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NCLT refuses to recall order sanctioning scheme of arrangement stating that Section 230(12) cannot be invoked in a case of demerger

In the recent decision of *Shri Shreans Daga v. IBM India Private Limited*,¹ the Hon'ble National Company Law Tribunal ("NCLT"), Bengaluru refused to recall an order by which it had sanctioned a scheme of arrangement ("Sanction Order") between IBM India Private Limited ("Demerged Company") and Kyndryl Solutions Private Limited ("Resulting Company"). The NCLT held that the application for recall was liable to be dismissed at the threshold, as it had been filed under Section 230(12)² of the Companies Act, 2013 ("2013 Act"), which applies only in cases of takeovers and not in cases of demergers. On merits, the NCLT held that the applicants failed to prove their status as creditors of the Demerged Company entitling them to raise objections to the scheme of arrangement.

Brief Facts

The applicants were individuals who had executed a share purchase agreement ("SPA") with the Demerged Company on October 26, 2016, for sale of their stake in another company. They claimed to be creditors of the Demerged Company to the extent of the consideration to be paid to them under the SPA. The applicants argued that the proceedings leading up to the Sanction Order stood vitiated since: (a) their names had not been disclosed in the list of creditors filed before the NCLT; and (b) statutory notice under Section 230(3) of the 2013 Act had not been issued to them. Accordingly, they filed an application under Section 230(12) of the 2013 Act read with Rule 11 of the National Company Law Tribunal Rules, 2016 ("NCLT Rules") praying that the Sanction Order be recalled.

Pertinently, the applicants also disclosed that arbitral proceedings for seeking payment under the SPA were also pending, with the Resultant Company substituted for the Demerged Company in pursuance of the Sanction Order.

The respondents argued that the application for recall of the Sanction Order deserves to be dismissed as: (a) the applicants could not claim to be creditors of the Demerged Company since the amount claimed by them was uncrystallized and subject matter of dispute in the pending arbitration; and (b) the application had been filed under Section 230(12) of the 2013 Act, which only applied in cases of takeovers and not in cases of demergers.

Issue

The issue before the NCLT was whether Section 230(12) of the 2013 Act could be invoked for recalling the Sanction Order and if so, whether such an order of recall was warranted in the present case.

¹ Order dated April 19, 2024 in IA(CA) No. 12/2022 in CP(CAA) No. 17/2021 before the NCLT Bengaluru Bench.

² As per this provision, an aggrieved party may apply to the NCLT in the event of any grievances with respect to takeover offers of companies other than listed companies.

Analysis and Findings

The NCLT found merit in the contentions of the respondents and held that:

1. the application was liable to be dismissed *in limine* as it prayed for recalling the approval of a scheme of demerger under Section 230(12) of the 2013 Act, which only concerned takeovers. Thus, the application was not maintainable; and
2. the applicants cannot be regarded as creditors of the Demerged Company because: (a) they have not been reflected as such in the financial statements of the Demerged Company; (b) the pending arbitration has not concluded; and (c) the applicants' claim has not crystallized.

For these reasons, the NCLT dismissed the application and refused to recall the Sanction Order.

Conclusion

While refusing to recall the Sanction Order, the NCLT reasoned that (a) the application for recall was not maintainable; and (b) the applicants failed to prove their status as creditors of the Demerged Company. The second reason appears to be sound given that the amounts claimed to be owed to the applicants were pending adjudication and crystallization in arbitration.

However, so far as the first reason is concerned, the NCLT may have overlooked that the applicants had invoked not only Section 230(12) of the 2013 Act but also Rule 11 of the NCLT Rules. While it is true that the power to recall an order by which a scheme of arrangement was sanctioned is not available under Sections 230 – 232 of the 2013 Act, the inherent powers of the NCLT under Rule 11 of the NCLT Rules may be, and have been, exercised for this purpose.

For instance, the NCLT Benches at Chandigarh,³ Jaipur⁴ and Mumbai⁵ have in the past exercised powers under Rule 11 of the NCLT Rules for recalling final orders by which schemes of arrangement had been sanctioned by them. Such orders of recall have also been passed by various High Courts under the erstwhile Companies Act, 1956 ("**1956 Act**")⁶. In fact, the Hon'ble Delhi High Court expressly clarified that company courts in exercise of their inherent powers can recall orders sanctioning schemes of arrangement in peculiar facts.⁷ Since the provisions pertaining to schemes of arrangement under the 1956 Act and the 2013 Act are in *pari materia*, these decisions rendered under the 1956 Act still hold precedential value for proceedings under the 2013 Act. As such, the point of maintainability deserved a deeper analysis.

In any event, in the present case, even if the applicants were able to satisfy the NCLT on the issue of maintainability by placing reliance on Rule 11 of the NCLT Rules (which they had in fact invoked), their application for recall of the Sanction Order could not have been allowed in view of their failure to prove their status as creditors.

³ *Reckitt Benckiser (India) Private Limited*, order dated March 5, 2021, in CA No. 156/2020 in CP(CAA) No. 7/CHD/HRY/2019.

⁴ *Hem Multi Commodities Pvt. Ltd.*, order dated December 5, 2019, in IA No. 299/JPR/2019 in CP (CAA) No. 75/230-232/JPR/2018.

⁵ *HDFC Property Ventures Limited*, order dated July 28, 2023 in IA(CA) No. 92/2023 in CP(CAA) No. 219/MB/2022.

⁶ *Vodafone Essar South Ltd.*, ILR (2013) III Delhi 1979; *Capital 18 Fincap Pvt. Ltd.*, 2015 SCC OnLine Del 10707; *Castron Technologies Limited v. Castron Mining Limited*, 2013 SCC OnLine Cal 12914.

⁷ *Vodafone Essar South Ltd.*, ILR (2013) III Delhi 1979.

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