difficult to find independent directors and woman directors to be appointed. Therefore in exercise of powers under section 242(2) and (4), the appointment of independent directors and women directors was to be dispensed with.

M. A. Nos. 1576, 1577 and 1054 of 2019 in C. P. No. 3638 of 2018.

Sanjay Shorey, Joint Director (Legal and Prosecution), *Manmohan Juneja*, Regional Director, Western Region, *Meghav Gupta* Company Prosecutor, and *Rakesh Tiwari*, Registrar of Companies, Mumbai for the petitioner.

Ashish Kamat, *Aditya Sikka*, *Ms. Neelakshi Bhadauria*, *Ravi Kadam*, Senior Advocate with *Ms. Vedika Chetan* instructed by *Junnarkar and Associates*, for the respondents.

ORDER

1 M. A. Nos. 1576 and 1577 of 2019 have been filed by Union of India, MCA in connection with C. P. No. 3638 of 2018, seeking impleadment of Mrs. Asha Kiran Bawa and Ms. Akansha Bawa as respondents Nos. 319 and 320 in the original Company Petition No. 3638 of 2018 ; and further relief has been seeking to extend the order dated December 3, 2018 as modified by order dated January 16, 2019 passed by this Tribunal in C. P. No. 3638 of 2018 to the additional respondents Nos. 319 and 320.

M. A. No. 1576 of 2019

2 It is stated in the application that due to the continuous failure of the Infrastructure Leasing and Financial Services Ltd. (IL and FS)-respondent No. 1, to service its debt and imminent possibility of contagion effect in the

financial market, the applicant-petitioner, at the request of Department of Economic Affairs, filed Company Petition No. 3638 of 2018 under sections 241 and 242 of the Companies Act, 2013 before this hon'ble Tribunal, inter alia, seeking suspension of the then board of directors of respondent No. 1 and further seeking restraint on alienation of movable and immovable properties of the respondents named therein during the pendency of investigation into the affairs of respondent No. 1 and its subsidiaries, which had been ordered to be carried out by the Serious Fraud Investigation Office (SFIO) vide order dated September 30, 2018 under section 212(1)(a) and (c) of the Companies Act, 2013.

The petitioner further states that this Tribunal, vide order dated October 1, 2018 passed an order whereby the then board of directors of IL and FS was suspended, and the Government-nominated directors have been appointed, who have been tasked with the orderly resolution of the IL and FS and its group companies. Being cognizant of the fact that the mismanagement existed across the IL and FS group, on an application by the petitioner, this Tribunal, by order dated October 9, 2018 further permitted the newly appointed directors to appoint themselves as directors on the group/subsidiary/associate/jointly controlled entities or operations of IL and FS Ltd. During the resolution process, the petitioner had also sought a moratorium against the creditors, which was granted by an interim order passed by the hon'ble National Company Law Appellate Tribunal, vide its order dated October 15, 2018 in Company Appeal Nos. 346 and 347 of 2018. The matter is still sub judice before the hon'ble National Company Law Appellate Tribunal. The petitioner further states that based on the SFIO's interim report dated November 30, 2018 the petitioner immediately sought impleadment of further respondents in Company Petition No. 3638 of 2018. These respondents were persons named as accused in the SFIO's interim report dated November 30, 2018. Union of India also sought certain reliefs under sections 242(4) and 246 read with section 339 of the Companies Act, 2013 against the additional respondents, namely, Hari Sankaran, Arun K. Saha, Ravi Ramaswami Parthasarthy, Vibhav Kapoor, K. Ramachandra, R. C. Bawa, Pradeep Puri, S. Rengarajan and Mukund Sapre. Interim reliefs were sought by the petitioner against the said respondents among other things seeking disclosure of moveable and immovable properties/assets and further restraining them from mortgaging or creating charge or lien or third party interest or in any way alienating, the moveable or immovable properties owned by them, including jointly held properties. **3**

It is further stated in the application that : **4**

1. That upon hearing the applications above at length and appreciating the urgency involved and gravity of the matter, this hon'ble Tribunal, vide its order dated December 3, 2018 among other things directed :

> "Keeping in view the submissions and given the circumstances, we are relying upon the interim report of SFIO, and we at this moment pass the interim order and directing respondents Nos. 2, 3, 9 and 313 to 318 (namely, Shri Hari Sankaran, Arun K. Saha, Ravi Ramaswami Parthasarthy, Vibhav Kapoor, K. Ramachandra, R. C. Bawa, Pradeep Puri, S. Rengarajan and Mukund Sapre, to disclose their moveable and immovable properties/assets, including bank accounts, lockers owned by them in India or anywhere in the world, including jointly held properties.
>
> Further direction is being issued against the abovementioned respondents Nos. 2, 3, 9 and 313 to 318 restraining them from mortgaging or creating charge or lien or creating third party interest or in any way alienating, the moveable or immovable properties owned by them, including jointly held properties.
>
> The abovementioned respondents are further restrained from dealing with the securities in any company till the next date of hearing."

Copy of the order dated December 3, 2018 is annexed herewith as annexure A-5.

2. That the order above dated December 3, 2018 still subsists. However, it is submitted that this hon'ble Tribunal considered the orders above dated December 3, 2018 in another application M. A. No. 126 of 2019 in Company Petition No. 3638 of 2018, and after hearing passed the following directions vide orders dated January 16, 2019.

> "20. It is therefore clear that the order of this Tribunal passed in C.P. No. 3638 of 2018 has been challenged in the M. A. No. 422 of 2018 by one of the respondents Mr S. Rengarajan, and the hon'ble National Company Law Appellate Tribunal has modified the order of this hon'ble Tribunal to a certain extent as stated in the order itself. This is to be clarified that when the matter is sub judice under appeal before the hon'ble National Company Law Appellate Tribunal, which is pending, this it is beyond our jurisdiction to modify or clarify our order dated December 3, 2018.
>
> 21. In the above circumstances, we are of the view that order passed by us on December 3, 2018 stands modified to the extent of the order of hon'ble National Company Law Appellate Tribunal and by implication of that order, a sum of Rs. 2 lakhs per month can be

withdrawn from the bank account after intimating the Tribunal. The hon'ble National Company Law Appellate Tribunal has further prohibited from withdrawing any further amount from the said or any other account.

22. Thus the interim order passed by us, which is sub judice before the hon'ble National Company Law Tribunal can only be clarified or further modified by the appellate court only. M. A. No. 126 of 2019 is disposed of accordingly."

Copy of the order dated January 16, 2019 passed by this hon'ble Tribunal in M. A. No. 126 of 2019 in C. P. No. 3638 of 2018 is annexed herewith annexure A6.

3. That under directions issued by this hon'ble Tribunal vide its order dated December 3, 2018 the applicant-petitioner through letter No. RD(WR)/Legal/IL&FS/2018 dated December 6, 2018 forwarded the same to the Indian Banks' Association (IBA) for onward circulation to all banks to ensure necessary compliance of the orders of this hon'ble Tribunal. Consequently, the applicant-petitioner also received confirmation from the IBA, vide e-mail dated December 6, 2018 copied to the applicant-petitioner, that the order dated December 3, 2018 passed by this hon'ble Tribunal have been forwarded to CEOs of all member banks for information and necessary action. Copies of the applicant-petitioner's letter No. RD(WR)/Legal/IL&FS/2018, dated December 6, 2018 and IBA's confirmation e-mail dated December 6, 2018 is annexed herewith as annexures A7 and A8, respectively.

4. That meanwhile, pursuant to the directions issued by this hon'ble Tribunal vide order dated December 3, 2018 Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) filed a declaration dated December 21, 2018 before this hon'ble Tribunal, disclosing the moveable and immovable assets owned by him including jointly held properties and information relating to bank accounts and lockers maintained with the various banks. The said information was also forwarded by the applicant-petitioner vide letter dated December 31, 2018 to the IBA for circulation amongst all banks and to ensure compliance of the order dated December 3, 2018 passed by this hon'ble Tribunal. Action taken report was also requested from the IBA. Copy of the declaration dated December 21, 2018 filed by Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) is annexed herewith as annexure A9. Copy of the applicant-petitioner's letter dated December 31, 2018 to IBA is annexed herewith as annexure A10.

5. That the applicant-petitioner is now in receipt of the letter dated April 16, 2019 from its subordinate office of the Regional Director (Western

Region), wherein multiple instances of wilful disobedience of the order dated December 3, 2018 by Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) and his family members, have been highlighted. The same is reproduced hereunder for ready reference :

(a) The office of the Regional Director (Western Region), upon non-receipt of any compliance report from the banks (per circulation by IBA), itself sought details from the concerned banks on the basis of the declaration dated December 21, 2018 made by Mr. Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) before this hon'ble Tribunal. The details concerning the following accounts of respondent No. 1 were received :

Sl. No.	*Name of the bank*	*Account No./ Locker No.*	*Branch*
1.	Axis Bank	007010100451192	Safdarjung Enclave, New Delhi
2.	Axis Bank	007010100452007	Safdarjung Enclave, New Delhi
3.	Axis Bank	917010046057552 First holder-Aakanksha Bawa Second holder–Ramesh C. Bawa	M-61, Kalkaji, New Delhi
4.	ICICI Bank	002901061865	W-57, Greater Kailash, Part I, New Delhi-110 048

(b) From the details received, it has been noticed that regarding account No. 007010100451192 in Axis Bank, Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) has withdrawn a total sum of Rs. 1,14,93,053.12 between December 3, 2018 to April 12, 2019 which includes Rs. 1 crore on December 3, 2018 itself, Rs. 3,22,666 for his American Express credit card payment on December 3, 2018, Rs. 25,000 for his credit card payment on December 3, 2018, Rs. 12,750 on December 5, 2018 4 withdrawals of Rs.1,03,695 each for his EMI on December 10, 2018 January 10, 2019, February 11, 2019 and March 11, 2019 Rs. 2,340 and Rs. 11,822.12 for his electricity bill payment to Rajdhani Power Ltd., on December 20, 2018 3 withdrawals of Rs. 2 lakhs each as cash withdrawals for self on February 8, 2018, March 25 2019 and April 10, 2019.

(c) Account No. 007010100452007 in Axis Bank was having an opening balance of Rs. 27,445 and the same was withdrawn on November 29 2018 and Rs. 156 are the interest charges and the closing balance of Rs. 156 only.

(d) Account No. 917010046057552 with Axis Bank was having an opening balance of Rs. 2,61,911 out of which Rs. 2 lakhs was withdrawn on November 28, 2018 the interest of Rs. 1,872 was credited during the period

and as on February 5, 2019, Rs. 63,783 were withdrawn on the closing of account as full and final settlement.

(e) From the above, it may kindly be seen that there have been withdrawals from the account over and above the withdrawals of Rs. 2 lakhs per month, allowed by this hon'ble Tribunal vide its order dated April 16, 2019.

(f) Furthermore, the office of the Regional Director, (Western Region) also received an e-mail dated April 12, 2019 from Axis Bank, wherein the bank had simply submitted the bank statements, but later on, confirmed that the bank had marked debit freeze on both active account Nos. 007010100451192 and 007010100452007. However, despite the debit freeze been marked on both accounts, the said accounts have been operated by Mr. Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) in clear disobedience of the order dated December 3, 2018 issued by this hon'ble Tribunal. Furthermore, despite the order above dated December 3, 2018 having being brought to the notice and knowledge of the Axis Bank, the said orders of this hon'ble Tribunal have not been honoured, and the Axis Bank has allowed operation of the accounts by Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018).

(g) Furthermore, as per transaction log times received from Axis Bank, Rs. 1 crore was withdrawn from account No. 007010100451192 at 10:37:13 hours on December 3, 2018 and Rs. 3,22,666 at 13:22:58 hours on December 3, 2018.

(h) In addition to the above, Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) also has a Locker No. 3074 with Axis Bank and Locker No. K1119 with Standard Chartered Bank. The Axis Bank has reported that Locker No. 3074 has been operated 4 times since the date of the order dated December 3, 2018, i. e., on December 3, 2018, December 4, 2018, December 10, 2018 and March 27, 2019. Further, vide letter dated April 20, 2019 Standard Chartered Bank Ltd., has provided information regarding the operation of locker account by Mr. Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) or his wife Ms. Asha Kiran Bawa, which locker is jointly held by them. It is pertinent to notice here that the locker has been operated twice since the date of the order dated December 3, 2018, i. e., on December 3, 2018 and December 10, 2019. This indicates that the lockers which are jointly held by Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) and his wife have been operated in complete disregard to the directions were issued by this hon'ble Tribunal vide its order dated December 3, 2018.

(i) ICICI Bank has informed that Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) has an account with No. 002901061865, on which there is a debit freeze. However, it is pertinent to note that Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) has transferred Rs. 3.84 crore by RTGS on December 3, 2018 vide transaction No. 299289 to some Aakansha (probably the daughter of Ramesh C Bawa). Furthermore, Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) had transferred such a huge amount on December 3, 2018 at 11:17 a.m. the day when the application was filed by the petitioner-applicant seeking restraint on alienation of moveable and immovable properties.

5 It is further stated in the application that Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) along with his family members has been trying to whisk away his properties despite restraint orders of this Tribunal. Furthermore, an adverse inference is also to be taken of the transaction of Rs. 3.84 crores to Ms. Aakanksha (daughter of Ramesh C. Bawa) on the day of filing of an application by the applicant-petitioner, seeking restraint orders against Bawa. It is, therefore, most humbly submitted that the family members of Ramesh C. Bawa, i. e., his wife Mrs. Asha Kiran Bawa and his daughter Ms. Akansha Bawa are both beneficiaries of the misfeasance by Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) in the mismanagement of affairs of respondent No. 1. Therefore, it is imperative that Mrs. Asha Kiran Bawa and Ms. Aakansha Bawa be arrayed as respondents Nos. 319 and 320 in the original Company Petition No. 3638 of 2018 as they are also necessary and proper parties in the matter, being beneficiaries of the misfeasance committed by Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018).

6 It is further stated that the proposed respondents are necessary and property parties to the original company petition and as such it is essential they be arrayed as respondents Nos. 319 and 320 in Company Petition No. 3638 of 2018. It is imperative that immediate action against these persons be taken, in order to effectively support the investigation already being carried on into the affairs of respondent No. 1 and its subsidiary companies, through the Serious Fraud Investigation Office.

7 Based on the above facts, the petitioner has filed this application for impleadment of Mrs. Asha Kiran Bawa and Ms. Aakansha Bawa as respondents Nos. 319 and 320 in the original Company Petition No. 3638 of 2018.

8 We have heard the argument of the Director (Prosecution) on behalf of Union of India, MCA and perused the record. On perusal of the record, it is clear that the amount from the account of Ramesh C. Bawa (respondent

No. 315) has been transferred to the account of his daughter Ms. Aakansha Bawa on December 3, 2018, i. e., after the knowledge of the application and the order passed by this Tribunal. It is also clear that they have operated the locker in respect of the restraining order passed by this Bench on December 3, 2018 and January 16, 2019. Since the substantial amount from the account of respondent No. 315 has been transferred to the account of his daughter and wife and the applicant alleges that the alleged that amount which has been transferred, has been siphoned off from the company, in the circumstances, for proper adjudication of the case, we hereby allow M. A. No. 1576 of 2019 and pass an order for impleadment of Mrs. Asha Kiran Bawa and Ms. Aakansha Bawa as respondents Nos. 319 and 320 in the original Company Petition No. 3638 of 2018.

M. A. No. 1576 of 2019 is disposed of accordingly. **9**

M. A. No. 1577 of 2019

On perusal of the record for M. A. No. 1577 of 2019, it appears that the **10** amount which was lying in the account of respondent No. 315 has been transferred to the account of his daughter and wife, after the knowledge of the petition, therefore, order has been passed for impleading them as party to the original Company Petition No. 3638 of 2018 as respondents Nos. 319 and 320.

Vide order dated December 3, 2018 and January 16, 2019 we have **11** passed the restraining order whereby restriction has been imposed, the same restriction will also be imposed on respondents Nos. 319 and 320.

M. A. No. 1577 of 2019 is disposed of accordingly. **12**

M. A. No. 1054 of 2019

M. A. No. 1054 of 2019 has been filed by respondent No. 1-Infrastruc- **13** ture Leasing and Financial Services Ltd., relating to C. P. No. 3638 of 2018, filed under sections 241 and 242 of the Companies Act, 2013, seeking dispensation with the requirement under section 149 of the Companies Act, 2013 read with rule 4(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014 to appoint independent directors on the board of the subsidiaries, jointly controlled entitles, associates and jointly controlled operations of respondent No. 1. The applicant has further sought dispensation with the requirement under the second proviso to section 149(1) read with rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 to appoint women directors on the board of the subsidiaries, joint controlled entitles, associates and jointly controlled operations of respondent No. 1.

14 The applicant states that respondent No. 1 has a large number of group companies across various sections such as energy, transportation, financial services, etc., who are arrayed as respondents Nos. 12 to 313 to the company petition. The petitioner is the Union of India, Ministry of Corporate Affairs through the Regional Director (Western Region), respondents Nos. 2 to 9 are the erstwhile directors of respondents Nos. 1, 10 and 11 are officers of respondent No. 1 and are currently the Chief Financial Officer and company secretary at respondent No. 1 respectively.

15 By the present application, respondent No. 1 seeks an order for dispensation to appoint independent directors and women directors on the board of the subsidiaries, joint controlled entitles, associates and jointly controlled operations of respondent No. 1.

16 It is stated in the application that Union of India has filed C. P. No. 3638 of 2018 under sections 241 and 242 of the Companies Act, 2013 on the ground of oppression and mismanagement of respondent No. 1. In the said petition, the petitioner had, inter alia, sought relief that the then existing board of directors of respondent No. 1 be superseded by a fresh board of directors in terms of section 241(2) read with section 242(2)(k) of the Companies Act, 2013.

17 By order of this Tribunal dated October 1, 2018, the then existing board of directors was superseded and appointed six of the eight newly appointed directors in place and by order dated October 3, 2018, seventh director was also appointed by this Tribunal.

18 On the application filed by the petitioner, by order dated October 5, 2018 this Tribunal was pleased to grant the following immunities/protections, as described in our order dated October 5, 2018 :

> "(i) the seven appointed directors shall not suffer any disqualification under the Companies Act, 2013 on account of defaults committed by suspended directors of the respondent ;
>
> (ii) no action should be initiated against the seven appointed directors for the past actions of the suspended directors or any of the officers of respondent No. 1 and the past wrongs of the suspended directors and its officials without prior approval of this Tribunal."

19 By order dated December 21, 2018 two more directors were appointed by this Tribunal on the board of respondent No. 1 and immunities/protections granted to the seven appointed directors vide orders dated October 1, 2018 and October 3, 2018 were extended to the said new directors.

20 The applicant further state that section 149 of the Companies Act, 2013 mandates that each listed company must have one-third of its board of

directors comprise independent directors and also requires certain unlisted public companies which qualify the threshold of having (a) paid-up share capital of Rs. 10 crores ; or (b) turnover of one hundred crores ; or (c) in aggregate, outstanding loans, debentures and deposits exceeding Rs. 50 crores only as provided in rule 4(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014 to have at least two independent directors on its boards of directors. Further, important committees of the board of directors, such as the audit committee and nomination and remuneration committee, require majority and half of the directors on the committees, respectively to be independent directors.

The applicant further stated in the application that section 149(6) of the **21** Companies Act, 2013 provides the eligibility criteria for an independent director and excludes a "nominee director." Therefore, the newly appointed directors of respondent No. 1 may not qualify as "independent directors" when appointed on the boards of group companies of respondent No. 1 as they may be construed to be nominee directors of respondent No. 1.

Schedule IV to the Companies Act, 2013 sets out the role and respon- **22** sibilities of an independent director. Given the financial condition of respondent No. 1 group and the situation prevailing across respondent No. 1 group, the newly appointed directors are unable to find independent directors to be appointed on the board of directors of its group companies.

It is further submitted that the essence of the appointment of an inde- **23** pendent director is that the independent director must act as an effective control to manage the conflicting interests of all stakeholders and to evaluate the risk management and financial policies of the company from an independent perspective disjunct from promoter directors or nominee directors.

In the present case, the applicant has stated that the newly appointed **24** directors who will exercise control, directly or indirectly across the companies comprising respondent No. 1 group have been appointed under the authority of this Tribunal on the recommendations of the Central Government.

The petitioner further states that the newly appointed directors are dis- **25** charging an important public duty of resolving the financial problems and other issues arising from mismanagement of respondent No. 1 group as a whole by the earlier board of directors of respondent No. 1.

The petitioner further states that the newly appointed directors who **26** exercise control over companies comprising respondent No. 1 (directly or

indirectly, partially or wholly) are performing functions similar to that of independent directors on the companies in respondent No. 1 group.

27 Based on the above facts, the applicant has prayed that it is just necessary, convenient and in the interest of justice to dispense with the requirement for appointing independent directors on the board of companies where such independent directors are required.

28 It is further stated that as per the second proviso to section 149(1) of the Act read with rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, every listed company or every other public company having paid-up share capital of 100 crores rupees or more ; or turnover of 300 crores rupees or more must appoint at least one woman director. Several group companies in respondent No. 1 group, fall within the classes of companies which have been prescribed above and require at least one-woman director. However, given the financial condition of respondent No. 1 group, the newly appointed directors are unable to find women directors to be appointed on the board of directors of its group companies. Thus, the applicant has filed this application seeking dispensation with the requirement for appointing women directors on the board of companies where such women directors are required.

29 We have heard the argument of learned counsel for the applicant and also the argument advanced by director (prosecution) on behalf of Union of India and perused the record. It is pertinent to mention that in the petition filed on behalf of Union of India under sections 241 and 242 of the Companies Act, 2013, the then existing board of directors of respondent No. 1 was superseded and nominee directors of the Central Government were appointed to take over the control and affairs of the company. Since the company is facing the precarious and critical financial conditions and since the moratorium order has been passed by the hon'ble National Company Law Appellate Tribunal, in such a situation, it is difficult to find out independent directors and woman directors to be appointed.

30 We are of the considered view that the persons who have been appointed as nominee directors by the Central Government/Tribunal, or independent director, therefore, there is no need to appoint independent director during the moratorium period. It also appears that when the company is facing such a financial crisis/other problems, it may be difficult to find out eminent/suitable independent directors. In exercise of powers under section 242(2) and (4), we grant dispensation regarding the appointment of independent directors and women directors. However, best efforts should be made to appoint more independent/women director in each company, so as not to deprive of their participation in the board.

The prayer for dispensation for appointing the company secretary cannot be granted hence rejected. 31

M. A. No. 1054 of 2019 is disposed of accordingly. 32

[2020] 221 Comp Cas 489 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — MUMBAI BENCH]

MS. AAKANSHA BAWA AND ANOTHER[1]

v.

UNION OF INDIA

V. P. SINGH *(Judicial Member)*

September 4, 2019.

HF ▸ Respondent

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—NECESSARY PARTIES—TRIBUNAL IMPLEADING APPLICANT FINDING THAT SUBSTANTIAL AMOUNT TRANSFERRED TO HER ACCOUNT DESPITE RESTRAINING ORDER—JUSTIFIED—CODE OF CIVIL PROCEDURE, 1908, SCH. I, O. 1, r. 10.

The Tribunal impleaded the applicant in the petition filed under sections 241 and 242 of the Companies Act, 2013 observing that a substantial amount from the account of R the father of the applicant had been transferred to her and her mother's account on December 3, 2018, i. e., after the knowledge of the application and the order passed by the Tribunal and that they had operated the locker in spite of the restraining order passed on December 3, 2018 and January 16, 2019. On an application for recall of order dated April 26, 2019 allowing the impleadment as respondent in the petition and further imposing restrictions in terms of restraining orders :

Held, *that the amount had been transferred from the account of R to the applicants' account, and when the application was filed to freeze the accounts of R on the same date, i. e., on December 3, 2018 an amount of Rs. 4.84 crores was transferred to the account of the applicant who was not even an income-tax assessee. It was also on record that an amount of Rs. 27.67 crores had been transferred from the account of R to the account of his wife. The amount which was received from the account of R was further transferred to the account of companies wherein the applicants were directors. There was no justification for recalling the order dated April 26, 2019.*

---

1. This order has been affirmed by the National Company Law Appellate Tribunal : see [2020] 221 Comp Cas 501 (NCLAT) *infra*.—Ed.

RAMESH HIRACHAND KUNDANMAL *v.* MUNICIPAL CORPORATION OF GREATER BOMBAY [1992] 2 SCC 524 (para 43) *and* KANAKLATA DAS *v.* NABA KUMAR DAS [2018] 2 SCC 352 (para 44) *referred to.*

M. A. Nos. 2006 and 2007 of 2019 in C. P. No. 3638/241-242/2018.

Gautam Ankhad, *Hemant Sethi* and *Sachin Midha*, for the applicants.

Sanjay Shorey, Director (Legal and Prosecution) Union of India, MCA, *Manmohad Juneja*, Regional Director (Western Region), MCA, Mumbai, *Meghav Gupta*, Company Prosecutor, MCA for the respondent.

ORDER

1 V. P. SINGH ***(Judicial Member)***.—M. A. Nos. 2006 and 2007 of 2019 are filed by Ms. Aakansha Bawa and Mrs. Asha Kiran respectively, seeking, among other things, recall of order dated April 26, 2019 allowing their impleadment as the respondent in Company Petition No. 3638 of 2018 and further imposing restrictions in terms of restraining orders.

2 The applicant in M. A. No. 2006 of 2019, Ms. Aakansha Bawa is the daughter of Ramesh C. Bawa, who was the ex-chief executive officer and ex-managing director of IFIN. Ms. Aakansha Bawa was added as respondent No. 320 in original C. P. No. 3638 of 2018 vide order of this Tribunal dated April 26, 2019. M. A. No. 1576 of 2019 has been filed alleging that R. C. Bawa, on several occasions, had wilfully disobeyed the order of this Bench dated December 3, 2018 by transferring money from his bank accounts to his wife and daughter, i. e., Mrs. Asha Kiran Bawa and Ms. Aakansha Bawa. She was restrained, in terms of the order of this Tribunal dated December 3, 2018 as modified by order dated January 16, 2019 from mortgaging or creating charge or lien or creating third party interest or in any way alienating, the movable or immovable properties owned by her, including jointly held properties and dealing with securities in any company.

3 Ms. Aakansha Bawa has stated that the amount transferred from R. C. Bawa to her, were the proceeds of redemption of securities, that is duly reflected in the income-tax return of R. C. Bawa. It is contended that these securities are said to be kept as savings, to be utilized for the marriage ceremony of Ms. Aakansha Bawa. It is stated that a week before the order dated December 3, 2018 R. C. Bawa has issued instructions on November 26, 2018 to redeem the said securities to arrange funds for the wedding of Ms. Aakansha Bawa. The redemption amount of the said securities is said to have credited around November 30, 2018 in the account of R. C. Bawa.

The amount is said to be transferred for the wedding purpose from the account of R. C. Bawa, to the account of Ms. Aakansha Bawa.

4 Ms. Aakansha Bawa has submitted in her application the bank statements of R. C. Bawa that reflects the amount being credited from the redemption of various securities and the same is said to be transferred to her account. Ms. Aakansha Bawa has stated in her affidavit in rejoinder dated July 13, 2019 that the amounts transferred by R. C. Bawa, were part of his duly disclosed income, and it cannot be said to be proceeds of misfeasance or an attempt to overcome the reliefs sought by Union of India in the application filed on December 3, 2018. It is submitted that the said amounts were kept by way of investments by R. C. Bawa and were transferred without any wrongful intentions. It is stated that R. C. Bawa had made investments in securities as provision for the wedding of Ms. Aakansha Bawa and decided to liquidate the same as per his wisdom. Further, it is submitted that the absence of the details of expenses to be incurred does not in any manner reflect mala fides as alleged.

5 Furthermore, it is stated that the only reason for the application against her is that she received money from her father R. C. Bawa on December 3, 2018 and regarding that, she has submitted her explanation. Ms. Aakansha Bawa has submitted that the investigation report of SFIO does not contain any proof of siphoning of funds or misfeasance and the funds received by her from her father R. C. Bawa, cannot be said to be proceeds of misfeasance, that directly connect her to IFIN. Ms. Aakansha Bawa contends that she is not required to file an income-tax return for the amounts so received as these are not her income, and in any case, the period for filing of income tax return has not yet expired.

6 It is stated that the act of Central Government in obtaining the order against the applicants is infested with mala fide intentions and to cause harassment to them. The order against Ms. Aakansha Bawa was based on the impugned transfers by R. C. Bawa to the account of his daughter. It is stated that the impugned transfers, being made before the order dated December 3, 2018 cannot be said to be carried out upon knowing the application for attachment. Further, it is submitted that the order dated December 3, 2018 was not passed by the time, when the impugned transfers were made, and therefore, such transfers, being made before the passing of the order dated December 3, 2018 are not per se wilful disobedience of the said order.

7 The applicant in M. A. 2007 of 2019, Mrs. Asha Kiran is the wife of Ramesh C. Bawa, who was the ex-chief executive officer and ex-managing director of IFIN. Ms. Asha Kiran was added as respondent No. 319 in

original C. P. No. 3638 of 2018 vide order of this Tribunal dated April 26, 2019 in M. A. No. 1576 of 2019, as R. C. Bawa and his family, on several instances, had wilfully disobeyed the order of this Bench dated December 3, 2018. The particular allegation against Mrs. Asha Kiran was that despite the order dated December 3, 2018 she had operated two lockers jointly held by herself and her husband R. C. Bawa on December 3, 2018 December 4, 2018 December 10, 2018 and March 27, 2019. She was further restrained, in terms of the order of this Tribunal dated December 3, 2018 as modified by order dated January 16, 2019 from mortgaging or creating charge or lien or creating third party interest or in any way alienating, the moveable or immovable properties owned by them, including jointly held properties and dealing with securities in any company.

8 It is stated by Mrs. Asha Kiran that the said lockers were never used or operated by R. C. Bawa and she used these lockers to keep her "Stree Dhan". It is stated that there is no prohibition to keep the Stree Dhan in a locker jointly owned with her spouse. The lockers are said to contain personal jewellery articles of Ms. Asha Kiran which, she submits, have been taken out, used and kept back. It is submitted that the order dated December 3, 2018 could not be interpreted to apply to operation of lockers and the banks also allowed her to operate the lockers in the absence of any communication from Union of India to the contrary, and accordingly, there was no occasion for Ms. Asha Kiran to approach this Tribunal seeking modification of its order dated December 3, 2018. Ms. Asha Kiran states that she had operated the lockers without knowing the order dated December 3, 2018 as it was not communicated to her either by the Union of India or by her husband.

9 It is stated that the act of Central Government in obtaining the order against the applicants is infested with mala fide intentions and to cause harassment to them. It is stated that the impugned operation of the locker cannot be said to be carried out upon knowing the application for attachment. Further, it is submitted that the order dated December 3, 2018 was not passed by the time when the impugned operation of lockers was undertaken and therefore, such operation of lockers, being done before the passing of the order dated December 3, 2018 is not per se wilful disobedience of the said order. It is stated that as her husband is behind bars, it is very difficult to meet the basic household expenses and money for litigations for her husband, because of the freezing over the bank accounts, corresponding to the said lockers, is causing grave hardship to them.

The applicants have submitted that mere coincidence of the transfer of **10** the alleged amount and the lockers being operated on December 3, 2018, should not cause hindrance in the life of the applicants.

The respondent has filed its affidavit in reply to M. A. No. 2006 of 2019, **11** dated June 21, 2019 stating that the act of R. C. Bawa to liquidate mutual funds and transferring the amounts so received on liquidation of the mutual funds to his daughter's account on the morning of the day when the application for attachment was filed is not a coincidence but an attempt to transfer the proceeds of misfeasance to the account of his daughter. It is submitted that the mala fides of Ms. Aakansha Bawa is clearly demonstrated in her application as it does not indicate the details of when her wedding is scheduled, the expenses of her wedding, the persons to whom the said amount is paid and the reason for expediting liquidation of mutual fund units and the hurried transfer of its proceeds to the bank account of Ms. Aakansha Bawa. It is further submitted that the Serious Fraud Investigation Office (SFIO) which is ceased of an investigation into the matter has submitted two reports and has filed a complaint before the Special judge against the fraud perpetrated by R. C. Bawa. There is a direct link between Ms. Aakansha Bawa and IFIN as the proceeds of misfeasance which was transferred from the account of an ex-director of IFIN on the same day as an application was filed and served on R. C. Bawa.

The respondent has filed its affidavit in reply to M. A. No. 2007 of 2019 **12** dated July 11, 2019 stating that the order dated December 3, 2018 extended to the said lockers as they are jointly held by R. C. Bawa and Mrs. Asha Kiran, and operation of the said lockers is contrary to and in willful disobedience of the order dated December 3, 2018. It is submitted that there is direct link between Mrs. Asha Kiran and IFIN as the valuables purchased from the proceeds of misfeasance which were sought to be transferred/ alienated from the locker of an ex-director of IFIN against whom complaint before the special judge for committing fraud in the affairs of the IFIN is filed and under adjudication. It is submitted that there is no explanation as to why the lockers were jointly held, if they were used to keep her "Stree Dhan", which is the absolute property of Mrs. Asha Kiran. Further, it is submitted that both the lockers have been "co-incidentally" operated on the same date as on which the application for the attachment was filed. It is alleged that the respondent has failed to provide the details of the articles kept in the lockers, the source of acquiring the said assets, proof to substantiate her claim that only she operated the said lockers and not her husband R. C. Bawa and what were the things removed from the lockers when they were operated on December 3, 2018, December 4, 2018 December 10,

2018 and March 27, 2019 and whether they were returned. It is further contended by the respondent that if the lockers are the sole property of Mrs. Asha Kiran, then it is inconceivable why she did not approach this Tribunal for modification of the order of this Tribunal dated December 3, 2018 to exclude the lockers. In the absence of any such application by Mrs. Asha Kiran, it is stated that the respondent moved the Tribunal under which this Tribunal passed the order dated April 26, 2019. It is stated that both the applicants are beneficiaries of the misfeasance of R. C. Bawa.

13 The respondent contends that there was an order restraining dealing with jointly held properties and Ms. Asha Kiran dealt with the properties by moving contents of the lockers during the operation of the order. In such circumstances, it is stated that the reasons for operating lockers or the submission of Ms. Asha Kiran that R. C. Bawa never used the lockers are irrelevant. It is also submitted that it is inconceivable that there is "grave hardship" being caused as the lockers are said to contain only jewellery that was used for social/wedding purposes and inability to attend social/wedding functions, wearing the jewellery cannot constitute grave hardship. The respondent has denied the submissions of the applicants that on December 3, 2018 only one application was served to R. C. Bawa and further submitted that in any event, the said application was enough to give wind of the fact that injunctive reliefs would be sought against R. C. Bawa.

14 The respondent has submitted that, on their request, Serious Fraud Investigation Office (SFIO) has highlighted the beneficial interest of both the applicants in the fraud perpetrated on IL and FS/IFIN in its letter dated July 8, 2019. It is stated in the letter that Mrs. Asha Kiran received an approximate amount of Rs. 27.67 crores from R. C. Bawa. Mrs. Asha Kiran Bawa transferred money to AAAB Infrastructure P. Ltd., and AAA Infosystem P. Ltd. Further, the letter discloses that both the applicants are/were directors in AAA Infosystem P. Ltd., and Mashobra Farms P. Ltd. Where R. C. Bawa has given unsecured loans of Rs. 12,98,97,500 and Rs. 58,00,000 respectively.

15 The letter of the SFIO further mentions that R. C. Bawa had transferred Rs. 4.84 crores on December 3, 2018 to Ms. Aakanksha Bawa. It is pointed out that she has not filed any income-tax return and as per her bank statements there is no other source of income than the amounts so transferred from R. C. Bawa. The respondent has submitted an e-mail from Assistant Director (Cost), SFIO dated July 15, 2019 stating that as on the date of the e-mail, there are no income-tax returns filed by Aakansha Bawa and the same is confirmed verbally by Ms. Aakansha Bawa and her brother.

The applicants in their rejoinder have submitted that the letter of SFIO dated July 8, 2019 is not admissible as per the provisions of the Companies Act, 2013. The SFIO is said to be empowered to report for an investigation only after sanction and on approval in pursuance of following the procedure laid down in the Act. The said letter is said to be without authority and any basis, because it lacks requisite sanction. It is contended that the scope of investigation by SFIO was confined to IL and FS and its subsidiaries and in no manner, it could be stretched to the family members of the ex-managing director of one of the subsidiaries of IL and FS. As regards the loan, the applicants submit that there was no restriction on R. C. Bawa to give loans to the companies held and controlled by his wife and son. The transactions were made before the order dated December 3, 2018 and duly accounted in the books of account and disclosed to the concerned authorities. It is contended that there is no connection of both the applicants with the affairs of IL and FS or IFIN as is evident from the complaint of SFIO submitted before the Special Court, which neither makes any allegations against both the applicants, nor have they been named in the said complaints. The applicants have submitted that neither of them is beneficiaries of the alleged misfeasance by R. C. Bawa and they cannot be said to be directly connected to the IL and FS or any of its subsidiaries. The applicants have further contended that the order dated April 26, 2019 should be recalled/vacated as it was passed ex parte without serving any notice upon them for impleadment in the main company petition. Further, imposing restrains upon them is stated as not required since no possible relief is made out against them in the main prayers sought in the company petition. **16**

Heard the argument of learned counsels for the parties and perused the record. **17**

M. A. Nos. 2006 and 2007 of 2019 has been filed by Ms. Aakansha Bawa and Mrs. Asha Kiran Bawa respectively seeking among other things, recall of our order dated April 26, 2019 allowing their impleadment in C. P. No. 3638 of 2019 and further imposing restrictions in terms of a restraining order. **18**

These MAs have been filed under the order of the hon'ble National Company Law Appellate Tribunal passed in Company Appeal No. 115 of 2019 whereby the hon'ble National Company Law Appellate Tribunal has directed to the applicants to move before this Tribunal for vacation or modification of the interim order dated April 26, 2019. The hon'ble National Company Law Appellate Tribunal has further given direction that if such direction is preferred by the applicants before the Tribunal, the **19**

Tribunal will decide the same uninfluenced of its earlier order or in order passed by this Tribunal in other appeals.

20 In our order, this Bench has observed that "On perusal of the record, it is clear that the amount from the account of Ramesh C. Bawa (respondent No. 315) has been transferred to the account of his daughter Ms. Aakansha Bawa on December 3, 2018, i. e., after the knowledge of the application and the order passed by this Tribunal. It is also clear that they have operated the locker in spite of the restraining order passed by this Bench on December 3, 2018 and January 16, 2019. Since the substantial amount from the account of respondent No. 315, has been transferred to the account of his daughter and wife, and the applicant alleges that the alleged amount which has been transferred, has been siphoned off from the company, in the circumstances, for proper adjudication of the case, we hereby allow M. A. No. 1576 of 2019 and pass an order for impleadment of Mrs. Asha Kiran Bawa and Ms. Aakansha Bawa as respondents Nos. 319 and 320 in the original Company Petition No. 3638 of 2018.

21 It is pertinent to mention that applicant Mrs. Asha Kiran Bawa, claims that the contents of the locker were part of "Stree Dhan" but there is no explanation as to why the locker was held jointly by the applicant and her husband Ramesh C. Bawa (the ex-director of IFIN, who is currently in judicial custody). It is unbelievable that Stree Dhan which remains the absolute property of the wife to the exclusion of her husband, will be kept in lockers that jointly held by Bawa and the applicant Mrs. Asha Kiran Bawa.

22 In the affidavit filed by Union of India, it is stated that both the lockers have been co-incidentally operated on similar dates (tabulated and highlighted below) :

Sl. No.	*Locker Bearing No. 3074*	*Locker Bearing No. K-1119*
1.	December 3, 2018	December 3, 2018
2.	December 4, 2018	December 10, 2018
3.	December 10, 2018	
4.	March 27, 2019	

23 Significantly and admittedly both the lockers have been operated on the date when the applications seeking Bawa's impleadment and reliefs against among other things his property were sought to be frozen by the Union of India. This confirms the fact that the applicant attempted, or did remove contents from the locker, which pertain to the proceeds of the misfeasance committed by Ramesh C. Bawa in the affairs of IFIN.

24 The Union of India has further alleged that the tone and tenor of the contention of the applicant set out above indicates that the applicant has

emptied the contents of the lockers which was jointly held by her and Ramesh C. Bawa during the operation of an order which expressly attaches/freezes jointly held property including movable assets such as the locker and the contents thereof. This application demonstrates that the applicant has acted in wilful defiance of the orders of this Tribunal to surreptitiously remove the proceeds of Ramesh C. Bawa's misfeasance.

25 The Union of India has also raised the objections that since the applicant has in the present application failed to provide :

(i) the details and particulars of what is contained in the lockers and what is the source of the assets in the lockers to substantiate the alleged contention that the locker only contains "Stree Dhan".

(ii) proof from either bank to substantiate her alleged contention that only the applicant accessed the locker.

(iii) make necessary averments about what was removed from the locker on December 3, 4, and 10, 2018 and March 27, 2019 and for what purpose and whether it was returned to the locker after use.

26 Director (Prosecution and Legal), appearing on behalf of Union of India has also emphasized that the applicant has stated that has there been any wrongful intention, then she would have cleared the locker on the very first day of the application, and would not have waited for the subsequent three times. In fact much to the contrary, the applicant's contention that the lockers comprise of her "Stree Dhan" is belied by the fact that Ramesh C. Bawa has filed an affidavit pursuant to the order dated December 3, 2018 categorically stating that the lockers are jointly owned by the applicant and Ramesh C. Bawa and not solely the property of the applicant. A copy of Mr. Ramesh C. Bawa's affidavit disclosing his properties, including jointly owned property is annexed with the reply as annexure A.

27 It is further stated by Union of India that the applicant in wilful defiance of the order dated December 3, 2018 continued to operate the lockers. Only after this, the respondent filed the application and the order dated April 26, 2019 was passed attaching/freezing the applicant's accounts.

28 Union of India has also emphasised on the fact that the applicant and her daughter are both beneficiaries of the misfeasance of R. C. Bawa. Therefore, the applications should be dismissed. It is also stated that SFIO, which is seized of an investigation into the matter, has submitted two reports which demonstrate the fraudulent manner in which R. C. Bawa conducted the affairs of IFIN. Presently SFIO had filed a complaint before the Special Judge constituted under the Act for the fraud perpetrated by R. C. Bawa. Therefore, pending the conclusion of the trial and the petition

of mismanagement of affairs of IFIN, the order dated April 26, 2019 ought not to be vacated.

29 It is also contended that there is a direct link between the applicant and IFIN, viz., the valuables purchased from the proceeds of misfeasance which were sought to be transferred/alienated from the locker of an ex-director of IFIN in a hurried manner on the same day as an application was filed and served on Ramesh C. Bawa, inter alia, for freezing of his bank accounts.

30 SFIO has submitted its response highlighting the beneficial interest of the applicant and her daughter in the fraud perpetrated on IL and FS and IFIN. The key features in the SFIO letter are given below :

(i) On the basis of the analysis of the bank statements of Ramesh C. Bawa, it was observed that the applicant received an approximate amount of Rs. 27.67 crores from Ramesh C. Bawa. The amounts transferred by Asha Kiran Bawa to AAAB Infrastructure P. Ltd., and AAA Infosystem P. Ltd.

(ii) The applicant and her daughter are directors in companies AAA Infosystem P. Ltd., and Mashobra Farms P. Ltd., where Bawa has given unsecured loans of Rs. 12,98,97,500 and Rs. 58,00,000 respectively.

31 A copy of the SFIO letter is annexed with the objections of Union of India as exhibit B.

32 The Union of India has also filed a copy of the e-mail dated July 15, 2019 which shows that SFIO has informed Director (Prosecution and Legal) by e-mail dated July 15, 2019, i. e., date of hearing, that with regard to the income-tax return of Ms. Aakansha Bawa, it is gathered that no income-tax returns were filed by her till date as confirmed verbally by her and her brother. However, the e-mail sent to them for submitting income-tax return is still unanswered.

33 This e-mail has been sent by Rajesh Kumar T., Assistant Director (Cost), SFIO, MCA. From the above e-mail, it is also gathered that Ms. Aakansha Bawa is not filing her income-tax returns. Ms. Aakansha Bawa has stated in her application that the bank statement of Ramesh C. Bawa reflects the amount being credited from the redemption of various securities and the same is transferred to her account. Ms. Aakansha Bawa has further stated in her affidavit in rejoinder dated July 13, 2019 that the amount transferred by Ramesh C. Bawa was part of his duly disclosed income and by a stretch of imagination can the same be said to be proceeds of misfeasance, as referred to by the Union of India.

34 It is also on record that Mrs. Asha Kiran Bawa received an approximate amount of Rs. 27.67 crores from Ramesh C. Bawa, and Mrs. Asha Kiran

Bawa transferred the money to AAAB Infrastructure P. Ltd., and AAA Infosystem P. Ltd., wherein both the applicants are/were directors, and Ramesh C. Bawa has given unsecured loan of Rs. 12,98,97,500 and Rs. 58,00,000 respectively.

35 Admittedly, Ramesh C. Bawa has transferred Rs. 4.84 crores on December 3, 2018 to Ms. Aakansha Bawa. As per the information gathered from SFIO, it has been pointed out that Aakansha Bawa is not filing her income-tax returns and as per her bank statement, there is no other source of income other than the amount so transferred from R. C. Bawa.

36 The Union of India is alleging that the lockers were operated in wilful defiance of the order of this Bench dated December 3, 2018 and there is direct link between Mrs. Asha Kiran Bawa and IFIN, as the valuables purchased from the proceeds of misfeasance, which were sought to be transferred/alienated from the locker of an ex-director of IFIN, against whom complaint before the Special Judge for committing fraud in IFIN is filed, and is under adjudication.

37 Union of India has also emphasised that the applicants have failed to provide the details and source of acquiring the said assets.

38 The respondent Union of India has impleaded the applicants as the party respondents on the ground that SFIO has highlighted the beneficial interest of both the applicants in the fraud perpetrated on IL and FS and IFIN, in its letter dated July 8, 2019.

39 It is also admitted that Mrs. Asha Kiran Bawa, wife of Ramesh C. Bawa, ex-director of IFIN has received an amount of Rs. 27.67 crores from the account of Ramesh C. Bawa and further this amount has been transferred to the account of the companies wherein the applicants are/were directors. It is also alleged that in the said companies Ramesh C. Bawa has given the unsecured loan of Rs. 12,98,97,500 and Rs. 58,00,000 respectively. It is also being informed that Ms. Aakansha Bawa is not the income-tax payee and she has not given the details of the source of income. It is an undisputed fact that SFIO is investigating into the affairs of IL and FS and IFIN wherein about Rs. 91,000 crores have been siphoned off, and Ramesh C. Bawa is in judicial custody about this case.

40 Mr. Sanjay Shorey, Director (Prosecution and legal) has emphasised that if the amount which has been siphoned off in IL and FS and IFIN is to be recovered, then it is necessary to freeze the accounts from where the siphoned off money have been transferred, otherwise the case will remain only ornamental. If there is no freezing of the accounts, then the siphoned off money will be out by the beneficiaries in whose account the siphoned off money has been transferred.

41 It is further stated that if the applicants are not a party in the case, then no restraint order can be passed against them and they will get the benefit of transferring the money and disposing of the other properties.

42 It is also emphasized by Union of India that SFIO is investigating on the huge details of the properties which have been acquired from the funds received from R. C. Bawa, who was a direct connection with IFIN.

43 It is pertinent to mention that in case of *Ramesh Hirachand Kundanmal* v. *Municipal Corporation of Greater Bombay* [1992] 2 SCC 524 at page 528, the hon'ble court has held that :

> "Sub-rule (2) of rule 10 gives a wide discretion to the court to meet every case of defect of parties and is not affected by the inaction of the plaintiff to bring the necessary parties on record. The question of impleadment of a party has to be decided on the touch stone of Order 1, rule 10 which provides that only a necessary or a proper party may be added. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The addition of parties is generally not a question of initial jurisdiction of the court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case . . .
>
> The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."

44 In the case of *Kanaklata Das* v. *Naba Kumar Das* [2018] 2 SCC 352, 355, hon'ble court has held that :

> ". . . the plaintiff being a dominus litis cannot be compelled to make any third person a party to the suit, be that a plaintiff or the defendant, against his wish unless such person is able to prove that he is a necessary party to the suit and without his presence, the suit cannot proceed and nor can be decided effectively. In other words, no person can compel the plaintiff to allow such a person to become the co-plaintiff or defendant in the suit."

45 In the case in hand, undisputedly, the amount has been transferred from the account of Ramesh C. Bawa to the applicants account, and it is also on record that when the application was filed to freeze the accounts of R. C. Bawa, on the same date, i. e., on December 3, 2018 the amount worth Rs. 4.84 crores was transferred to the account of the applicant Ms. Aakansha

Bawa, who is not even the income tax payee. It is also on record that amount of Rs. 27.67 crores has been transferred from the account of Ramesh C. Bawa to the account of the applicant Mrs. Asha Kiran Bawa, happens to be the wife of R. C. Bawa.

It is also on record that the said amount which was received from the account of R. C. Bawa was further transferred to the account of the companies wherein the applicants are/were directors. 46

The plaintiff remains the dominus litis. Order 1, rule 10 of the CPC provides discretionary power to the court. The IL and FS/IFIN case is one of the instances wherein Rs. 91,000 crores have been siphoned off, and SFIO investigation is undergoing. Father of Ms. Akansha Bawa who has been the director of IFIN is in judicial custody, based on the report filed by SFIO, and it is also on record that amount received from R. C. Bawa has been transferred to the accounts of the applicants. Therefore, they are a necessary party to the case. 47

In the circumstances as stated above, it is clear that there is no justification for recalling the order passed by this Bench dated April 26, 2019 hence M. A. Nos. 2006 and 2007 of 2019 deserves to be rejected. 48

M. A. Nos. 2006 and 2007 of 2019 is accordingly rejected. 49

[2020] 221 Comp Cas 501 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

1. MRS. ASHA KIRAN

(Company Appeal (AT) Nos. 249 and 250 of 2019)

2. MS. AAKANSHA BAWA

(Company Appeal (AT) Nos. 251 and 252 of 2019)

v.

UNION OF INDIA

JARAT KUMAR JAIN J. ***(Judicial Member),***
BALVINDER SINGH and
DR. ASHOK KUMAR MISHRA ***(Technical Members)***

May 29, 2020.

HF ▸ Respondent

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—NECESSARY PARTIES—TRIBUNAL IMPLEADING PARTIES SINCE HUGE SUM TRANSFERRED TO THEIR ACCOUNT DESPITE RESTRAIN ORDER—FINDING THAT

THEIR PRESENCE WOULD ENABLE COURT TO EFFECTIVELY AND ADEQUATELY ADJUDICATE MATTER INVOLVED IN CASE—JUSTIFIED—COMPANIES ACT, 2013, ss. 241, 242.

In a petition filed under sections 241 and 242 of the Companies Act, 2013, the Tribunal restrained the erstwhile directors inter alia including R from creating a charge or lien or creating a third party interest or in any way alienating the movable or immovable properties owned by them including jointly held property. It was observed that R had transferred a substantial amount to the account of the appellants who were the daughter and wife and accordingly held that the appellants were proper and necessary parties as in their absence no effective decree could be made. On appeal :

Held, *dismissing the appeal, that impleading a party did not mean that charges were proved on them but their presence would enable the court to effectively and adequately adjudicate the matter involved in the case.*

Orders of the National Company Law Tribunal in Ms. AAKANSHA BAWA *v.* UNION OF INDIA [2020] 221 Comp Cas 489 (NCLT) *and* UNION OF INDIA, MINISTRY OF CORPORATE AFFAIRS *v.* INFRASTRUCTURE LEASING AND FINANCIAL SERVICES LTD. [2020] 221 Comp Cas 477 (NCLT) *affirmed.*

Cases referred to :

Aakansha Bawa (Ms.) *v.* Union of India [2020] 221 Comp Cas 489 (NCLT) (para 1)

Union of India, Ministry of Corporate Affairs *v.* Infrastructure Leasing and Financial Services Ltd. [2020] 221 Comp Cas 477 (NCLT) (para 1)

Usha Ananthasubramanian *v.* Union of India [2020] 220 Comp Cas 295 (SC) (para 10)

Company Appeal (AT) Nos. 249 to 252 of 2019.

Rajiv Bansal, Senior Advocate with *Sachin (M.)* and *Anant Nigam*, for the appellant.

Sanjay Shorey, Director, MCA and *C. Balooni*, Assistant Director for the respondent.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

1 DR. ASHOK KUMAR MISHRA ***(Technical Member)***.—The appellants Mrs. Asha Kiran wife of Shri Ramesh C. Bawa and Mrs. Aakanksha Bawa daughter of Shri Ramesh C. Bawa have filed separate Company Appeal

(AT) Nos. 249 and 250 of 2019 and 251 and 252 of 2019 respectively against the impugned order dated April 26, 2019—(*Union of India, Ministry of Corporate Affairs* v. *Infrastructure Leasing and Financial Services Ltd.* [2020] 221 Comp Cas 477 (NCLT)) and September 4, 2019—(*Ms. Aakansha Bawa* v. *Union of India* [2020] 221 Comp Cas 489 (NCLT)) passed by National Company Law Tribunal, Mumbai Bench in M. A. No. 1576 of 2019, M. A. No. 2007 of 2019 and M. A. No. 1577 of 2019 and M. A. No. 2006 of 2019 in C. P. No. 3638 of 2018 respectively. Since impugned orders are common, hence the order is passed as a common order.

The appellants have sought relief for passing an order setting aside the impugned order dated April 26, 2019 and September 4, 2019 passed by National Company Law Tribunal, Mumbai Bench as also to give direction to the banks to de-seal the accounts of the appellants, etc. 2

As far as Company Appeal (AT) Nos. 249 and 250 of 2019 is concerned, it has been submitted that the appellant-Mrs. Asha Kiran has accessed the joint lockers in Axis Bank and Standard Chartered Bank on March 27, 2018, December 3, 2018, December 4, 2018, December 10, 2018 after passing of the order of wilful disobedience of the order dated December 3, 2018 by the National Company Law Tribunal Mumbai by Mr. Ramesh C. Bawa (respondent No. 315 in C. P. No. 3638 of 2018) and his family members. 3

The appellant has submitted that the same were operated without the knowledge of the order dated December 3, 2018 passed by the National Company Law Tribunal, Mumbai on account of need, as the lockers had her personal belonging like jewellery, etc., which were her "Stree Dhan" articles. They have also submitted that if they have alienated anything from the locker then there was no need to operate the locker multiple times. The jewellery kept in the lockers were duly disclosed to the income-tax authorities and the entire jewellery articles are either in her possession or in the locker. She has never been the shareholder, director or employees of the ILFS. It was also submitted by the appellant that when the application was filed in the National Company Law Tribunal, Mumbai by the appellant, the Union of India further produced a letter dated July 8, 2019 from the SFIO which stated that the appellant had received huge amount from Mr. Ramesh. C. Bawa from 2008 onwards and the same were used to purchase properties for other companies in which the appellant was a director. It was also submitted by the appellant that SFIO has completed its investigation on May 29, 2019 and has filed a complaint in the court of competent jurisdiction at Mumbai but no charge sheet has been issued to the appellant. The appellant has submitted that the person liable under section 339 of the Companies Act, 2013 are the following persons : 4

(a) Director of the company.

(b) Manager of the company.

(c) Officer of the company.

(d) Any other person who knowingly becomes a party to carrying of the business in the manner aforesaid in a manner prejudicial to public interest for any fraudulent purpose.

5 The appellant is a third party to the proceedings and cannot be subjected to an order under sections 241, 242, 337 and 339 of the Companies Act, 2013.

6 While in Company Appeal (AT) Nos. 251 and 252 of 2019 Miss. Aakanksha Bawa, d/o. of Ramesh C. Bawa has been impleaded because he has transferred Rs. 4.84 crores to her account into separate transactions and thereby they have done wilful disobedience of the order dated December 3, 2018. It was submitted that these amounts are from liquidating mutual fund investment of Mr. Ramesh C. Bawa and he has asked Axis Bank and ICICI Bank on November 26, 2018 prior to the passing of order dated December 3, 2018 by the National Company Law Tribunal, Mumbai. The money was received in his account on November 30, 2018 and was transferred to his daughter's account on December 3, 2018 as a provisions of her marriage expenses. The daughter, appellant has nothing to do ILFS and she has never been any shareholder, director or employee of the said company. It was also submitted that the SFIO has completed its investigation on May 29, 2019 and has filed a complaint in the court of competent jurisdiction at Mumbai and no charge sheet has been filed against the appellant, i. e., of his daughter Ms. Aakanksha Bawa. She is not attracted by the provisions of section 339 of the Companies Act, 2013 and she is a third party of the proceedings and cannot be subjected to an order under sections 241, 242, 337 and 339 of the Companies Act, 2013.

7 The director represented Union of India, has submitted in Company Appeal (AT) Nos. 249 and 250 of 2019 and 251 and 252 of 2019 that around September, 2018 series of default were made by entities in the IL and FS group during June to September, 2018 due to mismanagement and misgoverance by the then existing board of director of IL and FS and group companies. It has also been submitted that the exposure in the IL and FS group is very large both to the public and private sector banks and financial institutions and this will have a catastrophic impact on the economy of the country. It was also stated that based on the report of the Registrar of Companies, Union of India has filed a petition under sections 241 and 242 of the Companies Act, 2013 before the National Company Law Tribunal, Mumbai Bench bearing Company Petition No. 3638 of 2018 the charges

are on Mr. Ramesh C. Bawa that he has drawn hefty salaries and siphoned funds.

It was also submitted by director that on the basis of SFIO report and requisite application vide order dated December 3, 2018 the National Company Law Tribunal restrained the erstwhile directors, inter alia, including Mr. Ramesh C. Bawa from creating a charge or lien or creating a third party interest or in any way alienating the movable or immovable properties owned by them including jointly held property. The director has submitted that in December, 2018 it was brought to a notice by Indian Bank Association that Mr. Ramesh C. Bawa has operated its bank account and has transferred a large sum of money Rs. 1.14 crores plus on December 3, 2018 to his daughter account on the same day the National Company Law Tribunal has restrained the order and his wife has also operated the locker. They have observed that accordingly that the appellants in both the cases are a proper and necessary parties as in their absence no effective decree can be made. It has also been stated that C. P. No. 3638 of 2018 has been filed inter alia in the backdrop that the affairs of IL and FS group were mismanaged by the erstwhile directors, etc. **8**

Furthermore, the director has pointed out that Mr. Ramesh C. Bawa has transferred large sum of money to the company where the appellant is a director and these monies are the proceeds of mismanagement/fraud on the part of Mr. Ramesh C. Bawa. **9**

We have gone into a detail and observed that as far as operation of locker is concerned if the appellant have ulterior motive then they should have done on the very first day and would not have waited for the subsequent times. We have gone through the hon'ble Supreme Court judgment delivered on February 12, 2020 *Usha Ananthasubramanian* v. *Union of India* [2020] 220 Comp Cas 295 (SC), Civil Appeal No. 7604 of 2019. The fact of the two cases are different Ms. Usha Ananthasubramanian was the former managing director and CEO of Punjab National Bank for a limited periods 2015 to 2017 whereas she was not related party to directors of M/s. Gitanjali Gems Ltd., and the charges on her was "omitted to take precaution or preventive steps to prevent the fraud perpetrated by Mr. Neerav Modi" ; whereas in the present case either the money has been transferred by Mr. Ramesh C. Bawa, or non-compliance with the National Company Law Tribunal order has happened. Impleading a party does not mean that charges are proved on them but their presence would enable the court to effectively and adequately adjudicate the matter involved in the case. Hence both the appeals are dismissed. No order as to costs. **10**

[2020] 221 Comp Cas 506 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — MUMBAI BENCH]

SHRIRAM CHITS P. LTD. AND OTHERS, *In re*

V. K. RAJASEKHAR *(Judicial Member)* and
V. NALLASENAPATHY *(Technical Member)*

May 26, 2020.

HF ▶ Petitioner

SCHEME OF AMALGAMATION—SANCTION OF TRIBUNAL—TRANSFERORS AND TRANSFEREE SITUATE IN JURISDICTION OF DIFFERENT TRIBUNALS—EACH BENCH TO LOOK AT SCHEME AS INTEGRATED WHOLE—COMPLIANCE WITH ACCOUNTING STANDARDS—PARAGRAPH 23 OF ACCOUNTING STANDARD 14 DEALING WITH TREATMENT OF RESERVES IN SCHEME OF AMALGAMATION TO BE MANDATORILY FOLLOWED—ACCOUNTING STANDARDS ISSUED BY INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA HAD EFFECT OF LAW AND TO BE FOLLOWED—PROVISIONS TO SCHEMES, A COMPLETE CODE—SEPARATE PROCEDURES PRESCRIBED FOR CHANGE OF NAME, CHANGE OF REGISTERED OFFICE, REDUCTION OF CAPITAL, ETC., UNDER OTHER PROVISIONS OF ACT NOT REQUIRED TO BE FOLLOWED IF EFFECTED AS PART OF SCHEME—ALL REQUISITE STATUTORY COMPLIANCES FULFILLED—SCHEME TO BE APPROVED—COMPANIES ACT, 2013, SS. 133, 230, 231, 232.

In a petition under sections 230 to 232 of the Companies Act, 2013, sanction of the National Company Law Tribunal was sought to a scheme of amalgamation of three transferor companies with a transferee company. Except for the petitioner, which was one of the transferor companies, the other companies which were parties to the scheme were within the jurisdiction of other Benches of the Tribunal :

Held, *allowing the petition, (i) that since under the scheme the assets and liabilities of the transferor companies shall be transferred to and vested in the transferee company, the transferee company would be duty bound to provide all requisite information and explanation to the income-tax authorities. Any finding given by such authorities would be binding on the transferee company, subject to the right of appeal as might be available to it.*

(ii) That the petitioner had complied with the requirements in accordance with the directions of the Tribunal and it had filed necessary affidavits of compliance. It also had undertaken to comply with all statutory requirements, if any, as required under the Act and the Rules made thereunder whichever was applicable. This undertaking was to be accepted.

(iii) That the Ministry of Corporate Affairs notification dated March 30, 2016 inserted a footnote to paragraph 23 of Accounting Standard 14 to the effect that the paragraph shall not apply to any scheme of amalgamation approved under the Companies Act, 2013, thus removing the exemption in respect of treatment of reserves in a scheme of amalgamation. Thus the accounting treatment prescribed in a scheme could not override the provisions of paragraph 23 of Accounting Standard 14.

(iv) That the scheme involved Tribunals of multiple jurisdictions. Each Bench looked at the scheme as an integrated whole, rather than segregate it into parts with which the particular Bench was concerned. Therefore, the arguments of the transferor company that the accounting treatment prescribed in the scheme was a matter that the Tribunal at Bengaluru alone should be concerned with, was untenable. The scheme cannot be contrary to any law in force, and the Accounting Standards issued by the Institute of Chartered Accountants of India had the effect of law under section 133 of the 2013 Act. [Since the transferee company was within the jurisdiction of the Tribunal at Bengaluru, no opinion was expressed in the matter].

(v) That the provisions to schemes of arrangement were a complete code in themselves, and the separate procedures prescribed for change of name, change of registered office, reduction of capital, etc. under other provisions of the Act were not required to be followed if they were effected as part of the scheme itself. The approval by the members to the scheme should be treated as approval also under other provisions of the Act. Of course, the procedures consistent with the requirements of the MCA-21 programme would have to be followed, so as to ensure that the changes are effected in the registry maintained by the Registrar of Companies. The petitioner had undertaken to abide by all procedural compliances required in this regard. This undertaking was recorded.

(vi) That the official liquidator had filed a report that the affairs of the petitioner had been conducted in a proper manner. The scheme of amalgamation appeared to be fair and reasonable and was not violative of any provisions of law and was not contrary to public policy. Since all the requisite statutory compliances had been fulfilled, the scheme was to be approved.

Cases referred to :

Ad2Pro Global Creative Solutions P. Ltd. *v.* Regional Director (SER), Ministry of Corporate Affairs [2019] 217 Comp Cas 443 (NCLAT) (para 24)

Gallops Reality P. Ltd., *In re* [2009] 150 Comp Cas 596 (Guj) (para 30)

PMP Auto Industries Ltd., *In re* [1994] 80 Comp Cas 289 (Bom) (para 35)

Sutlej Industries Ltd., *In re* [2007] 135 Comp Cas 394 (Raj) (para 30)

C. P. (CAA) No. 846/MB/2019 connected with C. A. (CAA) No. 1062/MB/2017.

Hemant Sethi, *Srisabari Rajan* and *R. P. Shirole* instructed by *Deepakar Livingston* for the petitioner.

Ms. Rupa Sutar, Deputy Director, for the Regional Director (Western Region).

ORDER

The order of the Bench was delivered by

1 V. K. RAJASEKHAR ***(Judicial Member)***.—The court convened through video conferencing today.

2 Heard learned counsel for the petitioner-company and the representative of the Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai.

3 The sanction of this Tribunal is sought under sections 230 to 232 of the Companies Act, 2013, to a scheme of amalgamation of Shriram Chits P. Ltd., Shriram Chits (Maharashtra) Ltd., and Shriram Chits Tamil Nadu P. Ltd., with Shriram Chits (Karnataka) P. Ltd.

4 Except for the petitioner/transferor company No. 2, the other companies which are parties to the scheme are within the jurisdiction of other Benches of this Tribunal.

5 Learned counsel submits that the petitioner/transferor company No. 2 and the transferee company are engaged in the business of conducting chit funds or kuries and similar kinds of schemes which encourage the habit of savings, inter alia, by opening chit savings, thrift savings, and other deposit schemes in relation to trade or public, commercial and regular needs whether in the form of time, demand or call deposits and to allow interests in all such deposits.

6 Learned counsel submits that the board of directors of the petitioner/transferor company No. 2 has approved the said scheme of amalgamation by passing a board resolution at their meeting held on August 16, 2017.

7 Learned counsel for the petitioner/transferor company No. 2 further submits that the rationale for the scheme is that the amalgamation of transferor company No. 2 would have the benefits as all the transferor companies involved herein and the transferee company are incorporated

with the same/similar objects, and carry on the same line of business, viz., conduct of the business of chit funds, kuries, and similar kinds of chits.

8 The three transferor companies and the transferee company are all part of the same group and the shareholders of all of these companies are substantially same/common. The amalgamation of these companies would enable consolidation and lead to a more efficient utilisation of capital, better cash flow and create a consolidated base for the future growth of the amalgamated entity. The merger of these entities would only strengthen and reinforce the management of these companies. The amalgamation will enable appropriate consolidation of the activities of the transferor companies and the transferee company with pooling and more efficient utilisation of their resources, greater economies of scale, reduction in overheads and other expenses and improvement in various operating parameters, in addition to enabling the carrying on of the business in a more efficient, streamlined, and organised fashion. It will prevent cost duplication, that can improve financial efficiencies and the resultant operations would be substantially cost-efficient. It shall substantially prevent multiplicity of records and legal and regulatory compliances. The synergies created by the amalgamation would increase operational efficiency and integrate business functions.

9 Learned counsel for the petitioner states that on October 1, 2018 the meeting of the equity shareholders was duly convened in accordance with the order dated August 21, 2018 passed by this Tribunal in C. A. (CAA) No. 1062/MB/2017. The meeting was attended by all seven equity shareholders of the petitioner/transferor company No. 2. The equity shareholders of the petitioner/transferor company No. 2 present and voting at the meeting, approved the said scheme unanimously, without any modification.

10 The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, has filed his report dated May 8, 2019, inter alia, stating therein that save and except his observations in paragraph V of the said representation, the Regional Director has no other objection to the scheme.

11 In paragraph V of the said representation, the Regional Director has broadly stated that :

(a) The petitioners under provisions of section 230(5) of the Companies Act, 2013 have to serve notices to concerned authorities which are likely to be affected by amalgamation. Further, the approval of the scheme by this Tribunal may not deter such authorities to deal with any of the issues arising after giving effect to the scheme. The decision of such authorities is binding on the petitioner-company(s).

(b) It is observed that the petitioner-companies have not submitted the chairman's report, admitted copy of the petition, and the minutes of order for admission of the petition. In this regard, the petitioner has to submit the same for the record of the Regional Director.

(c) The National Company Law Tribunal may kindly direct to the petitioners to file an undertaking to the extent that the scheme enclosed to the company application and the scheme enclosed to the company petition are one and the same and there is no discrepancy or deviation.

(d) In compliance of AS-14 (Ind AS-103), the petitioner-companies shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable accounting standards such as AS-5 (Ind AS-8), etc.

(e) As per description of companies mentioned in the scheme, it is noticed that the registered office of the first transferor company is situated in Hyderabad, third transferor company is situated in Chennai, transferee company is situated in Bengaluru, i. e., outside the jurisdiction of this Bench and falls within the jurisdiction of the National Company Law Tribunal Benches at Hyderabad, Chennai and Bengaluru. Accordingly, similar approval be obtained by the first transferor company, third transferor company and transferee company from National Company Law Tribunal at Hyderabad, Chennai and Bengaluru respectively.

(f) As per clause 3 of the scheme, any differences in accounting policy between the transferor companies and the transferee company, will be quantified and adjusted in the general reserve of the transferee company. In this regard, deponent prays that the differences shall be quantified and adjusted in the capital reserve instead of general reserve.

(g) As per clause 6 of the scheme, as an integral part of the scheme, the transferee company's registered office will, on and from the effective date of this scheme stand transferred to the State of Tamil Nadu, in this regard, deponent prays that, the petitioner-companies have to undertake to comply with section 13 of the Companies Act, 2013 read with rule 30 of the Companies (Incorporation) Rules, 2014.

(h) As per clause 6 of the scheme, as an integral part of the scheme, on and from the effective date, the name of the transferee company will stand modified to "Shriram Chits (India) P. Ltd." from its current name. In this regard, deponent prays that the petitioner-companies have to undertake to comply with section 13 of the Companies Act, 2013 read with rule 29 of the Companies (Incorporation) Rules, 2014.

(i) As per clause 10 of the scheme, inter alia, has mentioned that the transferee company shall and to the extent required, increase their authorised share capital to facilitate issue of equity shares under this scheme, from an amount of Rs. 40,00,00,000 (rupees forty crores only) to Rs. 45,00,00,000 (rupees forty-five crores only) divided into 45 lakhs equity shares of Rs. 100 each, in this regard, the deponent prays that the court may pass orders to comply with section 61 read with section 13, section 64 and other sections of the Companies Act, 2013.

In response to the report of the Regional Director, the petitioner has **12** filed an affidavit-in-reply to the representation of the Regional Director dated September 3, 2019 and have clarified as under :

(a) A propos the observation of the Regional Director in paragraph V(a) of his report, the petitioner-company has clarified that notices have been served to all concerned regulatory authorities as required under section 230(5) of the Companies Act, 2013 such as the Regional Director, Registrar of Companies, concerned Income-tax Department, and official liquidator. Further, without prejudice to the petitioner's position that participation of the Registrar of Chits in the captioned proceeding under sections 230-232 of the Companies Act, 2013 is neither required nor mandated by law, the petitioner has strictly on a without prejudice basis and out of abundant caution served a notice of hearing upon the Registrar of Chits, Mumbai, Maharashtra and also provided a copy of the petition along with the chairman report and scrutiniser report filed before this Tribunal on September 13, 2019 and further states that an affidavit of service of company petition and notice of hearing on the Registrar of Chits dated September 26, 2019 has been filed with this Tribunal. Vide an order dated September 27, 2019 this Tribunal had directed the Registrar of Chits, Mumbai to remain present with the records of the petitioner-company on the next date of hearing, i. e., November 25, 2019. The Joint Registrar of Chits vide their letter dated January 9, 2020 had given their no objection subject to certain conditions which have been agreed upon by the petitioner. The letter dated January 2, 2020 addressed by the petitioner and the response dated January 9, 2020 issued by the Joint Registrar of Mumbai is annexed as exhibits A and B respectively to the affidavit dated January 24, 2020 titled as "Affidavit of No objection from Registrar of Chits" filed by the petitioner with this Tribunal.

(b) A propos the observation of the Regional Director in paragraph V(b) of his report, the petitioner has clarified that a copy of the chairman's report and admitted copy of the petition have been served in the office of the Regional Director on September 3, 2019 vide the petitioner's advocate's

letter dated September 3, 2019 and a copy of the minutes of order for admission of the petition has been served on the office of the Regional Director on September 5, 2019 vide the petitioner's advocate's letter dated September 5, 2019.

(c) A propos the observation of the Regional Director in paragraph V(c) of his report, the petitioners confirm and undertake that the scheme enclosed to the company application and the scheme enclosed to the company petition are one and same and there is no discrepancy or deviation.

(d) A propos the observation of the Regional Director in paragraph V(d) of his report, learned counsel for the petitioner clarifies that the accounting treatment proposed in clause 3 of the scheme is in consonance with Ind AS 14, which is applicable to the petitioner-company.

(e) A propos the observation of the Regional Director in paragraph V(e) of his report, learned counsel for the petitioner submits that the other companies involved in the present amalgamation had already moved the respective National Company Law Tribunals of appropriate jurisdiction. The National Company Law Tribunal, Hyderabad Bench has approved the scheme qua transferor company No. 1, i. e., Shriram Chits P. Ltd., on February 13, 2019. The National Company Law Tribunal, Chennai Bench has approved the scheme qua transferor company No. 3, i. e., Shriram Chits Tamil Nadu P. Ltd., on July 25, 2018. The transferee company, i. e., Shriram Chits (Karnataka) P. Ltd., has approached the National Company Law Tribunal, Bengaluru Bench, and its petition is pending for final hearing. Learned counsel for the petitioner confirms and undertakes to comply with the said observation and seek approval from the concerned National Company Law Tribunals.

(f) A propos the observation of the Regional Director in paragraph V(f) of his report, learned counsel for the petitioner-company submits that the accounting treatment proposed in clause 3 of the scheme is in consonance with Ind AS-14. In any event, the accounting treatment has to be given effect by the transferee company which is within the jurisdiction of the National Company Law Tribunal, Bengaluru Bench, and the Regional Director (South Eastern Region), Ministry of Corporate Affairs, Hyderabad. Learned counsel for the petitioner further submits that there is no bar or embargo in law in adjusting the difference in accounting policy to general reserve. Learned counsel for the petitioner further submits that the independent auditor of the petitioner-company by his report dated May 31, 2017 which is annexed at page 106, annexure A2 to the petition, had certified that the financial statements comply with the accounting standards specified under section 133 of the Companies Act, 2013. Learned counsel

for the petitioner further submitted that in any event, the differences being adjusted to the general reserves will not affect any party whosoever considering the financial strength of the transferee/amalgamated company after the amalgamation. Learned counsel for the petitioner further submits that it is trite law that any deviation from the earlier accounting standard per se does not qualify as an objection or ground for opposing the scheme more pertinently when it is a decision made as per commercial wisdom and is a product of discretion bestowed upon the board by the shareholders of the company, who have unanimously approved the scheme.

(g) A propos the observation of the Regional Director in paragraph V(g) and (h) of his report, learned counsel for the petitioner submits that an order sanctioning the scheme of amalgamation by this Tribunal is a comprehensive arrangement and is a single window clearance. Hence, once the scheme is considered and approved by the Tribunal, no further or separate procedure is required. Learned counsel for the petitioner further undertakes to file the requisite forms as may be applicable with the concerned Registrar of Companies.

(h) A propos the observation of the Regional Director in paragraph V(i), the petitioner submits that clause 10 of the scheme provides for the increase of the authorised share capital of the transferee company. Learned counsel for the petitioner submits that an order sanctioning the scheme of amalgamation by a court/Tribunal is a comprehensive arrangement and is a single window clearance hence, once the scheme is considered and approved by the Tribunal, no further and/or separate procedure is required. It is a settled legal proposition that there is no legal requirement for seeking independent approvals when a scheme of amalgamation provides for the same ; the scheme is approved by the shareholders and is considered and sanctioned by the Tribunal. Learned counsel for the petitioner also submits that in any event, the transferee company being the company which shall have an increased authorised share capital upon the scheme becoming sanctioned/effective, the Tribunal/Registrar of Companies having jurisdiction over the transferee shall be the appropriate authority to decide on the said aspect, if any. In any event, learned counsel for the petitioner undertakes to file the requisite/necessary forms as may be applicable with the concerned Registrar of Companies.

In response to the reply filed by the petitioner, the Regional Director has **13**
filed a supplementary report dated January 30, 2020 wherein the objections raised by the Regional Director in the previous affidavit dated May 8, 2019 were replied to by the petitioner in respect of the objections of the Regional Director with regard to :

(a) Serving of notices on other statutory authorities.

(b) Submission of a copy of the chairman's report to the Regional Director.

(c) The scheme attached to the company application and the company petition are one and the same.

(d) Accounting entries to be in compliance to AS 14.

(e) Approval of the respective National Company Law Tribunal in whose jurisdiction the other transferor companies and the transferee company is situated.

(f) To comply with the provisions of the Companies Act, 2013 for increase of the authorised capital of the transferee company subsequent to the approval of the scheme.

14 In the aforesaid supplementary/additional affidavit ("additional affidavit"), the Regional Director submitted that the petitioner may be directed to seek a NOC from the Registrar of Chits, Maharashtra for the scheme.

15 In response to the additional affidavit of the Regional Director in respect of the suggestion of the Regional Director for obtaining the NOC from the Registrar of Chits, Maharashtra for the scheme, learned counsel for the petitioner submitted that the same was obtained and filed before this Tribunal by way of an affidavit dated January 24, 2020.

16 In the said additional affidavit, the Regional Director reiterated the objections contained in his earlier report with regard to :

(a) Accounting treatment of adjustment of any differences between assets and liabilities in the general reserve instead of capital reserve.

(b) Need to comply with the provisions of section 13 for change of registered office from one state to other as part of the scheme.

(c) Need to comply with the provisions of section 13 for change in the name of the transferee company subsequent to amalgamation as part of the scheme.

17 A propos the aforesaid three remaining objections in the additional affidavit, learned counsel for the petitioner submitted that the petitioner herein is transferor company No. 2, whereas three remaining objections are in respect of the transferee company on sanctioning of the scheme. As such, the objections of the Regional Director are unsustainable qua the petitioner/transferor company No. 2. Further, the National Company Law Tribunal, Chennai Bench in whose jurisdiction transferor company No. 3 operates and National Company Law Tribunal, Hyderabad Bench in whose jurisdiction transferor company No. 1 operates, have already approved the scheme on July 25, 2018 and February 13, 2019 and the Regional Director

(Southern Region), Chennai and Regional Director (South-Eastern Region), Hyderabad have not raised any such objections in respect of any of these issues. Further, in so far as the petitioner-company is concerned, the petitioner-company is going to be dissolved without winding up on scheme becoming effective.

18 Learned counsel for the petitioner has relied upon the response filed by the petitioner in dealing with the aforesaid three remaining objections and has reiterated the same in his oral submissions during the course of final hearing.

19 The concerned income-tax authority had addressed a letter No. DCIT-14(3)(2)/2019-20 to counsel for the petitioner ("letter") stating that the petitioner has satisfied the conditions of the amalgamation. However, it made a demand for Rs. 2.81 crores, which according to the authority is pending from the petitioner and should be paid to the credit of the Revenue.

20 Learned counsel for the petitioner submits that the petitioner has filed an affidavit in response to the said letter ("reply to the letter") with this Tribunal on September 5, 2019 and also served the same with the office of the concerned income-tax authority vide their advocate's letter dated September 5, 2019. In the said reply, the petitioner has dealt with the aforesaid observations of the concerned income-tax authority.

21 A propos the observation with respect to the said demand for Rs. 2.81 crores made by the income-tax authority, learned counsel for the petitioner submits that the petitioner had filed an appeal dated January 9, 2017 with the Commissioner of Income-tax (Appeals) against the aforesaid assessment, impugning the demand notice of the Income-tax Department and the demand of Rs. 2.81 crores therein. Learned counsel for the petitioner further submits that the said appeal is pending. Once the scheme is sanctioned, the transferee company shall be prosecuting or defending all legal proceedings including the said appeal, by operation of law.

22 Learned counsel for the petitioner also submits that the scheme specifically provides that all the liabilities of the transferor companies shall stand transferred to and be vested in the transferee company in accordance with clause 3.2.6, clause 3.2.7 and 3.2.8 in Part III of the scheme. This is in pari materia with the provisions of section 232(3)(a) of the Companies Act, 2013 whereby all liabilities of the petitioner-company would stand transferred to the transferee company upon amalgamation. Learned counsel further submitted that in comparison with the annual turnover and net worth of the petitioner-company, the tax liability assessed is not significant. The amalgamated transferee company shall have more than sufficient net worth

which would also include the assets of the transferor companies including the assets of the petitioner/transferor company-No. 2 herein.

23 Learned counsel for the petitioner/transferor company further submits and clarifies that in any event, the tax liability would be subject to the outcome of the said appeal preferred by the petitioner/transferor company and all tax issues arising out of the scheme will be decided in accordance with law.

24 In this regard learned counsel for the petitioner/transferor company No. 2 has relied on the judgment of the hon'ble Bombay High Court's judgment dated May 9, 2014 in *Trinity India Ltd. and Ring Plus Aqua Ltd.* (C. P. No. 105 of 2014 connected with C. A. No. 858 of 2013 and C. P. No. 106 of 2014 connected with C. A. No. 859 of 2013 and of the hon'ble National Company Law Appellate Tribunal dated September 25, 2019 in *Ad2Pro Global Creative Solutions P. Ltd.* v. *Regional Director (SER), Ministry of Corporate Affairs* [2019] 217 Comp Cas 443 (NCLAT).

25 Since the scheme provides in clause 3.2.6, clause 3.2.7 and 3.2.8 that the assets and liabilities of the transferor companies shall be transferred to and vested in the transferee company, the transferee company shall be duty bound to provide all requisite information and explanation to the income-tax authorities. Any finding given by such authorities shall be binding on the transferee company, subject, of course, to the right of appeal as may be available to it.

26 The authorised share capital of the petitioner/transferor company No. 2 is Rs. 10,00,00,000 comprising of 1,00,00,000 equity shares of Rs. 10 each. The issued, subscribed and paid-up share capital of the petitioner/transferor company No. 2 is Rs. 8,33,00,700 which comprises of 83,30,070 equity shares of Rs. 10 each fully paid. Learned counsel for the petitioner undertakes to do compliances of various provisions of Companies Act, 2013 for increasing the authorised share capital by filing requisite forms and to the extent applicable.

27 The petitioner/transferor company No. 2 has complied with the requirements as per directions of the Tribunal and they have filed necessary affidavits of compliance. Moreover, the petitioner/transferor company No. 2 undertakes to comply with all statutory requirements, if any, as required under the Companies Act, 2013 and the Rules made thereunder whichever is applicable. This undertaking is accepted.

28 However, we are of the opinion that it would be better to clarify certain issues arising out of the Regional Director's report, and the response of the petitioner/transferor company No. 2 thereto. These issues are—

(a) Adherence to Accounting Standards ;

(b) Compliance with the provisions of section 13 for change of registered office of the transferee company from one State to another, as part of the scheme ; and

(c) Compliance with the provisions of section 13 for change in the name of the transferee company subsequent to amalgamation, as part of the scheme.

29 In so far as the issue of adherence to accounting standards is concerned, the relevant part of AS-14-Accounting for Amalgamation is contained in paragraph 23 thereof. This is extracted below for ready reference :

> *"23. Treatment of reserves specified in a scheme of amalgamation.*—The scheme of amalgamation sanctioned under the provisions of the Companies Act, 1956 or any other statute may prescribe the treatment to be given to the reserves of the transferor company after its amalgamation. Where the treatment is so prescribed, the same is followed. In some cases, the scheme of amalgamation sanctioned under a statute may prescribe a different treatment to be given to the reserves of the transferor company after amalgamation as compared to the requirements of this Standard that would have been followed had no treatment been prescribed by the scheme. In such cases, the following disclosures are made in the first financial statements following the amalgamation :
>
> (a) A description of the accounting treatment given to the reserves and the reasons for following the treatment different from that prescribed in this standard ;
>
> (b) Deviations in the accounting treatment given to the reserves as prescribed by the scheme of amalgamation sanctioned under the statute as compared to the requirements of this standard that would have been followed had no treatment been prescribed by the scheme ;
>
> (c) The financial effect, if any, arising due to such deviation."

30 Learned counsel for the petitioner/transferor company No. 2 has relied on the following judgments in support of his contention that can be a deviation in the scheme in so far as accounting treatment is concerned :

(a) The hon'ble Bombay High Court's judgment in *Laxmi Udyog Components P. Ltd. and Laxmi Agni Components and Forgings P. Ltd.*, C. P. No. 300 of 2009 connected with C. A. No. 404 of 2009 and C. P. No. 301 of 2009 connected with C. A. No. 405 of 2009 paragraphs 9 to 13—Deviation in accounting treatment to the surplus permissible in law.

(b) The hon'ble Rajasthan High Court's judgment dated May 12, 2006 in *Sutlej Industries Ltd., In re* [2007] 135 Comp Cas 394 (Raj)—paragraph

10 read along with paragraph 9—Surplus can be adjusted to general reserve with the approval of shareholders.

(c) The hon'ble Gujarat High Court's judgment in *Gallops Reality P. Ltd., In re* [2009] 150 Comp Cas 596 (Guj), paragraph 13—Surplus can be adjusted to general reserve.

31 The Ministry of Corporate Affairs, vide notification dated March 30, 2016 to paragraph 23 of AS-14, inserted a footnote to the said para to the effect that "paragraph 23 shall not apply to any scheme of amalgamation approved under the Companies Act, 2013". With this, the exemption that could be carved out in a scheme of amalgamation in respect of treatment of reserves, has now been removed. The end result is that paragraph 23 of AS-14 dealing with treatment of reserves in a scheme of amalgamation is now mandatorily to be followed, and the accounting treatment prescribed in a scheme cannot override the provisions of paragraph 23 of AS-14.

32 The judgments relied upon by learned counsel for the petitioner/transferee company were all delivered prior to the amendment dated March 30, 2016 issued by the Ministry of Corporate Affairs. The position after the amendment is yet to be tested in court.

33 This is a scheme involving multiple jurisdictions such as the National Company Law Tribunals Benches at Chennai, Hyderabad, Bengaluru and Mumbai. Each Bench looks at the scheme as an integrated whole, rather that segregate it into parts with which the particular Bench is concerned. Therefore, the arguments of learned counsel for the petitioner/transferor company No. 2 that the accounting treatment prescribed in the scheme is a matter that the National Company Law Tribunal Bengaluru alone should be concerned with, is untenable. The scheme cannot be contrary to any law in force, and the accounting standards issued by the Institute of Chartered Accountants of India (ICAI) have the effect of law under section 133 of the Companies Act, 2013.

34 Having said that, we are also acutely conscious of the fact that ultimately, upon the scheme being sanctioned, it is the transferee-company alone that will be concerned with the accounting entries to be made, which is not within our jurisdiction. The transferee-company being within the jurisdiction of the National Company Law Tribunal, Bengaluru Bench, we do not wish to express any opinion in the matter.

35 The second issue is regarding compliance with section 13 of the Companies Act, 2013 regarding change of name of the transferee company and change of registered office of the transferee company consequent upon sanction of the scheme of amalgamation. Learned counsel for the petitioner/transferor company relies on the judgment of the hon'ble Bombay

High Court's judgment dated December 12, 13, 1991 in the matter of *PMP Auto Industries Ltd., In re* [1991] SCC Online Bom 527 ; [1994] 80 Comp Cas 289 (Bom) to buttress his contention that no separate procedure is required to be followed.

36 It is now settled law that the provisions to schemes of arrangement area complete code in themselves, and the separate procedures prescribed for change of name, change of registered office, reduction of capital, etc., under other provisions of the Companies Act are not required to be followed if they are effected as part of the scheme itself. It is also settled law that approval by the members to the scheme should be treated as approval also under other provisions of the Companies Act. Of course, there may be procedures required to be followed consistent with the requirements of the MCA-21 programme, so as to ensure that the changes are effected in the registry maintained by the Registrar of Companies. The petitioner/transferor company No. 2 has undertaken to abide by all procedural compliances required in this regard. This undertaking is recorded.

37 The official liquidator had filed its report dated April 12, 2019 with this Tribunal stating therein that, the affairs of the petitioner/transferor company No. 2 have been conducted in a proper manner.

38 From the materials on record, the scheme of amalgamation appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy.

39 Since all the requisite statutory compliances have been fulfilled, C. P. (CAA) No. 846/MB/2019 is made absolute in terms of prayer of the petition mentioned therein. The petitioner/transferor company No. 2 shall be dissolved without winding up, upon the scheme being finally sanctioned by the jurisdictional benches of the National Company Law Tribunal.

40 The scheme is hereby sanctioned, and the appointed date of the scheme is fixed as April 1, 2017.

41 The petitioner/transferor company No. 2 is directed to file a copy of this order along with a copy of the scheme with the concerned Registrar of Companies, electronically in e-Form INC-28, within 30 days from the date of receipt of order duly certified by the Deputy/Assistant Registrar, of this Tribunal.

42 The petitioner/transferor company No. 2 to lodge copy of this order duly certified by the Deputy/Assistant Registrar of this Tribunal, along with the scheme with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, on the same within 60 days from the date of receipt of the order.

43 All concerned regulatory authorities to act on a copy of this order duly certified by the Deputy/Assistant Registrar of this Tribunal, along with the scheme.

44 Any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary.

[2020] 221 Comp Cas 520 (Mad)

[IN THE MADRAS HIGH COURT]

BANK OF NEW YORK MELLON

v.

INDOWIND ENERGY LTD.

P. T. ASHA J.

May 20, 2020.

HF ▶ Petitioner

WINDING UP—INABILITY TO PAY DEBTS—PETITION BY TRUSTEE OF BOND HOLDERS—FAILURE TO PAY INTEREST UNDER TERMS OF BOND AND TRUST DEED—LIABILITY ADMITTED IN BALANCE-SHEET FILED PRIOR TO FILING OF WINDING UP PETITION—PETITION TO BE ADMITTED—COMPANIES ACT, 1956, S. 434.

The respondent-company announced the issue of foreign currency convertible bonds. The bonds were to mature on December 22, 2012 and were to bear interest at 2.5 per cent. per annum payable semi annually in arrears on the sixth and twelfth months of each calender year after the issue date. The bond holders were given an option to convert their bonds into fully paid-up equity shares of the company. The company issued the bonds to the bond holders and the petitioner, as the trustee of the bond holders and the company, as the issuer, had entered into a trust deed on February 21, 2007. The petitioner contended that from the second semi-annual interest due on December 21, 2009 the company had not paid the interest that had become due and payable on the scheduled dates. Since the default continued for over five days in each of the instances, it became an event of default in terms of the conditions of the bond. As on April 6, 2011 the company therefore, was due in a sum of $ 38,098,737.85. The petitioner as trustee therefore, issued a notice of default dated April 6, 2011 calling upon the company to remit the early redemption amount together with the accrued and unpaid interest as contemplated under condition No. 10 of the bond. The company sent a reply dated April 19, 2011 stating that it had attempted to restructure the bonds in the year 2009. It

therefore, contended that since the bond holders were put on notice about the restructuring, an event of default had not occurred. On a petition filed under section 434(1)(a) of the Companies Act, 1956 :

Held, *that the bond holders who held more than 45 per cent. of the principal amount of the bonds had given permission to the petitioner to institute proceedings for winding up the company. The notice of default had been issued after the bond holders had expressed their intention not to proceed further with the restructuring. Till the date of the filing of the winding up petition, the restructuring had not taken place and only the preliminary stage of signing the term sheet had taken place. The dispute put forward by the company lacked substance and was contrary to the documents produced and since the liability had been admitted in the balance-sheet for the year ending March 31, 2011 which was just a few months prior to the filing of the winding up petition, the winding up petition was to be admitted.*

Amalgamated Commercial Traders P. Ltd. *v.* Krishnaswami (A. C. K.) [1965] 35 Comp Cas 456 (SC), Madhusudan Gordhandas and Co. *v.* Madhu Woollen Industries P. Ltd. [1972] 42 Comp Cas 125 (SC), Mediqup Systems P. Ltd. *v.* Proxima Medical System GmbH [2005] 124 Comp Cas 473 (SC) *and* Vijay Industries *v.* NATL Technologies Ltd. [2009] 147 Comp Cas 490 (SC) *relied on*.

Cases referred to :

A Company, *In re* [1894] 94 S. J. 369 ; [1894] 2 Ch D 349 (Ch D) (para 19)

Amalgamated Commercial Traders P. Ltd. *v.* Krishnaswami (A. C. K.) [1965] 35 Comp Cas 456 (SC) (para 19)

Brighton Club and Norfolk Hotel Co. Ltd., *In re* [1865] 35 Beav. 204 (para 19)

Haryana Telecom Ltd. *v.* Sterlite Industries (India) Ltd. [1999] 97 Comp Cas 683 (SC) (para 17)

London and Paris Banking Corporation, *In re* [1874] L. R. 19 Eq. 444 (para 19)

Madhusudan Gordhandas and Co. *v.* Madhu Woollen Industries P. Ltd. [1972] 42 Comp Cas 125 (SC) (paras 17, 19)

Mediqup Systems P. Ltd. *v.* Proxima Medical System GmbH [2005] 124 Comp Cas 473 (SC) (para 19)

P. and J. Macrae Ltd., *In re* [1961] 31 Comp Cas 424 (CA) (para 19)

Tweeds Garages Ltd., *In re* [1962] 32 Comp Cas 795 (Ch D) (para 19)

Vijay Industries *v.* NATL Technologies Ltd. [2009] 147 Comp Cas 490 (SC) (para 19)

Zenith Infotech Ltd. *v.* Bank of New York Mellon [2014] 187 Comp Cas 41 (Bom) (para 17)

C. P. No. 172 of 2011.

P. S. Raman Senior Counsel for *M/s. Rahul Balaji* for the petitioner.

Murali Kumar for *M/s. McGan Law Firm* for the respondent.

JUDGMENT

1 P. T. ASHA J.—The company petition filed as early as in the year 2011 which has travelled back and forth between the National Company Law Tribunal and this court was taken up for hearing by me on various dates starting from January 31, 2020 and orders were reserved on February 27, 2020. The brief facts necessary for considering the petition is herein below narrated.

Pleadings

2 The respondent-company which is engaged in generating power from wind, had issued an offer circular on December 13, 2007 announcing the issue of USD 30,000,000 2.5 per cent. convertible bonds due 2012 otherwise called the Foreign Currency Convertible Bonds. The bonds were to mature on December 22, 2012 and were to bear interest at 2.5 per cent. per annum payable semi annually in arrears on the sixth and twelfth month of each calender year after the issue date, i. e., December 21, 2007. The offer letter further stated that unless previously converted, redeemed or repurchased and cancelled the issuer, i. e., the respondent, will redeem each bond in US dollars at US $ 128.50158 per cent. of the principal amount on the date of maturity. The bond holders were given an option to convert their bonds into fully paid-up equity shares of the respondent.

3 In pursuance of the above offer letter, the respondent had issued the aforesaid bonds to the bond holders and the petitioner, as the trustee of the bond holders and the respondent, as the issuer, had entered into a trust deed on February 21, 2007. The terms and conditions of the bond formed a part of the trust deed and was set out as Schedule 2 to the trust deed.

4 It is the case of the petitioner that from the second semi-annual interest due on December 21, 2009 the respondent had not paid the interest that had become due and payable on the scheduled dates. Since the default continued for over five days in each of the instances, it became an event of default as per condition No. 10 of the bond. As on April 6, 2011 the respondent therefore, was due in the amount of $ 38,098,737.85. The petitioner as trustee therefore, issued a notice of default dated April 6, 2011 calling upon the respondent to remit the early redemption amount

together with the accrued and unpaid interest as contemplated under condition No. 10 of the bond.

5 The respondent has sent a reply dated April 19, 2011 stating that they had attempted to restructure the bonds in the year 2009. They therefore, contended that since the bond holders were put on notice about the restructuring, an event of default had not occurred. It is the contention of the petitioner that till the date of filing this winding up petition, the formal restructuring had not taken place. Therefore, the respondent is bound by the terms of the bond and the objectives under the trust deed. The petitioner would therefore, submit that there was no bona fide dispute to the respondent's liability to the bond holders.

6 Since there was no positive response from the respondent, the petitioner had issued a statutory notice under section 434(1)(a) of the Companies Act, 1956 (hereinafter called as "the Act") calling upon the respondent to pay the sums due by them within a period of twenty one days failing which the respondent was put on notice that a winding up petition would follow.

7 The respondent, who had sent a reply on June 1, 2011 had not disputed the liability or its failure to make the payment post December, 2009. To this, the petitioner had sent a rejoinder dated September 30, 2011 putting the respondent on notice that the winding up petition, as alerted in the notice dated May 18, 2011 would be filed as it has to be deemed that the respondent is unable to pay its debts.

8 The petitioner would further submit that the proposal for restructuring was turned down by the majority of the bond holders and the said decision was also communicated to the petitioner under cover of e-mail dated August 17, 2011. As on August 31, 2011 the respondent was due and owing a sum of $ 40,319,149.50.

9 The petitioner would further submit that the liability of the respondent to pay the bonds is seen at several places of the annual return for the period of 2009-10 which is repeated in the annual return for the period of 2010-11. It is only in the notes of account that the respondent had made a false statement that "the FCC Bonds have been restricted with the existing bond holders". This is an absolutely incorrect and misleading statement.

10 The petitioner would therefore, contend that the dispute that is now sought to be raised lacks bona fide. Considering the fact that the respondent is unable to pay its debts, the respondent company should be wound up.

11 The respondent has countered these averments by contending that the respondent is a profitable concern and for the period June, 2010-March, 2011, the profit of the respondent-company was Rs. 396 lakhs. They had

also set up wind mill projects in 2 places at Karnataka in 1998 and at Puducherry in 2004. In the year 2007, the respondent decided to raise funds through foreign currency convertible bonds. M/s. Jefferies International Ltd., was the manager for this fund and M/s. Euroclear its clearing agent. The respondent issued the offer circular dated December 13, 2007.

12 The respondent would further contend that the bond holders are unsecured creditors and the bonds are freely traded in the Singapore Exchange Securities Trading Ltd. Further, the bond holders are investing money subject to risk disclosed in the offer letter. The respondent would further contend that M/s. QVT Fund LP and Quintessence Fund LP, Cayman Islands (Collectively known as QVT bond holder) were the major subscribers to the issue. The petitioner trustee was bound to consider the collective interest of the bond holders and not individual bond holders.

13 It is the further case of the respondent that in June, 2009 owing to the global stagnation, the share value of the respondent-company fell. Thereafter, there was a consensus between the respondent and the bond holders which broadly provided as follows :

(i) Coupon sale of remaining bond was to be reduced to 0 per cent. from existing 2.5 per cent.

(ii) 50 per cent. of the outstanding bonds to be converted at applicable conversion premium stipulated by regulatory authorities with an upper cap of Rs. 65 per share.

(iii) Balance 50 per cent. of the bonds may be converted at the option of the bond holders at the time of maturity of the bond, i. e., December, 2012 and if not redeemed to be redeemed at a reduced redemption premium at 111.01 per cent. instead of 128.5 per cent.

(iv) Existing conversion premium at Rs. 167 would be down to 15 days.

14 The respondent would contend that the restructuring came into effect on June 22, 2009. This fact was communicated to the bondholders and they had agreed to the same. The respondent would further contend that on August 12, 2009 M/s. QVT Fund LP and Quintessence Fund LP, who held 45 per cent. of the bonds has signed the revised term sheet and the shareholders of the respondent had also passed a resolution on August 12, 2011 agreeing for the restructuring. In fact the petitioner acknowledging the restructuring had claimed 0 per cent. interest for December, 2009.

15 The respondent apart from raising the issue of the locus standi of the petitioner to maintain the winding up petition, had also contended that all the bond holders had not authorized the petitioner to file the winding up

petition. Considering the fact that the petition includes disputed questions of fact the winding up petition is not maintainable and further as there is no debt "in praesenti" the petition deserves to be dismissed. The respondent would therefore, seek to have the petition dismissed.

16 In their rejoinder, the petitioner would contend that the restructuring had not been approved by the bond holders and the procedure contemplated has not been followed. As per procedure after restructuring, the trust deed had to be amended by a supplementary trust deed. None of these, according to the petitioner, had been followed and therefore the only logical conclusion that can be arrived at is that the restructuring had not taken place. The respondent has themselves accepted this fact in some of their earlier correspondence. The petitioner further submitted that the bond holders had denied the execution of the revised term sheet. Further, the two companies who had questioned the petitioner's right to file the petition had not responded to the petitioner's letters asking them to identify themselves with the necessary proof of their holdings. Therefore, the petitioner contended that the respondent was attempting to put up a sham defense and the petition for winding up should be ordered.

Submissions

17 (A) Mr. P. S. Raman, learned senior counsel who was instructed by counsel for the petitioner had made his oral submissions which has been captured in the written submissions filed on behalf of the petitioner. Learned senior counsel had given a brief submission on the floating of the bonds by the respondent ; the procedure contemplated for applying for it, how and when the bonds are to be redeemed, the salient features of the bonds, etc. He had also briefly touched upon the sequence of events commencing from the issue of bonds up to the commencement of the dispute. Senior counsel would submit that the petitioner was appointed as a trustee by the bond holders and it was in this capacity that the petitioner had entered into the trust deed dated December 21, 2007 with the respondent/ issuer. Senior counsel would make his submission to each of the objections made by counsel for the respondent and the arguments are being extracted hereinbelow :

(a) The respondent had taken a preliminary objection to the winding up petition by questioning the jurisdiction of this court as parties had agreed to be governed by the English laws. The respondent had pleaded that the terms and conditions of the trust deed, the instruction letter dated April 4, 2011 and the notice of default dated April 6, 2011 would render the company petition not maintainable before this court. To the above contention, learned senior counsel for the petitioner would contend that the

trust deed had clearly stated that this restriction is only for the benefit of the trustee and each of the bond holders. However, the same would not restrict their right to take proceedings in any other court of competent jurisdiction. Further winding up proceedings which is a statutory remedy can only be filed in the High Court within whose jurisdiction the registered office of the respondent-company was situated. To support his argument, the petitioner has relied on the judgment reported in *Haryana Telecom Ltd.* v. *Sterlite Industries (India) Ltd.* [1999] 97 Comp Cas 683 (SC) ; [1999] 5 SCC 688 and a judgment dated June 16, 2008 of the Delhi High Court in the matter of *Shin Satellite Public Co. Ltd.* v. *S. T. V. Enterprises Ltd.*, Company Petition No. 128 of 2005.

(b) The next objection of the respondent was that the petitioner as a Trustee did not have the locus standi to maintain the winding up petition under sections 433 and 434 of the Act. The response to this objection is that the obligation to pay the amounts due under the bond as per clauses 2.2 and 2.2.1 of the trust deed was only towards the trustee. That apart, the onus of enforcing the terms and conditions of the trust deed was upon the petitioner as trustee and only in the event of the petitioner failing to act in this regard, the bond holders could initiate proceedings against the respondent. He would rely upon the following the judgments in support of this contention :

(i) Judgment of the Bombay High Court, dated September 2, 2013 in *Zenith Infotech Ltd.* v. *Bank of New York Mellon* [2014] 187 Comp Cas 41 (Bom), Appeal (L) No. 344 of 2013.

(ii) Judgment of the Division Bench of our High Court dated April 24, 2014 in *Deutsche Trustee Co. Ltd.* v. *Mascon Global Ltd.*, O. S. A. No. 231 of 2013.

(c) The next objection was that the petitioner has instituted the company petition without the proper authorization of the bond holder as certain bond holders, i. e., M/s. White Crown Holdings Ltd., had expressed the view that they were happy to go ahead with the restructuring and had not authorised the petitioner to move the winding up petition. To this, the petitioner would contend that as per clauses 16 and 24 of the trust deed that the petitioner was vested with the full discretion with regard to institution of proceedings to enforce the terms of the bonds/trust. The petitioner is bound to initiate such proceedings if so directed by an extraordinary resolution or if requested in writing by bond holders holding at least 25 per cent. of the bonds. Senior counsel would bring to the notice of the court the letter dated April 4, 2011 from M/s. QVT Fund LP and Quintessence Fund LP, who admittedly held over 45 per cent. of the

outstanding principal amount of the bonds, instructing the petitioner to proceed on the basis of the event of default. It was only on such instruction that the petitioner had issued the notice of default followed by the winding up notice and later the petition. The petitioner had also called in question the authenticity of the alleged mails from M/s. White Crowns Holding Ltd., and M/s. Eco Ventures International (FZE) dated November 14, 2011 since the two had not responded to the mail of the petitioner asking them to provide them proof of their holdings. The petitioner would contend that the mail had not emanated from the bond holders. The argument of the respondent that the petition is premature in as much the petitioner had not given the respondent an opportunity to rectify the event of default is patently incorrect. The winding up notice was issued only after the lapse of a month from the date of issue of the notice of default and thereafter the petition had been filed much later.

(d) An objection was raised that the company petition had not been signed by the person so authorised by the petitioner. The respondent would point out that the cause title of the petition would indicate that the petitioner is represented by its attorney Mr. Naveet Singh but the petition, affidavits and other documents filed into the court contained the signature of Ms. Ritu Rana.

The response to the above objection is that this objection was never raised in the counter statement and for the first time has been raised at the time of the argument. That apart, the power of attorney of Ms. Ritu Rana had been filed along with the petition and the same had been notarized and apostilled thereby establishing the authenticity of the power of attorney. All the formalities had been followed while filing the petition.

(e) The respondent had also raised a defence that the bonds did not constituted a debt and consequently, the winding up petition filed under section 433(e) read with section 434 of the Act was not maintainable. The petitioner would contend that the offer letter had clearly described the bond as constituting an unsecured obligation. The debt has been acknowledged in all annual returns up to the financial year 2016-17 and only in 2017-18, the amounts towards the bonds has without explanation moved to the equity portion and shown as unsecured equity. The petitioner would contend that the argument that USD 15 millions worth of bonds were purchased in the secondary market as alluded by the issuer was wrong since M/s. QVT Fund LP and Quintessence Fund LP., continued to hold USD 8 million worth of shares which represents 53 per cent. of the outstanding bonds. Once the debt is undisputed the ability of a company to pay is not a defence. The petitioner would rely on the judgment reported in

Madhusudan Gordhandas and Co. v. *Madhu Woollen Industries P. Ltd.* [1971] 3 SCC 632 ; [1972] 42 Comp Cas 125 (SC).

(f) The respondent had contended that there exists no admitted liability to enable the petitioner to maintain the present company petition. This defence is taken on the basis that no debt was due under the bonds which formed the subject matter of the company petition as the terms of the bond stood modified/restructured with effect from June 22, 2009. That apart, the petitioner acknowledging this restructuring had placed a zero interest debt service letter dated December 7, 2009 which would clearly prove that the petitioner had acted upon the restructuring. Further, M/s. QVT Fund LP and Quintessence Fund LP had signed the term sheet approving the modification/restructuring.

The petitioner would counter this objection by contending that except for signing the terms sheet, M/s. QVT Fund LP and Quintessence Fund LP had not proceeded further with the restructuring as contemplated under the terms and conditions of the bonds read with the articles of Schedule IV of the trust deed. There was no extraordinary resolution of the bond holders as contemplated. Further the term sheet upon which the respondent places great reliance is only a tentative (non-binding) document. Further the term sheet had not been executed by the bond holders M/s. QVT Fund LP and Quintessence Fund LP. A reading of the term sheet would clearly highlight its tentative nature as it states the restructuring would be subject to the satisfactory completion of the documentation and obtaining the approval of the regulatory authorities. The approval granted by the Reserve Bank of India was subject to the condition that the restructuring procedure had to be completed. As this procedure admittedly had not been completed, it is clear that the restructuring had not taken place. The petitioner would draw the attention of this court to the respondent's letter dated January 20, 2014 (pending this winding up petition) acknowledging that the conversion to equity was yet to take place and wherein they had requested the bond holders to hold a meeting for this purpose. The petitioner therefore, would contend that this defence is not bona fide and only a moonshine defence. The petitioner would contend that the respondent cannot rest its case on the zero interest letter dated December 7, 2009 as there was no obligation of the part of the petitioner to issue such a letter as the payment of the semi-annual interest had to be made on the scheduled date irrespective of a demand being made by the petitioner or not.

The petitioner would therefore, pray for the admission of the winding up petition and to direct the appointment of the official liquidator as a provisional liquidator.