

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 390 of 2017

IN THE MATTER OF:

1. Nirvan Clothing Company Pvt. Ltd.

A-41. Maya Puri Industrial Area,
Phase-I, New Delhi-110064

...Appellants

2. Mikasa Enterprises Pvt. Ltd.

A-41. Maya Puri Industrial Area,
Phase-I, New Delhi-110064

3. Richa Global Exports Pvt. Ltd.

A-41. Maya Puri Industrial Area,
Phase-I, New Delhi-110064

Vs

1. Registrar of Companies

4th Floor, IFCI Tower,
61, Nehru Place, New Delhi-110019

....Respondents

2. Regional Director(North)

B-2 Wing, 2nd Floor
Paryavaran Bhawan, CGO Complex
New Delhi-110003

Present:

For Appellant:

**Mr. Krishnendu Dutta, Mr. Vikas Mishra, Mrs.
Malini Sud and Mr. S.P. Singh Chawla, Advocates**

For Respondent:

**Ms. Aparna Mudiam, Assistant Registrar of
Companies for ROC.
Ms. Sonam Sharma, C. Balooni, Company
Prosecutor for R. D(NR)**

JUDGEMENT

A.I.S. CHEEMA, J. :

1. The Appellants have filed this appeal against the judgement and order dated 03.11.2017 passed by the National Company Law Tribunal, Delhi,

Principle Bench New Delhi (NCLT in short) passed in CA no. 384 (PB)/2017 in CA(CAA) 50(PB)/2017(First Motion Application).

2. CA(CAA)50(PB)/2017 was filed by the appellants jointly under Section 230-232 of the Companies Act, 2013 ('Act' in brief) read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ('Rules' in short) making prayers for dispensing on aspects mentioned and directions for convening of meetings of creditors of appellant no. 3. The NCLT vide order dated 01.06.2017 dispensed with meetings for which prayers had been made and issued directions for convening only 2 meetings with reference to (1) Secured Creditors and (2) Unsecured Creditors of the appellant no. 3.

3. It is the case of the appellants that as per directions of the NCLT the meetings were held and in the meeting of Unsecured Creditors of the appellants no. 3 company (i.e. Transferee Company), the Scheme for Amalgamation was approved by the requisite majority of the Unsecured Creditors and Chairperson of the meeting by report dated 01.08.2017 submitted the results accordingly.

4. However, with regard to Secured Creditors of the appellant no. 3 company it was reported that there was alleged failure to show proper authorization in relation to the representation either as proxy or in person. Out of total 18 Secured Creditors, 11 Secured Creditors were present either through proxies or in person being representatives of the Secured Creditors. The documents supporting authorization of the proxies were held invalid for want of Board Resolution/ Authority Letters and so the meeting of Secured

Creditors was called off and no voting of Secured Creditors took place on the Scheme of Amalgamation on the scheduled date of meeting.

5. The appellants claim that to avoid further delay in relation to approval of Scheme of Amalgamation by the Secured Creditors, the appellant no. 3 approached the Secured Creditors and requested them to give their respective consents to the Scheme of Amalgamation. The appellants then moved the learned NCLT with application CA no. 384(PB)/2017 requesting to wave convening of the meeting of the Secured Creditors. Consent affidavits of Secured Creditors having more than 90 per cent value of debts were filed. The appellant no. 3 is ongoing business concern and as part of day to day business there are transactions with bankers securing payments of letter of credit, etc. As part of the regular business activity letters of credit came to be discharged as on 31.07.2017. Syndicate Bank which had issued letters of credits confirmed by way of satisfaction letter/ certificates dated 29.08.2017 that all the letters of credit as on 31.07.2017 had been duly paid and nothing was outstanding on behalf of the appellant no. 3 company.

6. The appellants filed joint application CA no. 384(PB)/2017 in the Company Application seeking modification of the order dated 01.06.2017 requesting for dispensing with convening , holding and conducting of meeting of Secured Creditors of appellant no. 3. It is claimed that the NCLT however without considering the facts that appeared from respective affidavits dated 07.09.2017 and 16.09.2017 of the Secured Creditors which were to the extent

of 90 per cent value of debt and satisfaction letter dated 29.08.2017 issued by Syndicate Bank and certificate of CA dated 30.08.2017, vide orders dated 03.11.2017 (impugned order) dismissed the joint application with liberty to modify the scheme and restart the process via filing fresh Company Petition.

7. According to the appellants the NCLT factually erred in holding that the Scheme of Amalgamation had not met approval of the creditors and in observing that the Scheme of Amalgamation had been changed because of payment to certain Secured Creditors had been cleared. Thus the appeal.

8. We have heard learned counsel for the appellants and the learned Assistant Registrar of Companies.

9. Learned Counsel for the appellants submitted and has taken us through the various documents which were filed with CA no. 384/2017. It is the submission that these various documents were not considered by the learned NCLT while passing the impugned order dismissing the first motion. The learned NCLT simply relied on the report of Chairperson that all the proxy forms were incomplete whereas out of 11 Secured Creditors who were present in the meeting (via proxy forms and in person) one such creditor *viz.* HDFC Bank Ltd. was present in person by an authority letter supported with power of attorney but even that was rejected arbitrarily by the scrutinizer giving no good reasons. It is argued that the Unsecured Creditors had already given their approval as can be seen from the report of Chairperson of the meeting but NCLT wrongly observed that the scheme had not met “the approval of the

creditors”. According to the learned counsel the affidavits filed by the Secured Creditors were of the value of 98.49 per cent and this should have been considered. According to the Learned Counsel the observation of the learned NCLT that there was no request in the application filed for amendment of pleading in the first motion application was technical approach. The learned NCLT had powers to modify the order dated 01.06.2017 and the CA no. 384/2017 could have been allowed dispensing with convening of meeting of Secured Creditors of appellant no. 3. It has been argued that when the appellant no. 3 is an ongoing concern, the scene regarding Secured Creditors will keep changing and by that itself it cannot be said that the proposed Scheme of Amalgamation has changed. According to the learned counsel if the appellant no. 3 satisfied claims of some of the Secured Creditors and secured concerned affidavits of the other Secured Creditors to the extent of 98.49 per cent, the learned NCLT should have allowed the application which would be in the interest of justice. The learned counsel submitted that the appellants have filed affidavit in appeal and it is their submission also that merely because some of the Secured Creditors have been satisfied there is no amendment in the Scheme of Amalgamation. It is stated that letters of credits issued at the behest of appellant no. 3 in relation to ongoing business got discharged qua the Syndicate Bank i.e. the letter of credit issuing bank. The said documents were filed before NCLT and copies have been filed in this appeal.

10. It has been argued by the learned counsel for appellant that the appellants do not want to enter into the legal aspects whether or not the

rejection of authority letter supported by power of attorney by Secured Creditors HDFC Bank Ltd., at the time of the meeting of Secured Creditors was right or wrong. But however, his submission is that, the learned NCLT should have in the interest justice permitted the appellants to amend First Motion to seek dispensing of the calling of meeting of Secured Creditors instead of taking technical view that amendment in the application CA(CAA)50(PB)/ 2017 had not been sought. If the NCLT had indicated, Appellants would have amended to include prayer of dispensing in CA no. 50/2017 or reconvening meeting in CA no. 384/2017. The learned counsel submits that if the order of the NCLT is maintained, the appellants would be put too much and great hardship and prejudice as they would have to go back to square one and restart the whole process for the 3 companies which would delay the process, put all concerned to go through the process again, and incur expenses which would be severe hardship and which is avoidable stress, in the set of facts of the present matter. The appellants would be put to avoidable severe costs and delay.

11. The learned counsel submitted that the order regarding calling of meeting of Secured Creditors may be dispensed with so that the matter could proceed to the stage of second motion, or this Appellate Tribunal may reconvene the meeting of Secured Creditors or in the alternative the learned NCLT may be directed to call for meeting.

12. The learned Assistant Registrar of Companies was also heard and she submitted that meeting may be reconvened.

13. The appellant no. 1 and appellant no. 2 are Transferor companies which are to be merged with the appellant no. 3 Transferee Company. The order dated 01.06.2017 of the learned NCLT has been filed which shows that with regard to appellants no. 1 and 2 necessary dispensing with orders were passed, and, as prayed by the appellants, with respect to Secured Creditors meetings of the Secured Creditors was directed to be held on 21.07.2017 at 10.00 A.M and the quorum was fixed as 18. It was further directed with regard to Unsecured Creditors that the meeting would be held on 21/07/2017 at 11.00 A.M and the quorum was specified as hundred. The learned NCLT gave further directions regarding the place of meeting and with reference to submitting all valid proxies, etc. Chairperson, alternate Chairperson and scrutinizer were appointed and further necessary directions regarding notices and public advertisements were issued.

14. The learned counsel for the appellants has pointed out the report with reference to Unsecured Creditors as Annexure A4 to submit that the report shows that Unsecured Creditors had unanimously voted in favour of the Scheme of Arrangement for Amalgamation of Transferor Companies with Transferee Company.

15. The learned counsel for the appellant pointed out Annexure A5 with the appeal as the report of Hon'ble Chairperson with regard to the meeting held of Secured Creditors. The learned counsel submitted that although there are legal grounds available to submit that the Secured Creditor HDFC Bank could not

have been disallowed from voting only because it had come with authority letter as the record showed that the person had come alongwith authority letter and power of attorney and so should have been treated as present in person, still it is stated that the appellants now do not want to go into those technicalities in view of the further developments. The learned counsel referred to the list of Secured Creditors (at page no.151 of the paper book) to point out that the letters of credits referred with reference to parties at serial nos. 1 to 13 had been paid off and the Syndicate Bank which had issued the letters of credits confirmed the same as can be seen from Annexure A-7. He pointed out copy of CA no. 384/2017 to say that the said letter was filed before the NCLT. He also referred to the affidavits which were filed before NCLT relating to Secured Creditors having value more than 90 per cent approving Scheme and who had agreed and confirmed for dispensing the meeting of Secured Creditors. He submits these documents were before learned NCLT but were not duly considered and discussed.

16. We have considered the submissions and gone through the documents being relied on. It would be appropriate to reproduce Para 4 of the order of the learned NCLT. The same reads as under :

“Having heard the learned counsel, we are of the view that the Scheme of Amalgamation, which was presented at the stage of First Motion has not met the approval of the Creditors as per the report of the Chairperson and scrutinizer. The meetings of

Creditors were convened on the request made by the applicant in its application of first motion. There is no request in the application for amendment of pleading in the first motion application. The applicant appears to have further changed the Scheme as payment to certain Secured Creditors has now been made. It would, thus, require presentation of a new Scheme and the present Scheme has not been approved by the Secured Creditors and it would not qualify for an eventual approval of the Tribunal.”

The learned counsel for the appellant rightly submitted that the observation in the above order that the scheme has “not met the approval of the creditors” is not fully correct. Unsecured Creditors have admittedly given their consent.

17. It is further rightly submitted by the learned counsel for the appellant that the observation of the learned NCLT that there is no request to amend pleading in the first motion application was technical approach. The learned counsel submitted that if NCLT was of such a view opportunity should have been given to amend the application. The learned counsel stated that if learned NCLT was of the view that the application required amendment, the appellants would have taken the needful steps. We agree that for such technicality Appellants should not be sent back to square one.

18. We have seen the Scheme of Amalgamation. Only because while filing the first motion, the appellant submitted list of Secured Creditors, we are

unable to agree that merely because some of the Secured Creditors of appellant no.3, an ongoing concern have later on been paid, the Scheme as such gets changed. The learned counsel for the appellant submitted that in another matter of “Landmark Infonet Pvt. Ltd.” CA(CAA)-114/ND/2017 another Bench of the NCLT had in similar set of facts rightly invoked inherent powers to observe that no prejudice would be cost to the parties if the meeting is directed to be reconvened and had reconvened the meeting of Secured Creditors.

19. We find that if the learned NCLT was of the view that there is no request in the application for amendment of pleading in the first motion application, it should have in the interest of Justice given opportunity to the applicants to amend the first motion application instead of rejecting the CA. No. 384/2017 on such technical grounds. The impugned order does not show that the various documents filed by the applicants/ appellants were considered. If the impugned order is maintained, the appellants/ original applicants will be put to grave inconvenience and costs as well as delays, which is avoidable in the present set of facts.

20. We thus pass the following order.

Order

(i) The impugned order is quashed and set aside. The matter is remitted back to the learned NCLT. CA no. 384(PB)/ 2017 and CA(CAA)50(PB)/2017 are restored to the file of NCLT, New Delhi.

(ii) The learned NCLT should give opportunity to the appellants/ applicants to include pleadings and alternative prayer in the first motion application CA(CAA) no. 50 (PB)/ 2017 requesting for dispensing with calling of meeting of Secured Creditors.

(iii) The learned NCLT should give opportunity to the appellants/applicants to include pleadings and alternative prayer in CA no. 384 (PB)/2017 to request for reconvening of meeting of Secured Creditors.

(iv) After the appellants/applicants are allowed to amend their pleadings, the learned NCLT should give the appellants/original applicants another opportunity of hearing and may then pass any suitable orders deemed fit.

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

(Balvinder Singh)
Member (Technical)

New Delhi
Date: 19th March, 2018

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