NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH NEW DELHI

COMPANY APPEAL (AT) No.15/2021

IN THE MATTER OF:

Accelyst Solutions Pvt Ltd

A Company Incorporated under the
Companies Act, 1956
Having its registered office at
1st floor, Corporate Park-II,
Sion-Trombay Road,
Near Swastik Chamber,
Chembur, Mumbai 400071 **...Appellant**

Vs

Freecharge Payment Technologies Pvt Ltd

A Company Incorporated under the
Companies Act, 2013
Having its registered office at:
2nd floor, Plot No. 25,
Pusa Road,
New Delhi- 110005.

...Respondent

Present:

For Appellant:- Mr Jayant Mehta, Mr Arjun Krishan, Mr KaustavSom, Advocates

J U D G M E N T

Jarat Kumar Jain: J.

The Appellant 'Accelyst Solutions Pvt. Ltd.' filed this Appeal against the Order dated 28.02.2020 passed by National Company Law Tribunal, Mumbai (NCLT) in CSP No. 280/C-II/2019 connected with CSA No.517/C-II/2019 whereby allowed the scheme of amalgamation of Freecharge

Payment Technologies Pvt. Ltd. and Accelyst Solutions Pvt Ltd under Sections 230 to 232 of the Companies Act, 2013. However, modified, the Appointed date from 07.10.2017 to 01.04.2018.

2. Brief facts for deciding this Appeal, are that Accelyst Solutions Pvt Ltd (Petitioner / Transferor Company) and Freecharge Payment Technologies Pvt. Ltd. (Non-Petitioner / Transferee Company) under Sections 230 to 232 of the Companies Act, 2013 submitted a scheme for amalgamation of the Transferor Company into Transferee Company. NCLT, Delhi has approved the scheme of amalgamation with Appointed date 07.10.2017 vide order dated 22.10.2019 passed in CP No. CAA-144/ND/2018. NCLT, Mumbai has also approved the scheme vide impugned order but modified the Appointed date from 07.10.2017 to 01.04.2018 on the ground that considerable time has lapsed from the Appointed date as mentioned in scheme and the Board Resolution of the Scheme is dated 27.03.2018 and Valuation Report is dated 22.03.2018.

3. Being aggrieved with this order, the Appellant has filed this Appeal.

4. Learned Counsel for the Appellant submits that the appointed date fixed as per the scheme of amalgamation was 07.10.2017.The said scheme was approved by the NCLT, Delhi vide order dated 22.10.2019 in respect of Transferee Company with the same Appointed date 07.10.2017. However, by the impugned order NCLT, Mumbai modified the Appointed date 01.04.2018 such order is erroneous. The Tribunal would not sit in Appeal over the commercial wisdom of the parties who proposed and approved the scheme if the scheme is otherwise in accordance with statutory requirements. For this

proposition, he placed reliance on the Judgment of Hon'ble Supreme Court in the case of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd. (1997) 1 SCC 579. This Judgment has been approved by the Hon'ble Supreme Court in the Case of Hindustan Lever &Anr. Vs. State of Maharashtra &Anr. (2004) 9 SCC 438. The Court laid down the broad contours of the Jurisdiction of the Company Court in granting sanction to the scheme.

5. It is submitted that the Company Court/Tribunal ought not to modify the Appointed date without justification as held by Hon'ble Gujrat High Court in Re. Shree BalajiCinevision (India) Pvt. Ltd. in O.J. Appeal No. 65 of 2009 decided on 23.09.2009 and the Hon'ble Punjab and Haryana High Court in Re. Highway Cycle Industries Ltd. &Anr. (2003) 115 Comp. Cas. 260.

6. Learned Counsel for the Appellant further submitted that in regard to Appointed date the impugned order had mis-quoted the report dated 15.01.2019 of Regional Director Western Region. For this purpose, he drew our attention towards the RD report at Page 864.

7. It is also submitted that NCLT, Mumbai while modifying the Appointed date has not assigned any reason for modification and has failed to consider this fact that such Appointed date in respect of Transferee Company has already been approved by the NCLT, Delhi vide order dated 22.10.2019. Therefore, the modification of the Appointed date is liable to set aside and fixed the Appointed date as per scheme i.e. 07.10.2017 and condone the delay and extend the time for compliance

8. After hearing Learned Counsel for the Appellant, we have perused the record and considered the submissions.

9. It is admitted fact that amalgamation scheme of Transferee Company 'Freecharge Payment Technologies Pvt. Ltd.' with the Appointed date 07.10.2017 is approved by NCLT, Delhi vide order dated 22.10.2019 passed in CP No. CAA-144/ND/2018.

10. Now, we have considered, whether in regard to Appointed date the impugned order had mis-quoted the RD report dated 15.01.2019.

As quoted in Para 10(e) of the impugned order at pg. 36-37	The Observations ofthe Regional Director on proposed scheme at Page. 864.
(e) As per clause 3.2 of the Scheme, the Appointed date means October, 7, 2017 (Or such other date as may be mutually determined by the Board of Directors of the Transferor Company and the Transferee Company). In this regard. It is submitted that Section 232 (6) of the Companies Act, 2013 states that the Scheme under this Section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date. <u>However, this aspect may be decided by the Hon'ble Tribunal taking into account its inherent powers</u>" (underlining added)	"(e) as per clause 3.2 of the scheme, the Appointed date means October, 7 2017 (or such other date as may be mutually determined by the board of Directors of the transferor company and the transferee company) **and impact of the amalgamation will be given as per the requirements of the applicable Indian accounting standards from this date (or such other date as may be mutually determined by the Board of Directors of the Transferor Company and the Transferee Company**). In this regard, it is submitted that Section 232 (6) of the Companies Act, 2013 states that the Scheme under this Section shall clearly indicate an Appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the Appointed date" (emphasis added)

11. With the above chart, it is clear that para 10(e) of the impugned order had erroneously mis-quoted the observations of the RD report pertaining to Appointed date.

12. Now, we have considered the scope and ambit of the jurisdiction of the Tribunal while exercising its power in sanctioning the scheme of amalgamation. It is useful to refer the Judgment of Hon'ble Supreme Court in the Case of Miheer H. Mafatlal (Supra). This Judgment has been approved by the Hon'ble Supreme Court in the case of Hindustan Lever (Supra) and at para 11 & 12 held that:

> "11. While exercising its power in sanctioning a scheme of arrangement, the Court has to examine as to whether the provisions of the statute have been complied with. Once the Court finds that the parameters set out in Section 394 of the Companies Act have been met then the Court would have no further jurisdiction to sit in appeal over the commercial wisdom of the class of persons who with their eyes open give their approval, even if, in the view of the Court better scheme could have been framed. This aspect was examined in detail by this Court in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., 1997 (1) SCC 579. The Court laid down the following broad contours of the jurisdiction of the company court in granting sanction to the scheme as follows:-
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> 1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.
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> 2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).
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> 3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of

voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).

5. That all the requisite material contemplated by the proviso of sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not unconscionable, nor contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court has neither

the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority.Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392. Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. The supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement.

12. Two broad principles underlying a scheme of amalgamation which have been brought out in this judgment are:

1. That the order passed by the Court amalgamating the company is based on a compromise or arrangement arrived at between the parties; and

2. That the jurisdiction of the company court while sanctioning the scheme is supervisory only, i.e., to observe that the procedure set out in the Act is met and complied with and that the proposed scheme of compromise or arrangement is not violative of any provision of law, unconscionable or contrary to public policy. The Court is not to exercise the appellate jurisdiction and examine the commercial wisdom of the compromise or arrangement arrived at between the parties. The role of the court is that of an umpire in a game to see that the teams play their role as per rules and do not overstep the limits. Subject to that how best the game is to be played is left to the players and not to the umpire.

Both these principles indicate that there is no adjudication by the court on the merits as such."

(Emphasis added)

13. With the aforesaid, it is settled legal position that while exercising its power in sanctioning a scheme of amalgamation, the Court/Tribunal has to examine as to whether the provision of statute have been complied with.The Court/Tribunal would have no further jurisdiction to sit in Appeal over the commercial wisdom of shareholders of the Company.

14. In the light of the aforesaid proposition, we have examined the impugned order, Ld. NCLT in Para 20 & 21 held that:

> "20. As per this scheme, the Appointed date is fixed as 07.10.2017 since considerable time has lapsed from the Appointed date as mentioned in the scheme and the Board Resolution of the Scheme of amalgamation is dated 27.03.2018 and the valuation report is dated 22.03.2018 the Bench considers that the Appointed date be modified suitably and fixed as 01.04.2018.
> 21. Since all the requisite statutory compliances have been fulfilled, the Company Scheme Petition No. 280 of 2019 filed by the Petitioner/Transferor Company made absolute in terms of prayer clauses at 49(i) of the said Petition.

15. With the aforesaid, it is clear that the Appellant Company has fulfilled all the requisite statutory compliances. However, Ld. NCLT modified the Appointed date considering the valuation report which is subsequent to the Appointed date. While modifying the Appointed date Ld. NCLT has not considered that the Appointed date 07.10.2017 is approved by the NCLT, Delhi vide order dated 22.10.2019 passed in CP No. CAA/144/ND/2018 in respect of Transferee Company.The alteration of the Appointed date would render all calculations awry, none of the shareholder opposed the Appointed date proposed in the scheme of amalgamation. In identical facts Hon'ble High Court of Gujrat in the Case of O.J. Appeal No. 65 of 2009 in CP No.

100 of 2009 in Re. Shree BalajiCinevision IndiaPvt. Ltd. decided on 23.09.2009 held that:

> "We have perused the Judgment of the Ld. Company Judge.We do agree with the Ld. Company Judge that the Company Court has discretion to make modification in the proposed scheme of compromise, arrangement etc. However, such discretion is required to be exercisedfor cogent reasons.We do agree with Mr Soparkar that the Ld. Company Judge had no reason to modify the Appointed date proposed inthe scheme of amalgamation.We also agree that the alteration in the appointed date would affect the calculations and would have financial implications.
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> For the aforesaid reasons, we allow these appeals. The modification made by the Ld. Company Judge in respect of the Appointed date proposed in the scheme of amalgamation is set aside. The scheme of the amalgamation as proposed is sanctioned.

16. With the aforesaid, we are of the considered view that the exercising jurisdiction by the NCLT Mumbai to modify the Appointed date from 07.10.2017 to 01.04.2018 in the facts of this case was unwarranted. Thus, the impugned order so far as the modification of Appointed date is concerned is set aside and the Appointed date as per the scheme is fixed 07.10.2017, which is approved by the shareholder of the Appellant Company.

17. For Compliance of the directions in Paras 22 and 23 of the impugned order,we extend the period nowthirty and sixty days respectively calculated from the receipt of the certified copy of this order. It is also made clear that in Para 24 of the impugned order, effective date of the scheme shall be the date on which the certified copy of this order alongwith sanctioning scheme order are filed with both Registrar of Companies, Mumbai and New Delhi

remaining conditions of the impugned order stated in Para 24 will be the same.

Thus, The Appeal is allowed as indicated above, However, no order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

New Delhi
24th March, 2021.
SC