NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI
COMPANY APPEAL (AT) NO.128 OF 2020

(Arising out of Impugned order dated 02.03.2020 passed by the National Company Law Tribunal, Mumbai Bench, in Company Scheme Petition No. 2199 of 2019).

In the matter of:

1. RHI India Private Limited
C-604 Neelkanth Business Park,
Opposite Railway Station,
Vidhyavihar (West), Mumbai 400086

2. RHI Clasil Private Limited
301-302 Orbit Plaza,
New Prabhadevi Road Prabhadevi
Mumbai 400025

3. Orient Refractories Limited
C-804, Neelkanth Business Park,
Opposite Railway Station,
Vidhyavihar (West), Mumbai 400086 **Appellants**

Versus

Union of India,
Ministry of Corporate Affairs,
Through the Regional Director,
Western Region 100 Marine Drive
Mumbai 400002 **Respondent**

Present

Mr. Sudipto Sarkar, Sr. Advocate with Ms Navpreet Ahluwalia, Mr Adish Sharma and Mr. Deepak Chawla, Advocates for Appellants.

Mr Kamal Kant Jha, Advocate for Respondent

JUDGMENT

(19th January, 2021)

Mr. Balvinder Singh, Member (Technical)

Introduction

The present appeal has been preferred by the Appellants under Section 421 of the Companies Act, 2013 against the impugned order dated 02.03.2020 passed by the National Company Law Tribunal, Mumbai Bench, Mumbai ('NCLT' in short) in Company Scheme Petition No.2199 of 2019 vide which the Tribunal has rejected the scheme for amalgamation proposed by the Appellants.

2. The NCLT while passing the impugned order dated 02.03.2020 have made the observations, the relevant paras of the impugned order are enumerated as follows:

> "**34**. In the matter of de-merger of East West Pipelines (demerged Company) and Pipeline Infrastructure Pvt. Ltd. (the resultant Company), Court-I, NCLT, Mumbai had ordered the Petitioner Company to amend the Scheme of amalgamation by deciding the appointed date as on the date on which the demerged Undertaking has been valued. As decided in the case discussed supra, the Bench is of the considered view that the appointed date can be the date on which the Valuation Report was prepared and the Fairness Opinion was given by the Merchant Banker i.e. 31.07.2018. Since the Transferee Company will be allotting the shares which are listed and being regularly traded on the Stock

Exchanges, on consideration, the share exchange ratio would undergo change significantly in view of the market price on which the cut-off date i.e. appointed date is considered. In the instant case, if we consider 31.07.2018 as the appointed date, the average of two weeks market price per share was Rs.182.58 as stated above. However, if we consider the market price per share as on the appointed date proposed in the Scheme i.e. 01.01.2019 the average market price is 234.50."

"38. Further, it is also observed that the Transferee Company would allot a maximum of 4,08,57,131 shares as per the Valuation Report which works out to 34% of the current paid-up share capital of the Transferee Company. Once the Scheme is approved and the Scheme coming into effect the total capital of the Transferee Company would increase to 16,09,96,331 shares and allotment of 4,08,57,131 shares as proposed in the Scheme would amount to 25.38% of the post allotment percentage of the shareholding by the shareholders of these two Transferor Companies."

"39. Considering the above factual details, the profit earning capacity and other financials of the Transferor-I and Transferor-II Companies, the share exchange ratio as per the valuation given by the Auditor and the Fairness Opinion given by the Merchant Banker appears to be too high which results in undue advantage/ enrichment to the shareholders of both the Transferor Companies and to the shareholders of the ultimate holding Company RHI Magnesita. Therefore, we are of the considered view that the Scheme is devised/ designed majorly to benefit the Two shareholders of Transferor Company-I and few shareholders of Transferor Company-II which in turn the undue advantage ultimately flows to the shareholders/ holding Company, i.e. RHI Magnesita. In view of the above analysis, we are of the considered view that the Scheme appears to benefit only a few shareholders of Transferor Company to be unfair and unreasonable and contrary to the public policy, public shareholders of the listed Company therefore, we deem it fit not to sanction/ approve the proposed Scheme of

Amalgamation. Therefore, we do not sanction/ approve the Scheme as prayed for."

Brief Facts of the Case

3. The brief facts of the case are that the 1st Appellant is primarily engaged in business of purchase, sale, import, export and marketing of refractories, refractory products, chemicals, formulations and related equipment required in industries such as steel plants, furnaces, power house and cement plants. 2nd Appellant is engaged in the business of manufacturing and marketing of refractories and allied products. 3rd Appellant is engaged in the business of manufacture and marketing of refractory products, systems and services and has various global partners for its international quality products.
4. The Appellant no. 1 & 2 herein are the transferor companies and 3rd Appellant is the transferee company. Appellants herein are a part of RHI Magnesita group of companies. The 3rd appellant is a subsidiary of Dutch US Holding, BV which is ultimately owned by RHI Magnesita N.V., Netherlands (RHIM). Two group companies of RHIM being Dutch Brasil Holdings, BV, the Netherlands and VRD Americas BV, the Netherlands, hold 100% of 1st appellant and 2nd appellant is a subsidiary of VRD Amercas BV, the Netherlands, which is ultimately owned by RHIM.
5. Appellants presented a scheme of amalgamation for approval of the Tribunal for merging 1st and 2nd appellant in 3rd appellant. The rationale for the scheme to simplification of the corporate structure and consolidation of the India business of the RHIM group, establishing a comprehensive refractory product portfolio; realizing business efficiencies inter alia through optimum utilization of resources due to pooling of management, expertise, technologies and other resources of the

Companies, improved allocation of capital and optimization of cash flows contributing to the overall growth prospects of the combined companies, creation of a larger asset base and facilitation of access to better financial resources and enhanced shareholder value pursuant to economies of scale and business efficiencies.

6. The proposed scheme was got approved from Board of Directors of each of the company vide their respective Board Resolution dated 31st July, 2018. The appellants complied with all the directions issued by the Tribunal and necessary affidavits to that effect were filed.
7. Notice was issued to the Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai who appeared and filed its report stating that appellants have not served notices to the concerned authorities which are likely to be affected by the amalgamation; appellants have not submitted the Chairman's report, admitted copy of the petition and Minutes of Order for admission of the petition; to submit an undertaking there is no discrepancy or deviation in the scheme enclosed with the Company Application and the scheme enclosed with the Company Petition; Appellants shall pass such accounting entries which are necessary in connection with the scheme; as per definition of the scheme, appointed date means the 1st day of January, 2019.
8. Arguments were heard and after hearing the arguments the Tribunal passed the order dated 2.3.2020 thereby rejecting the scheme of amalgamation based on the aforementioned observations.
9. Having being aggrieved by the impugned order, the Appellant therefore, preferred the instant Appeal before this Appellate Tribunal.

Submission on behalf of the Appellants

10. The learned counsels for the Appellants have submitted that the NCLT has rejected the scheme filed by the appellants on the ground that the appointed date of the Scheme is 01.01.2019 whereas the Valuation Date is 31.07.2018. The appellants stated that the appointed date under the Scheme was specified as 01.01.2019 but Clause 1.1.3 of the Scheme provides that the Appointed Date can be such other date as may be fixed by the NCLT.

11. It is further submitted on behalf of the Appellants that the tribunal while passing the impugned order has based its findings on a very limited ground that the scheme which was proposed is against public policy. It is also submitted that the interpretation of the term 'public policy' in judicial prudence is based on a concept, whereby, an entity misleads the public at large with a view to gain undue advantage over the general public by committing certain acts of deceit/ fraud.

12. The learned counsel for the Appellant also submitted that the legislature while enacting Chapter XV namely "Compromises, Arrangements and Amalgamations" (under section 230-232 of the Companies Act) has made it a pre-condition for an entity applying for a Compromises/ Arrangement/ Amalgamation to inform the entire public at large including the public/ institutional shareholder, about the entire contours of the scheme as well as its impact on each and every shareholder. Basis such information, a minimum percentage of consent from various shareholders (be it public or institutional)/ stakeholders is mandatory for a scheme to be sanctioned under the Companies Act. Further, NCLT has not come to any finding that the Appellants while applying for the mandatory consent of the Public Shareholders have committed a fraud upon the Public Shareholders/ or have withheld any information/ or have manipulated any information or have committed any deceit, whereby, it can be stated or inferred that the consent for the scheme which has been received by the Appellants is based on any of the above mentioned illegal actions.

13. It is stated by the learned counsels for the Appellant that all the relevant documents/ information were duly placed before all the stakeholders of 3rd Appellant. The NCLT has ignored the fact that basis the entire information placed before the general public and other stakeholders of 3rd Appellant, the scheme has been accorded an approval by an overwhelming majority of 99.95% of the relevant stakeholders (which includes 96.05% of the Public Shareholders). Thus the finding by the NCLT that the scheme being in the interest of certain shareholders and is against public policy is contrary to law.

14. It is further stated on behalf of the Appellant that the legislature in its wisdom has made it mandatory that in case of a scheme which involves listed public shareholders, consent of the Securities & Exchange Board of India (SEBI) is mandatory. The intent behind such consent is that the SEBI is the Authority which has been bestowed with the responsibility of ensuring the protection of the public shareholders. Admittedly, in the present case, no objection was raised by the SEBI in respect of the said scheme. Since no suspicion was ever raised by SEBI in respect of the said scheme, it cannot be said that the scheme is against the interest of public shareholders and therefore in violation of public policy.

15. The learned counsel for the Appellants contended that a bare perusal of the impugned order, would make it evident that it is a case of judicial overreach, as the NCLT, while examining the said scheme for the purposes of according its approval has delved into issues, which it need not have. The scope of judicial intervention, while approving a scheme is very limited and has been well defined by this Appellate Tribunal as well as the Hon'ble Supreme Court of India in a catena of judgments. The Learned Counsel for the Appellants have put their reliance in the matter of **UFO Moviez India Ltd. & Anr. V. UOI, Company Appeal (AT) No. 48 of 2019,** wherein, a scheme of merger was rejected by the NCLT inter alia on the basis that the scheme is effecting the share price and is devaluing the investment of the public

shareholders, therefore, the same is against public policy. The order of rejection passed by the NCLT therein was overruled and the Appeal was allowed by this Appellate Tribunal vide Judgment dated 24.10.2019 inter-alia holding the rejection of the scheme of merger by NCLT has been on the grounds, which were not required to be delved into for the determination of a merger in terms of scheme of Section 230-232 of the Companies Act.

16. The Leaned Counsel for the Appellants further contended that the NCLT has wrongly held that the scheme is to the advantage of some shareholders as opposed to all the shareholders and as such is against public policy. NCLT has overlooked the informed/ unprejudiced consent and commercial wisdom exercised by the shareholders of the Appellants, who have made an informed decision to approve the said scheme and is doing so has attempted to superimpose/ sub-plant its own commercial wisdom on all the stakeholders.

17. Appellant also stated that after post-merger a minor increase of 4% of the promoter group as before the scheme was promulgated, 66.49% of the 3rd appellant was controlled by the promoter group and post scheme it will become 70.19%.

18. It is further contended on behalf of the Appellants that the valuation, basis which the exchange ratio has been determined reflects the inherent value of the shares of each of the Appellant Company and therefore to arrive at a conclusion that the scheme is prejudicial to a particular set of stakeholders basis the prevailing market price of the share of a share of a listed public entity is inherently flawed because the market price of a share of a listed public entity is subject to change on a continuous basis and is a factor which is completely beyond the control of any person/ entity on account of the prevailing regulations forces which govern the functioning of the stock exchanges in India. In any case, the NCLT does not possess any power to delve into such realms while dealing with the matters concerning the sanction of a scheme of amalgamation.

19. It is argued by the learned counsel for the Appellant that the scheme was pending for approval before the NCLT for a period of 1.5 years (approx.) and no concerns, which have now been raised by the NCLT in the impugned order, were ever raised by the NCLT with the Appellant during the course of the subject proceedings. The Appellant was never given an opportunity to clarify or assuage any of the doubts which have now come to be expressed by the NCLT in the impugned order concerning the Valuation methodology basis which it has gone on to reject the said scheme.

20. It is stated by and on behalf of the Appellant that for the purpose of the scheme which is being proposed, notices in compliance of Section 230(5) of the Companies Act were duly sent to Regulatory Authorities such as Income Tax Authority concerned, the Regional Director, Ministry of Corporate Affairs, Western Region, the Registrar of Companies, Maharashtra, Mumbai, the Reserve Bank of India, the Competition Commission of India, the Official Liquidator, High Court of Bombay, BSE Limited, the National Stock Exchange of India Limited, and the Securities Exchange Board of India, however, no objection whatsoever was received from any of the said authorities.

21. It is further stated by learned counsel for the Appellants that the Regional Director, the Ministry of Corporate Affairs i.e. the Respondent herein had raised certain observations qua the said scheme, which have been enumerated under Para 8 of the impugned order. Insofar as these observations are concerned, the NCLT had been satisfied with the response of the Appellants herein qua each of the said observations, which will be evident from Para 15 of the impugned order, however basis which the said scheme has been rejected by the NCLT is completely alien to the observations which were raised by the Respondent.

22. The Learned Counsels for the Appellants further argued that the NCLT, while rejecting the scheme has further gone on a technical ground stating the Valuation

Report, the Board Resolution and the Fairness Opinion are of same date i.e. 31.7.2018 within a gap of few hours, therefore, the same raises concerns. NCLT while rejecting the said scheme has failed to cite any provisions of law and record any reasonable grounds in support of its concern. The learned counsels further put its reliance on the Judgment of this Appellate Tribunal in the matter of **Arvind Aggarwal vs. Trinetra Cement Ltd., Company Appeal (AT) No. 171 of 2017,** whereby it was specifically held that "We do not agree with the submission made on behalf of the Appellants that the multiple steps for the 'Scheme' taken on a single day (26th February, 2014 herein) will render the reports invalid. Validity of one or other report can be looked into if specific illegality is brought to the notice of the Hon'ble High Court/Tribunal."

23. The Learned Counsels for the Appellants further contended that Company under a Scheme has the freedom to choose an appointed date as per Section 232(6) of the Companies Act, which states that the scheme shall clearly indicates an appointed date and as clarified by the General Circular bearing No. 09/2019 dated 21.08.2019 issued by the Ministry of Corporate Affairs, however, the impugned order has alluded to the said circular in part by stating that the said scheme is not tied to the occurrence of an event or fulfillment of any pre-conditions agreed upon by the parties and therefore, the appointed date should be the valuation date. In support of its reasoning, the NCLT has wrongly relied upon the Judgment passed by the NCLT in East West Pipeline Limited and Pipelines Infrastructure Private Limited (CSA No. 719/2018), which had been passed prior to the said circular. The Circular on the contrary clarifies the appointed date, which may be a specific calendar date or may be tied to the occurrence of an event which are relevant to the scheme and therefore, the concerned parties are free to mutually agree upon a specific calendar date in this regard.

24. Learned counsel for the Appellants in its written submission stated that to put the entire issue at rest they are agreeable and filed an affidavit to this effect that the appointed date should be same as the Valuation Date i.e. 31.07.2018.

25. Appellants lastly prayed that the scheme of Amalgamation proposed by the Appellants may be sanctioned by setting aside the impugned order dated 02.03.2020 passed by the NCLT, Mumbai Bench in Company Scheme Petition No. 2199 of 2019.

Submission on behalf of the Respondent

26. Short reply affidavit has been filed on behalf of the Respondent viz. Regional Director, Western Region. The learned counsel for the Respondent stated that they had filed the report and had given their observations dated 24.06.2019 before the NCLT, Mumbai Bench (which are enumerated under para 7 above). It is further submitted on behalf of the Respondent that there is nothing more to add that what is stated earlier in the representation dated 24.06.2019 before the NCLT and the matter may kindly be decided on its own merits.

Appraisal

27. We have heard the parties and perused the record.

28. We have observed that the NCLT in its impugned order dated 2.3.2020 at paras 9 to 15 has clearly stated that so far the observations made by the Regional Director, the Appellants have made the following clarifications and undertakings which are hereby accepted by the NCLT.

I. The Appellant companies have served notices to all the regulatory authorities concerned as required under Section 230(5) of the Companies Act, 2013;

II. The Appellants have also submitted a copy of the Chairman's report together with an admitted copy of the petition and order for admission of the petition;

III. 3rd Appellant undertakes that in addition to compliance of AS-14, 3rd appellant shall pass such accounting entries which are necessary in connection with the Scheme to comply with other applicable accounting standard.

IV. The Appellant Companies undertake to comply with provisions of Section 232(3)(i) of the Companies Act, 2013.

V. The Appellant Companies confirm and undertake that the Appointed Date has been fixed as the 1st day of January, 2019 which is in compliance with section 232(6) of the Companies Act, 2013 and the Scheme shall be effective from such Appointed Date but shall be operative from the Effective Date

29. We also note that the Official Liquidator has filed his report stating therein that the affairs of the 2nd and 3rd Appellants have been conducted in a proper manner and that 2nd and 3rd appellant companies may be ordered to be dissolved.

30. On the basis of the arguments we have come to conclusion that at the statutory meetings 139 public shareholders including public institutions voted either in person or by postal ballots or by remote e-voting and over 92% of the public institutions and over 81% of other public shareholders participated by voting. All Public institutions and 99.73% of other public shareholders voted in favor of the scheme, making the tally at 99.74%. Further no minority shareholders have come forward to oppose the scheme.

31. Since, no objections have been raised by SEBI or any regulatory authority to whom notices had been issued under section 230(5) of the Companies Act, 2013 and also, as the scheme has been accorded an approval by an overwhelming majority of 99.95% of the relevant stakeholders (which includes 96.05% of the Public

Shareholders). We are of the view that before the NCLT, Mumbai the Appellants brought to their notice that all the procedures prescribed u/s 230-232 of the Companies Act, 2013 were followed. This was noticed by the NCLT. However, by impugned order dated 02.03.2020, the NCLT rejected the Scheme of Amalgamation on certain ground which was not required to be noticed for determination of Amalgamation u/s 230-232 of the Companies Act, 2013.

32. The NCLT while passing the impugned order have overreached its scope of Judicial Intervention in determination of the Scheme of Amalgamation u/s 230-232. NCLT have failed to point out any material illegality under the scheme and also accepted the clarifications submitted by the Appellant against the objections raised by the Regional Director, Western region. Since no minority shareholders have raised any objections against the scheme thus, the commercial wisdom of the shareholders shall not be overlooked by the NCLT. We are of the view that the scheme cannot be said to be violative of public policy just on the ground that NCLT considered that the scheme appears to benefit only a few shareholders of Transferor Company without giving any reasonable findings for the same.

33. We also heard the Appellants on the issue of appointed date as fixed by them in the company petition. NCLT has rejected the scheme filed by the Appellants stating that the appointed date of the Scheme is 01.01.2019 whereas the Valuation Date is 31.07.2018. NCLT by putting its reliance on the case of **East West Pipelines (demerged Company) and Pipeline Infrastructure Pvt. Ltd. (the resultant Company), Court-I, NCLT, Mumbai** ordered that the appointed date can be the date on which the Valuation Report was prepared and the Fairness Opinion was given by the Merchant Banker i.e. 31.07.2018. Since the Transferee Company will be allotting the shares which are listed and being regularly traded on the Stock Exchanges, on consideration, the share exchange ratio would undergo change

significantly in view of the market price on which the cut-off date i.e. appointed date is considered.

34. The Ministry of Corporate affairs in its General Circular bearing No. 09/2019 dated 21.08.2019 made the clarification under section 232(6) of Companies Act, 2013. According to such circular, section 232(6) of the Companies Act enables the companies in question to choose and state in the scheme an 'appointed date'. This date may be a specific calendar date or may be tied to the occunence of an event such as grant of license by a competent authority or fulfilment of any preconditions agreed upon by the parties, or meeting any other requirement as agreed upon between the parties, etc., which are relevant to the scheme. Therefore, NCLT have wrongly relied on the abovementioned judgement. Also, since the appointed date under the Scheme was specified as 01.01.2019 but Clause 1.1.3 of the Scheme provides that the Appointed Date can be such other date as may be fixed by the NCLT. Therefore, NCLT shall not reject the Scheme solely on the ground that the appointed date and valuation date is different. The Appellants to put the entire issue at rest, are agreeable and filed an affidavit to this effect that the appointed date should be same as the Valuation Date i.e. 31.07.2018.

35. We are of the opinion that since a considerable amount of time have been lost and as the Appellants are agreeing under the scheme that the appointed date may be such date as the NCLT may decide i.e. the valuation date (31.07.2018). Therefore, in view of the aforegoing discussions and observations the appeal is allowed and the appointed date shall be the valuation date i.e. 31.07.2018. However, this is decided by considering the facts of the case and it will in no way shall be used as a precedent as the General Circular issued by the Ministry of Corporate Affairs have made the reasonable clarification in regards to the appointed date under section 232(6) of the Companies Act, 2013.

36. We, therefore, direct the NCLT, Mumbai Bench to approve the proposed scheme without any further delays in order to meet the ends of justice. We also direct the Regional Director, Western Region, Ministry of Corporation Affairs, Mumbai to monitor that the scheme is implemented according to appointed date as 31.7.2018.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Techncial)

(V.P. Singh)
Member (Technical)

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