

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 04 of 2019

[Arising out of Common Order dated 5th November, 2018 passed by the National Company Law Tribunal, Bengaluru Bench in CA (CAA) No.54/BB/2018, CA (CAA) No.55/BB/2018 and CA (CAA) No.56/BB/2018.]

IN THE MATTER OF:

MEL Windmills Pvt. Ltd.

Having its registered office at
#28 (Old No. 485), 10th Cross,
15th Main RMV, S. S. Nagar,
Bangalore - 560080.
Karnataka, India.

...Appellant

Vs

1. Mineral Enterprises Limited

Having its registered office at
Khanija Bhavan, West Wing,
3rd Floor, No. 49, Race Course Road,
Bangalore - 560001.
Karnataka, India.

2. MEL Properties Private Limited,

Having its registered office at
#28 (Old No. 485), 10th Cross,
15th Main RMV, S. S. Nagar,
Bangalore - 560080.
Karnataka, India.

....Respondents

Present:

For Appellant: Mr. Gopal Krishnan, Advocate.

For Respondents: Mr. Rajiv Ranjan, Sr. Advocate with Mr. Aditya Narayan with Ms. Nimita Kaul and Ms. Amrita Sarkar, Advocates for R-1.

Mr. Ashok Mathur, Advocate for R-2.

With

Company Appeal (AT) No. 05 of 2019

[Arising out of Common Order dated 5th November, 2018 passed by the National Company Law Tribunal, Bengaluru Bench in CA (CAA) No.54/BB/2018, CA (CAA) No.55/BB/2018 and CA (CAA) No.56/BB/2018.]

IN THE MATTER OF:

MEL Properties Private Limited

Having its registered office at
#28 (Old No. 485), 10th Cross,
15th Main RMV, S. S. Nagar,
Bangalore - 560080.
Karnataka, India.

...Appellant

Vs

1. Mineral Enterprises Limited

Having its registered office at
Khanija Bhavan, West Wing,
3rd Floor, No. 49, Race Course Raod,
Bangalore - 560001.
Karnataka, India.

2. MEL Windmills Pvt. Ltd.,

Having its registered office at
#28 (Old No. 485), 10th Cross,
15th Main RMV, S. S. Nagar,
Bangalore - 560080.
Karnataka, India.

....Respondents

Present:

For Appellant: Mr. Ashok Mathur, Advocate.

For Respondents: Mr. Rajiv Ranjan, Sr. Advocate with Mr. Aditya Narayan with Ms. Nimita Kaul and Ms. Amrita Sarkar, Advocates for R-1.

Mr. Gopal Krishnan, Advocate for R-2.

with

Company Appeal (AT) No. 06 of 2019

[Arising out of Common Order dated 5th November, 2018 passed by the National Company Law Tribunal, Bengaluru Bench in CA (CAA) No.54/BB/2018, CA (CAA) No.55/BB/2018 and CA (CAA) No.56/BB/2018.]

IN THE MATTER OF:

1. Mineral Enterprises Limited

Having its registered office at
Khanija Bhavan, West Wing,
3rd Floor, No. 49, Race Course Raod,
Bangalore - 560001.
Karnataka, India.

...Appellant

Vs

1. MEL Windmills Pvt. Ltd.,

Having its registered office at
#28 (Old No. 485), 10th Cross,
15th Main RMV, S. S. Nagar,
Bangalore - 560080.
Karnataka, India.

2. MEL Properties Private Limited,

Having its registered office at
#28 (Old No. 485), 10th Cross,
15th Main RMV, S. S. Nagar,
Bangalore - 560080.
Karnataka, India

....Respondents

Present:

For Appellant: Mr. Rajiv Ranjan, Sr. Advocate with Mr. Aditya Narayan with Ms. Nimita Kaul and Ms. Amrita Sarkar, Advocates.

For Respondents: Mr. Gopal Krishnan, Advocate for R-1.
Mr. Ashok Mathur, Advocate for R-2.

J U D G M E N T

BANSI LAL BHAT, J.

These appeals arise out of common order dated 5th November, 2018 passed by the National Company Law Tribunal, Bengaluru Bench (hereinafter referred to as 'Tribunal') in C.A. (CAA) No. 54/BB/2018, C.A. (CAA) No. 55/BB/2018 and C.A. (CAA) No. 56/BB/2018 by virtue whereof the Tribunal declined to sanction the scheme of demerger on the ground that several issues were pending finalization and certain investigations were pending in relation to the business of the demerged company. However, liberty was granted to file afresh after the pending investigations are disposed of. Since, the parties and subject matter are common, all the three appeals were heard together and are proposed to be disposed of by a common judgment.

2. For better understanding of the issues involved, it would be appropriate to briefly notice the factual matrix. The Appellants in all the three appeals who were petitioners before the Tribunal, sought an order for sanctioning the scheme of demerger in terms whereof the wind energy generation business of 'Mineral Enterprises Ltd.' (the Demerged Company) was sought to be separated and given to 'MEL Windmills Pvt. Ltd.' (Resulting Company No.1) whereas the real estate, shares and security investments of

'Mineral Enterprises Ltd.' were sought to be given to 'MEL Properties Pvt. Ltd.' (Resulting Company No.2). Admittedly, the Demerged Company in para IV (h) of its application CA (CAA) No. 56 of 2018 disclosed the factum of pendency of certain proceedings in relation to the mining business of the Demerged Company which on clarification turned out to be investigations registered as Spl. CC No. 12/2016 and Spl. CC No. 471/2016 arising out of charge sheet lodged by Special Investigation Team, Karnataka Lokayukta Police before 23rd Additional City Civil & Sessions Court, Bangalore Urban at Bangalore wherein proceedings are stated to have been stayed by Hon'ble High Court of Karnataka. According to Appellants the said proceedings have no bearing and cannot be an impediment in considering approval of the scheme of demerger.

3. It is submitted by learned counsel for the Appellants that the Company Applications were filed by the Demerged Company and the Resulting Companies praying for dispensation of meetings of their creditors and shareholders by duly producing consent affidavits in support of the scheme from 100% of the Shareholders of each company and 100% of the Creditors of the Resulting Companies and 97.18% of the Demerged Company. It is further submitted that the Demerged Company alongwith the Resulting Companies proposed the separation of the business undertakings of the Demerged Company in respect of its (i) wind energy generation through windmills; and (ii) real estate, shares and securities investments from the Demerged Company and vesting the same in the

Resulting Company No. 1 and Resulting Company No. 2, respectively. The scheme of demerger was proposed due to distinct nature of the activities carried out by the Demerged Company and the nature of risk and dynamics involved in the said activities being distinct and necessitating different management approaches. The scheme of demerger was proposed to focus on accelerated growth and profitability posing a good option for business viability. It is further submitted on behalf of Appellants that the Tribunal, in terms of the impugned order rejected the prayers made in the applications filed under Section 230 and 232 of the Companies Act, 2013 r/w Rule 3 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 rejecting the scheme itself at the very threshold stage when the sole question before it for consideration was whether a case was made out for dispensing with the meetings of the Shareholders and Creditors. Learned counsel for Appellants further submits that the impugned order was passed without hearing the parties on the said issue and without considering the terms of demerger scheme. The impugned order is assailed on the ground that it's a non-speaking order and the Tribunal has overstepped its jurisdiction. It is further submitted that the question of sanction of the scheme of demerger could not have been decided at the preliminary stage and without eliciting the views of the Stakeholders including the concerned regulatory authorities. The Tribunal ought to have directed meetings to be convened and notices to be issued to the concerned authorities in terms of the statutory provisions. Lastly it is contended that the demerger scheme

proposed by the Appellants was not with regard to the business of Mining which had to continue with the Demerged Company. Therefore, the pending investigations against the Director of the Demerged Company would continue post the demerger without adversely impacting the scheme of demerger.

Appellants in Company Appeal (AT) No. 04 of 2019 and Company Appeal (AT) No. 05 of 2019 figure as Respondents No. 1 and 2 in Company Appeal (AT) No. 06 of 2019. They have supported proposal for scheme of demerger by 100 percent voting.

4. We have given our anxious consideration to the submissions made at the bar and also scanned through the record. The relevant provisions of the Companies Act, 2013 are reproduced hereinbelow:-

***“230. Power to compromise or make arrangements
with creditors and members***

(1) Where a compromise or arrangement is proposed—

*(a) between a company and its creditors or any class
of them; or*

*(b) between a company and its members or any class
of them, the Tribunal may, on the application of the
company or of any creditor or member of the*

company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.—For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

(2) The company or any other person, by whom an application is made under subsection (1), shall disclose to the Tribunal by affidavit—

(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including—

(i) a creditor's responsibility statement in the prescribed form;

(ii) safeguards for the protection of other secured and unsecured creditors;

(iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

(v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

(3) Where a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice

of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and such other matters as may be prescribed:

Provided that such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed:

Provided further that where the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned

persons free of charge from the registered office of the company.

(4) A notice under sub-section (3) shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:

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.

(5) A notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement

and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

(6) Where, at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company.

(7) An order made by the Tribunal under sub-section (6) shall provide for all or any of the following matters, namely:—

(a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash

or accept equity shares equal to the value of the dividend payable;

(b) the protection of any class of creditors;

(c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;

(d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;

(e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or

arrangement is in conformity with the accounting standards prescribed under section 133.

(8) The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

(9) The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent. value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

(10) No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

(11) Any compromise or arrangement may include takeover offer made in such manner as may be prescribed:

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

(12) An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in

such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.

x..x..x..x

232. Merger and amalgamation of companies

(1) Where an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

(b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another

company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies, the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply mutatis mutandis.”

5. On a plain reading of the aforesaid provisions it comes to fore that the Tribunal, while dealing with an application under Section 230 of the Act, on being satisfied that the compromise or arrangement has been proposed in connection with a scheme for the reconstruction of the company or companies involving merger/ amalgamation of two or more companies and under the scheme property or liabilities of the transferor company is required to be transferred to transferee company or divided among/ transferred to two or more companies is required to order meeting of the creditors or members, as the case may be, to be called. Sub-section (9) thereof empowers the Tribunal to dispense with calling of a meeting of creditors where such creditors, having at least 90% value agree to and confirm the scheme of compromise or arrangement. The creditors/ members are required to file an affidavit stating that they agree to and confirm the scheme of compromise or arrangement. It is abundantly clear

that where the creditors/ members having at least 90% value signify their consent to the scheme of compromise or arrangement by filing affidavits, the Tribunal will have the discretion to dispense with calling of meeting of creditors/ members. This is to be done at the very threshold stage and precedes an order by the Tribunal under Sub-Section (6) sanctioning a compromise or arrangement which can be passed by the Tribunal only after majority of the persons representing three-fourths in value of the creditors or members as the case may be agree to any compromise or arrangement. Once the companies concerned approach the Tribunal for sanctioning of a compromise or an arrangement, the Tribunal, at the very outset is required to order a meeting of the creditors/ members to be held for according consideration to the proposed scheme. This is a sine quo non for proceeding further and any order of sanctioning or refusing to sanction such compromise or arrangement by the Tribunal would be without jurisdiction unless the Tribunal has dispensed with calling of such meeting of creditors/ members in terms of Sub-section (9). It is manifestly clear that at the stage of calling of meeting of creditors/members for consideration of the scheme of compromise or arrangement the Tribunal is not required to examine the merits of the scheme qua the proposed compromise/ arrangement. Any such indulgence on the part of Tribunal would fall foul of the provision engrafted in Section 230 (1) of the Act and would be without jurisdiction.

6. As noticed elsewhere in this judgment, the Tribunal declined to sanction the proposed scheme of demerger, albeit on account of several

issues pending finalization, without either considering prayer for dispensation of meeting of creditors and members of the three Appellant Companies or in the alternative directing convening of a meeting of the creditors and members of these companies for considering the proposed scheme of demerger. The mandate of law engrafted under Section 230(1) of the Act requiring the Tribunal to order calling of meeting of the creditors/ members of the concerned companies not being complied with and the mandatory provisions being observed in breach, the impugned order cannot be supported. The Tribunal, at the very threshold stage, was not required to venture into the merits of the proposed scheme of demerger which had to be examined only after obtaining the consent of creditors/members with requisite majority. For proper exercise of jurisdiction vested in the Tribunal it was imperative either to call the meeting of creditors/ members for consideration of the proposed scheme of demerger or to dispense with such meeting by invoking Sub-section (9) of Section 230 as 100% of shareholders of each company, 100% of creditors of Resulting Companies and 97.18% of creditors of the Demerged Company had filed consent affidavits. The Tribunal failed to adhere to the mandate of law which was mandatory and imperative in nature. This goes to the root of the impugned order which cannot be sustained.

7. Apart from what has been stated hereinabove, the pending issues could not be construed as an impediment in sanctioning the proposed scheme of demerger. It is so for more than one reason. First being the case

of Appellants - Petitioners before the Tribunal, that the demerger scheme proposed by the Appellants was not with regard to business of Mining which would continue with the Demerged Company and the pending investigation would continue unhindered against the Director of the Demerged Company without having any impact on the proposed scheme of demerger. Second, because pendency of investigation would not stand as a legal impediment in sanctioning the proposed scheme of demerger for any civil action or criminal proceedings in respect of past events/ transactions. In identical circumstances, the Hon'ble Gujarat High Court sanctioned the modified composite scheme of arrangement in terms of its judgment dated 1st March, 2007 rendered in **Company Petition Nos. 9 and 10 of 2006 titled "Core Health Care Limited Vs. Nirma Limited."** reported in 2007 SCC Online **Guj 235**. Relevant portion thereof reads as under:-

"89. From this judgment, it would be clear that the scheme can always be sanctioned subject to and without prejudice to the liability, if any, in the civil and criminal proceedings in respect of the past transactions. The argument of objectors that the scheme is vague and incomprehensible should not detain this court unnecessarily because the scheme is clear, nobody either raised an objection in the meetings held for the purpose or at the time of the discussion that the scheme was vague and incomprehensible. The liability, if any, of the board,

directors, management, etc., in civil and criminal proceedings would continue, and I accordingly so order.”

8. For the foregoing reasons the impugned order cannot be supported. The Tribunal seriously erred in dismissing the application on merit when the stage of consideration of the proposed scheme of demerger was yet to arrive. The impugned order suffers from serious legal infirmity and the same is set aside. The appeals are accordingly allowed. The matter is remanded back to the National Company Law Tribunal, Bengaluru Bench for proceeding further in the matter in the light of observations made hereinabove and the provisions of law and pass appropriate orders after hearing the parties.

A copy of this judgment be sent to National Company Law Tribunal, Bengaluru Bench for information and appropriate action.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

NEW DELHI

27th May, 2019

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