

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No. 416 of 2017

(Arising out of Order dated 8th December, 2017 passed by the National Company Law Tribunal, New Delhi Bench, New Delhi in CA (CAA)-105(ND)/2017]

IN THE MATTER OF:

R. Systems International Limited

...Appellant

Present: For Appellant:- Mr. Arun Kathpalia, Senior Advocate assisted by Mr. Rajeev Kumar and Mr. Mahesh Agarwal, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant filed an application under Section 230 of the Companies Act, 2013 read with Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016 before the National Company Law Tribunal (hereinafter referred to as "Tribunal"), New Delhi Bench, New Delhi, in relation to the Scheme of Arrangement which contemplates reduction of Share Capital in relation to the Appellant Company enclosed as Annexure "A" to the application.

2. The Tribunal by impugned order dated 8th December, 2017, rejected the application being not maintainable, relevant portion of which is quoted below:

“3. It is pertinent to note that Reduction of Capital and sanction relating to the same has been prescribed separately elsewhere in Companies Act, 2013 and for the said purpose separate rules have also been framed by the Central Government. Thus reduction of capital requires separate set of procedure to be complied for which specific rules have been framed and hence cannot be brought within the confines of Section 230 of the Companies Act, which is more for restructuring business. At the cost of repetition where a separate section deals in relation to the scheme contemplated by the applicant company and which also contains specific rules to be complied with it will be appropriate for the applicants to file the application under the

relevant provision and not under the one presently under which, the application has been preferred.

4. *Hence, the Tribunal is constrained to dismiss the application as provisions for exclusive reduction of share capital is provided elsewhere in Companies Act, 2013 and the applicant, if so advised may prefer under the said provision of the Act of 2013.*

This application is accordingly dismissed.

No order as to costs.”

3. Section 391 of the Companies Act, 1956 related to “*Power to Compromise or make Arrangements with Creditors and Members*”. The Hon’ble High Court was empowered on an application of the Company or any creditor or member of the Company or in case of a company which is being wound up, of the liquidator, to pass order of meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, in such manner as the Hon’ble High Court directs.

4. The Companies Act, 1956 has been repealed by the Companies Act, 2013 and power to ‘compromise or make arrangements’ with creditors and members is now prescribed under Section 230 of the Companies Act, 2013, relevant of 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 subsection, 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 Investigation, etc., of foreign companies. Penalty for furnishing false statement, mutilation, destruction of documents. Power to compromise or make arrangements with creditors and members

(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.

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(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.”

5. Section 66 of the Companies Act, 2013 deals with “Reduction of share capital”, relevant portion of which reads as follows:

“66. Reduction of share capital.— (1) *Subject to confirmation by the Tribunal on an application by the company, a company limited by shares or limited by guarantee and having a share capital may, by a special resolution, reduce the share capital in any manner and in particular, may—*

(a) extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up; or

(b) either with or without extinguishing or reducing liability on any of its shares,—

(i) cancel any paid-up share capital which is lost or is unrepresented by available assets; or

(ii) pay off any paid-up share capital which is in excess of the wants of the company, alter its memorandum by

reducing the amount of its share capital and of its shares accordingly: Provided that no such reduction shall be made if the company is in arrears in the repayment of any deposits accepted by it, either before or after the commencement of this Act, or the interest payable thereon.

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(3) The Tribunal may, if it is satisfied that the debt or claim of every creditor of the company has been discharged or determined or has been secured or his consent is obtained, make an order confirming the reduction of share capital on such terms and conditions as it deems fit:

Provided that no application for reduction of share capital shall be sanctioned by the Tribunal unless the accounting treatment, proposed by the company for such reduction is in conformity with the accounting standards specified in section 133 or any other provision of this Act and a certificate to that effect by the company's auditor has been filed with the Tribunal."

6. From the impugned order dated 8th December, 2017, it appears that the Tribunal referred to Section 66, being the specific provision for rejecting the application under Section 230 as the Scheme and Arrangement related to reduction of share capital.

7. From *explanation* below Section 230, it will be evident that for passing an order under Section 230 to compromise or make arrangements with the creditors and the members, the provision of Section 66 shall not apply for reduction of share capital. Such order can be passed by the Tribunal under Section 230 of the Act.

8. In view of the aforesaid provisions, we hold that the Tribunal failed to notice the '*Explanation*' below Section 230, which makes it clear that even for reduction of share capital effected in pursuance of the order of the Tribunal under Section 230, the provision of Section 66 shall not apply.

9. As noticed above, earlier the Hon'ble High Courts used to entertain application(s) under Section 391 for reduction of share capital. This will be evident from the decision of the Hon'ble Bombay High Court in "***Investment Corporation of India Ltd.— (1987) 61 Com Cases 92 Bom***"; Hon'ble High Court of Gujrat in "***Gujarat Ambuja Exports Ltd.—2003-(CC1)-GJX-0113-GUJ***"; Hon'ble High Court of Madras in "***Panasonic Appliances India Co. Limited***" in Company Petition No. 331 of 2013 and the Hon'ble High Court of Andhra Pradesh decision in

“M/s. Jyoti Inraventures Limited– Company Petition No. 263 of 2013” decided on 21st April, 2014.

10. Now it is not necessary to refer the earlier decisions in view of the ‘*explanation*’ below Section 230. Having held that the Tribunal failed to notice the aforesaid observations, we have no other option but to set aside the order dated 8th December, 2017 passed in CA (CAA)-105(ND)/2017 which is accordingly set aside. The case is remitted to the Tribunal to decide the application under Section 230 in accordance with law after notice and hearing the parties.

11. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

NEW DELHI

16th July, 2018

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