

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.90-91 of 2018

and

Company Appeal (AT) No.324 of 2018

[Arising out of Common Order dated 27th August, 2018 passed by National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in CP (CAA) No.57/NCLT/AHM/2018 with CP (CAA) No.58/NCLT/AHM/2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Neptune Overseas
Limited
Through its authorized
Signatory
Mr. Kailash Ramkishan
Gupta,
Office No.1, 4th Floor,
H.K. House,
Ashram Road,
Ahmedabad – 380009

Objector

Appellant

Versus

1. National Multi Commodity
Exchange of India Limited
Office No.5, 4th Floor,
H.K. House,
Ashram Road,
Ahmedabad – 380009

Petitioner No.1
(Transferor Company)
(N.M.C.E.)

Respondent No.1

2. India Commodity
Exchange Ltd.
1st Floor, Office 109,
Nodh No.1158 63/65/9,
Hat Faliyu, Mahidhapura,
Surat – 395003 GJ
Corporate Office at:
Reliable Tech Park

Petitioner No.2
(Transferee Company)
(I.C.E.)

Respondent No.2

403-A, B Wing,
4th Floor, Thane –
Balapur Road,
Airoli
Navi Mumbai - 400708

(Array of parties in both the Appeals is same.)

For Appellant: Shri Hitesh Buch, PCS

For Respondents: Shri Navin Pahwa, Sr. Advocate with Ms. Vatsala Kak, Shri Manish Handa, Shri Sumesh Dhawan, Shri Mohit D. Ram and Ms. Geetika, Advocates

J U D G E M E N T

(1st July, 2019)

A.I.S. Cheema, J. :

Arising of the Appeals – Three Impugned Orders

1. CA 90 – 91 of 2018 (hereafter referred as “earlier Appeal”) arise out of proceedings which were filed before National Company Law Tribunal, Ahmedabad Bench (NCLT – in short) for amalgamation of Respondent No.1 – National Multi Commodity Exchange of India Limited (NMCE – in short) with Respondent No.2 – India Commodity Exchange Ltd. (ICE – in short). The earlier Appeal was filed against Orders passed at interim stage which were passed on 31st January, 2018 (First Impugned Order) and 21st February, 2018 (Second Impugned Order). The proceedings which were initiated by the Respondents for amalgamation by proposing scheme of amalgamation as per provisions of Sections 230 and 232 of the Companies Act, 2013 (Act – in short), got approved by common Order dated

27.08.2018 (Third Impugned Order) which has led to the filing of CA 324 of 2018.

References

2. The parties have argued the matter mostly from the record of Company Appeal 324 of 2018 and as such, unless we will be mentioning otherwise, we will be referring to the documents and page numbers from CA 324 of 2018.

3. Respondent No.1 – NMCE – Transferor Company, a deemed recognized Stock Exchange under Securities Contracts (Regulation) Act, 1956 filed CA (CAA) No. 97/NCLT/AHM/2017) in the First Motion before the Tribunal for convening and holding of meetings of equity shareholders and unsecured creditors for approval of a Scheme of Amalgamation of Respondent No.1 with Respondent No.2.

Respondent No.2 – ICE – Transferee Company, which is also similarly deemed recognized Stock Exchange filed CA (CAA) 105/NCLT/AHM/2017 before the Tribunal seeking dispensing of meetings of the secured creditors and unsecured creditors, while seeking directions to convene and hold meeting of equity shareholders for approving the proposed scheme of amalgamation.

4. During pendency of such applications, the Appellant – Neptune Overseas Limited (NOL) (through Kailash Ramkishan Gupta) filed objections at the stage of First Motion itself.

5. The record of earlier Appeal shows that learned NCLT noticed that the Board of Directors of NMCE had on 30th June, 2017 approved proposed merger of Respondent No.1 with Respondent No.2 and thus, the proceedings had been filed. NMCE was deemed recognized Stock Exchange under the Securities Contracts (Regulations) Act, 1956 providing online screen based derivative exchange for permitted commodities and that it was registered with Securities Exchange Board of India (SEBI). ICE is also deemed recognized Stock Exchange under the Securities Contracts (Regulations) Act, 1956, doing the same activity as NMCE. NCLT noticed the proposals made in the scheme. The first Impugned Order which is dated 31st January, 2018, was passed when the Appellant moved NCLT claiming that it has 30.18% equity shareholding in NMCE and referred to Order passed by Hon'ble Supreme Court of India in IA 53586/2017 permitting the Appellant to raise all issues before NCLT. As such, NCLT in the first Impugned Order took up the objections raised by the Appellant.

Developments

6. A brief reference may be made at this stage to the earlier developments, before the matter came up in NCLT in the amalgamation proceedings.

(A) The Appellant claims to be the founder, co-founder and largest shareholder of Respondent No.1 – NMCE holding 5768464 shares. The Board of Directors comprised of shareholders, nominated Directors as well as Independent Directors nominated by Forward Markets Commission

(FMC) (now SEBI - since September, 2014). The Appellant claimed that it had right to nominate a new Managing Director of NMCE. It appears that there was some Anil Mishra who was nominated by Appellant as Chief Executive Officer of NMCE who resigned on 27.09.2010. The Appellant claims that Kailash Gupta raised objection to unexplained resignation of Anil Mishra from the Board and FMC started alleged enquiry into the affairs of the Company.

FMC Order dated 23.07.2011

(B) FMC enquired and on 23rd July, 2011 passed Orders (copy of the Order is at Page – 44 of the Reply of Respondent No.2 in CA 324 of 2018). Perusal of the Order shows that FMC had various issues against the Appellant and Kailash Gupta and others. In this Appeal, we take note but we are not concerned for decision of those issues as they are not subject for us to decide. FMC on that date of 23.07.2011 passed Orders giving direction in paragraph – 34 ‘a’ to ‘o’ which we note. FMC gave directions to NMCE and its Enforcement Commission to initiate various proceedings and actions. The material directions relevant for us for the purpose of keeping special note, are at para – 34 ‘a’ and ‘o’ which read as follows:-

- “a) The NMCE is directed to place before the Board of Directors the evidence regarding the irregularities in the allotment of shares of NMCE to NOL for convening an extra-ordinary meeting of the General Body of the NMCE to consider passing a resolution to authorize the Exchange to refer the matter to the appropriate authorities under the Companies Act, 1956 for cancellation of the irregular allotment of

29,32,280 share to the NOL and any other action as provided under the Companies Act, 1956; Needless to say, the impugned 29,32,280 shares presently held by NOL will not have voting rights.

.....

- o) Shri Kailash Gupta is hereby held guilty of grossly abusing his executive fiduciary position as the Managing Director, and later as the Executive Vice Chairman of the NMCE for causing wrongful and illegal monetary benefit to the firms/companies controlled by him or his close relatives at the expense of the Exchange and is, therefore, declared as a person not “fit and proper” to hold any position in the management and the Board of any Exchange recognized or registered by the Government of India, Forward Markets Commission or any other financial market regulator. It is further ordered that no company controlled by him either directly or indirectly, including the NOL shall hold shares in any association/exchange recognized by the Government or registered by the FMC in excess of 2% of the total issued capital of the Association/exchange. The NOL shall bring down its holding in the NMCE to 2% or less within a period of three months, which can be extended by a maximum period of further three months by the FMC at its discretion on the request of the NOL supported by evidence of sufficient reasons for not being able to divest the excess shareholding within a period of three months. Not being able to get a price deemed to be reasonable by NOL shall not be accepted as the sufficient reason for seeking extension of three months.”

Thus directions were that with regard to the 29,32,280 shares, NOL will not have voting rights and to initiate steps to cancel the allotment to

NOL and Kailash Gupta was held not 'fit and proper' person for purposes specified.

(C) It is stated that after such Order dated 23.07.2011, NMCE started taking various actions against NOL and Kailash Gupta. According to the Appellant, in the meeting of shareholders dated 19.09.2011 of NMCE, they passed Resolution to cancel shareholding of the Appellant and remove Kailash Gupta from the Board. Company Petition was also filed to seek cancelation of the shares of the Appellant. Appellant claims that the Appellant moved Hon'ble High Court of Gujarat which interfered with the Order dated 23.07.2011 of FMC as well as the Resolution dated 19.09.2011 passed by Respondent No.1. It is stated that against such interference, NMCE as well as FMC and other parties moved before the Hon'ble Supreme Court which stayed the Orders which had been passed by the Gujarat High Court on 9th February, 2012 and 28th February, 2012 with a direction that any action, decision or proceedings taken in view of the FMC Order dated 23.07.2011 would abide by the result of the Special Leave Petition.

(D) It is claimed that the Managing Director of Respondent No.1 filed FIR against Kailash Gupta with Crime Branch, Ahmedabad. He also filed private complaint before Enforcement Directorate alleging money laundering against Kailash Gupta and sought action under Prevention of Money Laundering Act (PMLA). The Enforcement Directorate registered a case under Section 420 and other provisions of Indian Penal Code, 1860

and froze the shareholding of the Appellant. The Enforcement Directorate passed Provisional Attachment Order dated 18.10.2013 against 33,45,729 shares held by the Appellant in Respondent No.1 Company which included 29,32,680 shares, which were sought to be cancelled by Respondent No.1 Company before Company Law Board (now NCLT). It is stated on 31.12.2013, Enforcement Directorate further provisionally attached 12,96,900 shares of the Appellant in Respondent No.1 which were part of 29,32,680 shares sought to be cancelled by Respondent No.1 Company.

(E) According to the Appellant, due to a revised guideline dated 06.05.2014 (Reply in CA 324/2018 – Page -147) issued by FMC, the voting rights of the Appellant were treated as retrospectively extinguished by the Respondent No.1 Company. The two Provisional Attachment Orders were confirmed by the Adjudicating Authority under PMLA and the Appellant filed Appeals to the Appellate Tribunal under PMLA. When NCLT was established, the petition filed by Respondent No.1 Company was transferred as TP 56/2016.

(F) The Appellant claimed that coming to know that Respondents 1 and 2 are contemplating merger, he moved SEBI and when there was no response, he moved Hon'ble Supreme Court filing IA 53586/2017 and Hon'ble Supreme Court on 25.07.2017 directed SEBI to reply to the representation. SEBI consequently replied on 09.08.2017 (Page – 85 of CA 90-91/2018)

(G) As per the Appellant, when his IA 53586/2017 was pending before Hon'ble Supreme Court, CA 97/2017 was filed in NCLT under Section 230 – 232 and his IA before Hon'ble Supreme Court came to be disposed granting him permission to raise the issues before NCLT.

First Impugned Order

7. The First Impugned Order dated 31.01.2018 considered that objections had been filed and raised by the Appellant which basically claimed that if the merger was allowed, it would pre-emptively foreclose legitimate claims of NOL against lost opportunity to dilute its stake at a proper offer. These and various other objections raised by the Appellant with regard to conducting of the meetings of the equity shareholders and unsecured creditors of NMCE with ICS and as regards question whether the scheme was sustainable or not were referred and First Impugned Order referred to the observations of Hon'ble Supreme Court dated 22nd March, 2012 in SLP (C) 10225 – 10227 and 6246 of 2012 where Hon'ble Supreme Court while staying the operation of Order of High Court observed:-

“As a result of the interim order passed now the order dated 23.07.2011 passed by the petitioner – Forward Markets Commission gets restored but any proceedings, decision or action taken in pursuance of that order shall abide by the final result of the special leave petitions.”

8. The first Impugned Order took note of the Order of FMC and held in para – 29 that the situation which was emerging from the developments and litigations, was that:-

“Therefore, the situation, as it emerges now, does not permit the participation of NOL in shareholders’ meeting, wherein the proposed Scheme will be placed for approval.”

It further observed in para – 32:-

“32. In case the Scheme is approved by the shareholders and unsecured creditors and in case NMCE comes up before this Tribunal with a petition to sanction the Scheme, then, at that stage, NOL is at liberty to raise all objections and all such objections raised by NOL have to be considered by this Tribunal before approving of the Scheme.”

Second Impugned Order

9. The NCLT thereafter on 21st February, 2018, passed a Second Impugned Order where it took stock of the earlier developments and proceeded to pass Orders for holding meeting of the equity shareholders on 5th April, 2018 at 12 O’ Clock noon and for holding meeting of unsecured creditors on 5th April, 2018 at 2.30 p.m. This Order was regarding the Respondent No.1 – NMCE with which the Appellant has been concerned. It appointed Retired Justice Kamal Mehta as Chairperson of the meeting and directed appointment of Mahesh Chand Gupta, PCS and in absence, Mr. Sparsh M. Gupta as PCS to be scrutinizer. It fixed a quorum of equity shareholders at 5 and unsecured creditors at 3. It appears that similar meetings were directed to be held for Respondent No.2 on 6th April, 2018.

Directions in Earlier Appeal – CA 90 – 91 of 2018

10. After the above first and second Impugned Orders were passed and the earlier Appeal came to be filed in this Tribunal, this Tribunal by Order dated 2nd April, 2018 in CA 90-91/2018 observed that during pendency of the Appeal, if any decision was taken by Respondents or NCLT, it would be subject to the decision of this Appeal (CA 90-91/2018). On 9th May, 2018, when earlier Appeal came up, the Appellant expressed that NCLT would consider only those objections which were earlier filed by the Appellant, but not the objections which have been raised in the present Appeal and this Tribunal (another Hon'ble Bench). Consequently, Interim Order was passed and it was observed by this Tribunal that we expect that NCLT would consider all objections including the objections raised by the Appellant, including objections which are subject matter of the Appeal, and be uninfluenced by the observations made in the first and second Impugned Orders.

Thus the field was left open for NCLT in the Second Motion.

Chairperson's Report – Meeting dated 05.04.2018

11. Meanwhile, the meeting of the shareholders and unsecured creditors of Respondent No.1 came to be held on 5th April, 2018, as was directed by the second Impugned Order and the Chairperson filed Affidavit and Report of Scrutinizers. The Affidavit of the Chairperson is at Page – 113 and Chairperson filed Report (Page – 115) along with Report of scrutinizers.

The Report shows that the Appellant, through Mr. Kailash Gupta, raised objections even before the Chairperson and the Chairperson in his Report recorded:-

“20. It may further be observed that out of 57,68,464 equity shares held by Neptune Overseas Ltd., the Enforcement Directorate has attached 46,42,629 shares (24.29%) which now stand transferred in the name of the Deputy Director, Directorate of Enforcement, whose name appears in the list of share holders. It may further be observed that the said attachment orders of the Directorate of Enforcement are challenged by Neptune Overseas Ltd. by filing appeals which are pending for hearing before the Appellate Tribunal under PMLA 2002. It may also be observed that at present 11,25,835 shares of NMCE are standing in the name of Neptune Overseas Ltd. However, they are also not entitled to vote in view of the regulatory guidelines dated May 6, 2014 referred to hereinabove. It may be observed that Regulation 19 of the Securities Contracts (Regulation) (Stock Exchange and Clearing Corporations), Regulations, 2012 provides for eligibility for holding of shares and Regulation 20 provides for criteria of a ‘fit and proper person’.”

Chairperson considered the developments in the litigation and observed (para - 23) that Mr. Kailash Gupta cannot be allowed to vote at the present meeting. It was mentioned in para – 25 of the Report of the Chairperson:-

“25. At the conclusion of the meeting, after considering the above, the result of the voting upon the said question was as follows:

25(1) The majority of the shareholders representing three-fourth in value of the equity shareholders voted in favour of the scheme of amalgamation being adopted.

25(2) Three equity shareholders of the applicant company holding in aggregate 81,28,447 equity shares representing 83.97% of total valid votes cast and 75% of total number of shareholders whose votes were found to be valid on poll at the meeting voted in favour of the scheme of amalgamation being adopted.”

Third Impugned Order

12. In the Third Impugned Order, the learned NCLT took note of the developments in the Second Motion and Report of Regional Director and Official Liquidator and also the statements made on behalf of Respondents 1 and 2 and also took note of comments made by Special Public Prosecutor on behalf of Enforcement Directorate with regard to the proposed scheme. It also noticed the various communications addressed by SEBI to NMCE suggesting that SEBI was contemplating stringent regulatory actions against NMCE, if there is any delay in the merger of NMCE with ICE. Para – 25 of the 3rd Impugned Order shows that the learned NCLT considered the objections raised by the Appellant and the further paragraphs of the Impugned Order shows NCLT considering the various submissions made and also took note of further development as the Appellate Tribunal of PMLA had by Order dated 10.07.2018 given certain direction to Enforcement Directorate to transfer back equity shares of the objector to the extent of 33,45,729 equity shares. NCLT heard the parties on such developments also and kept in view the earlier Orders of FMC with the effect of voting rights being ceased.

NCLT observed:-

- “41. It is noted that the Scheme is approved by more than statutory majority of the shareholders and creditors of both the Companies. It is also revealed that the Scheme is essentially proposed to meet with the networth requirements stipulated under the SEBI Regulations. Both the Petitioner Companies are recognized Stock Exchanges dealing in commodity derivatives. It is also not in dispute that the objector Neptune Overseas Limited does not have any voting rights in respect of any shares held by it. All the voting rights have stood extinguished by virtue of the order dated 23.07.2011 made by FMC read with the guidelines issued by FMC read with the relevant SCRA Regulations 2012.
42. It was also noted by this Tribunal that though the Objector has filed appeal challenging the order made by Forward Market Commission before SAT, it is reported that there is no stay granted by SAT until this date. The shares are attached by the Enforcement Directorate on the ground that the shares are proceeds of crime. The Appellate Tribunal under PMLA has also observed in Para 28 that the order dated 10.07.2018 made by it shall have no bearing in other proceedings. This order has since been stayed by the Hon’ble High Court of Gujarat. Even otherwise, the Appellate Tribunal had also observed that it had no concern as to whether the Neptune Overseas Limited be allowed or not be allowed to exercise its voting rights as the same is not within the domain of the said Tribunal as the said aspect is being dealt with by other Courts. This Tribunal also considered the objections along with the response on behalf of NMCE. The Tribunal also perused the objections raised in the pending Company Appeal.
43. Under the circumstances, this Tribunal is also of the view that objections that NMCE has other options to enhance the capital or that the

Scheme is not in the interest of the shareholders is not justified. The Board of Directors and the shareholders of both the companies in their commercial wisdom have proposed and approved the Scheme of Amalgamation. SEBI being the Regulator has also approved the Scheme of Amalgamation. In fact, it is one of the contentions on behalf of the Petitioner Companies that the Scheme of Arrangement is being proposed to comply with certain guidelines issued by the Government of India as also the regulations made by SEBI and the proposed Scheme would help the Petitioner Commodity Exchange to meet with the net worth criteria under the SEBI regulations. It is also brought on record that the merger would bring about better business synergies which would ultimately be in the interest of shareholders and other stakeholders of both the Exchanges.

44. This Tribunal has also considered that the shares are under attachment and there are no voting rights. The order made by Appellate Tribunal, PMLA is also stayed by the Hon'ble High Court. The objections taken by the Objector in the pending Company Appeal is essentially on the status of the shares over which the appellant claims ownership which fact is evident in the orders made by the FMC, the Appellate Tribunal, PMLA and the Hon'ble High Court.
45. Even assuming the Objector has voting rights in respect of disputed shares i.e. 30.18%, then even, it is in the paramount interest of the Company as well as considering the public interest involved, the Objector cannot be allowed to stall the sanction of the Scheme, when majority of the shareholders and the creditors have supported/consented to the Scheme. Under the facts and circumstances, as discussed above and considering all the relevant aspects put forward by both the Petitioner Companies, this Bench is of the opinion that the objections are liable to be rejected. The Tribunal finds that the Scheme of

Amalgamation proposed by the Petitioner Companies is in the interest of the Petitioners and all its stakeholders. The Scheme is valid. The shareholders and the creditors of both the Companies, in their commercial wisdom, have decided to enter into the arrangement of amalgamation. This Tribunal cannot substitute its wisdom with the commercial wisdom of shareholders and creditors of petitioner companies. The objections taken by the Objector even otherwise do not suggest that the Scheme is illegal or prohibited by law. On the contrary, it appears that the Scheme is proposed so as to ensure compliance with the SEBI regulations and other guidelines issued by the Government of India. SEBI being the regulator has also issued directions to seek expeditious sanction to the Scheme.”

13. Consequently, the NCLT was of the view that the scheme will be in the interest of the Company and of all stock holders and proceeded to reject the objections of the Appellant and allowed the petitions and merger scheme was sanctioned subject to decision made by higher Forums.

Arguments

14. We have heard Counsel for both sides. Counsel for both sides have referred to the developments and litigations as referred above and which is reflected even in the 3 Impugned Orders. The arguments raised before NCLT as can be seen in the Impugned Orders, are repeated before us also. A brief reference we make. The learned Counsel for the Appellant in substance argued that the scheme proposed did not mention that it was for complying with net worth criteria; the Respondent No.2 was in cash bleeding financial position and, R2 had insignificant presence in the

market and that, R2 was incurring heavy annual operational expenditures and the scheme was not in the interest of Respondent No.1. Respondent No.1 had various prudent options to raise the capital which were not explored. If the scheme was allowed to go through, it would pre-emptively forfeit the rights of Appellant. It is argued that there was no valid quorum at the meeting convened of the shareholders. There were only 2 members when the meeting began and thereafter, 2 more joined when the meeting had already started. It is claimed that instead of Reliance Capital Limited (a shareholder as on cut-off date) someone representing Reliance Corporate Advisory Services remained present and was counted for quorum. It is argued that only because the shares of Appellant were attached, it would not disentitle the Appellant to exercise the right of vote. Section 230(4) Proviso of the Act gives the right to a person "holding" not less than 10% of the shareholding to object, and the same has no connection with right to vote. It is argued that even if the shares which were hit by FMC order were excluded, the Appellant still had further shares to the extent of 15% which entitled him to vote, but he was not allowed to vote. It is argued that at the time of meeting of shareholders of R1, the Chairperson and scrutinizers did not ensure that only authorized persons came forward to vote. The learned Counsel argued that the scheme of merger should not have been approved by NCLT as it was not in public interest.

15. Against this, the learned Counsel for the Respondents has supported the Impugned Orders passed by the NCLT. According to the Counsel, NMCE is an association recognized under Section 6 of the Forward Contracts (Regulation) Act, 1952 and registered with Forward Markets Commission under Section 14B of the said Act. It is argued that as per Regulation 14(1) of the Securities Contract (Regulation) (Stock Exchange and Clearing Corporations) Regulations, 2012 read with revised norms applicable to Commodity Exchange dated 6th May, 2014 issued by FMC, it became applicable for a recognized commodity exchange to have a minimum net worth of Rs.100 Crores. The Counsel referred to Regulation 14(1) which states that:-

“Every recognized stock exchange shall have a minimum networth of one hundred crore rupees at all times.....”

It is argued that NMCE tried to raise fresh capital to comply with the requirement but could not achieve the net worth criteria. SEBI advised NMCE to be in compliance with the revised norms and R1 and R2 agreed to enter into the scheme. The Counsel referred to the acts of the Appellant and Kailash Gupta which led to the Respondent No.1 Company coming into difficulties. It is argued that detailed Order of FMC dated 23.07.2011 held Shri Kailash Gupta in the capacity of MD of NMCE and as promoter and controlling person of the Appellant (NOL) to be in complete breach of

fiduciary responsibilities towards NMCE and held him responsible for committing systematic fraud, misappropriation and committing series of crimes to benefit himself and his family members and the companies/entities owned and controlled by him or his family members. The learned Counsel for Respondents referred to the Orders passed by FMC and other judicial Orders to submit that the voting rights of the Appellant and Kailash Gupta continued to remain suspended in view of Orders issued by FMC under Section 10 of the Forward Contracts (Regulation) Act, 1952 read with Rules 7(2)(ii) of Forward Contracts (Regulation) Rules, 1954 which were valid and in force even till now (i.e. when arguments were done and completed). According to the Respondents in the light of Orders of FMC and the Regulations, the Appellant had no right to raise objections and even if the objections were considered, they had no substance. Respondents claimed that the scheme was brought in the interest of both the Respondents and to comply with the Statutory Regulations. The Scheme was just, fair and reasonable and in the interest of all stake holders. It is claimed that it was also in public interest. It is argued that when the meeting was held on 5th April, 2018, 7 members satisfying the requirement of quorum had attended. The 7 members of R1 were:-

- i. Central Warehousing Corporation
- ii. Bajaj Holdings Investment Limited
- iii. Gujarat State Agricultural Marketing Board

- iv. Punjab National Bank
- v. Reliance Corporate Advisory Services Limited
- vi. Neptune Overseas Limited
- vii. Kailash R. Gupta”

According to the Respondents, the objection of the Appellant that Reliance Corporate Advisory Services Limited was not a shareholder/member, but it was Reliance Capital Limited, is contrary to record produced before scrutinizers where Reliance Corporate Advisory Services Limited showed that they were existing shareholders. According to the Respondents, there was no problem with the quorum. The Respondents argued that the objections being raised by the Appellant have no substance and they were rightly discarded by NCLT.

Reasonings & Findings

16. There is no dispute that the FMC Order dated 23.07.2011 referred in para 6(B) (supra) was in force on the date of meeting of the shareholders and when Impugned Orders were passed and even when final hearing of the present Appeals took place. FMC found the Appellant and Shri Kailash Gupta and others guilty of various misconducts and illegal activities which led to various actions getting initiated, and litigations arising therefrom, which appear to be at different stages. The FMC Order found 29,32,280 shares to be irregular allotment to the Appellant and directed taking of steps to cancel the same. The operative Orders of FMC which we have referred in para – 6 above, also found Shri Kailash Gupta to be a person

not “fit and proper” to hold any position in the management and the Board of any Exchange recognized or registered by the Government of India, FMC or any other financial market Regulatory. Thus, on 23.07.2011 itself, the FMC had found Kailash Gupta as not “fit and proper person” and the shares held by NOL were eclipsed. This position continued when the meeting took place and remained the same when final hearing of these Appeals took place. On 6th May, 2014, the Government of India conveyed to NMCE vide Annexure – R5 (Reply Page – 145) the Revised Norms dated 06.05.2014 regarding shareholder, ownership, net worth, fit and proper criteria, etc. applicable to Nationwide Multi Commodity Exchanges (NMCEs). These norms were issued by Forward Markets Commission in the Department of Economic Affairs, Ministry of Finance, Government of India revising earlier applicable norms. Relevant paragraph of Norm – 2 relating to net worth requirements specifies:-

“2. Net worth requirements:

(1) Every recognized commodity exchange shall have a minimum networth of one hundred crore rupees at all times:

Provided that a recognised commodity exchange having a lesser networth as on the date of commencement of these directions shall achieve a minimum networth of one hundred crore rupees within a period of three years from the date of issue of these directions.”

The same norms deal with fit and proper person criteria also. Norm – 6 deals with consequences if a person ceases to be fit and proper person.

Norms – 5 and 6 read as follows:-

“5. Fit and proper person criteria.

(1) For the purposes of these directions, a person shall be deemed to be a fit and proper person if -

(a) such person has a general reputation and record of fairness and integrity, including but not limited to –

(i) financial integrity;

(ii) good reputation and character; and

(iii) honesty;

(b) such person has not incurred any of the following dis-qualifications ---

(i) the person or any of its whole time directors or managing partners has been convicted by a Court for any offence involving moral turpitude or any economic offence, or any offence against the securities laws;

(ii) an order for winding up has been passed against the person;

(iii) the person or any of its whole time directors or managing partners has been declared insolvent and has not been discharged;

(iv) an order, restraining, prohibiting or debarring the person, or any of its whole time directors or managing partners from dealing in commodity derivatives or securities or from accessing the commodity derivative or securities market, has been passed by the Commission or any other regulatory authority, and a period of three years from the date of the expiry of the period specified in the order has not elapsed;

(v) any other order against the person, or any of its whole time directors or

managing partners, which has a bearing on the commodity derivatives or securities market, has been passed by the Commission or any other regulatory authority and a period of three years from the date of the order has not elapsed;

(vi) the person has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force; and

(vii) the person is financially not sound.

(2) If any question arises as to whether a person is a fit and proper person, the decision of the Forward Markets Commission in this behalf shall be final.”

6. Consequences of ceasing to be a “fit and proper person”

In the event of any person ceasing to be a ‘fit and proper person’ or being declared so by the Commission, such person shall forthwith divest his shareholding. Further, pending divestment of shares, the voting rights of such person shall stand extinguished and any corporate benefit in lieu of such holding shall be kept in abeyance/withheld by exchange. The exchange shall take necessary steps as it may deem fit so as to ensure that the shareholding of such person is divested forthwith.”

Considering (a) as above, it appears to us that now, even if for any technicality or reason the FMC Order dated 23.07.2011 and all consequential actions against Appellant and Kailash Gupta were to get quashed still, Mr. Kailash Gupta may not be able to claim that he has a general reputation and record of fairness and integrity, and should be deemed to be a fit and proper person.

On 5th April, 2018, the meeting of shareholders of Respondent No.1 took place. The FMC Order was in force and these revised norms were also in place and apart from the FMC Order holding Kailash Gupta not fit and proper person, these norms clearly created obstacle for the Appellant and Mr. Kailash Gupta. Considering this, we do not find anything wrong in the Appellant and Mr. Kailash Gupta not being allowed to vote in the meeting of the shareholders although he was allowed to attend and he even raised objections which were recorded as can be seen from the Report of the Chairperson of the Meeting. Thus, we discard the arguments on behalf of the Appellant that some shares were affected and some were still available to the Appellant. We find that Mr. Kailash Gupta who attended the shareholders' Meeting and who claims himself to be authorized signatory of the Appellant being not fit and proper person, could not have voted and was rightly not allowed to vote.

17. The other objections raised by the Appellant regarding quorum at the time of meeting, have no substance. The Report of the Chairperson is already on record as well as the Report of scrutinizer which shows the presence of quorum. The objections raised subsequently by the Appellant before NCLT and before us, need to be discarded as no such objections regarding quorum or questions regarding the authority of persons voting, appear to have been raised before the Chairperson or scrutinizers. Had such objections been raised, surely, the Chairperson, a Retired Judge of High Court would have dealt with the same. The Chairperson dealt with so

many other objections raised by the Appellant through Mr. Kailash Gupta and the Chairperson answered those objections in his Report. The subsequent objections raised regarding quorum and the authority of persons who attended the meeting, appear to be afterthought and when Mr. Kailash Gupta was present in the Meeting, if at that time they were not raised, now the objections raised must be treated as without substance and afterthought objections to create obstacles. We have gone through the Reports of Chairman (Annexure I – Page 113) and Scrutinizer (Page – 127) and part of the Report we have reproduced at para – 11 (supra). We are aware of the general rule of such meetings where adjournment can be there for want of quorum and at adjourned meeting, quorum figure would stand relaxed. As such, Chairman had no reason to fudge Report. We have no reasons to doubt the Reports. Considering Para – 25(2) of Report of Chairman, the scheme had sufficient support to sail through.

18. Coming to the objections raised by the Appellant with regard to the scheme, some of them were already answered by SEBI itself. It may be recalled that the Appellant claimed to have sent representation to SEBI against the proposed merger and when SEBI did not respond, the Appellant moved the Hon'ble Supreme Court and sought directions. The letter of SEBI dated 9th August, 2017 by way of Reply is at Annexure – H of CA 90-91 of 2018 (Page – 85). Part of the letter is reproduced below:-

“2. With regard to the Order dated July 23, 2011 passed by the erstwhile Forward Markets Commission (‘FMC’) in the matter of National Multi Commodity Exchange of India Limited

(‘NMCE’), Ahmedabad, it is observed from the available records that the Hon’ble Supreme Court of India has passed its interim Order dated March 22, 2012, vide which, the Apex Court has stayed the operation of the Order dated 09-02-2012 passed by the Hon’ble Gujarat High Court, with a direction that any actions, decisions or proceedings taken in pursuance of FMC order shall be subject to the final outcome of the pending Special Leave Petitions. As a result, the Order dated 23-07-2011 passed by the erstwhile FMC got restored for enforcement. National Multi Commodity Exchange of India Limited (‘NMCE’) has informed that directions contained in the said FMC Order have been substantially implemented by it and by various other enforcement agencies, viz. Gujarat State Police and Directorate of Enforcement (‘ED’) who have also initiated various actions, which include, two provisional orders that have been reportedly passed by ED, viz., (a) order dated 18.10.2013 attaching 33,45,729 equity shares of NOL and (b) order dated 31.12.2013 attaching 12,96,900 equity shares of Neptune Overseas Limited. In other words, out of 57,68,464 shares of NMCE shares held by NOL, a total no. of 46,42,629 shares have been attached by ED. Thus, it is observed that various law enforcement agencies have taken action on the basis of the Order passed by the erstwhile FMC.

3. NMCE has reported to SEBI that Directorate of Enforcement has written to the Share Transfer Agent and NSDL to give possession of no. of 46,42,629 attached shares to them as per Sec 8(4) of the PMLA. As per the said direction, the attached shares are proposed to be transferred in the name of “Deputy Director (PMLA) Directorate of Enforcement, Ahmedabad” and will be held in their name till disposal of the proceedings before PMLA Court.
4. With regard to your allegations against the Indian Commodity Exchange Limited (‘ICEX’) inter alia, claiming that it is a defunct company since 2014, had a negative net-wroth as at 31-03-2016 and carries huge financial liabilities,

etc., it may be noted that net-worth of ICEX was not negative, rather, it was Rs.3.99 crore as on 31-03-2016 and it stands at Rs.113 crore, as on March 31, 2017. SEBI has conducted the inspection of ICEX with regard to its preparedness for re-commencement of its trading activities and has granted its approval to ICEX on July 07, 2017 for re-commencement of trading operations.

5. With regard to your allegations pertaining to NMCE, inter alia, claiming that it has a clean cash net-worth of approx.. Rs.75 crore, can easily meet the net-worth requirement by way of issuing bonus shares followed by an IPO, etc., it may be noted that the net worth of NMCE was Rs.58.82 crore as on March 31, 2016 and the same was reduced to 55.40 crore as on September 30, 2016 and it stands at Rs.56.21 crore, as on March 31, 2017. NMCE has made several attempts in the past 6 years for increasing the net-worth including by way of issuing of Bonus shares, however, it could not enhance its net-worth. NMCE has also stated that coming up IPO is not feasible in the current situation particularly when, critical litigations are pending with NOL. In view of the continuous non-compliance by NMCE with the minimum net-worth requirement of Rs.100 crore as prescribed by SEBI, it is liable to face penal action by the regulator, which may adversely affect its trading activities thereby further affecting its financial position to the detriment of its shareholders. Further, NMCE has also not been able to meet the minimum number of required members, viz, fifty, as per the SEBI Regulations. NMCE has, presumably therefore, opted for merger with ICEX with a view to enhance its net-worth and comply with other mandatory regulatory requirements without which, its continuance as a recognised commodity derivative exchange could be unviable and questionable.”

In spite of such communication by SEBI which is a Regulatory, the Appellant has kept harping that ICE is a company which was bleeding and had no net worth and that NMCE could have raised its own cash net worth. Nothing is shown that the Appellant raised any questions to this communication of SEBI. The letter of SEBI itself shows how the shares of the Appellant got affected and the submissions made that ICE was bleeding in finance and had no net worth, etc., need to be discarded. The argument that the scheme does not mention that it was proposed to meet the net worth requirement and so the scheme should be doubted, also needs to be discarded. Only because the scheme does not mention that meeting net worth criteria was one of the objective, does not make the scheme bad. Ultimately, it is a matter of legal requirement which Respondent No.1 Company was required to meet or find a solution. Letter of SEBI shows that NMCE (Respondent No.1) carried the risk of penal action against it. As such, we have no reason to doubt the Scheme for ulterior motives. It was necessary to meet the net worth requirement. We discard the objections being raised by Appellant.

19. We have gone through the First, Second and Third Impugned Orders. We do not find any reason to interfere with the same. The shares held by the Appellant in Respondent No.1 Company have been under eclipse since the Order passed by FMC on 23.07.2011 and the same were under eclipse when the shareholders meeting took place and the Impugned Orders were passed and the position remained the same when final hearing of this

Appeal took place. In the period after we reserved this matter for Judgement, the parties have not moved us to say that any Orders in favour of the Appellant have been passed in the litigations pending. The Third Impugned Order dated 27.08.2018 shows that when in NCLT, Judgement was reserved by Order dated 02.07.2018 (see para – 32) and some Order came to be passed by the Appellate Tribunal – PMLA, the Appellant had moved NCLT and sought and received rehearing. No such Motion has been brought before us and as such, we presume that the position regarding eclipse to the rights of Appellant and Kailash Gupta is still there.

20. We find no reason to interfere with the Impugned Order and for reasons recorded above, Appeals against the three Impugned Orders deserve to be rejected.

21. Alternatively, in case our views become necessary at any point of time, we observe that, even if the eclipse to the rights of the Appellant and Kailash Gupta were to get removed, still it would not be appropriate to set the clock back so as to undo the scheme of amalgamation of Respondents 1 and 2. We observe this as we are of the view that looking to the legal requirements, it was, but a necessity, for the Respondent No.1 to either raise its net worth or seek alternative options. The letter of SEBI dated 9th August, 2017 (referred supra) makes the picture clear. Respondent No.1, in the situation, chose amalgamation and has gone through the process of getting scheme of amalgamation approved. Only because the rights of Appellant were eclipsed (for which there appears to be contribution of Mr.

Kailash Gupta himself), even if for any reason the eclipse was to get over, it would not be in public interest to reverse the clock. May be, in such situation, the Appellant may be entitled to other reliefs but undoing the amalgamation does not, in our view, appear to be in the interest of the Respondent No.1. For reasons recorded in para – 16, even if the litigation arising from the FMC Order and FMC Order was to be set aside, Mr. Kailash Gupta may still not be able to claim himself to be fit and proper person. We have expressed these views in the alternative. The directions of the higher Forums would naturally prevail considering the caveat recorded by the learned NCLT itself in para – 48 of the Third Impugned Order that the order of sanction of the scheme is subject to decisions made by the higher Forums.

22. For reasons recorded, we find no substance in these Appeals. The appeals are dismissed. No orders as to costs.

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

[Balvinder Singh]
Member (Technical)

/rs/nn