NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

COMPANY APPEAL (AT) No.365 of 2019

(Arising out of order dated 10th December, 2019 passed by the National Company Law Tribunal, Bench II, Mumbai in Company Petition No.447 of 2018)

In the matter of:

Jayshree Damani
6A Shanaz, 90,
Napeansea Road,
Mumbai 400006 Appellant No.1

Yashita Damani
Minor through her mother,
Mrs Jayshree Damani
6A Shanaz, 90, Napeansea Road,
Mumbai 400006 Appellant No.2.

Vs

Atlas Copco (India) Ltd
Sevanagar,
Dapodi,
Pune, Maharashtra 411012 **Respondent**

Mr Abhijeet Sinha, Mr Mahesh Agarwal, Mr. Mantul Bajpai, Mr. Divyanshu Chandiramani, MR Saikat Sarkar, Advocates for appellant.
Mr. A.S. Chandiok, Sr. Advocate, Mr. Hemant Sethi, Mr. Gaurav Sethi, Ms Shweta, Ms Neelam Deol, Ms Shruti Sharma, Advocates for Respondent.

And

COMPANY APPEAL (AT) No.366 of 2019

In the matter of:

Janak Mathuradas **Appellant**
187, Lohar Chawl, Manhar Building,
2nd Floor, Mumbai 400002 **Appellant**

Vs

Atlas Copco (India) Ltd
Sevanagar,
Dapodi,
Pune, Maharashtra 411012 **Respondent**

Mr Sudipto Sarkar, Sr. Advocate, Mr Mahesh Agarwal, Mr. Mantul Bajpai, Mr. Divyanshu Chandiramani, Advocates for appellant.
Mr. A.S. Chandiok, SR. Advocate, Mr. Hemant Sethi, Mr. Gaurav Sethi, Ms Shweta, Ms Neelam Deol, Ms Shruti Sharma, Advocates for Respondent.

and

COMPANY APPEAL (AT) NO.24 OF 2020

In the matter of:

Sanjay Asher,
32, Mody Street,
Fort, Mumbai 400001 Appellant

Vs

Atlas Copco (India) Ltd
Sevanagar,
Dapodi,
Pune, Maharashtra Respondents

Mr Shikhil Suri, Mr Shiv Kr Suri, Ms Nikita Thapar, Vinati Bhola and Ms Shilpa Jaini, Advocates for appellant.
Mr. Hemant Sethi, Mr. Gaurav Sethi, Advocates for Respondent.

And
COMPANY APPEAL (AT) No.27 of 2020

In the matter of:

Arun Kejriwal
302, Bharat Apartments,
Gandhigram Road,
Near ISCKON Temple,
Juhu, Mumbai
Maharashtra 400049 **Appellant**

Vs

Atlas Copco (India) Ltd
Sevanagar,
Dapodi,
Pune, Maharashtra 411012 **Respondent**

Mr Amit Singh Chadha, Sr. Advocate with Mr. Pranjit Bhattacharya, Advocates for appellant.
Mr. Hemant Sethi, Mr. Gaurav Sethi, Advocates for Respondent.

And
COMPANY APPEAL (AT) No.28 of 2020

In the matter of:

Sudhir Haribhai Patel
C/4 Mehta Estate,
262 Thakurdwar Road,
Mumbai 400002 **Appellant**

Vs

Atlas Copco (India) Ltd
Sevanagar,
Dapodi,
Pune, Maharashtra 411012 **Respondent**

Mr Abhijit Sinha, with Mr. Pranjit Bhattacharya, Mr Saikat Sarkar, Advocates for appellant.
Mr. Hemant Sethi, Mr. Gaurav Sethi, Advocates for Respondent.

and
COMPANY APPEAL (AT) No.29 of 2020

In the matter of:

Deep Janak
187, Lohar Chawl, Manhar Building,
Gandhigram Road,
Near ISCKON Temple,
2nd Floor, Mumbai 400002 **Appellant**

Vs

Atlas Copco (India) Ltd
Sevanagar,
Dapodi,
Pune, Maharashtra 411012 **Respondent**

Mr. Pranjit Bhattacharya, Advocate for appellant.
Mr. Hemant Sethi, Mr. Gaurav Sethi, Advocates for Respondent.

And
COMPANY APPEAL (AT) No.30 of 2020

In the matter of:

Jawahir Jagatsinh Merchant, Adult,
Sheel Chambers, 2nd floor,
10 Cawasji Patel Street,
Fort, Mumbai 400001 **Appellant**

Vs

Atlas Copco (India) Ltd
Sevanagar,
Dapodi,
Pune, Maharashtra 411012 **Respondent**

Mr Sudipto Sarkar, Sr. Advocate, Mr. Pranjit Bhattacharya, Advocates for appellant.
Mr. Hemant Sethi, Mr. Gaurav Sethi, Advocates for Respondent.

JUDGEMENT
(3rd June, 2020)

MR. BALVINDER SINGH, MEMBER (TECHNICAL)

The present seven appeals have been preferred by the appellants under Section 421 of the Companies Act, 2013 against the order dated 10th December, 2019 passed by the National Company Law Tribunal, Bench II, Mumbai in Company Petition No.4475 of 2018.

2. The brief facts of the case are that the Respondent company is a company incorporated under the provisions of the Companies Act, 1956 carrying the business of manufacturing and selling industrial gas and air compressors, vacuum solutions, industrial tools and solutions, mobile airs, tools, power pumps and light towers. The issued, subscribed and paid up share capital of the Respondent company before filing the Company Petition before the NCLT was Rs.22,56,15,640/- comprising of 22561564 equity shares of Rs.10/- each. 96.32% shares of the company were held by the holding company viz Atlas Copco AB and the remaining 3.68% shares were held by public shareholders and group companies of the Respondent

Company. The shares of the Respondent company were listed on BSE and Pune Stock Exchange. In May, 2011 the equity shares of the Respondent company were delisted from the Bombay and Pune Stock Exchange.

3. Respondent company issued a notice dated 18.9.2018 to its shareholders convening an EOGM on 25.10.2018 to consider a special resolution approving reduction of the paid up equity share capital held by the public shareholders and extinguishing their entire shareholding in the Respondent company. The special resolution was passed on 25th October, 2018 by the shareholders whereby the shareholding of the company would get reduced from 22,561,564 fully paid up shares of Rs.10/- each to 2,17,31,951 fully paid up shares of Rs.10/- each.

4. In the EOGM held on 25th October, 2018 all except 37 shareholders representing 34,476 equity shares (the objecting shareholders) i.e representing about 0.15% of the total equity Shares have voted for approving the proposed reduction of the Respondent Company. After getting approval from the shareholders the Respondent Company filed Company Petition No.4475/2018 before the NCLT Mumbai for getting its approval under Section 66 of the Companies Act, 2013 and the Rules framed thereunder and Reduction of Equity Share capital of Respondent Company.

5. Before the NCLT, Mumbai, out of 37 shareholders, only 4 shareholders namely (1) Mr.Janak Mathuradas, (2)Mr. Arun Kejriwal, (3)Mr. Monish Bhandari and (4) Oswal Trading Co Pvt ltd filed an objection to the proposed reduction before the NCLT, Mumbai. The Respondent company gave price of Rs.2100/-per share, offering the objectors to exit. The Respondent company had obtained a fair equity value of Rs.1854 per share given my M/s BSR &

Associates LLP, after utilizinag different valuation methods. The company added premium of Rs.246/- per share to the fair value of each share thereby improving the value to Rs.2100/- per share. The appellant had mentioned that the price offered per share is on the lower side and also station that it is against the spirit of Section 66 of the Companies Act. 46 other shareholders of the Respondent Company also filed objections supporting the objections raised by Mr. Janak Mathuradas against the proposed reduction stating that the reduction is unfair. Their main objection was that the proposed reduction is unfair.

6. The Respondent Company stated that the objections of appellants no longer survive as the Respondent company has given an undertaking that the appellants can continue as a shareholder.

7. After hearing the parties the NCLT, Mumbai passed the following order:

"Application for the reduction of share capital allowed subject to the directions given hereinabove. All concerned regulatory authorities to act on production of certified copy of this order."

8. Being aggrieved by the said impugned order the appellants have preferred the present appeal by challenging the impugned order.

Company Appeal (AT) No.365 of 2019

9. The appellants stated that the appellant No.1 and appellant No2 hold 3703 and 1761 equity shares of the Respondent company. Appellants stated that the Company issued a notice dated 18.9.2018 to its shareholders convening an EOGM on 25th October, 2018 to consider a special resolution in reduction of capital of the company and that such reduction be effected by cancelling and extinguishing 3.68% of the total issued, subscribed and paid

up equity shares capital of the company (Non-Promoter shares which are held by the public shareholders. Appellants stated that on perusal of the explanatory statement under Section 102 of the Act, there was no option available to any minority or public shareholder to exercise the option of remaining a shareholder. Appellants stated that in other words the resolution proposed and the explanatory statement of reduction of share capital was mandatory for all minority or public shareholders. Appellants stated that they were opposed to their shareholding being compulsorily extinguished as also to the value of Rs.2100/- per equity share. Appellants stated that they hold only 5464 equity shares and the 96.32% of the total share capital is held by the Respondent company, they realised that the appellants will be outvoted despite genuine concerns regarding reduction and extinguishment and value offered to each shareholder. Therefore, the appellants did not attend the EGOM held on 25th October, 2018. Appellants stated that the Meeting was held and several minority or public shareholders voiced their concern against the capital reduction and voted against the resolution. Appellants stated that the Resolution was passed and the Respondent filed company petition for approval before the NCLT, Mumbai. Appellants further stated that they came to know that one Mr. Janak Mathuradas filed objections to the Company Petition before the NCLT, Mumbai, therefore, the appellants by duly sworn affidavits 11th October, 2019 duly supported that objections filed by Mr. Janak Mathuradas. Appellants stated that the Company has stated that the Respondent shall unconditionally permit such minority or public shareholders who had attended the EGM and voted against the resolution to remain shareholders of the company but since the appellants had voted in

favour of the resolution, they were precluded from objecting the Company Petition before the NCLT and the option to remain shareholders shall not be extended to them. Appellants stated that they filed Misc Application No.3869 of 2019 and 3911 of 2019 before the NCLT Mumbai pointing out that the Appellants did not attend the EGM and hence the question of voting in favour of the Resolution did not arise.

10. Reply on behalf of the Respondents have been filed. The Respondent stated that the appellants through the electronic voting facility made available by the Respondent to its shareholders prior to EGM, voted in favour of the resolution approving the said reduction. Respondent further stated that Mr. Sanjay Damani, husband of appellant No.1 and father of appellant No.2, attended the EGM held on 25th October, 2019 and recorded his presence at the EGM by signing the attendance slip. Respondent has stated that the certificate issued by Scrutinizer and the attendance slip is placed herewith. Respondent stated that the appellants and their family members substantially increased their shareholding in the Respondent company after fully knowing the Resolution passed in the EOGM on 25th October, 2018. Respondent stated that the appellants and his family members had acquired/purchased more than 7000 shares approx. post 25.10.2018. Respondent statd that the appellant has not disclosed at which price they have purchased these 7000 shares. Respondent stated that Sanjay Damani is a professional stock broker and is selling the Respondents shares on his own website at a price of INR 2125 per share while at the same time alleging that the Respondent's offer price of INR 2100 is grossly undervalued. Respondent submitted that the appellants have themselves admitted themselves decided to object the said

reduction only on 11.10.2019, almost a year after the resolution. Respondent stated that Mr. Janak Mathuradas sent **email** dated 7th October, 2019 to appellants and other public shareholders to support his objections before the NCLT, Mumbai. Respondent stated the appellants are falsely alleging that the Respondent has modified the resolution passed in EGM by an undertaking in the affidavit 8th November, 2019 filed by Respondent. Respondent stated that the said undertaking was filed at the directions of the NCLT Mumbai and there has been no modification of the Resolution. Respondent further stated that who want to participate in the said reduction and have not appealed against the impugned order, they are approaching the Company for release of payment but the Respondent company is unable to release in view of the stay on the implementation of impugned order. Respondent further state that the Respondent is also facing financial losses and the company has transferred the consideration amount to a separate non-interest being bank account as of date. Respondent stated that they have already filed certified copy of the impugned order with ROC and a certificate confirming registration of the impugned order has also been issued by ROC Pune on 27.12.2019.

12. In Rejoinder filed by the appellant, appellant stated that the respondent has no answer to the ground raised that had the option of retaining shares been part of the Explanatory Statement to the notice convening the EGM, the minority shareholders would have voted differently. Appellant further stated that the respondent has not disputed the fact that the actual undertaking dated 8th November, 2019 was substantially and materially different from the undertaking expressed by the respondent before NCLT. Appellant stated that the resolution can be modified only by the shareholders after taking a

conscious decision taking into consideration all the relevant and important aspects of the resolution affecting their rights. Appellant stated that a special resolution cannot be amended without giving sufficient notice to all the shareholders for the amendment. Appellant stated that there is no power granted to NCLT or Board of Directors to modify/amend the resolution. Appellant stated that at the time of passing of the resolution the shareholders did not have any information regarding the future modification which the Respondent will propose, the modification can not take place. Appellant stated that the alleged certificate issued by the Scrutinizer is incorrect. Appellant stated that the appellants herein have not voted in favour of the resolution by electronic voting or any other means. Appellant stated that this certificate has been made on the request of the Respondent. Appellant stated that had the appellants known that voting against the resolution would entitle them to retain the shares, the appellants would have voted against the resolution.

Company Appeal (AT) No.366 of 2019

13. The appellant stated that he holds 1372 equity shares since its incorporation. Appellant stated that the Company issued a notice dated 18.9.2018 to its shareholders convening an EOGM on 25th October, 2018 to consider a special resolution in reduction of capital of the company and that such reduction be effected by cancelling and extinguishing 3.68% of the total issued, subscribed and paid up equity shares capital of the company (Non-Promoter shares which are held by the public shareholders. Appellant stated that on perusal of the explanatory statement under Section 102 of the Act, there was no option available to any minority or public shareholder to exercise

the option of remaining a shareholder. Appellant stated that in other words the resolution proposed and the explanatory statement of reduction of share capital was mandatory for all minority or public shareholders. Appellant stated that he attended the EGOM held on 25th October, 2018. Appellant stated that the Meeting was held and several minority or public shareholders voiced their concern against the capital reduction and voted against the resolution. Appellant stated that he voted against the resolution. Appellant stated that the Resolution was passed and the Respondent filed company petition for approval before the NCLT, Mumbai. Appellant stated that during the EGM the appellant requested for copies of the valuation report as well as the Fairness Opinion procured by Respondent in support of the valuation of Rs.1854/- per equity share sought to be assigned to the equity shares of the Respondent. Appellants stated that the Respondent required the appellant to sign a 'confidentiality and hold harmless letter' before providing the documents on the ground that the said documents were confidential in nature. Appellant stated that he filed objections to the Company Petition filed by Respondent under Section 66 of the Act for sanction of resolution for capital reduction passed at the EOGM. Appellant stated that the valuation issued by the BSR & Associates LLP dated 14.9.2018. The date for valuation is taken as 31st March, 2018 which is much prior to the date of valuation report. Appellant stated that prior to valuation i.e. in November, 2017 the mining and excavation business of the Respondent was hived off to another company namely Epiroc Mining India Ltd. Appellant stated that the Scheme as confirmed is unfair and inequitable and in any case does not provide for a fair value for the share capital which is sought to be reduced by confirmation

of the Scheme. Appellant stated that the Scheme was confirmed in respect of 8,29,613 issued subscribed and fully paid up equity shares of Rs.10/- each held by the non-promoter public shareholders of the Respondent Company but at the time hearing of the petition it was suggested that the shares of dissenting shareholders that were opposed to the Scheme would not be the subject matter of reduction, yet the minutes which form part of the impugned order refers to the entirety of the share capital held by the minority shareholders of the Respondent and the words "not exceeding" have been added. Appellant stated that when a resolution is passed by the shareholders it can only be modified by the shareholders in a legally convened general meeting. Appellant stated that the Respondent company cannot by way of an affidavit filed in Court seek to modify the resolution. Appellant stated that the Respondent's suggestion that any modification to the Resolution was suggested by the Tribunal is incorrect. The modification was sought by the Respondent company. The changes that were proposed by the Company to resolution are factual in nature. Appellant stated that the company under the garb of modification by the Tribunal itself purported to modify the Resolution for the benefit and interest of its promoters. Appellant stated that the Tribunal is vested with the responsibility of protecting the minority shareholders from oppression of majority promoter shareholders in the matters of reduction of share capital. Appellant stated that as per Section 188 of the Act only the meeting of the affected parties i.e. the non promoter minority shareholders should have been conducted and the special resolution for reduction of share capital should have been put to vote. Appellant stated that an option to remain with the Company was never disclosed to its

shareholders before the EGM. Appellant stated that valuation report issued by Valuer is admitted based only on the information provided by the Compan and valuer has admittedly not even independently verified or checked the accuracy or timelines of the same. The valuer has not done necessary due diligence. Appellant stated that the business plan, assumptions and otaher information relied in the valuation report are not even placed before NCLT so as to enable it to verify the reasonableness of the assumptions. Appellant stated that the valuer has even ignored the anticipated enhanced revenues and operational efficiency which the Company expects to derive. Appellant stated that due to the amendment in 2019 to Income Tax Act 1961 corporate tax rates have been reduced, however, the valuation proceeds on the basis of old rates. The fair market value of shares of the company needs to be determined after taking into account the provisions for taxation applicable as on date. Appellant has stated that the appellant had the shares independently valued at Rs.3627/- per share as against the valuation of Rs.1854/-

14. In reply on behalf of the Respondents, the Respondent stated that the appellant hold 885 shares of the Respondent company and is attempting to override the collective wisdom and decision taken by the NCLT and 99.84% of the shareholders as well as the majority of the non-promoter. Respondent stated that the appellant has admitted that the appellant can choose not to participate in the said reduction and continue to retain his shares in the Respondent as per the impugned order and Respondent's letter dated 13th December, 2019 if he feels that the said reduction is unfair or prejudicial to his interest. Respondent stated that the appellant did not even intimate the Respondent regarding the filing of the said appeal and a copy of the said

appeal was only delivered to Respondent on 26.12.2019 and obtained ex parte stay on 20th December, 2019 from the Hon'ble Appellate Tribunal. Respondent further stated that there has been no modification of the resolution at the EOG and the acceptance of the undertaking by the Tribunal is just one of the terms and conditions subject to which Hon'ble Tribunal has approved the said reduction in accordance with Section 66(3) of the Act. Respondent further stated that who want to participate in the said reduction and have not appealed against the impugned order, they are approaching the Company for release of payment but the Respondent company is unable to release in view of the stay on the implementation of impugned order. Respondent further stated that the Respondent is also facing financial losses and the company has transferred the consideration amount to a separate non-interest being bank account as of date. Respondent stated that they have already filed certified copy of the impugned order with ROC and a certificate confirming registration of the impugned order has also been issued by ROC Pune on 27.12.2019. Respondent stated that the appellant is well known for and has extensive history of objecting to all capital reduction schemes undertaken by companies in which he is a shareholder. Respondent stated that the appellant follows a set pattern of placing a frivolous and biased valuation report before the Courts to cast doubts and aspersions on the valuation exercise conducted by company and then raises the same frivolous and baseless allegations to challenge the legality of the capital reduction process despite being well aware of judicial precedents to the contrary. Respondent stated that the appellant sent an email to other shareholders, after obtaining Register of Members of the Respondent from ROC, requesting

them to support his objections before NCLT Mumbai. Respondent stated that Section 66 does not distinguish between promoter and public shareholding or require a separate meeting of any class of shareholders to be convened as sought by the appellants. Respondent stated that once a notice has been duly served on the parties and they choose not to attend or vote at the meeting it must be presumed that they have no objection the scheme and have given their implied consent thereto. Respondent stated that they have received various requests and email from public shareholders requesting for an exist. Respondent stated that the NCLT has been vested with wide substantive powers under Section 66(3) of the Act whereby it can make an order approving reduction of share capital on such terms and conditions as it may deem fit. Respondent stated that this power has been reiterated under Rule 6 of the Reduction Rules and also finds mention in Form RSC-6 thereby fortifying he fact that the NCLT's powers are wide and substantive. Respondent stated that vide Board Resolution dated 18th September, 2018, the company secretary was granted authority to furnish undertaking affidavit as directed by NCLT, Mumbai. Respondent stated that the mining and rock excavation equipment business was demerged into Epiroc Mining India Ltd in November, 2017 and the shareholders were issued shares at a 1:1 ratio of Epiroc as part of the demerger.

15. Rejoinder has been filed by the appellant. Appellant stated that the respondent has no answer to the ground raised that had the option of retaining shares been part of the Explanatory Statement to the notice convening the EGM, the minority shareholders would have voted differently. Appellant further stated that the respondent has not disputed the fact that

the actual undertaking dated 8th November, 2019 was substantially and materially different from the undertaking expressed by the respondent before NCLT. Appellant stated that the resolution can be modified only by the shareholders after taking a conscious decision taking into consideration all the relevant and important aspects of the resolution affecting their rights. Appellant stated that a special resolution cannot be amended without giving sufficient notice to all the shareholders for the amendment. Appellant stated that there is no power granted to NCLT or Board of Directors to modify/amend the resolution. Appellant stated that at the time of passing of the resolution the shareholders did not have any information regarding the future modification which the Respondent will propose, the modification can not take place. Appellant further stated that it is wrong that the appellant is attempting to override the collective wisdom of the decision of 99.84% of the shareholders. Appellant stated that majority of the shareholding of the Respondent company are held by Atlas Copco AB, who has voted in favour of the resolution. Appellant stated that the challenge before this Appellate Tribunal is on the patent incorrectness and manifest unfairness in the valuation arrived by the valuer at the instance of Respondent company. Appellant stated that it is wrong that the valuation report put up by him is frivolous or biased.

16. In all other five appeals namely Company Appeal (AT) No.24, 27, 28, 29 and 30 of 2020 the facts, grounds, prayer are similar as are in Company Appeal (AT) No.366 of 2019. The only difference is that in one appeal the appellant acquired/shares after the resolution was passed; in another appeal the appellant did not attend the meeting to cast their votes; in another appeal

the appellant voted against the resolution for some shares and for some shares the appellant did not vote and in other case the appellant cast invalid votes. But the relief sought in these appeals are similar as sought in the earlier appeal. The following reliefs have been sought in the present appeals:-

a) Hon'ble Tribunal be pleased to quash and set aside the impugned order dated 10th December, 2019 and be further pleased to reject the petition for capital reduction of Respondent.

b) Hon'ble Tribunal be pleased to appoint an independent valuer to value the shares of the Respondent for the purpose of the selective capital reduction and after consideration of the report of such independent valuer, this Hon'ble Tribunal be further pleased to pass such orders as this Hon'ble Tribunal deems fit.

c) That without prejudice to prayer (a) above and in the alternative to prayer clause (b), this Hon'ble Tribunal be pleased to direct the Respondent to extend the option to continue as shareholders to all minority or public shareholders including the appellants.

d) Pending the hearing and final disposal of the appeal, the effect, implementation and operation of the impugned order dated 10th December, 2019 be stayed;

e) Ad-interim reliefs; costs; etc.

17. We have heard the learned counsel for the parties and perused the record.

18. Before we proceed further we want to place undisputed facts. It is correct that the Respondent company was a listed company and later on the

equity shares of the Respondent Company were delisted from BSE Ltd and Pune Stock Exchange in May, 2011. Post the delisting, the investment made by the non-promoter public shareholders of the Respondent Company are locked and these shareholders do not have an opportunity to liquidate their shareholding or realize their investment easily in the Respondent company. Various non-promoter public shareholders approached Respondent Company to provide them an exit route. Considering the request, the Respondent Company convened a EOG Meeting on 25th October, 2018 wherein the shareholders of the company had approved the reduction in the issued, subscribed and paid-up equity shares capital of the Respondent Company by cancelling and extinguishing the 3.68% equity shares held by non-promoter in the Company.

19. In the EOGM, all except 37 shareholders representing 34,476 equity shares have voted for approving the proposed reduction by the Respondent Company. Out of the 37 objecting shareholders only 4 shareholders namely Mr Janak Mathuradas, Mr Arun Kejriwal, Mr Monish Bhandari and Oswal Trading Co Pvt filed objection to the proposed reduction before the NCLT Mumbai. Out of these 4, only Mr Janak Mathurdas filed Company Appeal challenging the order of NCLT, Mumbai.

20. Other 6, namely Mr. Arun Kejriwal, Mr Jayshree Damani & Ors, Mr Sanjay Asher, Mr Jawahr Jagatsinh Merchant, Mr Deep Janak, Mr Sudhir Haribhai Patel have also filed Company Appeal challenging the order of the NCLT.

21. Learned counsel for the appellants in Company Appeal (AT) No.365/2019 has argued that the appellants did not attend the EOGM dated

25th October, 2018 for reduction of share capital and did not voted in favour of Resolution. Learned counsel for the appellants further argued that they vide email dated 25th November, 2019 and reminder dated 27th November, 2019 called upon the Respondent to provide evidence in this regard but Respondent company neglected to provide any such details.

22. Learned counsel for the Respondent argued that the report submitted by Mr. Shalesh Indapurkar & Associates, Company Secretaries, who was appointed to scrutinize the e-voting process and ballot process in relation to the propose capital reduction has submitted his report which states that e-voting period commenced from 20th October, 2018 (9 AM) till 24th October, 2018 (5PM) and the shareholders who have voted in favour of the proposed capital reduction considered and approved at the EGM includes the name of Mrs Jayshree Sanjay Damani holding 1892 shares and Ms Yashita Sanjay Damani 261 shares at the time. Learned counsel for the Respondent also argued and shown attendance slip duly signed by Sanjay Damani who attended the meeting on behalf of Yashita Damani.

23. We have considered the submission of the parties on this issue and perused Annexure 1 and Annexure-2 at Pages 11 to 13 of Counter affidavit filed by Respondent. We note that attendance slip has been duly signed by Sanjay Damani who attended Meeting on behalf of his daughter Yashita Damani. In this attendance slip it is clearly mentioned No of shares held is 261. We also perused letter dated 3rd December, 2019 issued by Scrutinizer. The said letter clearly states that Mrs Jayshree Sanjay Damani holding 1892 shares and Ms Yashita Sanjay Damani holding 261 shares voted in favour of the proposed capital reduction through e-voting. Therefore, we are satisfied

that the meeting was attended and voting was done through evoting in favour of the resolution by the appellants.

24. Learned counsel for the appellant in Company Appeal (AT) No.28 of 2020 argued that he is holding 500 shares in demat form and did not attend the EGM held on 25th October,2018 for consideration of the proposed resolution for reduction of share capital.

25. Learned counsel for the Respondent argued that the appellants admittedly acquired/purchases share only in May,2019 i.e. after 7 months after EGM and he was fully aware of the reduction. Learned counsel for the Respondent argued that when the appellants were not holding any share as on 25th October, 2018 how he can attend the Meeting.

26. We have considered the submissions of the parties. We have gone through at para 7(vii) of the Appeal filed by the appellants wherein it is stated *"It is solely due to this reason that the appellant did not attend the EGM held on 25th October, 2018 for consideration of the proposed resolution for reduction of share capital."* We have also perused Page No.343 of Company Appeal (AT) No.366 of 2019 wherein the status of shareholders who have filed an affidavit in support is given which is part of NCLT. We are satisfied that the argument of appellant has no force as he purchased/acquired the shares in May 2019 knowing fully well that the reduction in shareholding has been approved in the EOGM on 25th October, 2018.

27. Similarly we have perused the record in the other company appeals also and we noticed that in Company Appeal (AT) No.366/2019, the appellant has 885 shares held at the EGM and voted against for all shares. In Company Appeal (AT) No.24/2020, the appellants have 18434 shares at the time of EGM

and he voted against for 17858 shares and did not vote for 576 shares. In Company Appeal (AT) No.27 of 2020 the appellant has 348 shares and voted against for all shares. In Company Appeal (AT) No.29 of 2020 the appellant voted against 219 shares and cast an invalid votes for 594 shares.

28. Learned counsel for the appellants argued that they are the minority shareholders and have opposed the scheme but despite such opposition the scheme has been approved on a valuation report dated 14th September, 2018 and the date of valuation is taken as 31st March, 2018. Learned counsel for the appellants further argued that prior to valuation, in November 2017 the mining and excavation business of the Respondent was hived off to another company namely Epiroc Mining Ltd. Learned counsel for the appellant further argued that an independent valuer. Learned counsel further argued that the valuation is on lower side as he got done the valuation from Jayesh Desai & Co which has valued Rs.3627/- as against Respondent valuation of Rs.2100/- per share.

29. Learned counsel for the Respondent argued that appellant has deliberately concealed the fact when the mining and excavation business of the Respondent was hived off to another company, the Respondent had issued share at a 1:1 ratio of Epiroc as part of the demerger. Learned counsel for the Respondent argued that Section 66 does not require the company to undertake any valuation exercise for implementing a capital reduction unlike Section 230 and other provisions of the Act. Learned counsel for the Respondent argued that it is settled law that under Section 66 it is for the appellant to establish that the valuation obtained by the Respondent is unreasonable and perverse and in absence thereof the Respondents' valuation

has to be accepted by the Court. Learned counsel for the Respondent argued that some of the appellants or their family members have acquired 7734 shares post the EGM and deliberately suppressed the purchase price of per share. Learned counsel for the Respondent argued that the father/husband of Appellants in CA No.365/2019 is a professional stock broker and is selling the Respondents shares on his own website at a price of INR 2125 per share and alleging that the Respondents' offer price of Rs.2100/- is grossly undervalued.

30. We note that the mining business and other business of the Respondent company was hived off and the shares at a 1:1 ratio were issued. Appellant has not touched this argument that the shares were issued. However, demergers involve issue of shares of new company to existing shareholders and it is not a relevant issue for purpose of this appeal.

31 We also note that at the time of arguments a pamphlet was given by the Respondent to prove that Mr. Sanjay Damani, husband and father of appellants in Company Appeal (AT) No.365 of 2019 is offering Respondents' share at a price of Rs.2125/-. We also note that the actual price of share is determined by the market but as the shares are already delisted, therefore, the Respondent has got the valuation of shares for the benefit of minority shareholders. We also note from the record that various shareholders are approaching to Respondent for surrendering their shares in lieu of consideration. Further the Respondent has also clarified that the shareholders who has voted against the resolution can hold the shares for which the Respondent has filed an affidavit before the NCLT Mumbai and also argued before this Tribunal.

32. We note that to ensure fairness a fair play of the share purchase is necessary. The company appointed M/s BSR & Associates LLP to do the valuation of share of the company. The company also added valuation taking into consideration the past performance as well as future projection by expert.

33. We find no irregularity in the valuation done by the valuer.

34. Further the data of the company is available with the Management and the same has been provided to the valuer to done the valuation. An outsider may have some data of company, in other words it can be said the outsider has the incomplete data. We also note that if an outsider has incomplete data, he will get the valuation done on that incomplete data which is of no use. We also note that the appellant in Company Appeal (AT) No.366/2019 has voted against the resolution and as per the affidavit of Respondent the appellant can hold the shares of Respondent company. If the appellant, Mr. Janak Mathuradas feels that the offer price is less and the valuation got done by him is the best, then we allow him to purchase/acquire the shares of other minority shareholders at a price of Rs.2100/- and can hold it as per his wish.

35. Learned counsel for the appellants argued that the special resolution passed at EGM was illegally modified. Learned counsel for the appellants further argued that the resolution can not be modified by filing undertaking and it can only be modified by shareholders. Learned counsel for the appellants further argued that the NCLT or Board of Directors have no power to modify the same. Learned counsel for the appellant argued that the company by way of affidavit is creating a class within the class of shareholders.

36. Learned counsel for the Respondent argued that this contention has been raised by the appellant for the first time and this was not urged before the NCLT. Learned counsel for the respondent argued that any such fresh submission/contention taken for the first time at this stage is barred by law and cannot be contended. Learned counsel argued that the factum of this special resolution under Section 114 of the Act is not in dispute before NCLT or NCLAT. Learned counsel submitted that the affidavit has been filed based on the directions given by the NCLT to the Respondent during the course of final hearing on 8th November, 2019. Learned counsel argued that vide Board Resolution dated 18th September, 2018, Company Secretary was given authority to file the same. Learned counsel further argued that the resolution specifically provides that the said reduction is being approved by the shareholders subject to any terms, modifications or conditions that the NCLT Mumbai may impose and the Board of Directors of the Respondent may agree (Page 61 para 1 of CA 365/2019). Learned counsel for the respondent further argued that NCLT Mumbai has the power to approve the said reduction on such terms and conditions as it may deem fit under the Act and the Reduction Rules and the NCLT Mumbai has considered/approved to include while sanctioning the said reduction.

37. We have considered the submissions made by the parties. We note that undertaking affidavit was filed as per the direction of the NCLT Mumbai, when the Respondent company stated that the shareholders who have voted against the resolution can continue to hold the shares of Respondent company. We also note that the special resolution specifically provides that the said reduction is being approved by the shareholders subject to any terms,

modifications or conditions that the NCLT Mumbai may impose and the Board of Directors of the Respondent may agree. We note from the record that the NCLT has given directions and the same has been approved by the Board of Directors of the company.

38. If the contention of the appellant is that NCLT or Board of Directors on instructions from NCLT has not power to modify the Scheme as approved by the Shareholders, it will destroy the case of appellant altogether that even if he has been given an opportunity to continue as a shareholder of the company it would destroy his option to retain his shares as the shareholders in the EOGM has already approved the scheme for acquisition of the shares. We may state here that the NCLT has the powers, therefore, the Company has approached for approval of the same and the objectors have objected to the Scheme and the modification has been done. The same modification has been ratified by the Board of Directors. Therefore, it can not be said the NCLT has no power. If we assume that the NCLT has no power then it means that the scheme approved by the shareholders, whether wrong or right, the NCLT has to approve. We are not satisfied with the argument of the appellants that the NCLT has no power.

39. Thus, we also note that the directions issued by the NCLT and modification proposed by the Board of Directors are the practical method to ensure that the shareholders who want to retain his shares are able to do so which does prejudice them. We also note that the Board has already approved the terms of the impugned order, ratified all actions and steps taken for procuring and implementing the impugned order and also caused a copy of the impugned order to be filed with the ROC, Pune.

40. The other issues raised by some of the appellants that they did not attend the meeting and the resolution has been modified and they may be given another option to vote for the same. On this issue we are of the opinion that the appellants are shareholders of the company and they were issued notice to attend the EOGM and they did not attend the same. The company has done its duty as per statutory requirements by intimating their shareholders, if the shareholder has not attended the EOGM it is their sweet will but they have to go with decision taken in the matter.

41. We also note that the other issues have been dealt with by the NCLT, Mumbai and no serious challenge has been raised to upset the position and we agree to the same.

42. In view of the aforegoing observations and discussions we find no merit in the appeals and accordingly they are dismissed. Interim order passed by this Tribunal, if any, is vacated. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

Bm/kam