NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 63 of 2018

(Arising out of the order dated 08.01.2018 passed by the Hon'ble NCLT, Principal Bench at New Delhi in CP No. 689/2016 connected with Company Application No. CA (M) 77/2016.)

IN THE MATTER OF:

The Statesman Ltd. **....Appellant**
Statesman House, 4 Chowringhee Square (Original Objector)
Kolkatta, 700001

Vs

1. Emaar MGF Land Ltd. **....Respondents**
ECE House, 28, Kasturba Gandhi Marg (Original Petitioner No.1-
New Delhi-110001 Demerged Company)

2. MGF Developments Limited
MGF House-4/17B, Asif Ali Road (Original Petitioner No. 2-
New Delhi-110002 Resulting Company)

Present:

For Appellant: **Mr. Sudheer Nandrajog, Sr. Advocate with Mr. Jagdeep Singh Bakshi, Mr. Vivek Malik and Mr. Dhawal Jain, Advocates.**

For Respondent: **Mr. U. K Choudhary, Sr. Advocate with Mr. Rajeev K. Goel, Mr. Kartikeya Goel and Mr. Himanshu Vij, Advocates**

JUDGEMENT

A.I.S. CHEEMA, J. :

This appeal has been filed against the Judgement and Order dated 08.01.2018 (corrected vide order dated 16.02.2018) passed by the National Company Law Tribunal, Principal Bench at New Delhi (NCLT in brief) in

Company Petition No. 689/2016 connected with Company Application No. CA (M) 77/2016 which was transformed from Hon'ble High Court of Delhi to the NCLT. By the Impugned Judgement and Order the learned NCLT has while disposing the petition approved the proposed Scheme of Arrangement between the Respondent Companies. Respondent No. 1 Emaar MGF Land Limited had proposed itself as Petitioner Company No. 1/ Demerged Company and the present Respondent No.2 MGF Developments Limited had approached as Petitioner Company No. 2/Resulting Company. The final order passed by the NCLT in the Impugned Order is as under:

> *"9. THIS TRIBUNAL DO FURTHER ORDER:*
>
> *That in the terms of the Scheme:*
>
> *a. That all the property, rights and powers of the Demerged Undertaking of the Demerged Company be transferred without further act or deed, to the Resulting Company and accordingly the same shall pursuant to Section 232 of 2013 Act, be transferred to and vest in the Resulting Company for all the intents, purposes and interests of the Demerged Undertaking of Demerged Company therein but subject nevertheless to all charges now affecting the same; and*
>
> *b. That all the liabilities and duties of Demerged Undertaking of Demerged Company be transferred without further act or deed, to the Resulting Company and accordingly the same shall pursuant to section 232 of the Act, be transferred to and become the liabilities and duties of the Resulting Company; and*
>
> *c. That all proceedings now pending by or against the Demerged Undertaking of Demerged Company be continued by or against the Resulting Company; and*
>
> *d. That Petitioner/Resulting Company shall file within thirty days of the date of the receipt of this order a certified copy of this order to the Registrar of Companies; and*
>
> *e. That any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary."*

2. In the matter before NCLT, the Appellant was one of the objectors to the demerger. The learned NCLT dealt with the objections raised by the Appellant in Para 5 of the Impugned Judgement and rejected the objections raised. Thus the present Appeal.

3. In short, the Appellant is claiming that the Respondent Companies had jointly taken from the Appellant an area measuring 162,520 sq. ft. at Kolkata on 20.09.2016. It is claimed that the lease was for 12 years with an option to renew for another 9 years. Some disputes arose and the Appellant invoked arbitration clause. The Appellant filed a claim petition before the arbitrators in 2015. A settlement was arrived at between the Appellant and Respondent Companies which was reduced into writing on 12.05.2016. The Hon'ble Arbitral Tribunal comprising of three Hon'ble Retired Judged of Supreme Court of India, as arbitrators passed Award on the same date of 12.05.2016, which was in terms of the Settlement Agreement. According to the Appellant, on 12.05.2016 itself the Respondents had filed Joint Application (M) 77/2016 dated 12.05.2016 before the Hon'ble High Court of Delhi, under Section 391(1) and 394 read with Sections 100 to 104 of the Companies Act, 1956 (old Act in short) seeking directions to convene meetings of their shareholders, secured and unsecured creditors to consider and approve the Scheme of Arrangement between the Respondent Companies. According to the Appellant, the Respondents in such Company Application suppressed the fact of the Award dated 12.05.2016 being passed in favour of the Appellant. It is stated that the Hon'ble High Court on 30.05.2016 allowed the first Motion Company

Application (M) 77/16 directing holding of meetings of the shareholders, unsecured creditors and secured creditors of both the Respondent companies. The meetings were accordingly held.

4. It is stated by Appellant that the Respondents then filed second Motion Company Petition 689/16 before the Hon'ble Delhi High Court. The Hon'ble High Court vide orders dated 09.08.2016 directed the Respondents under Section 230 to 232 of the Companies Act, 2013 (new Act in brief) read with relevant Rules, to issue notice in the Second Motion Petition to Regional Director, Registrar of Companies, Income Tax Department, Official Liquidator, etc.

5. It is the case of the Appellant that the Managing Director and Chief Editor of Appellant wrote emails to the Respondents that they have not fulfilled their commitments under the Arbitral Award dated 12.05.2016 and Respondents were requested to pay balance sum of Rs. 5,92,81,459/-. According to the Appellant this amount has been wrongly deducted by the Respondents as TDS. The Appellant had also taken up with the Respondents that in lieu of an additional cash payment of Rs. 24,90,87,095/-, the Appellant had accepted the property allotted by the Respondents in terms of the Award on the express commitment by the Respondents that the property was ready and marketable and Appellant will be able to sell the same for not less than Rs. 25 crores within 4 to 5 months. According to the Appellant it was found that the project was not ready and the Appellant was unable to sell the property and so the demand of Rs. 24,90,87,095 was made from the Respondents. The

Appellant also made grievance with the Respondents that the Appellant had not been informed about the proposed meeting of creditors of the companies. The Appellant raised objections to the Scheme in CA No. 4688/16 in CP No. 689/16 before the NCLT on 21.11.2016. According to the Appellant its claim of Rs. 30,83,68,554 is pending before Arbitral Tribunal.

6. According to the Appellant the NCLT erred in observing that the Arbitral Award dated 12.05.2016 had been duly satisfied when the Arbitral proceedings have been revived and are pending. The NCLT wrongly held that the Board of Directors of the Respondent Companies were oblivious of the Arbitral Award dated 12.05.2016 when one of the Directors Rakshit Jain was signatory to the settlement dated 12.05.2016 and had also signed the first Motion Petition. The grievance of the Appellant is that the Scheme approved by the learned NCLT does not provide for the dues of the Appellant and neither of the two resulting companies are taking over such liabilities. According to the Appellant, it would be left without entity from whom Appellant can recover its dues as neither of the resulting companies have assumed the liability towards the Appellant under the Award.

7. Counsel for Appellant has argued that there is no dispute that no notice of the First Motion or the Second Motion was issued to the Appellant. It is stated that Appellant was Judgement Creditor and entitle to Notice. The Appellant became Judgement Creditor on 12.05.2016.

8. It is argued that date of 12.05.2016 was the same day when the affidavit of first Motion Petition in Company Application M(77)16 was filed in the High

Court. The Award dated 12.05.2016 had been passed consequent to Settlement Agreement dated 12.05.2016. It was signed by Rakshit Jain, Director of Respondents in the Arbitral proceedings which were pending before the 3 former Hon'ble Judges of the Supreme Court of India. According to the Appellant when the first Motion was heard by the High Court and allowed in 30th May, 2016 the Appellant was already a Judgement Creditor and continued to be Judgement creditor even when second Motion was taken up. It has been argued that the Respondents intentionally did not include the name of Appellant as creditor. Respondents suppressed in the affidavit filed in support of Judges' Summons that there was no substantial change in the financial position of the demerged company. Even the correct list of secured creditor filed in second Motion (paper book 2.3, page No. 578) did not include name of the Appellant. The counsel for Appellant then made submissions to show that while making payments in view of the Award, the Respondents wrongly deducted amounts towards TDS. The Appellant has further argued to show that Respondents defaulted while executing Buyers Agreement finding fault with the same on the basis that the same was not signed/executed by land owners and thus it was no agreement in the eyes of law. The effort is to show that the Award is yet not satisfied. The Appellant has further made submissions to claim that the matter has again been taken up before the Arbitral Tribunal. Appellant has argued that the lis is pending before the Arbitral Tribunal of the 3 retired Hon'ble Judges of the Supreme Court. The Respondents have been jointly referred in the Arbitral Award as "EMGF". In the

argument the Appellant claims that the following issues are pending before the Arbitral Tribunal:-

> *"a. Whether EMGF have made payment of the agreed sum of Rs. 40 crores to TSL in terms of the understanding reached between the parties and the consequent settlement agreement dated 12.05.2016?*
>
> *b. Whether EMGF by depositing Rs.5,92,81,459/- as income tax deductable at source from the decretal dues failed to discharge their payment obligations in terms of the understanding reached between the parties and the consequent settlement agreement dated 12.05.2016?*
>
> *c. Whether EMGF are liable to pay Rs. 24,90,87,095/- in lieu of the value of commercial property given by EMGF to TSL on the express understanding that the property would be marketable and the sum realized within a period of four to five months failing which said sum would be payable in lieu of the said property in terms of the understanding reached between the parties and the consequent agreement dated 12.05.2016?"*

It is claimed by the Appellant that it was entitled to notice as Judgement Creditor and as the notice was not issued to the Appellant, the Scheme suffered for suppressing material fact and thus the NCLT could not have passed the orders as it has been done.

9. It has been argued on behalf of the Respondents/Companies that it was correct that the Respondents had taken on lease portion of property from the Appellant in Kolkata and Agreement as stated had been executed. The dispute between parties was referred to arbitration was also not disputed. It is also not in dispute that a Settlement Agreement took place between the parties on 12.05.2016 and on the same date Arbitral Award came to be passed. According to these Respondents the grievance of the Appellant has no substance that the

Appellant was purposely excluded from the list of creditors when the First Motion Application was filed. According to them, the Board of Directors of the 2 Respondent companies had considered and accepted the Scheme of Arrangement before the first Motion Application was filed in the High Court on 12.05.2016. The said meeting had taken place on 11.05.2016 and the extracts were filed in the High Court. The affidavits verifying the first Motion Application were confirmed before the Oath Commissioner on 12.05.2016 in the morning hours and the First Motion Application was filed for necessary orders and with the First Motion Application lists of the secured and unsecured creditors as they stood on 29.02.2016, which was the latest practicable earlier date for the purpose of convening their meetings, was filed. The High Court acted on such lists and on 30.05.2016 passed order to convene separate meetings of the equity shareholders, secured creditors and unsecured creditors of the Respondent Companies under the supervision of the High Court. The First Motion Application was accordingly disposed. In compliance of the orders separate meetings of the shareholders, secured creditors and unsecured creditors of the two companies were convened and the Scheme of Arrangement was approved unanimously or with overwhelming majority in the meetings. It is claimed that on 29.02.2016 which was the base for the lists, the Appellant was neither a secured creditor nor the unsecured creditor. The Arbitral Award was signed and delivered in the late evening hours on 12.05.2016 and thus according to the Respondents they cannot be said to have suppressed material facts when the First Motion Application was moved. Along with the First Motion

Application lists of secured and unsecured creditors are required to be filed as on a latest practicable date. The Respondent Companies were not expected to file list updated till presentation date of First Motion of secured and unsecured creditors or keep updating it on day-to-day basis as it is practically not feasible to up-to-date the lists on real time basis. It has been argued that if the new provisions of the Companies Act, 2013 now enforced are seen under Section 230 read with Rule 9(b) of the Companies (Compromises, Arrangements & Amalgamations) Rules, 2016, the Law as it now stands requires submitting list of secured and unsecured creditors, linked with financial statements should not be more than 6 months old at the time of filing the proceedings. It has been argued by the learned counsel for Respondents that when under the old Act, First Motion Application was filed the lists of secured and unsecured creditors were as on 29.02.2016 which was less than 6 months on the date of filing First Motion Application on 12.05.2016. The submission is that under the old Act it was not specified as to how old the list could be but in the new Act it can be said that it should not be more than 6 months old. If the objects of filing of the lists are kept in view, it has to be practical and it cannot be expected that till the date of filing of first Motion the list should be updated.

10. It has been further argued for the Respondents that in the Arbitral Award and the Settlement Agreement Respondents No. 1 Company had agreed to pay Rs. 40 crores to the Appellant in 3 tranches beginning 31.07.2016 and also to allot certain commercial properties in Capital Tower project. The aforesaid amount is not due for payment as on the date of First Motion Application.

According to the Respondents the High Court had excluded Creditors whose dues were not ripe for payment as on the date of Company Application CA(M) 77/16 for the purpose of convening meetings. Thus, according to the Respondents even if the Appellant was to be treated as unsecured creditor he would have to be excluded. It has been further argued that the Second Motion Company Petition was filed as per the format under the Companies (Court) Rules, 1959 and the format did not require the Respondents to disclose commercial disputes or pending litigations in the Company Petition. Thus it is claimed that if the averments of the Appellant are accepted it would mean that the matter before Arbitral Tribunal is still pending and it would not be required to be shown. The Respondents have then made submissions to state that they have actually complied with the Award which was passed and have tried to show that the disputes being raised by the Appellants with regard to the deduction of TDS and the Property allotted has no substance. Alternatively, it has been argued by the Respondents that total value of the unsecured creditors of the Respondent No.1 Company as per the list filed before the Hon'ble High Court was Rs. 1792,81,70,282 out of which unsecured creditors for the value of Rs. 1159,68,28,452 were present. The total claim of the Appellant is around Rs. 60 crores. The Argument is that even if the Appellant had attended and voted against the Scheme, it would not have any impact on the outcome of the meeting.

11. Counsel stated that even at the time of Second Motion reference was not made to Appellant as comparing the financial standing and debts of

Respondents the dues of Appellant did not constitute "substantial change in financial position". It has been further argued for Respondents that the notice of meetings of unsecured creditors of both the Respondents were published in Newspapers-Business Standard (English) on 09.06.2016 and 15.06.2016 and Business Standard (Hindi) dated 09.06.2016 and 16.06.2016 and that the Appellant chose to ignore the notices and did not attend the meetings and thus cannot now raise any complaint of non-receipt of notice. It is then further argued by the learned counsel for Respondents that when the law provides for holding of meeting of secured and unsecured creditors and there is provision of taking votes, the will of the majority prevails and this is recognized by the law as it can be now seen from the proviso below sub-Section 4 of Section 230 of the new Act which now lays down that objection to the Compromise or Arrangement can be made only by persons holding not less than 10 per cent of the shareholding or having outstanding debt amounting to not less than 5 per cent of the total outstanding debt, as per latest audited balance sheets. The Respondents argued that the debt of the Appellant even if accepted is less than 5 per cent of the total debt of the Respondent Company and on this count also the objection of the Appellant is unsustainable. The Respondents also rely on Section 230(9) of the new Act which provides that the NCLT has discretion to dispense with meetings of a class of creditors where creditors representing 90 per cent value agree and confirm to the Scheme. It has been argued that only because the Appellant may have objection does not mean that the Appellant can resist the Scheme if the value of the creditor does not meet the

requirements under the Act. The Scheme has been approved by overwhelming majority of unsecured creditors and thus according to Respondents the appeal is liable to be dismissed as it has been filed with ulterior motive. It has been further argued for the Respondents that the Scheme will not have impact on the dispute between the Appellant and the Respondent Companies as both the companies in Scheme of arrangement for De-merger continue to exist and the Appellant if he has grievance can have recourse to remedy of law.

12. It is then argued for Respondents that in demerged company also the claim of Appellant is protected. The project relating to property for which Appellant is making grievance, was in EMAAR and it still remains there and only because some other projects have been divided and demerged with MGF, the Appellant cannot make grievance.

13. If the Impugned Judgment/ Order is seen, the learned NCLT has dealt with the objections raised by the Appellant in Para 5 under the heading "Objector-Statesman". Before the NCLT also the Appellant raised similar arguments to show that the Respondents misrepresented and concealed material facts from the Court and thus the petition should have been dismissed and Scheme of Demerger should have been declined. There also the Appellant claimed that the TDS of 5.9 crores was illegally deducted. NCLT noted the argument that the Appellant was claiming that the Arbitration Proceedings were still pending and the property as per the Award had not been transferred to the objector-applicant (Appellant). NCLT also noted the arguments of the counsel for Respondents that the Respondents claimed that as per the Award

dated 12.05.2016 the Respondents had paid on 29.09.2016 the amounts due to the Appellant and they were no longer creditors. Reference was made to form 16A and certificate issued under Section 203 of Income Tax Act to show that the amount due has been fully paid. The other arguments were also noted by NCLT regarding Board of Directors had met out on 11.05.2016 and the newspaper publication and holding of meetings. Considering these and other arguments NCLT recorded:-

> *" Having heard the learned counsels for the parties we are of the view that the objectors have no locus standi to raise objections at this stage as the payment of over Rs. 59 crores had been paid on 26.07.2016, 24.08.2016 and 02.09.2016. The whole awarded amount stands paid as has been rightly contended by learned counsel for the Appellant. The allegation of concealment of facts is also belied because the award was announced on 12.05.2016 by the arbitral tribunal and whereas the meetings of Board of Directors of Demerged and Resulting companies were also held on 11.05.2016 which approved the Scheme of Arrangement obviously without any idea of Award. In any case the objector could have filed objections in pursuance of notices published in the press at the time of first Motion i.e. on 24.08.2016 wherein objections to the scheme were invited. No such objections were ever filed. In view of the above we don't find any substance in the objection and arguments raised by objector Statesman Limited."*

NCLT then dealt with the approval accorded by the members and the creditors of the companies to the proposed Scheme and affidavits of Regional Director where no objections had been raised and held that there was no reservation to grant sanction to the Scheme. NCLT thus sanctioned the Scheme under Section 230 to 232 of the new Companies Act of 2013 and has given further directions and passed orders as have been reproduced earlier.

14. At the time of beginning of arguments before us when learned counsel for the Appellant criticised the above Impugned Order to say that NCLT wrongly found that the whole Awarded amount stands paid, on the basis that the dispute before the Arbitral Tribunal has been revived and argued that such observation hinders the claim of Appellant, we had proposed to the learned counsel for Appellant that if this is the only bone of contention we could dispose the Appeal observing that these observations would not be binding on the Appellant who can pursue his dispute before the Arbitral Tribunal or take any further legal recourse. The learned counsel for the Respondents had also consented by saying that Respondents would agree to such direction by this Tribunal. However, the learned counsel for the Appellant still insisted on arguing the whole appeal and we did not obstruct the Appellant from putting up the case it wanted.

15. Now, having heard counsel for both sides at length and having gone through the material on record, we do not find substance in the arguments being made for the Appellant. There is no substance in the submission of the learned counsel of the Appellant that on 12.05.2016 when the Respondents moved the Hon'ble High Court in the first Motion, they had suppressed material fact by not referring to the Award. Looking to the First Motion Application, the copies and documents of which have been filed before us, it is not something which is prepared in an hour or so. Apparently, the First Motion Application was prepared before filing the same in High Court in the course of the day on 12.05.2016. Before filing the petition etc. the same are deliberated

and prepared and signed and affidavits are sworn. All this naturally happens before filing or in the course of the day and working hours. The same cannot be said for arbitral proceedings which were already pending before the Arbitral Tribunal of Hon'ble retired Judges of the Hon'ble Supreme Court on 12.05.2016. It is the argument for the Respondents that these proceedings before the Arbitral Tribunal took place in the evening of 12.05.2016. These arguments have not been denied by the learned counsel for the Appellant. Thus, if in the morning of 12.05.2016 steps were completed so as to file the First Motion Application before the High Court in the course of the day, merely because there is no reference to the Award passed on the same date (which may be in the evening), the Respondents cannot be branded to have suppressed material fact, or that they were with unclean hands.

16. The other argument of the Appellant that the Appellant was not included in the list of secured or unsecured creditors of the Respondent Companies and so the Petition of Respondent should have been rejected also deserves to be rejected. The record shows that the Respondents had moved the First Motion Application on 12.05.2016 on the basis of list of secured and unsecured creditors as on 29.02.2016 which lists were attached. Copies of audited financial statements were also filed. Admittedly, on that date of 29.02.2016, the dispute between the Appellant and Respondents had not crystallized into any Award. In fact the Appellant on its own showing has now again re-opened the dispute and the same is to be settled. The argument is that under the old Act there was no specific requirement to give any list but list of creditors for a

date which was reasonably before filing of the first Motion Application was to be given. The argument of the learned counsel for Respondents has substance that the law has now under the new Act crystalised legislative intent which can be gathered from Rule 9 of The Companies (Compromises, Arrangements and Amalgamations) Rules 2016 which reads as under:

> *"9. Voting.- The person who receives the notice may within one month from the date of receipt of the notice vote in the meeting either in person or through proxy or through postal ballot or through electronic means to the adoption of the scheme of compromise and arrangement.*
> *Explanation.- For the purpose of voting by persons who receive the notice as shareholder or creditor under this rule-*
> *(a) "shareholding" shall mean the shareholding of the members of the class who are entitled to vote on the proposal; and*
> *(b) "outstanding debt" shall mean all debt owed by the company to the respective class or classes of creditors that remains outstanding as per the latest audited financial statement, or if such statement is more than six months old, as per provisional financial statement not preceding the date of application by more than six months."*

17. Once having moved the High Court in the first Motion on the basis of lists of creditors as on 29.02.2016 so as to call for meeting of the secured and unsecured creditors, and once the Hon'ble High Court having accepted it and passed orders to call the meeting, subsequently, how adding or deducting the names of creditors would be permissible is not shown by Appellant. Appellant has not shown that the company is bound to go on updating the list of creditors till the date of filing of the First Motion Application or after orders, till the meetings of creditors takes place.

18. The learned NCLT appears to have observed regarding whole Awarded amount standing paid as it accepted the submission of the counsel for the

Respondents. According to us even if the Appellant continues to raise disputes regarding the question whether or not TDS was rightly deducted or to find fault with the commercial property given by Respondents and the buyers Agreement, we are not entering into those aspects as it appears that the Appellant has again claimed issues as mentioned in Para 8 supra, to be pending before the Hon'ble Arbitral Tribunal. They are not issues for us to settle. Here we find substance in the submissions of the learned counsel for Respondents that even if the claims as calculated by the Appellant are kept in view, and even if the Appellant was allowed to participate in the meeting of creditors, the value of his dues, considering the financial statements of the companies, was not such so as to tilt the outcome of the meetings of secured or unsecured creditors of the Companies.

19. There is substance in the argument for the learned counsel for Respondents that in spite of public notice if the Appellant did not attend the meetings or raise the objections, subsequently, he could not be heard. We reject the arguments of the counsel of the Appellant that the Appellant was not expected to go on watching the newspapers. The very object of giving public notice is to give opportunity to come forward and participate or raise objections. The NCLT was right when it observed that the Appellant could have filed objections in pursuance to the notice published in the press at the time of First Motion when objections to the Scheme were invited.

20. There is substance in the argument of the learned counsel for Respondents that the Appellant cannot have grievance as the project with

which Appellant is concerned continues to remain with EMAAR even if some other projects have been merged with MGF. In the written submissions (Diary No. 5913) the Respondents have stated in Para 24:

> *" 24. The Scheme will not have any adverse impact on the dispute between the Appellant and the Respondent No.1 & 2 Companies. The present Scheme being a Scheme of Arrangement for De-merger, etc., both the Respondent No. 1 & 2 Companies shall remain in existence"*

Thus there is no substance in the arguments of the Appellant that because of the demerger, Appellant would have no entity from whom Appellant can recover dues. We find no force in the various arguments raised for the Appellant.

21. For such reasons, we do not find any substance in this appeal. The same is rejected. The Appellant will pay each of the Respondents Rs. 75,000/- as costs of this Appeal.

Justice A.I.S. Cheema)
Member (Judicial)

(Balvinder Singh)
Member (Technical)

New Delhi
8th August, 2018

Sh/nn