IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, MUMBAI

CP (CAA)/190/MB.I/2017
connected with
Company Summons for Directions
No.925/2015
(before Hon'ble Bombay HC)

In the matter of
The Companies Act 1956 and the Companies Act 2013

and

In the matter of
Sections 391 to 394 read with sections 100 to 105 of the Companies Act 1956 and other relevant provisions of the Companies Act 2013

and

In the matter of
Scheme of Arrangement

between

Kumaka Industries Limited
and its Equity Shareholders

Order reserved on: 22nd June 2020
Order pronounced on:06th July2020

Kumaka Industries Limited … Petitioner Company
CIN: L99999MH1973PLC016315

Coram:

Shri Rajasekhar V. K. : Member (Judicial)

Shri V Nallasenapathy : Member (Technical)

Appearances (through videoconferencing):

For the Petitioner	:	Mr. Hemant Sethi, Mr Rajendra Shah a/w Mr Imran Karachiwalla i/b Mansukhlal Hiralal and Co.
For the Regional Director (WR)	:	Ms Rupa Sutar, Deputy Director.
Objector	:	Mr Ashish Lalpuria, party in person.

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. The Court convened by videoconference today (06.07.2020).

2. Heard Mr Hemant Sethi, learned counsel for the Petitioner,Ms Rupa Sutar, Deputy Director for the Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, and Mr. Ashish Lalpuria,the objecting shareholderof the Petitioner.

3. This Petition was originally filed before the Hon'ble Bombay High Court. By virtue of notification issued by the Ministry of Corporate Affairs (MCA) on December 7, 2016, notifying the Companies (Transfer of Pending Proceedings) Rules, 2016, the above proceedings were transferred to this Bench.

4. The sanction of this Tribunal is sought under sections 230 to 232 of the Companies Act, 2013, to a Scheme of Arrangement between the Petitioner Company and its equity shareholders.Learned Counsel for the petitioner states that the Scheme of Arrangement has been filed

by the Petitioner Company pursuant to the advice of the Bombay Stock Exchange to the Petitioner by its letter dated 22 August 2013. The Scheme has been unanimously approved by the shareholders and creditors of the Petitioner Company.

5. Learned Counsel for the Petitioner submits the rationale for the Scheme is as follows:

(a) The Petitioner was incorporated in the year 1973 as Ashok Organic Industries Limited. It has changed its name to Kumaka Industries Limited on 05 March 2011 and is in the business of manufacturing, buying, selling, importing, exporting, distributing, processing, exchange, converting, altering or otherwise handling or dealing, in export of chemicals of any nature and kind whatsoever including organic and inorganic chemicals, synthetics, solvents, dyes and chemicals, drugs, pharmaceuticals, medicines and chemicals popularly known as laboratory or fine chemicals and by-products.

(b) On 12 January 1995,the Petitioner entered into a capital market by a public issue of 37,47,400 equity shares of ₹10 each, at a premium of ₹150 per share (aggregating to ₹160 per share) vide a prospectus dated 12 January 1995. The issue opened on 16 February 1995 and closed on 20 February 1995.

(c) Pursuant to the payment of application monies of ₹40 per share (consisting of ₹2.50 against the face value of ₹10 per share and 37.5 towards the premium of ₹150), 37,47,400 shares were allotted to successful Applicants by the Petitioner. Out of the said 37,47,400 shares, 13,34,400 shares were fully paid up. However, shareholders of the remaining 24,13,000 shares did not pay the balance amount of ₹120 per share despite several calls being made by the Board of the Petitioner. The Counsel for the Petitioner submitted that the Petitioner Company had an option to forfeit the aforesaid 24,13,000 shares for non-payment of allotment monies. However, since the forfeiture was not an investor

friendly measure the Board decided to implement a proposal whereby the 24,13,000 partly paid up shares would be reduced to 6,03,250 fully paid up shares in proportion to the amount of monies already paid as application money.

(d) That the aforesaid arrangement was approved by the shareholders in the AGM of the Company on 14 August 1997. On 24 August 1997, the shareholders of the Company, passed a resolution authorising the Company to enter into a scheme of arrangement between the Company and its equity shareholders in respect of conversion of the partly paid shares, into fully paid shares, in proportion with the amounts paid by such shareholders of partly paid up shares.This above arrangement was carried out on the legal opinion ofMr Justice (Retd) YV Chandrachud, retired Chief Justice of India, who had opinedthat such an action did not amount to a reduction of share capital and compliance with the provisions of section 100 of the Companies Act, 1956 was not necessary.

(e) On 23 November 1998, the Board of Directors of the Company, implemented the proposal, whereby the 24,13,000 partly paid up shares were converted to 6,03,250 fully paid up shares. During the time of allotment, 406 shareholders had subscribed to 10,375 shares by paying the full subscription amounts of ₹160 per share. However,they had applied for less than 100 shares, which was the minimum threshold.

(f) It is further stated that by a letter dated 6 May 1999, the Bombay Stock Exchange (BSE) declined the request of the Petitioner to list the 6,03,250 proportionately reduced shares and the 10,375 shares that were issued. The said letter of the BSE was not received by the Petitioner due to a change in its address.

(g) The Petitioner states that being unaware of the decision of the decision of BSE of non-listing of the aforesaid 6,03,250 proportionately reduced shares and the 10,375 shares that were issued, the Company's recognised share capital in its audited financial statement, annual returns 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 or non-receipt of any objections from them the company presumed and believed that these authorities have confirmed and accepted the capital status of the Company. The capital structure of the company was shown to be as under:

S.No	*Particulars*	*No. of Shares*	*Share Capital (₹)*
1.	*Original number of paid-up shares*	*1,01,37,600*	*10,13,76,000*
2.	*Fully paid-up shares*	*13,34,400*	*1,33,44,000*
3.	*Partly paid-up shares converted into fully paid-up shares [as per III (A)]*	*6,03,250*	*60,32,500*
4.	*Fully paid-up shares allotted [as per III (B)]*	*10,375*	*10,37,500*
	Total	*1,20,85,625*	*12,08,56,250*

(h) It was only in 2012 when the Petitioner sought permissions from BSE Limited to issue preferential shares to Bank of Baroda, that the refusal to list the aforesaid shares came to the knowledge of the Petitioner.

(i) Following this, and upon the advice of BSE Limited,the Petitioner approached the Hon'ble Bombay High Court tofor sanction of the present Scheme, which is now transferred to this Bench.

6. The Scheme of Arrangement was ratified by the Board of Directors of the Petitioner Company *vide* Board Resolutions dated 10 May 2014, 06 June 2015 and 6 July 2015. Learned Counsel for the Petitioner submits that BSE Limited has issued a letter dated 15

September 2015 wherein it has stated that they had no adverse observations with respect to the Scheme. The letter of BSE Limited is annexed at Exhibit-I page 497 of the Company Petition.

7. In these circumstances the Petitioner filed Scheme of Arrangement under sections 391-394 of the Companies Act 1956 before the Hon'ble High Court. By order dated 11 December 2015 passed in Company Summons for Directions No.925/2015 meetings of the Equity Shareholders and Unsecured Creditors were convened and held on 08 February 2016 and the scheme was unanimously approved by the shareholders and creditors present at the meetings. The Chairman's report of the meetings of the Equity Shareholders and Creditors is annexed to the Company Petition as Exhibits H1 & H2.The Report of Scrutinisers,*viz.,* M/s Jayesh Vyas & Associates, Practising Company Secretaries, forms part of the Chairman's Report.

8. The material provisions of the proposed scheme of arrangement were:

(a) 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.

(b) 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 by the promoters at the rate of 0.005 paise per share to restore the rights of the said 406 shareholders.

(c) Rearranging and numbering the distinctive numbers of shares to reconcile the same with the paid-up share capital.

(d) Issue and allotment of 21,04,865 fully paid up shares as bonus shares to the public shareholders of the company other than promoters.

9. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai [RD] has filed his report dated02 January 2018 opposing Scheme on the following grounds:

(1) As per the scheme and information submitted by the company it is clearly mentioned that approval is sought for as under:

(a) 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.

(b) 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 by the promoters at the rate of 0.005 paise per share.

(c) to 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.

(d) 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.

(2) 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: -

1. 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.

2. *Subscription made by each of the shareholders less than 100 each which is not acceptable.*

3. *Letter of Bombay Stock Exchange dated 6.5.1999 not received by the company and only came to know in the year 2012 is also not acceptable since the company was listed in touch with the Bombay Stock Exchange, the reason mentioned above is not justifiable.*

4. *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.*

5. *There is no proposed scheme. But it isrectification of action already taken.*

6. *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.*

The RD has submitted that this Tribunal may decide the matter after considering the above observations.

10. In response to the report filed by the RD, the Petitioner Company has filed affidavit in reply dated 22 October 2018, broadly reiterating the contents of the Petition. It was averred that the objection raised by the RD is too technical.

11. Mr. Ashish Lalpuria, one of the shareholders of the Petitioner appears in person. He has filed his objection to the proposed Scheme. The only objection is that the if the present Scheme is rejected, the Petitioner may come out with scheme to buy back the shares from the public shareholders. He also contends that the

Scheme in its present form is not a Scheme that can fit into sections 230-232 of the Companies Act, 2013.

12. The core contention raised is whether the scheme as presented can be construed as a *'Scheme of Arrangement'* under section 391 of the Companies Act, 1956 or under section 230 of the Companies Act,2013.

13. Mr. Hemant Sethi, learned Counsel for the Petitioner, submits that the term '*arrangement'* is not defined in the Companies Act, but as per judicial interpretation, it is of wide amplitude. The arrangement contemplated by way of the present scheme would certainly fall within the ambit of the term *'arrangement'* as envisaged under section 391-394 of the Companies Act, 1956 or section 230-232 of the Companies Act, 2013.

14. In support of his contention Mr. Hemant Sethi relies upon the following judgments:

(a) Q.H. Talbros Ltd., In re [(2016) 65 taxmann.com 159 (Punjab & Haryana)] dated 10.12.2015

The Division Bench of Punjab & Haryana High Court in paragraph 14 inter-alia observed:

"A merger and a demerger are not the only components of a composite scheme of arrangement. The term arrangement in section 391 is of wide amplitude. It is not defined in the Act. Corporate affairs are often complex involving the interplay of innumerable factors including those relating to policy matters, management and financial aspects and legal issues. The schemes often require considerations of various enactments and adherence to various legal provisions not only under the Companies Act but also under other enactments. Financial aspects are not limited

in their nature or in scope. Each component is studied, and the resultant arrangement is arrived at after taking all of them into consideration.There are consequential acts to be performed as an integral part of the scheme. Many of them, therefore, involve other arrangements such as reduction in share capital and the amendment of the Memorandum of Association and the Articles of Association of the company.These very components canconstitute one composite scheme/arrangement under section 391 of the Act. The legislature, therefore advisedly did not restrict the scope of the term arrangement by defining it. A view to the contrary would place an unwarranted fetter upon the activities of a company and restrict the choice of its members, creditors, debentures holders and other stakeholders."

(b) Re Savoy Hotels Ltd. All England Law Reports (1981)3AllER646 (Chancery Division) (April 1981):

"… there can be no doubt that the word 'arrangement' in s 206 has for many years been treated as being one of very wide import. Statements to that effect can be found in the judgments of Plowman J in Re National Bank Ltd [1966] 1 All ER 1006 at 1012,[1966] 1 WLR 819 at 829, and of Megarry J in Re Calgary and Edmonton Land Co Ltd [1975] 1All ER 1046 at 1054,[1975] 1 WLR 355 at 363. That is indeed a proposition for which any judge who has sat in this court in recent years would not require authority and its validity is by no means diminished by what was said by Brightman J in Re NFU Development Trust Ltd [1973] 1AllER 135,[1972] 1 WLR 1548. All that that case shows is that there must be some element of give and take. Beyond that it is neither necessary nor desirable to attempt a definition of 'arrangement.'"

(at page 652)

(c) TCSP No.151/2017 Hindustan Unilever Limited in the National Company Law Tribunal, Mumbai Bench dated 30.08.2018

In this scheme of Arrangementan amount of ₹2187.33 crore standing to the credit of the general reserves of the company was re-classified as and credited to the Profit & Loss of the company. and subsequent thereto, such amounts credited to Profit & Loss Account of the Company was reclassified as and constitute accumulated profits of the Company for the previous financial years. Further, on the scheme becoming effective, and subsequent to re-classification of the amounts standing to the credit of the General Reserves and credit thereof to the Profit & Loss Account, the amount so credited shall be paid out to the Members of the Company, from time to time by the Board of Directors at their sole discretion.

The Regional Director, Western Region,MCA, opposed the scheme on various grounds including that the Scheme is not an arrangement hence cannot be filed under section 391-394 or sections 230-232 of the 2013 Act. This Tribunal, after considering various judgments cited, sanctioned the scheme as Scheme of Arrangement.

(d) SEBI & another v Sterlite Industries (India)Limited [(2003) 113 ComCases 273 decided on 15.07.2002]

The principal challenge to the scheme was by SEBI and Ministry of Corporate Affairs before the Division Bench of Bombay High Court on the ground that the court has no power to sanction the scheme of this nature under section 391 of the companies act as the company is required to follow the procedure prescribed under section 77A and SEBI (Buy Back of Securities) Regulations, 1998. In para 18 of the judgment of the High Court it is stated that …It is well settled that under section 391 of the Companies Act, the court is invested with very wide powers to approve or sanction any scheme of amalgamation, arrangement, compromise or reconstruction. The Court has power to sanction all matters which for their effectuation require a special procedure to be followed under the Companies Act.

15. Mr Hemant Sethi, learned Counsel for the Petitioner, further submits that the proposed scheme is for the benefit of public shareholders. The scheme does not benefit the promoters in any manner. On the contrary, if the Scheme is sanctioned, the promoters' shareholding shall be reduced from 87.56% to less than 75% as required under the minimum public shareholding requirements stipulated by regulation 38 of the SEBI (LODR) Regulations, 2015, read with rule 19(2) and rule 19A of the Securities Contracts (Regulation) Rules, 1957. Further, the promoters'group shall forego their rights to receive Bonus Shares.

16. Mr Hemant Sethi invited our attention is invited to clause 5 of Part-V of the scheme at page 185 which *interalia* states that the 406 shareholders who shall be get 10,375 shares from the promoters'group, shall also be entitled to get fully paid up Bonus Shares as per the Scheme proposed hereinafteras non-promoter public shareholders along with other non-promoter shareholders, subject to requisite approvals of all concerned authorities.

17. Learned Counsel for the Petitioner further submits that in any case, Mr Ashish Lalpuria, the objecting shareholder, has no *locus standi* to file any objection as admittedly he does not have the required qualification. Mr Hemant Sethi also invited our attention to the proviso to section 230(4) of the Companies Act 2013 which *inter alia* reads as:-

"*Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent of the shareholding or having outstanding debt amounting to not less than five per cent of the total outstanding debt as per the latest audited financial statement."*

18. Per contra, Mr Ashish Lalpuria submitted that the issue of *locus* should be decided only if this Tribunal holds that the Scheme as filed by the Petitioner in its present form is an 'arrangement' within the meaning of Companies Act 1956/2013.

19. We have carefully considered the rival contentions of the learned counsel for the petitioner and the objecting shareholder. We have also perused the report of the RD objecting to the present Scheme on the ground that it is not a Scheme at all but only a rectification of the errors on the part of the petitioner.

20. That the term *'arrangement'* envisaged by sections 391-394 of the Companies Act, 1956 as also sections 230-232 of the Companies Act, 2013, is a term capable of the widest import, is not *res integra.*The legislature, in its infinite wisdom, deliberately did not get down to the task of marking delimiters to the term *'arrangement,'* aware as it was that arrangements can take on multiple hues and a bewildering assortment of forms. It is limited only by human ingenuity in finding solutions to corporate problems. Therefore, to make it conform to set parameters would be to doinjustice to the statutory provisions, and this is certainly not what the lawmakers intended.

21. Some of the evaluation parameters set out in the judgment of the Hon'ble Supreme Court in ***Miheer H Mafatlal v Mafatlal Industries Limited,***[1]are that the scheme should be fair, just and reasonable, not contrary to any provisions of law and does not violate any public

[1] AIR 1997 SC 506 : (1997) 1 SCC 579 decided on 11.09.1996

policy. The fairness of the scheme *qua* the objecting shareholder has also be kept in view. The Hon'ble Supreme Court also cautioned against the court acting like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the nature of compromise or arrangement. It said that 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 has to be kept in view by the court.

22. In the light of settled position in law and judicial pronouncements on the import of the term *'arrangement,'* which is of wide ambit and import, there is no basis to hold that the scheme as filed by the Petitioner does not constitute as an arrangement between the Petitioner Company and its members within the meaning of section 391-394 of the Companies Act, 1956 orsection 230-232 of the Companies Act, 2013.There are no restrictive covenants built into the language of section 391-394 of the Companies Act 1956 or section 230-232 of the Companies Act 2013 that would inhibit our considering the present Scheme to satisfy the requirements of an 'arrangement' within the meaning of those sections.Even if the Scheme purports to rectify and regularise the allotments already made by the Petitioner, there is no reason why the Scheme should not be treated as an arrangement between the company and its shareholders.

Objection by the Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai

23. Having held that the Scheme propounded does indeed answer the description of being an *'arrangement,'* we now proceed to examine the objections of the RD and of the shareholder holding 0.00012% of the paid-up share capital of the petitioner company.To recapitulate, the RD had submitted that –

(a) 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.

(b) Subscription made by each of the shareholders less than 100 each which is not acceptable.

(c) Letter of Bombay Stock Exchange dated 6.5.1999 not received by the company and only came to know in the year 2012 is also not acceptable since the company was listed in touch with the Bombay Stock Exchange, the reason mentioned above is not justifiable.

(d) 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.

The RD's objection is more on the procedural aspects than anything else. Procedural niceties would not be sufficient to deter us from considering the Scheme. The RD has not raised any objection as regards any illegality in the Scheme, or that it is against public policy, and therefore we overrule the said objections.

Objection by Mr. Ashish Lalpuria, one of the shareholders holding fifteen shares

24. We next consider the objections of the shareholder holding fifteen shares in the petitioner company. Having held that the scheme envisaged is an 'arrangement' for the purposes of sections 391-394 of the Companies Act, 1956 and sections 230-232 of the Companies Act, 2013, it is now necessary to determine whether the objector has the necessary *locus* to object to the Scheme.

25. The admitted position is that the objector holds fifteen shares, representing 0.00012% of the paid-up share capital of the petitioner company. This is below the threshold of ten percent stipulated in section 230(4) of the Companies Act, 2013. However, even so, we have proceeded to consider the objections. On being questioned by the Bench as to how rejection of the scheme will benefit him, Mr Ashish Lalpuria stated that if the present Scheme is rejected, then it is possible the petitioner company may come out with a proposal in the future to buy back the shareholding from the public. This is purely speculative. We are not inclined to leave any loose ends. Therefore, the objection cannot be sustained even on merits.

26. Having thus repelled the last vestiges of challenge, we notice from the material on record that the Scheme appears to be fair and reasonable and does not violate any provisions of law and is not contrary to public policy or public interest.BSE Limited has stated in its letter dated 15 September 2015 that there are no adverse observations. In the absence of anything inherently abhorrent in the Scheme, we see no reason why the Scheme should not have the imprimatur of this Tribunal.

27. Since all the requisite statutory compliances have been fulfilled, CP(CAA) 190/MB.I/2017 is made absolute in terms of prayer clause (a) to (c) of the Petition.

28. The Petitioner is directed to lodge a certified copy of this Order and this Scheme with the concerned Superintendent of Stamps, within 60 working days from the date of receipt of certified copy of order, for adjudication of stamp duty payable, if any on the above.

29. The Petitioner is directed to lodge a certified copy of this Order along with a copy of the Scheme of Arrangement with the concerned Registrar of Companies electronically in Form INC-28, in addition to physical copy, within 30 days from the date of issue of the Order duly certified by the Deputy/Assistant Registrar of this Tribunal.

30. All concerned regulatory authorities to act on a copy of this Order duly certified by the Deputy/Assistant Registrar of this Tribunal along with a copy of the Scheme.

31. Pronounced today in Open Court. File be consigned to records.

Sd/-	Sd/-
V. Nallasenapathy	Rajasekhar V. K.
Member (Technical)	Member (Judicial)