National Company Law Appellate Tribunal

NEW DELHI

Company Appeal (AT) No.136 of 2020

(Arising out of judgement and order dated 6th July, 2020 passed in CP(CAA)/190/MB.I/2017 by National Company Law Tribunal, Mumbai Bench)

IN THE MATTER OF:

Ashish O. Lalpuria
S/O Late Shri Om Prakash Lalpuria
R/O 14, Adarsh, 83 Nehru Road,
Near HDFC Bank, Ville Parle(E) Mumbai-400057 …Appellant

Versus

1. **Kumaka Industries Ltd.**
   404, Sharda Chambers,
   33, Sir Vithaldas Thackersey Marg,
   New Marine Lines, Mumbai- 400020

2. **Union of India**
   Through Office of Regional Director
   Western Region, Ministry of Corporate Affairs
   5th floor, 100, Everest Building,
   Marine Drive,
   Mumbai 400002

3. **BSE Limited**
   Phiroze Jeejeebhoy Towers,
   Dalal Street, Mumbai-400001 …Respondents

Present:

For Appellant: Mr. Gaurav Gododia and Mr. Ashish O. Lalpuria, Advocates. Ms Yogita Bhatia and Ms. Shweta Gupta, Company Secretary.

For Respondents: Mr. Gaurav Sethi, Advocate for R-1.

J U D G M E N T

(20th October, 2020)

Mr. Balvinder Singh, Member (Technical)

1. The present appeal has been preferred by Mr. Ashish O. Lalpuria (hereinafter referred to as 'Appellant') U/S 421 of Companies Act, 2013 challenging the impugned order dated 6th July, 2020 passed in Company Petition bearing No. CP(CAA)190/MB.I/2017 by National Company Law Tribunal, Mumbai (hereinafter referred as 'NCLT Mumbai').
2. The brief facts of the case are that the Respondent No. 1 Company i.e. Kumaka Industries Limited presented a Scheme of Arrangement Under Section 391-394 of Companies Act, 1956 (Existing Sections 230-232 of Companies Act, 2013) for sanction of the Arrangement embodied in the scheme originally filed before Bombay High Court which by virtue of notification issued by Ministry of Corporate Affairs (MCA) on 7th December, 2016 got transferred to NCLT, Mumbai.

The Appellant is a shareholder of Respondent No. 1 Company and he pointed out certain irregularities and non-compliances and raised the objections that the Scheme of Arrangements is a mere rectification of action already taken by the Respondent company without obtaining approval of the Tribunal and other Regulatory Authorities as required under the provisions of Companies Act. NCLT, Mumbai passed the order dated 6th July, 2020 stating that the scheme appears to be fair and reasonable and does not violate any provision of law and is not contrary to public policy or public interest. Hence, the Appellant on being aggrieved by the order of NCLT, Mumbai have preferred this appeal under section 421 of Companies Act, 2013.

3. It is sated by the Appellant that on 12th January, 1995, the Respondent No. 1 company entered into capital market by way of Public Issue of 37,47,400 equity shares of Rs. 10/- each at an issue price of Rs. 160/- per share. Pursuant to the payment of application money of Rs. 40/- per share (consisting of 2.50/- against the face value of Rs. 10/- per share and Rs. 37.5/- towards the premium of Rs. 150/-), 37,47,400 shares were allotted to successful applicants by the company. Out of the total offer size 13,34,400 shares were fully paid up. Application pertaining to 10,375 shares were aggregating to Rs. 16,60,000/- at Rs. 160/- per share were deferred as the Application applied were for less than the minimum lot size i.e. 100 shares. Instead of rejecting the said Application money which were against the terms of public issue and refunding the said money immediately after the allotment was completed, the company retained the money till 1998. By way of scheme of arrangement company sought to convert public deposit into share capital as the retained application money, being a public deposit attracted the provision of section 58 A of the erstwhile Companies Act, 1956.
4. It is further stated that the shareholders of the remaining 24,13,000 shares did not pay the balance amount of Rs. 120/- per share despite several calls being made by the company. Therefore, on 14th August 1997, a special resolution under section 391 of Companies Act, 1956 approving the arrangement comprising of allotment of 25 fully paid up shares of Rs. 10/- each in lieu of 100 partly paid up shares of Rs. 2.50/- each was passed by the company. The explanatory statement for the said Special Resolution clearly mentioned that the same is being contemplated under section 391 of Companies Act, 1956 and also speaks about applications to be made to SEBI and Bombay High Court. Instead of obtaining sanction from these Authorities, an opinion was taken from Hon'ble Y.V. ChandraChud, Retired CJI on whether this Arrangement would tantamount to reduction

in share capital. On 19th July 1998, Bombay Stock Exchange (BSE) informed the Company that it does not agree with the Company and advised them to comply with Section 100 of the Companies Act, 1956. However, no such letter received from BSE formed part of the petition filed before the Court.

5. It is further submitted by the Appellant that inspite of the above communication from BSE, the Company suo-moto proceeded to fraudulently give effect to the said capital reduction in its audited financial statements, annual returns, shareholding pattern and other documents of the company and its submission of quarterly and half yearly financial results made to the BSE, SEBI and other governmental authorities. Since then and till date and in absence of any communication to the contrary, the Company presumed and believed that these authorities have accepted the revised capital status of the Company.
6. It is also submitted by the Appellant that despite receiving the above mentioned communication regarding adherence to provisions of Section 100 of Companies Act, 1956 from BSE on 23rd January, 1999, the Company made application to BSE for the said capital reduction. Thereafter on 6th May 1999, BSE communicated to the Company that it has rejected the Application for listing of these shares and that the Exchange has taken a serious view of the same.
7. It is also submitted by the Appellant that after the Depositories Act, 1996 came into force, SEBI alongwith Stock Exchange made it mandatory for all companies to register themselves with the depositories in order to facilitate dematerialisation of shares and trading of securities on the stock exchange platform was made mandatory in demat form in a phased manner. The Company, being fully aware of the rejection of the Listing Application did not adhere to the guidelines as prescribed by SEBI and Stock Exchanges and did not bother to register itself with the depositories

as the revised Capital structure would not have been admitted by them. It is an undisputed fact that unless securities of any listed company are not granted listing permission by the stock exchange(s), the same are not admitted by the depositories. It was only due to this and certain other non-compliances, BSE suspended trading in the securities of the Company on 7th January, 2002. The Company could have challenged the suspension order before appropriate forum in the year 2002 itself. Considering the most important fact that before suspending the trading the securities of any company, Stock Exchanges issues show-cause notices periodically, clearly giving the details of non-compliances to be made good.

8. It is further submitted that the Respondent No. 1 Company, all through these years was under the blind belief that the Statutory Authorities have accepted the Capital Reduction and was unaware of the BSE Rejection Letter dated 6th May, 1999 until in the year 2012 when the company was proposing to make a preferential allotment to Bank of Baroda, was made aware of the said fact (reason mentioned by the company for non-receipt of the said rejection letter is due to change in address). On 4th June 2010, SEBI amended Securities Contracts (Regulation) Act (SCRA) which provided that all the Listed Companies other than Public Sector Companies were required to maintain public shareholding of at least 25% within a period of 3 years. Since the public shareholding of the Respondent No. 1 Company was less than minimum statutory requirement, it was required to fulfil the requirement within the said time frame as prescribed by SEBI.
9. It is further submitted by the Appellant that on failure of the company with the said requirements SEBI on 4th June, 2013, vide order passed stern orders against the Company, Director and promoters by imposing severe restrictions and with a warning to take further steps in the event of continued default. All through these years company did not care about the distressed shareholders who were unable to sell their shares due to newly

issued shares being labelled as illegal by the Stock Exchange and due to prohibition in trading. Only after the said SEBI order, the Company and its Director presented the scheme to save their skin from the clutches of SEBI rather than for well being of shareholders as mentioned in the petition for portraying it as an "investor friendly" proposition.

10. It is further stated by the Appellant that after learning about the said order the Respondent No. 1 Company filed an application with BSE on 22nd July, 2013 for revocation of suspension of trading. However, no such evidence was attached in the petition filed by the company. Upon receipt of the letter from the Company, BSE advised the Company to implement Reduction of Capital through Scheme/ Court or approach Registrar of Companies (RoC) for alternative remedy.

11. It is further stated by the Appellant that the Company filed the Scheme of Arrangement before the Bombay High Court. On 11th December, 2015, the Company was directed to convene meeting of shareholders and creditors. As per the Order and as per the directions, a meeting of Equity Shareholders and Creditors was held on 8th February, 2016. Finally, on 8th March, 2016, the Company filed the scheme petition before the Bombay High Court and thereafter, in December 2016 for confirmation the said matter was transferred to NCLT, Mumbai Bench and numbered as CP 190 of 2017.

12. It is also stated by the Appellant that the Regional Director, Western Region, Mumbai also submitted its preliminary representation and requested NCLT to dismiss the Petition on the following grounds:

- Ratification of reduction of 18,09,750 shares by conversion of 24,13,000 partly paid up shares of 6,03,250 fully paid up shares.
- Reduction of share capital by cancellation and extinguishment of 10,375 fully paid up shares allotted to 406 shareholders and transfer

of fully paid up 10,375 by the promoters at the rate of 0.005 paise per share.

- To restore the rights of the said 406 shareholders, rearranging and numbering the distinctive Nos. of shares to reconcile the same with the paid up share capital.
- Issue and allotment of 21,04,865 fully paid up shares as Bonus Shares to the public shareholders of the Company other than promoters.

Therefore, it is clearly mentioned by the petitioners that the arrangement which is already implemented is placed before the Hon'ble Court/Tribunal for sanction is not in accordance with law and may not be considered on the following grounds:

- The Company has acted only on the legal opinion dated 3rd November, 1997 and not on the basis of the letter and spirit of provisions of Section 100 of the Companies Act, 1956.
- Subscription made by each of the shareholders less than 100 each which is not acceptable.
- Letter of Bombay Stock Exchange dated 6th May, 1999 not received by the Company and only came to know in the year 2012 is also not acceptable since the company was listed and was in touch the Bombay Stock Exchange, the reason mentioned above is not justified,
- The present scheme is made only as per the advice of the Bombay Stock Exchange in the year 2013 which is not acceptable since the company has to comply with the Companies Act, 1956 before the letter received from the Bombay Stock Exchange.
- There is no proposed scheme, but it is rectification of action already taken.

- In view of above, it is humbly presented that the Regional Director is filing these preliminary observations on the scheme and he is reserving his rights to make further observations if need arises.

13. It is submitted by the Appellant that the impugned order has been passed on the premise that the scheme of arrangement between the company & its equity shareholders seems to be fair, reasonable and no public policy is being prejudiced by the said scheme including overruling the objections raised by the Regional Director (Western Region) Ministry of Corporate Affairs, Mumbai stating that the objections are mere procedural lapses than anything else and there is no illegality pointed out by them. However, NCLT has grossly failed in appreciating the entire facts and circumstances of the case to the conclusion which is opposed to every principle laid down under section 230-232. Furthermore, the Company has time and again misled the courts in the name of Bonus Shares to believe that the proposal is a scheme for the benefit of all raising serious doubts about the existence of these 406 shareholders and whether the Company is a shell company or not.

14. The Appellant further contended that he has the locus to file the present appeal and the embargo under section 230(4) would not apply to the Appellant as he has challenged that the proposal made by the Respondent Company in the form of a Scheme or Arrangement cannot be termed as Scheme or Arrangement as contemplated under section 230-232 of the Companies Act, 2013. Section 230(4) was created to stop shareholder holding less than 10% of the total number of the shares from objecting to an otherwise legal scheme. It nowhere contemplates that when there are questions of legality, breach of law, unfairness, non-compliance of the mandatory provisions, the same cannot be brought before the court by way of a challenge. Rule 16 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 also mandates that the notice of final hearing

has to be advertise in addition to giving notices to the concerned authorities and the objecting Shareholders.

15. The Appellant further contended that the Hon'ble Supreme Court in the case of Mihir Mafatlal vs. Mafatlal Industries Limited where the Shareholder held only 5% Shares as well as in the matter of Sesa Industries Limited vs. Krishna Bajaj the Shareholder held only 0.12% shares, the Apex Court has entertained the petition when the questions involved were of mandatory procedural requirements like proper disclosure and valid consent in the meeting. The only objection raised by the Advocate of Respondent No. 1 Company was on the point of locus of the Appellant and they did not offer a single explanation or arguments for the issue raised by the petitioner. This clearly shows that Respondent No. 1 Company is only interested in hiding the illegalities committed by them.

16. *Per contra*, Mr. Gaurav Sethi, learned counsel for respondent no 1 submitted that at the outset the appeal is non-maintainable, without any locus and is therefore liable to be dismissed. It is submitted that the appellant holds merely fifteen shares (having face value of Rs. 10 each i.e. total value of Rs. 150/- only) of the respondent no 1. This represents only 0.00012% of the paid up capital of respondent no. 1. The said percentage of the shareholding of the appellant is not only negligible but drastically below the threshold of the percentage prescribed to object the scheme under Section 230(4) of the Companies Act, 2013, which clearly states that it should not be less than 10% of the shareholding. Therefore, the appellant has no locus to approach this Tribunal and object to the scheme approved by the ld. NCLT.

17. It is submitted by the learned counsel for respondent no 1 that the appellant was not even a shareholder of Respondent No. 1 Company at the time of the court convened meeting held on 08.02.2016. The father of the

appellant, one Shri Om Prakash Lalpuria died on 15.06.2004, and thereafter, on expiry of nearly twelve years, the appellant on 17.02.2016, for the first time applied for the transmission of shares of respondent no 1. The said 25 (twenty five) shares originally held by the appellant's father were transferred to the appellant without delay and in compliance of law, who is presently holding 15 (fifteen) shares out of the 1,20,85,625 (one crore twenty lakh eighty five thousand six hundred twenty five shares) shares of Respondent No. 1 Company.

18. It is further submitted by the learned counsel for respondent no 1 that the appeal filed is frivolous, vexatious and appears on the face of it to be malicious prosecution. It is averred that as per the said Scheme, the appellant shall be allotted 21 new bonus shares on its present 15 shares. Further, all rights of the shareholders including the appellants are duly protected. The Directors have no interest in the Scheme and it is a duly sanctioned investor friendly Scheme. The only purpose of the said appeal, according to learned counsel, is to harass and blackmail the respondent no 11, in order to avail some sort of ransom or monetary benefit.

19. It is further submitted that the vital part of the Scheme approved by NCLT is already implemented and at such an advanced stage, the Scheme cannot be challenged. The Scheme was already brought in effect on 01.08.2020, and the vital part of the Scheme is already implemented including the issuance of 21,04,865 bonus shares to the shareholder including the appellant. Hence, the prayers sought in the said appeal are now infructuous and cannot be entertained.

20. It is submitted that presently the impugned Scheme is on the verge of final implementation and may be fully implemented by 25.09.2020. Form INC-28 was duly filed by the answering respondent with the Registrar of Companies, Mumbai on 01.08.2020 and has been approved on 01.09.2020.

The accounting effect of the Scheme is also implemented and reflected in the books of accounts of respondent no 1 and the same has already been approved by the auditors of respondent no 1. The answering respondent has also obtained ISIN form NSDL and has initiated the process of listing of shares with the Bombay Stock Exchange.

21. Learned counsel has further stated the present status of the implementation of the Scheme after around 72 days of the impugned order dated 06.07.2020 having being passed:

S.No.	Status	Description
1.	Implemented	Ratification of reduction of 18,09,750 shares by conversion of 24,13,000 partly paid up shares to 6,03,250 fully paid up shares.
2.	Implemented	Reduction of share capital by cancellation and extinguishment of 10375 fully paid up shares allotted to 406 shareholders and transfer of fully paid up 10375 shares by the promoters at the rate of 0.005 paisa per share.
3.	Implemented	Restore the rights of the said 406 shareholders, rearranging and numbering the distinctive numbers of shares to reconcile the same with the paid up share capital.
4.	Implementation to be completed on 24.09.2020 (tentatively) (ISIN obtained from NSDL, allotment of bonus shares to the public shareholders pending)	Issue and allotment of 21,04,865 fully paid up shares as bonus shares to the public shareholders of the company out of the free reserves of the company. (Ratio of 7 shares for every 5 shares held by non-promoter public shareholders to comply with minimum public shareholding.)

22. It is submitted by the learned counsel that the appellant has raised fresh objections and grounds for the first time as a matter of convenience and as an afterthought. The appellant had sufficiently raised his objections before the High Court of Bombay/ NCLT in the affidavit dated 22.08.2016. Learned counsel for the respondent averred that this is against the settled position of law that no new grounds can be raised in the appeal, if they were not originally pleaded before the original court of jurisdiction.

23. It is further submitted that all the arguments and contentions advanced by the appellant were sufficiently heard and considered by NCLT, only after which NCLT dismissed the said objections and approved the Scheme as being fair, reasonable, investor friendly and in the wider interest of the public shareholders. He has placed reliance on para 25 of the impugned order, dated 06.07.2020 which is reproduced below:

24. It is submitted by the learned counsel for Respondent No. 1 that the Appellant is trying to mislead and misguide this Tribunal by filing incomplete pleading and veiling the relevant documents which were originally filed before NCLT/ High Court of Bombay. Prima facie, it appears that the appellant has omitted to place on record crucial documents in the appeal including its own objection affidavit filed before the High Court of Bombay and the reply filed by the Respondent No. 1. It is averred that this is an attempt on the part of the Appellant to derail the legal process and hamper the interests of the rest of the majority non-promoter shareholders.

25. It is further submitted that on 15th September, 2020, a contempt petition (CA (CONTEMPT) 1060/MB/2020 IN CP(CAA) 190/MB/2020) was filed in the NCLT pleading similar prayers of the appeal as well as of the IA.

The appellant mentioned the said IA with similar facts and prayers before this Tribunal on 16.09.2020 without serving a copy to the answering respondents or disclosing that the matter has been mentioned. The contents of the said Contempt Petition filed before NCLT and the IA served on 17th September, 2020 as entirely the same with same prayers.

26. It is further submitted that the IA served upon the answering respondent on 17th September, 2020 is in gross violation of Section 340 CrPC, 1973 and the NCLAT Rules, 2016 as the appellant fixed his signatures at Mumbai and has got the affidavit attested by a notary in Delhi. The appellant has omitted his signatures at one place in the affidavit and it is alleged by counsel for Respondent No. 1 that the counsel for the Appellant has affixed her signatures instead of the client.

27. We have heard the learned counsel for the parties and perused the record. The proposed scheme of compromise and arrangement should not be violative of any provisions of law and is not contrary to public policy. It is apparent from the records that there were irregularities and non-compliances from a very long time due to which Stock Exchange took action against the Respondent No. 1 Company and suspended the trading of its securities in the year 2002. Nothing has been brought on record that the Respondent No. 1 Company have taken any serious actions to make the requisite compliances so that trading of the shares of the company can be resumed. Non action of the Respondent No. 1 Company have serious impact on the investors who have invested their hard money in the company. These non-compliances and irregularities or any illegal act already committed cannot be ratified under the umbrella of "scheme" as envisaged under Section 230-232 of Companies Act, 2013.

28. Respondent company have submitted that the Appellant holds only 15 shares of the Respondent No. 1 Company which represents only 0.00012%

of the paid up capital of Respondent No. 1 Company. The said percentage of the shareholding of the appellant is not only negligible but drastically below the threshold of the percentage prescribed to object the scheme under Section 230(4) of the Companies Act, 2013. Even if the objection of the Respondent No. 1 Company that the Appellant has no locus standi under section 230 (4) to object the scheme is accepted but this will not affect the power of Regional Director as there is no such limitation prescribed for the Regional Director to file his objections as he is a public authority and has to look after the interest of the public/shareholders/investors at large. Thus the Objections raised by the Regional Director should be given due weightage/consideration. The Regional Director have made the following objections which are reproduced below:

- The company has acted only on the legal opinion dated 3.11.1997 and not acted on the basis of the letter and spirit of provisions of Section 100 of the Companies Act,1956.
- Subscription made by each of the shareholders less than 100 each which is not acceptable.
- Letter of Bombay Stock Exchange dated 6.5.1999 not received by the company and they only came to know in the year 2012 is also not acceptable since the company was listed and was in touch with the Bombay Stock Exchange, the reason mentioned above is not justifiable.
- The present scheme is made only as per the advice of the Bombay Stock Exchange in the year 2013 which is not acceptable since the company has to comply with the Companies Act, 1956 before the letter received from the Bombay Stock Exchange.

- There is no proposed scheme. But it is rectification of action already taken.
- In view of above, it is humbly presented that the Regional Director is filing these preliminary observations on the scheme and he is reserving his right to make further observation if need arises.

We have also gone through the above observations made by the Regional Director, Western Region, Mumbai. These objections raised by the regional directors clearly points out the irregularities and non-compliances that were present at the time of sanctioning of scheme by the NCLT. The Company must be in compliance of the provision of law and cannot act just on the basis of a legal opinion. The respondent No. 1 Company should have instantly rejected the application money for 10,375 shares as the Application applied were for less than the minimum lot size i.e. 100 shares. The assertion of the Respondent No. 1 Company that it was unaware of the BSE Rejection Letter dated 6th May, 1999 until in the year 2012 is not tenable as the company was listed and must be in touch with the Exchange for various compliances. The scheme appears to be used as a course of action to rectify the irregularities previously done/committed by the Respondent No. 1 Company. Therefore, the grounds raised by the Regional Director for dismissing the petition seems to be just and reasonable.

29. The main objective behind establishment of SEBI is to protect the interest of the investors and their hard-earned money trading in the stock exchanges, to regulate and facilitate efficient and flawless functioning of the securities market, to promote its development and to resolve the matters connected to it. It is apparent from the records that the Respondent No. 1 Company came into action after SEBI passed an adverse order against the Company and its Directors holding them liable to actions as permissible

under law. Only after the SEBI order the Respondent No. 1 Company was compelled to take a decision and therefore it brought forth a proposal, as a scheme in order to safeguard their directors and the Company.

30. It is pertinent to note under section 230 (5) provides that a notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectorial regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals. The basic intent behind this provisions of law is that these authorities plays a vital role in the overall legal structure and should work harmoniously with the Tribunal in order to ensure that the proposed scheme is not violative of any provision of law and is also not against the public policy.

31. NCLT has overruled the objections raised by the Regional Director on the ground that the objections are mere on the procedural aspects and do not raise any illegality in the scheme or that it is against public policy. Even if the objections are procedural but it is the jurisdiction of the Tribunal that such procedural aspects need to be duly complied with before sanctioning of the scheme, as it would lay down a wrong precedent which would allow companies to do whatever acts without the compliances and confirmation of the Court and other sectoral and regulatory authorities and thereafter get it ratified by the Court under the Umbrella of "scheme". It should have

been contemplated that compliance of law in itself is a part of public policy. It is the duty of the Tribunal or any court that their Orders should encourage compliances and not defaults.

32. The Scheme under section 230 of Companies Act, 2013 cannot be used as a method of rectification of the actions already taken. Before the scheme gets approved, the company must be in compliance with all the public authorities and should come out clean. There must be no actions pending against the company by the public authorities before sanctioning of a scheme under section 230 of the Companies Act, 2013.

33. In light of the above observations the appeal is allowed and we set aside the impugned order dated 6th July, 2020 passed by National Company Law Tribunal, Mumbai.

We are further directing the Respondent No. 1 Company to undo all the actions taken in line with the scheme sanctioned by the NCLT, Mumbai Bench. The Regional Director, Western Region, Mumbai may observe the compliances of the same. No order as to cost.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Mr. Balvinder Singh]
Member (Technical)

BM