

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

[Arising out of Order dated (19th December, 2018 passed by the National Company Law Tribunal, Single Bench Chennai in MA/175/2018]

Company Appeal (AT) No.35 of 2019

IN THE MATTER OF:

**Bank of Baroda
SAMB Branch, 8718
1st Floor, Ram Nagar,
Paharganj D.B.Gupta Road,
New Delhi**

...Appellant

Vs.

**Aban Offshore Limited
Having its registered office at
Janpriya Crest, 113
Pantheon Road, Egmore
Chennai – 600 008**

...Respondent

Present:

For the Appellant:

**Mr. Brijesh Kumar Tamber
And Ms. Khijati Bhardwaj, Advocates.**

For the Respondent :

**Mr.Haripriya Padmanabhan
And Ms. Pooja Dhar, Advocates.**

J U D G M E N T

(29th January, 2020)

Dr. Ashok Kumar Mishra, Technical Member

The present Appeal has been filed by the Appellant i.e. Bank of Baroda under Section 421 of the Companies Act, 2013 against the impugned order dated 19th December, 2018 passed by National Company Law Tribunal (for short “Tribunal”) Chennai Bench in MA/175/2018. The Appellant prays for the following reliefs:

- a) Call for the records of and quash/set aside the impugned judgment dated 19.12.2018 passed by Tribunal in MA No. 175 /2018 and/or
 - b) Direct the Respondent Company to pay a sum of RS. 41,68,09,739/- as on 19.03.2018 with future interest @ 18.25 (Base Rate 10.25% + plus 8%) till repayment being the outstanding amount for the non-payment of cumulative redeemable non-convertible preference shares held by the Applicant and also pass appropriate orders for violation of the provisions of the Companies Act, etc.
2. The Tribunal by order dated 19.12.2018 passed the following orders:

“Counsels for both the parties are present. Heard. It has submitted by Counsel for Respondent that as per Section 55(3) of the Companies Act, 2013, the Company if not in a position to redeem any preference shares or to pay dividend, if any, on such shares in accordance with the terms of the issue, it may, with the consent of the holders of 3/4th in value of such preference shares and with the approval of the Tribunal on a Petition made by the Company in this behalf, issue further redeemable preference shares equal to the amount due, including the dividend thereon,

in respect of the unredeemable preference shares, and on the issue of such further redeemable preference shares, the unredeemable preference shares shall be deemed to have been redeemable.

The procedure laid down under Section 55(3) of the Companies Act, 2013 clearly provides a mandate to the Company to file the Petition with the consent of the holders having 3/4th in value in relation to the preference shares.

But the holder of the preference shares has no locus standi to file such application. Further Section 245 of the Companies Act, 2013 deals with class action for seeking different remedies against the Company and its Directors. The same is not dealing with the subject preference shares. Therefore, the Application is not maintainable, the same stands dismissed.”

3. This Appellate Tribunal has passed an order dated 02.05.2019, that the substitution of Appellant i.e. Vijaya Bank, with Bank of Baroda is sought by the Appellant on account amalgamation of Vijaya Bank with Bank of Baroda w.e.f. 01.04.2019 vide notification of Ministry of Finance (Department of Financial Services) G.S.R. 2 (E) dated 2nd January, 2019 identifying the amalgamation of Vijaya Bank and Dena Bank with Bank of Baroda Scheme, 2019 and the same has come into force from 01st April, 2019.

4. The Appellant has submitted that the Respondent Company is a listed Company with Madras Stock Exchange Limited, Bombay Stock Exchange Limited and National Stock Exchange of India Limited. The Appellant has subscribed on various dates i.e. 09.07.2005, 29.05.2007 and out of total subscription of Rs.

30,00,00,000/- worth of cumulative Redeemable Non-Convertible Preference Shares at varying coupon rate of 8% and 9% per annum; has also consented on 31.10.2011 for extended/rolled over of redemption of preference share for a period of 3 years from the date of original redemption date. The Appellant has also submitted that the Respondent Company has not yet redeemed any preference shares inspite of they are paying equity dividend to the extent of 180% for the equity shareholders in the financial Year 2014-15.

5. The Respondent has defaulted on the redemption as well as payment of dividend for the Financial Year 2015-16 onwards and the said defaults continues till date. The amount is due and liable to pay the following sum as on 19th March, 2018 to the Appellant:

Principal Amount	Rs.22.50 Cr.
Dividend and Overdue interest Amount till 19.03.2018	Rs.19.18 Cr.
Total Amount	Rs. 41.68 Cr.

6. The Appellant has also submitted that they have been made the remediless by the Tribunal for not considering the issue of redemption of preference shares either under Section 55 or Section 245 of the Companies Act, 2013.

7. The Respondent has submitted that the Appellant is only representing in these proceedings and none others representatives from the class of shareholders

i.e. Preference shareholders class are representing. They are not eligible to file application under Section 245 of the Companies Act, 2013 because Section 245 clearly reflects that an application must be filed by a minimum requisite members of the Company. They cannot unilaterally decide that they are empowered to represent a class of shareholders. They have also submitted that they cannot invoke Section 55 of the Companies Act, 2013 and the same cannot be approached by shareholders/members of the Company and as per them, only the Application can be made by the Company. The Respondent has every intention of redeeming its preference shares upon improvement in the financial situation and their business has gone drastically in rough weather. In view of uncertainty in crude oil prices and their cash flow position was under severe strain due to the non-realization of receivables from the Middle East rendering them unable to redeem their preference share (Dividend in 2014-15 was paid to both Equity and Preference shareholders as per the terms and conditions of the issues).

8. The Respondent has also submitted that due to poor financial condition of cash flow in the Financial Year 2015-16 to conserve cash resources, no dividend was recommended by the Board of Directors for equity or preference shareholders. They have convened meeting on 07.09.2016 with all preference shareholders to find a solution in the matter of redemption of shares. The Appellant's preference share will be redeemed as per financial situation and their intention is not to

withhold redemption of preference shares and the same would be done in due course of time, once the financial position improves.

9. The Respondent has also cited a judgment, passed by this Appellate Tribunal, dated 06.11.2017 *Company Appeal (AT) No. 297 of 2017 in Shanta Prasad Chakravarty and Ors Vs. M/s. Bochapathar Tea Estate Private Limited and Ors.*, wherein it has been observed that Section 245 of the Companies Act, 2013 provides for complete procedure as to when and how it can be invoked and the present case is not meeting any requirements as prescribed under Section 245 of the Companies Act, 2013 and accordingly, the Respondent prayed for dismissal of the present Appeal.

10. We have gone the provisions of Section 55 and Section 245 of the Companies Act, 2013 as depicted below:

55. Issue and redemption of preference shares-

(1) No company limited by shares shall, after the commencement of this Act, issue any preference shares which are irredeemable.

(2) A company limited by shares may, if so authorized by its articles, issue preference shares which are liable to be redeemed within a period not exceeding twenty years from the date of their issue subject to such conditions as may be prescribed:

Provided that a company may issue preference shares for a period exceeding twenty years for infrastructure projects, subject to the redemption of such percentage of shares as may be prescribed on an annual basis at the option of such preferential shareholders:

Provided further that—

(a) no such shares shall be redeemed except out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption;

(b) no such shares shall be redeemed unless they are fully paid;

(c) where such shares are proposed to be redeemed out of the profits of the company, there shall, out of such profits, be transferred, a sum equal to the nominal amount of the shares to be redeemed, to a reserve, to be called the Capital Redemption Reserve Account, and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the Capital Redemption Reserve Account were paid-up share capital of the company; and

(d) (i) in case of such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133, the premium, if any, payable on redemption shall be provided for out of the profits of the company, before the shares are redeemed:

Provided also that premium, if any, payable on redemption of any preference shares issued on or before the commencement of this Act by any such company shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.

(ii) in a case not falling under sub-clause (i) above, the premium, if any, payable on redemption shall be provided for out of the profits of the company or out of the company's securities premium account, before such shares are redeemed.

(3) Where a company is not in a position to redeem any preference shares or to pay dividend, if any, on such shares in accordance with the terms of issue (such shares hereinafter referred to as unredeemed preference shares), it may, with the consent of the holders of three-fourths in value of such preference shares and with the approval of the Tribunal on a petition made by it in this behalf, issue further redeemable preference shares equal to the amount due, including the dividend thereon, in respect of the

unredeemed preference shares, and on the issue of such further redeemable preference shares, the unredeemed preference shares shall be deemed to have been redeemed:

Provided that the Tribunal shall, while giving approval under this sub-section, order the redemption forthwith of preference shares held by such persons who have not consented to the issue of further redeemable preference shares.

Explanation.—For the removal of doubts, it is hereby declared that the issue of further redeemable preference shares or the redemption of preference shares under this section shall not be deemed to be an increase or, as the case may be, a reduction, in the share capital of the company.

(4) The capital redemption reserve account may, notwithstanding anything in this section, be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Explanation.—For the purposes of sub-section (2), the term ‘‘infrastructure projects’’ means the infrastructure projects specified in Schedule VI.

Section 245 – Class action –

(1) Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (2) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, namely:—

(a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;

(b) to restrain the company from committing breach of any provision of the company’s memorandum or articles;

(c) to declare a resolution altering the memorandum or articles of the company

as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;

(d) to restrain the company and its directors from acting on such resolution;

(e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f) to restrain the company from taking action contrary to any resolution passed by the members;

(g) to claim damages or compensation or demand any other suitable action from or against—

(i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) to seek any other remedy as the Tribunal may deem fit.

(2) Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

(3) (i) The requisite number of members provided in sub-section (1) shall be as under:—

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(ii) The requisite number of depositors provided in sub-section (1) shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.

(4) In considering an application under sub-section (1), the Tribunal shall take into account, in particular—

(a) whether the member or depositor is acting in good faith in making the application for seeking an order;

(b) any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in clauses (a) to (f) of subsection(1);

(c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;

(d) any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;

(e) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—

(i) authorised by the company before it occurs; or

(ii) ratified by the company after it occurs;

(f) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.

(5) If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely:—

(a) public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;

(b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to

choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;

(c) two class action applications for the same cause of action shall not be allowed;

(d) the cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.

(6) Any order passed by the Tribunal shall be binding on the company and all its

members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

(7) Any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and

with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(8) Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.

(9) Nothing contained in this section shall apply to a banking company.

(10) Subject to the compliance of this section, an application may be filed or any other action may be taken under this section by any person, group of persons or any association

of persons representing the persons affected by any act or omission, specified in sub-section (1).

11. The NCLT has dismissed the application of Appellant solely on the ground that the Appellant being preferential shareholders has no locus standi to file application for redemption of shares under Section 55(3) of the Companies Act, 2013 or even under Section 245 of the Companies Act, 2013.

12. We would like to examine the intention of legislature for enacting Section 55 as well Section 245 of the Companies Act, 2013. Section 55(3) of the Companies Act, 2013 clearly states that the Company, when not in a position of redeem its preference shares, 'may' with the consent of 3/4th in value of such preference shares and the approval of the Tribunal (on a petition filed in this behalf), issue further redeemable preference shares equal to the amount due (including dividend, if any) in respect of such unredeemed shares. However, there is a proviso.

In ordering such further issue, the Tribunal shall forthwith order redemption of preference shares held by such persons who do not consent to such further issue.

13. The Section stipulates that the Company only with the requisite consent of preference shareholders and filing a petition in this behalf before the Tribunal and its consequent approval – can issue further redeemable preference shares with regard to the unredeemed preference shares. The Section though requires prior consent of the shareholders, does not provide for any action that can be taken by the concerned preference shareholders prior to filing of such petition by the Company. Thus, remedies available to such preference shareholders are only by way of either consenting or dissenting with such further issue.

14. However, intention of the legislature while promulgating Section 55 of the Companies Act, 2013 was clearly to compulsorily provide for redemption of preference shares by doing away with the issue of irredeemable preference shares. Therefore, even there being no specific provision stipulated under the Act 2013 through which relief can be sought by preference shareholders in case of non-redemption by the Company or consequent non-filing of petition under Section 55 of the Act, the intention of the legislature being clear and absolute, Tribunal's inherent power can be invoked to get an appropriate relief by an aggrieved preference shareholder(s).

15. Alternatively, preference shareholders coming within the definition of 'member(s)' under Section 2(55) read with Section 88 of the Companies Act, 2013, may file a petition under Section 245 of the Act, as a class action suit – being aggrieved by the conduct of affairs of the Company.

16. With the above discussions, we are of the view that the preference shareholders are not remediless and for redemption of preference share can file application under Section

55(3) of the Companies Act, 2013. They may also file application under Section 245 of the Companies Act, 2013 as a class action suit and the NCLT while exercising the inherent power viz. Rule 11 of NCLT Rules, 2016 can pass appropriate order.

17. In such circumstances, we are unable to convince with the findings of the NCLT that the Appellant being preference shareholders has no locus standi to file application for redemption of preference shares. Hence, the order passed by the NCLT is set aside. The matter is remitted back to NCLT, Chennai Bench to decide the application as per law. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

New Delhi

RK