

National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) No. 148 of 2021 (Arising out of Order dated 23rd September, 2021 passed by National Company Law Tribunal, New Delhi, Court-II, in C.A.(CAA)-84/ND/2021).

IN THE MATTER OF:

**1. Ericsson India Private Limited,
A Company incorporated under the Companies
Act, 1956.**

**Registered Office: 4th Floor, Dhaka House,
18/17 WEA, Karol Bagh,
New Delhi – 110005.**

**...Appellant No. 1/
Transferor Company**

**2. Ericsson India Global Services Private
Limited,
A Company incorporate under the Companies
Act, 1956.**

**Registered Office: 4th Floor, Dhaka House,
18/17 WEA, Karol Bagh,
New Delhi – 110005.**

**...Appellant No. 2/
Transferee Company**

Appellant:

Mr. Krishnendu Datta, Sr. Advocate along with Mr. Parag Maini, Mr. Abhimanyu Chopra, Mr. Raghav Chadha, Mr. Bharat Apte and Mr. Varun Lamba, Advocates.

JUDGEMENT

[Per; Shreesh Merla, Member (T)]

1. Aggrieved by the Order dated 23.09.2021, passed by the NCLT (National Company Law Tribunal, New Delhi, Court-II) in C.A.(CAA)-84/ND/2021, the Appellants „M/s. Ericsson India Private Limited“ (the ‘Transferor Company’) and „M/s. Ericsson India Global Services Limited“ (the ‘Transferee Company’) preferred this Appeal. By the Impugned Order, the NCLT has dismissed the Application C.A.(CAA)-84/ND/2021, filed under

Sections 230 to 232 of the Companies Act, 2013, (hereinafter referred to as the 'Act') praying to dispense with convening and holding of the Meeting of Shareholders and Creditors in relation to the 'Transferor and Transferee

Companies' for approval of the Scheme of Amalgamation which shall take effect from the appointed date on 01.04.2021. The NCLT while dismissing the Application observed as follows:

"25. That we further notice that there are 473 Unsecured Creditors representing a total outstanding unsecured debt of Rs.24,640.21 million as on 30.06.2021 against the Transferor Company. Similarly, there are 177 Unsecured Creditors representing a total outstanding unsecured debt of Rs.1,262.71 million against the Transferee Company.

26. That in terms of Accounting Reporting, the Creditors are the liabilities of the Company. That on approval of the Scheme, the liability worth Rs.24,640.21 million will be shifted to the 'Transferee' Company, which is already having an existing liability of Rs.1,262.71 million towards its own creditors.

27. In our considered view, the Unsecured Creditors of both the Applicant Companies cannot be kept in dark. If without their consent Affidavits, the meeting of the unsecured creditors is dispensed with, they will be deprived of an opportunity of being heard or oppose the Scheme.

28. That in accordance with law, it should be the well-informed decision of the Unsecured Creditors of the Transferor Company, whether they want to merge or shift the right to recover their debt from the Transferor Company to the Transferee Company, who is already saddled with the debt of 177 creditors. Further, whether the existing 177 creditors of Transferee Company are willing to welcome an addition of 473 Unsecured Creditors of the Transferor Company is a matter to be viewed and expressly decided by the Creditors of the Transferee. Therefore,

in our view approval of the unsecured creditors of both the Applicant Companies is needed and cannot be evaded. Hence, it would be wrong to say that no prejudice can ever be caused to any of the creditors if the Scheme is approved without obtaining their explicit consent.

29. That the legislature under Section 230(9) of the Companies Act, 2013 has not made any exception in case of an amalgamation between a holding and a subsidiary company from filing the consent Affidavits of Creditors, nor has it given any explicit power to this Tribunal to dispense with the meeting of the creditors in absence of their consent affidavits in any circumstance. The contents of Section 230(9) of Companies Act, 2013 are reproduced below:

“9) The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent. Value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.”

30. Here, it is worthwhile to refer to the Judgment in the matter of **Nathi Devi v. Rahda Devi Gupta in Case No. Appeal (Civil) 5027 of 1999**, dated 17.12.2014, wherein the Hon'ble Supreme Court observed that:

“It is equally well settled that in interpreting a statute, effort should be made to give effect to each and every word used by the Legislature. The Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting error ...

31. In sequel to the aforesaid discussion, we conclude that the Affidavits filed under Section 230(2)(a) of Companies Act, 2013 are incomplete and defective. Further, we are not inclined to dispense with the

meeting of Unsecured Creditors of any of the Applicant Companies in light of the facts of the case and in the absence of their consent Affidavits in terms of Section 230(9) of the Companies Act, 2013.

32. The Application is accordingly Dismissed.”

2. Learned Counsel appearing for the Appellants strenuously argued that the Tribunal erred in construing the Scheme to be entered pursuant to Section 230(1)(a) and Section 230(2)(b) of the Act, that is the Scheme of Amalgamation between the Appellant Companies and its respective Shareholders and Creditors, though the Appellant Companies have not made Creditors parties to the Scheme, as the Scheme is pursuant to Section 230(1)(b) of the Act. Dispensation has been granted by this Tribunal in several cases where the case is of a merger of a Wholly Owned Subsidiary and Parent Company as is in the present case, where net worth of both Companies was highly positive; ‘Unsecured Creditors’ are paid of in the ordinary course of business; the Scheme is not pre-judicial to their interest as their liability is not proposed to be reduced or extinguished; that the Appellant Companies have sufficient and positive net worth as on 31.01.2021, that Section 230(2)(a) of the Act contemplates disclosure only of material facts (and not all facts) which include proceedings and investigations and it is the Companies discretion as to which investigation or proceeding, it considers as the material fact for the purpose of disclosure; that Rule 6(3)(viii) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (hereinafter referred to as the ‘**Rules**’), requirements disclosure only of the investigations and proceedings under

the Act; that the NCLT has transgressed into the domain of policy making which is impermissible under law as held by the Hon'ble Supreme Court in a catena of Judgements; that there are no investigations and proceedings pending against the Appellant Companies under Sections 210 to 227 of the Act and Sections 235 to 251 of the Companies Act, 1956, which is affirmed by Affidavit; all material Litigations in the Application supported by the Affidavit, which the Appellant Company is considered the material fact under Section 230(2)(a) of the Act and also furnished the duly Audited Financial Statements/Management approved and supplementary Accounting Statements which are filed with the Application which adequately disclosed the matter of the pending Litigations of the Companies Financial position and hence seek the setting aside of the Impugned Order passed by the NCLT.

3. We find it relevant to reproduce the following Sections for better understanding of the case on hand. Sections 230(1) and 230(2)(a) of the Act read as hereunder:

“230. Power to compromise or make arrangements with creditors and members.–

(1) Where a compromise or arrangement is proposed-

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under

the Insolvency and bankruptcy Code, 2016, as the case may be, order a meeting of the creditors in class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.- For the purposes of this sub section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both of those methods.

2) The company or any other person, by whom an application is made under sub-section (1), shall disclose to the Tribunal by affidavit-

(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;.....

(Emphasis Supplied)

4. Rule 6(3)(viii) of the Rules is reproduced as hereunder:

“6. Notice of meeting.-

.....3) The notice of the meeting to the creditors and members shall be accompanied by a copy of the scheme of compromise or arrangement and a statement disclosing the following details of the compromise or arrangement, if such details are not already included in the said scheme:-

.....(viii) investigation or proceedings, if any, pending against the company under the Act;”

5. Section 230(2)(a) of the Act read with Rule 6(3)(viii) of the Rules shows that the scope and intent is to require Companies to disclose all investigations/proceedings which are ‘material’ and relating to the Company.

We are of the considered view that the wording of Section 230(2)(a) should be interpreted as „*all material facts relating to the Companies, such as, pendency of any investigation of any proceeding against the Company*“. The Affidavit filed by the Appellant Companies discloses all the duly Audited Financial Statements along with the investigations and enquiries which are material to the implementation of the Scheme. In any event, as per Clause 6 of the Scheme upon this implementation, all proceedings in the name of the ‘Transferor Company’ shall be continued and enforced against the ‘Transferee Company’ and such proceedings shall not be discontinued or prejudicially affect anyone by reason of the Scheme. Accordingly, the requirements of Section 230(2)(a) of the Act read with Rule 6(3)(viii) of the Rules are met.

6. This Tribunal in a catena of Judgements has dispensed with the Meeting of the Shareholders wherein the case is of a merger of a Wholly Owned Subsidiary and Parent Company, wherein, the net worth of both Companies is positive and ‘Unsecured Creditors’ are paid off in the ordinary course of business and their liability is not affected as it is neither reduced nor extinguished. Relying on the Judgements of this Tribunal in the matter of „**Ambuja Cements Limited**“ in **Company Appeal (AT) No. 19 of 2021**, „**Mohit Agro Commodities Processing Pvt Ltd. & Ors.**“ in **Company Appeal (AT) No. 59 of 2021** and „**DLF Phase IV, Commercial Developers Limited and Ors.**“ in **Company Appeal (AT) No. 180 of 2019**, we are of the considered view that as the merger is of a Wholly Owned Subsidiary

Company into its holding Company, no shares would be allotted as consideration pursuant to the merger; the proposed Scheme will not result in any dilution in the Shareholding of the Shareholders of the 'Transferee Company', the net worth of the 'Transferee Company' is positive, we are of the considered view that the ratio of this Tribunal in the aforementioned Judgements can be squarely made applicable to the facts of this case. We also hold that the material disclosed in the Affidavit is in compliance of Section 230(2)(a) of the Act read with Rule 6(3)(viii) of the Rules.

7. Hence, this Appeal is allowed and the Impugned Order dated 23.09.2021 is set aside.

8. The Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to National Company Law Tribunal, New Delhi forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
18th January, 2022
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