

For Respondents: - Mr. Tushar Mehta, ASG, Mr. Virender Ganda, Senior Advocate assisted by Shri Ramanuj Kumar, Shri Manpreet Lamba and Ms. Priyal Modi, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In both the appeals as common question of law is involved and have been preferred against common judgment dated 16th August, 2017 passed by the National Company Law Tribunal (hereinafter referred to as “Tribunal”) Principal Bench, New Delhi in Company Petition No. 07 (ND)/2017, they were heard together and are being disposed of by this common judgment.

2. The brief facts of the case are as follows:

A joint petition under Sections 230 to 232 of the Companies Act, 2013 read with the Companies (Compromise, Arrangement and Amalgamation) Rules, 2016, was filed by Appellants (1st Petitioner Company)- ‘Ratnagiri Gas and Power Private Limited’ and (2nd Petitioner Company/’Resulting Company’)- ‘Konkan LNG Private Limited’ before the Hon’ble Delhi High Court for sanction of ‘Scheme of Arrangement’ (Demerger) as contemplated between the Petitioner Companies and their shareholders and creditors.

3. The Hon'ble High Court of Delhi in Company Application No. (M) 142/2016, vide order dated 7th October, 2016, directed convening of the following meetings in relation to the Petitioner Companies:

Class of Meeting	Date of Meeting	Chairman appointed for the Meeting
Equity shareholders of Demerged Company	03.12.2016	Mr. S.P Singh Premi, Registrar General (Rtd.) Delhi High Court
Secured Creditors of Demerged Company	03.12.2016	Mr. Manjeet Singh Oberoi, Advocate
Unsecured Creditors of Demerged Company	03.12.2016	Mr. Sandeep Agarwal, Advocate
Equity Shareholders of Resulting Company	03.12.2016	Ms. Gunjan Sinha Jain, Advocate

4. Directions were also issued for the publication of notices of meetings in 'Indian Express' (English) and 'Jan Satta' (Hindi), both in Delhi and Maharashtra Editions, more than 21 days before the appointed date of the meetings. Meetings were directed to be convened at Sri Sai Satya Auditorium, Bhishmapitamah Marg, Lodhi Road, New Delhi-110003. Subsequent to the above order dated 7th October, 2016 passed by the Hon'ble High Court of Delhi, the Appellants- (joint Petitioners) moved Company Application in CO.APPL.4246/2016 before the Hon'ble High Court seeking for the change in venue which was allowed by the Hon'ble High Court of Delhi vide order dated 26th October, 2016. Consequent to the above directions given by the Hon'ble High Court of Delhi dated 7th October, 2016 and 26th October, 2016, meetings were convened by the respective companies as is evident from the reports of the respective Chairmen filed before the Hon'ble High Court of Delhi.

From the reports of the respective Chairmen, the following picture emerges:

Class of Meeting	No. of shareholders/ creditors (present and voting)	Percentage of Vote	Value
Equity Shareholders of Demerged Company	8	100%	38,20,27,24,150
Secured creditors of Demerged Company	14*	88.43%	91,86,02,97,366
Unsecured Creditors of Demerged Company	6**	100%	8,32,50,645
Equity Shareholders of Resulting Company	2	100%	1,00,000

*Dissented by power Finance Corporation Limited.

**6 Unsecured Creditors, as above, as per the Report of the Chairman, attended the meeting either personally or through their proxy and 21 unsecured Creditors have given their consent by way of signed letters.

5. Subsequent to the Report of the respective Chairmen, the case was transferred from Hon'ble High Court of Delhi to the Tribunal.

6. Thereafter, the Companies preferred the Second Motion Petition on 23rd December, 2016 before the Tribunal, wherein the Tribunal, by impugned judgment dated 16th August, 2017, observed as follows:

"19. Since the Scheme is yet to be sanctioned, the petitioner companies have ample scope to seek the approval of the shareholders and creditors with a view to comply with the provisions of Section 66 of the Companies Act, 2013 or at least for the modifications as sought for in the application in CA- 180 (PB) 2017 claimed to be an

integral part of the Scheme as this Tribunal cannot supplant its wisdom as to that of its shareholders and creditors in the exercise of supervisory jurisdiction and with the above said observations we are constrained to close the petitioner sine die with liberty being granted to the Petitioner Companies to revive the Petition as and when compliances are effected. Further before parting it is also to be seen that under Clause 31 of the Scheme which reads as follows: -

31. In the event of this Scheme does not come into effect by March 31, 2017 or by such later date as may be agreed by the respective Board of Directors of the Resulting Company and the Demerged Company, this Scheme shall stand revoked, cancelled and be of no effect and become null and void and in that event no rights and liabilities whatsoever shall accrue to or be incurred inter se by the parties or their shareholders or creditors or employees or any other person. In such case each party shall bear its own costs, charges and expenses or shall bear costs, charges and expenses as may be otherwise mutually agreed.

Thus the Scheme contains a Long Stop Date being that of 31st March, 2017 and no record has been produced to establish that the same has been extended beyond the

said period by the respective Boards and ex post facto approval by the Board of the respective petitioner companies cannot revive the Scheme which has lapsed due to efflux of time and the liberty granted to revive the petition is hence hedged based on the respective Boards extending the time period through a date of resolution passed prior to 31.03.2017.”

7. Learned Additional Solicitor General, appearing on behalf of the Appellant Companies submitted that after the orders were passed by the Hon’ble High Court of Delhi, the Scheme was approved by all the: -

- i. Equity shareholders of both the Companies in Special General Meetings;
- ii. Secured creditors of both the Companies and;
- iii. Unsecured creditors of both the Companies.

8. It was submitted that the order refusing to sanction the Scheme by the Tribunal is not only legally but also factually unsustainable on different grounds, as discussed below.

9. The Tribunal held that modified Scheme cannot be sanctioned without complying with the Section 66 of the Companies Act, 2013, or at least without obtaining fresh consents from the shareholders and creditors of the Appellant Companies.

10. Learned Senior Counsel for the Appellant has rightly pointed out that the Tribunal failed to consider that Section 230 of the Companies Act, 2013 is a complete code in itself and the explanation to Section 230 of the Companies Act, 2013 expressly and categorically states that the provision of Section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under Section 230 of the Companies Act, 2013, which reads as follows: -

“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.

xxx xxx xxx

(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.”

11. In any event, in view of the express powers conferred under Section 231 (1) (b) of the Companies Act, 2013, taking into consideration the stand taken by the Appellant Companies that the secured lenders had also supported the modified Scheme and such modification would not

prejudice their interests, it was open to the Tribunal to sanction the Scheme if necessary by exercising its power to modify the Scheme.

12. The other ground of rejection is that one of the secured creditors namely— M/s. Power Finance Corporation Limited had dissented to the Scheme.

13. However, we find that such finding is contrary to the records. The IDBI Bank Limited, which is the lead Creditor, filed an application before the Tribunal, wherein it is specifically and categorically stated that initially M/s. Power Finance Corporation Limited had objected to the Scheme; however, the said objection was withdrawn subsequently.

Relevant paragraph no.11 of the application of IDBI Bank Limited reads as follows:

“11. It is submitted that the lenders have, at the statutory meeting held on December 03, 2016 pursuant to the directions of the Hon’ble High Court of Delhi, approved the Scheme with the requisite majority. Further, Power Finance Corporation Ltd. (one of the Secured Lenders) who had initially declined to vote in favour of the Scheme has also granted its consent by way of a letter dated March 21, 2017 in order for the Scheme to be sanctioned. The Secured Lenders are therefore wholeheartedly supporting the Scheme and

*desire, subject to this Hon'ble Tribunal's approval, that the Scheme be implemented at the earliest in the interest of all stakeholders. A copy of the letter issued by Power Finance Corporation Ltd. is annexed herewith and marked as **Annexure A 3**. In the aforementioned circumstances, the Secured Lenders through the Applicant humbly submit that they may be allowed to intervene and assist this Hon'ble Tribunal towards sanctioning of the Scheme."*

14. Another ground for rejection of Scheme has been recorded in Paragraph No. 19, as quoted above to the effect that the life of the Scheme (Long stop date) was 31st March, 2017 and there is no record to suggest that the same has been extended.

15. Learned Senior counsel for the Appellant submitted that the aforesaid finding is contrary to the record. From the record placed before the Tribunal we find that the Long Stop Date of 31st March, 2017 was extended to 31st March 2018.

Extract of 101st Meeting of the Board of Directors of 'Ratnagiri Gas and Power (P) Ltd.' held on 23rd March, 2017 and extract of Minutes of 9th Meeting of the Board of Directors of 'Konkan LNG Private Limited' held on 30th March, 2017 as submitted by the Company Secretary show that

the Demerger Scheme was extended to 31st March, 2018, as extracted below:



ANNEXURE A-9
RATNAGIRI GAS AND POWER (P) LTD.

459

Promoters: NTPC Ltd. & GAIL (India) Ltd.
GAIL Jubilee Tower, 5th Floor, B-35-36
Sector-1, NOIDA - 201 301
Uttar Pradesh, India
Tel.: +91-120-4148900, Fax: +91-120-4148913
E-mail: cs@rgppl.com

EXTRACT OF MINUTES OF 101ST MEETING OF BOARD OF DIRECTORS HELD ON THURSDAY THE 23RD MARCH, 2017 AT 4:30 P.M. AT MAHAGENCO OFFICE, PRAKASHGAD, SECOND FLOOR, PLOT NO.G-9, ANANT KANEKAR MARG, BANDRA (EAST), MUMBAI-400051.

Subject: Extension of Long Stop Date from 31.03.2017 as prescribed under Clause 31 of the Demerger Scheme to 31.03.2018.

“RESOLVED THAT approval of the Board of Directors be and is hereby accorded for extension of the Long Stop Date from 31.03.2017, as prescribed under Clause 31 of the Demerger Scheme, to 31.03.2018.”

“RESOLVED FURTHER THAT Managing Director or Dy. Managing Director be and is hereby individually authorized to do all the act, deed and thing as may be necessary to give effect to the aforesaid resolution.

**Certified true copy
For Ratnagiri Gas and Power Private Limited**

Ankit Jain
30/8/2017

Ankit Jain
Company Secretary
ANKIT JAIN
Company Secretary
RATNAGIRI GAS & POWER PVT. LTD.
5th Floor, GAIL Jubilee Tower, B-35-36
Sector-1, Noida - 201301 (U.P.)

Ashwini

2017

Registered Office : NTPC Bhawan, Core-7, SCOPE Complex 7, Institutional Area, Lodhi Road, New Delhi-110003
Website : (www.rgppl.com), CIN : U40105DL2005 PTC 138458

ANNEXURE A-10

Konkan LNG Private Limited

Promoter: Ratnagiri Gas and Power Private Lim
 5th Floor, GAIL Jubilee To
 B-35-36, Sect
 NOIDA-201301, Uttar Pradesh, In
 Tel.: +91-120-4148900, Fax: +91-120-41489
 E-Mail : cs@rgppl.co

460

EXTRACT OF MINUTES OF 9TH MEETING OF THE BOARD OF DIRECTORS HELD ON 30TH MARCH, 2017 AT 4:00 P.M. AT COMPANY CORPORATE OFFICE 5TH FLOOR, GAIL JUBILEE TOWER B35-36, SECTOR-1, NOIDA-201301

Subject: Extension of Long Stop Date from 31.03.2017 as prescribed under Clause 31 of the Demerger Scheme to 31.03.2018.

“RESOLVED THAT approval of the Board of Directors be and is hereby accorded for extension of the Long Stop Date from 31.03.2017, as prescribed under Clause 31 of the Demerger Scheme, to 31.03.2018.”

“RESOLVED FURTHER THAT Directors of the Company be and are hereby individually authorized to do all the act, deed and thing as may be necessary to give effect to the aforesaid resolution.

**Certified true copy
 For Konkan LNG Private Limited**

Ankit Jain
 30/03/2017

**Ankit Jain
 Company Secretary**

ANKIT JAIN
 COMPANY SECRETARY
 KONKAN LNG PVT. LTD.
 5th Floor, GAIL Jubilee Tower, B-35-36
 Sector-1, Noida-201301 (U.P.)

[Handwritten signature]

[Handwritten signature]

Registered Office: GAIL Bhawan, 16, Bhikaji Cama Place, R K Puram, New Delhi, 110066, CIN No.U11100DL2015PTC288147

16. So far as the standard of accounting is concerned, the Statutory Auditor of 1st Appellant Company, only had suggested a different method of accounting and it is not in dispute that the said method do not affect the financial position or the net worth of the Appellant Companies. The accounting method was also not objected to by any of the Appellant

Company. The Appellant Companies, through their respective Board of Directors had approved the suggestions made by the Statutory Auditor and modified the Scheme accordingly only to the extent pointed out by the Statutory Auditor.

17. Clause 27.1 of the Scheme itself envisages that modification, if necessary for the smooth functioning/ implementation of the Scheme, can be made by the Board of Directors, and for such modification matters the Appellant Companies are not required to approach the shareholders or creditors for fresh consents.

18. A separate application was filed by the Appellant Companies wherein it was specifically and categorically mentioned that the change in the accounting method suggested by the Statutory Auditor of 1st Appellant Company would not change or alter the financial position of Appellant Companies since there was no change in the shareholders' funds or the net-worth of the Appellant Companies. Therefore, no prejudice would be caused either to any shareholder or to any creditor of the Appellant Companies. The aforesaid fact has not been disputed by the parties, nor by the Tribunal in its impugned order. In such circumstance, the aforesaid technical objection cannot come in the way of Appellant Companies for sanction of their Scheme.

19. Purushottam Mareshwar Vartak & Anr, the Appellants in the connected appeal is the 1st Objector, who represent the employees of

'Ratnagiri Gas and Power Private Limited'. According to the 1st Objector, the lands of 158 employees were taken over for construction of the factory. In a Writ Petition- WP 2735 of 1994, a Division Bench of the Bombay High Court, by its order dated 27th July, 1994 had ordered, and the Company agreed that one member from each family would be given employment. In another Writ Petition- WP 4625 of 1998, similar order was passed on 7th September, 1998, which have reached finality. Therefore, according to 1st Objector, until retirement as per Rules all the 158 workmen have a right to continue. In case any of the Company terminates employment of any such workmen, in such case their respective lands must be given back to them.

20. 1st Objector has claimed that all the 158 Workmen are permanent employees of Ratnagiri Gas and Power Private Limited. However, in absence of any such record, we are not making any observation in this appeal. It appears that the Maharashtra Industrial Court by an order dated 7th January, 2017 in Complaint (ULP) 321 of 2002 held that the services of the workmen were never terminated; the establishment was never closed; the workmen are the successor-in-interest of the 'Dabhol Power Company' and that the workmen are the permanent employees of the Ratnagiri Gas and Power Private Limited. If that be so, they may continue with their status, if taken over in one or the other company.

21. Even if aforesaid submission is accepted, it is always open to the employers to pass appropriate order of termination of one or other

workmen, following the procedure of law. For example, in a disciplinary proceeding, if misconduct is proved against one or other workmen or employees, it is always open to the employer to terminate the service and in such case question of return of land does not arise.

22. In view of aforesaid discussion during the course of hearing, learned counsel appearing on behalf of the workmen (Objectors), suggested to modify the part of the Scheme protecting the rights of employees and workmen, who have been granted reliefs by Court's order. On the suggestion of the parties, a draft note of part amendment of the Scheme was handed over to the parties, and on the basis of such draft amendment, learned Senior Counsel appearing on behalf of the 1st Objector (Appellants)- Purshottam Mareshwar Vartak & Anr. presented two alternative drafts to protect the interest of the workmen, as quoted below:

*“Without Prejudice
Courts Note*

1. *The employees represented by Objector No.1 will be accommodated either in Konkan LNG Pvt. Ltd. or Ratnagiri Gas & Power Pvt. Ltd. In case of closure, declaration of sick or initiation of Insolvency Resolution Professional of any of the aforesaid two companies, the employees will be accommodated in the other existing company, if so necessary be retrenching those employees who are engaged on contract through other contractors. That means the*

employees will have priority of adjustment in the other company which continues to function.

2. *For example, if after transfer of some of the workmen, represented by the Objector No.1, if taken to Ratnagiri Gas & Power Pvt. Ltd. pursuant to the demerger scheme and there is a closure, or lay off, initiation of insolvency corporate process and inability to provide work except where workman to be removed after disciplinary proceedings or on attaining age of superannuation such employees should be accommodated in Konkan LNG Pvt. Ltd. and if so necessary by retrenching the other workmen engaged through contractors.*

[OR]

3. *In other words, if for any reason one or other workmen of Ratnagiri Gas & Power Pvt. Ltd. if thrown out of the service or retrenched on any ground, except disciplinary proceedings or superannuation, such employee will be accommodated in Konkan LNG Pvt. Ltd. by retrenching the workmen of same status, working through contractors”*

23. Learned counsel appearing on behalf of the Appellant Companies have objection with regard to the example as cited above. According to Appellant Companies, no example can be a part of a Scheme. The Scheme cannot show ‘for example’ in the Scheme as mentioned in Para nos. 2 & 3 of the draft, handed over by learned Senior Counsel for the workmen/employees and quoted above. The Appellant Companies,

without prejudice has submitted a draft amendment of Scheme in regard to the workmen, which reads as follows:

“Changes proposed by Ratnagiri Gas and Power Private Limited on the draft suggested by Hon’ble NCLAT on 23.11.2017

Subject to the outcome of proceedings arising out of Writ Petition No. 3892/2017, the 158 employees represented by Objector No.1, in whose favour an award or order has been passed by the Industrial Tribunal, Kolhapur shall be accommodated in the Konkan LNG Private Limited or Ratnagiri Gas and Power Private Limited, as may be decided by the Board of Directors of Ratnagiri Gas and Power Private Limited. In case of lay-off due to closure, declaration of sickness, or initiation of insolvency resolution process against, either of the companies, aforesaid employees shall be accommodated in either of the existing company, if so necessary by retrenching those employees who are engaged on contract basis through a contractor and not having any order in their favour from any Tribunal or court of law. That means, the 158 employees represented by Objector no.1 will have priority of adjustment in the other company which continues to function normally, over the contract employees in whose favour there is no order or award passed by any Tribunal or court of law.

The aforesaid arrangement shall be subject to the order, as may be, passed by the Hon'ble high Court or Hon'ble Supreme Court, in the cases pending before such court of law. The 158 persons will be governed by the requirements and conditions of service as stipulated in the Rules, Regulation, Instructions, Guidelines or Statute of the company in which they will be accommodated.

This means, the 158 employees represented by Objector No.1 in whose favour an award has been passed by the said Industrial Tribunal will have priority of adjustment over those who do not have such order in their favour from any court of law or tribunal, in the demerged company or the resultant company, subject to the condition as referred to above. Nothing contained in the aforesaid paragraphs shall affect or prejudice the rights and contentions of the parties in any pending judicial proceedings.

24. As the suggestions made by the Appellant Companies, with regard to the 158 workmen/employees represented by the 1st Objector-Purshottam Mareshwar Vartak take care of all such employees represented by 1st Objector, in whose favour an award or order has been passed by the Court(s) of competent jurisdiction, we approve the draft suggested by the Appellant Companies as quoted at Paragraph 23 above, for incorporating it as part of the Scheme at an appropriate place, in place of the proposed Scheme with a view to safeguard the interest and rights of 158 workmen/employees of Ratnagiri Gas and Power Private Limited.

25. For the reasons aforesaid, while we set aside the impugned order dated 16th August, 2017 passed by the Tribunal, Principal Bench, New Delhi in Company Petition No. 07 (ND)/2017, approve the Scheme with modification as noticed and quoted above and the Long Stop Date stands extended up to 31st March, 2018. It will come into effect from the date as mentioned in the Scheme and shall be given effect from the date of its notification as required to be issued under the law. The Scheme of Demerger stands approved with modification as quoted above. Both the appeals are allowed with aforesaid observations. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

NEW DELHI
28th February, 2018

AR