

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT) NO.169 OF 2024

(Arising out of judgement and order dated 22.04.2024 passed by the National Company Law Tribunal, Chandigarh Bench in CA No.1197/2023 in CA (CAA)No.24/CHD(HRY)/2023.

In the matter of:

One World Center Private Ltd
Plot No.422-B,
Udyog Vihar, Phase IV
Village Dundahera, Gurugram 122016
Haryana

Appellant

Vs

FIM Holdco Ltd
Level 6, Tower A,
1 Exchange Square, Wall Street, Ebene 72201
Republic of Mauritius

2. Ariston Investments Sub A Limited,
Level 6
Tower A
1 Exchange Square, Wall Street, Ebene 72201
Republic of Mauritius

Respondent

For Appellant:Mr Arun Kathpalia, Sr Advocate with Mr. Hemant Sethi, Mr Gaurav H Sethi, Mr. Deepanshu Chandra and Mr. Rahul H Pawar, Advocates.

For Respondent:

JUDGEMENT

JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

The present Appeal is preferred under section 421 of the Companies Act, 2013 ('Act') by the Appellant Company / Transferee Company against an order dated 22.04.2024 ('Impugned order') passed by the Ld National Company Law Tribunal, Chandigarh Bench ('NCLT') in C.A. No. 197 / 2023

in C.A. (CAA) No. 24 / CHD / HRY / 2023 filed under section 230-232 read with section 234 of the Act. for the scheme of amalgamation between FIM Holdco Ltd. ('Respondent Company 1' or 'Transferor Company 1') and Ariston Investments Sub A Limited ('Respondent Company 2' or 'Transferor Company 2') and the Appellant Company (hereinafter referred to as 'Scheme of Amalgamation' or 'Scheme'). The appellant has prayed for following reliefs in the said appeal:-

- i) The impugned order dated 22.04.2024, passed by the Hon'ble NCLT, Chandigarh Bench, Chandigarh in the application filed by the Apapellant Company being CA No.197/2023 in CA (CAA) No.24/CHD/HRY/2023 filed under Section 230-232 read with Section 234 of the said Act be set aside.
- ii) That the Hon'ble NCLT, Chandigarh Bench, Chandigarh be directed to allow the Appellant Company to file the second motion Petition under Section 230-232 read with Section 234 of the said Acte alongwith the amended scheme.

2. The facts of the case are the Appellant Company / Transferee Company is primarily engaged in the business of construction and leasing of commercial real estate and also undertakes business of providing operation, maintenance and support services in relation to the real estate projects. FIM Holdco Ltd. is a company incorporated in Mauritius on November 7, 2007. The Respondent Company 1 holds a Global Business License in Mauritius and its main activity is also to act as an investment holding company. Ariston Investments Sub A Limited is a company incorporated in Mauritius on December 19, 2006. The Respondent Company 2 holds a Global Business

License in Mauritius, and its main activity is to act as an investment holding company.

3. The Transferor Companies / Respondent Companies being desirous of amalgamating with the Appellant Company / Transferee Company and in furtherance thereto had formulated the Scheme of Amalgamation. The said Scheme was duly approved by the Board of Directors of the Transferor Companies / Respondent Companies on 20.03.2023 and the Appellant Company on 17.03.2023. Thereafter, the Appellant Company filed a Company Scheme Application being C.A. (CAA) No. 24 / CHD / HRY / 2023 ('said CSA') under Section 230-232 read with Section 234 of the said Act on 28.04.2023 before the Ld NCLT, for approval of the said Scheme on 28.04.2023.

4. For the purpose of filing the First Motion Application, the Appellant Company carried out the following applicable compliances as under:

i) Fair share exchange ratio report from Mr Akshat Jain, IBBI Registered Valuer on March 15, 2023.

ii) Approval of the Scheme of Amalgamation by the board of directors of the Appellant Company on March 17, 2023 after considering the fair share exchange ratio report dated March 15, 2023 issued by Mr Akshat Jain, IBBI Registered Valuer

iii) Approval of the Scheme of Amalgamation by the board of directors and the shareholders of the Respondent Company 1 on March 20, 2023 after considering the fair share exchange ratio report dated March 15, 2023 issued by Mr Akshat Jain, IBBI Registered Valuer

v) Approval of the Scheme of Amalgamation by the board of directors and the shareholders of the Respondent Company 2 on March 20, 2023 after considering the fair share exchange ratio report dated March 15, 2023 issued by Mr Akshat Jain, IBBI Registered Valuer

v) Certificate dated March 17, 2023 from two directors of the Appellant Company ensuring compliance with the Rule 9(1) of the

Notification No. FEMA.389/2018-RB dated March 20 2018 of the Foreign Exchange Management (Cross Border Merger) Regulation, 2018 ('RBI Regulations') as the Scheme of Amalgamation is in accordance with the RBI Regulations and shall be deemed to have prior approval of the Reserve Bank of India as required in Rule 25A of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016

vi) Certificate of the statutory auditors of the Appellant Company confirming the accounting treatment proposed in the Scheme of Amalgamation u/s 133 of the Companies Act, 2013

vii) Chartered Accountant certificate certifying the list of shareholders of the Appellant Company as on March 17, 2023

viii) Consent affidavits from all (100%) the equity shareholders of the Appellant Company, according, their consent to the Scheme of Amalgamation

ix) Chartered Accountant certificate certifying the list of secured and unsecured creditors of the Appellant Company as on March 17, 2023

x) Approval from sole secured creditor of the Appellant Company. Thereafter, the Appellant Company had also filed consent affidavit of the sole secured creditor (100%) of the Appellant Company, according, its consent to the Scheme of Amalgamation by way of an Additional Affidavit vide diary no 0404116014512023/1 on May 29, 2023

xi) Consent affidavits from 99.99% of the unsecured creditors of the Appellant Company, according, their consent to the Scheme of Amalgamation

5. The Ld. NCLT allowed the first motion application vide order dated 11.09.2023. As per the said first motion application order, in lieu of consent affidavits filed by the Appellant Company, the meetings of the equity shareholders, secured creditors and unsecured creditors of the Appellant Company were dispensed with.

6. Subsequent to the approval of the Scheme by the Board of Directors of the Appellant Company, there was a minor change in the share capital of the

Transferor Companies as the existing shareholders were allotted a certain number of ordinary shares). This allegedly caused a miniscule change to occur in the *swap ratio*. The table depicting the change in share capital and aforesaid swap ratio is as under:-

Pre-Amendment (ordinary shares of USD I each)	Addition of shares (ordinary shares of USD I each)	Post Amendment (ordinary shares of USD I each)
Swap Ratio		
2.0242:1000	0.0017	2.0225:1000
Stated Capital:		
17,93,93,372	1,50,000	17,95,43,372
Transferor Company 2/Respondent Company		
As on date of approval of the Scheme (ordinary shares of USD I.2828 each)	Addition of shares (ordinary shares of USD I.2828 each)	As on date (ordinary shares of USD I.2828 each)
Swap ratio:		
2.7998:1000	0.0083	2.7915:1000
Stated capital:		
2,60,76,343	77,955	2,61,54,298

7. Consequently on 20.10.2023 before filing the second motion application, the Appellant Company filed C.A. No. 197/ 2023 in C.A. (CAA) No. 24 / CHD / HRY / 2023 ('said CA') before Ld NCLT permitting amendment

of the Scheme in terms of the powers available to the Ld NCLT and as provided for in the scheme itself vide clause 28 as under:-.

'28. Subject to approval of the NCLT and other Appropriate Authorities, the Board of Directors of the Amalgamating Companies and the Amalgamated Company may assent to any modification(s) or amendment(s) in this Scheme which the NCLT may deem fit to direct or impose or which may otherwise be considered necessary or desirable for settling any question or doubt or difficulty that may arise for implementing and/or carrying out the Scheme and the Board of Directors of the Amalgamating Companies and the Amalgamated Company and after the dissolution of the Amalgamating Company, the Board of Directors of the Amalgamated Company be and are hereby authorised to take such steps and do all acts, deeds and things as may be necessary, desirable or proper to give effect to this Scheme and to resolve any doubts, difficulties or questions whether by reason of any orders of the NCLT or of any directive or orders of any other authorities or otherwise howsoever arising out of, under or by virtue of this Scheme and / or any matters concerning or connected therewith.'

8. In accordance with Clause 28 of the Scheme, the Board of Directors of the Appellant Company vide resolution dated 09.10.2023 and Board of Directors of the Transferor Companies vide resolution dated 10.10.2023 adopted the said addendum to the Valuation Report and requisite amendments to the said Scheme. The Appellant Company then filed the said CA before the Ld NCLT seeking modification of the said Scheme as per the schedule of amendment annexed to the aforesaid Company Application. Pursuant to the modification, the following compliances were also undertaken:-

- i) Addendum to the fair share exchange ratio report dated March 15, 2023 issued by Mr Akshat Jain, IBBI Registered Valuer on October 9, 2023
- ii) Approval of the Scheme of Amalgamation by the board of directors of the Appellant Company on October 9, 2023 after

considering the addendum to the fair share exchange ratio report dated October 9, 2023 issued by Mr Akshat Jain, IBBI Registered Valuer and requisite amendments to the said Scheme

iii) Approval of the Scheme of Amalgamation by the board of directors of the Respondent Company 1 on October 10, 2023 after considering the addendum to the fair share exchange ratio report dated October 9, 2023 issued by Mr Akshat Jain, IBBI Registered Valuer and requisite amendments to the said Scheme

iv) Approval of the Scheme of Amalgamation by the board of directors of the Respondent Company 2 on October 10, 2023 after considering the addendum to the fair share exchange ratio report dated October 9, 2023 issued by Mr Akshat Jain, IBBI Registered Valuer and requisite amendments to the said Scheme

v) In compliance with the interim order dated February 21, 2024, the Appellant Company had filed the consent affidavits of the shareholders of the Respondent Companies approving the modified Scheme by way of an Affidavit vide diary no 0404115035002023/2 on March 13, 2024

9. The Ld NCLT *vide* order dated 21.02.2024 directed the Appellant Company to procure consent affidavits of the shareholders of Transferor Companies towards the aforementioned amendments. The same were duly obtained and placed on record.

10. Thereafter, the Ld NCLT heard the said CA and passed an Impugned Order dated 22.04.2024 rejecting the said CA. It is alleged NCLT misconstrued the provisions of the Act particularly with respect to the amendment of the Scheme under Section 230-232 of the Act. It is alleged the Ld. NCLT in the Impugned Order acted against the interest of the Appellant Company, the Respondents Companies and their respective shareholders as it suggested to reset the clock and file fresh first motion application for the concerned matter

and it all not only lead to waste of precious judicial time and legal cost but would also have a huge impact on the shareholders of the Appellant Company and the Respondent Companies, whereby, fresh resolutions, certificates, consent affidavits, valuation reports may be required to be re-obtained along with re-setting of the Appointed Date.

11. It is argued the Ld. NCLT is well within its powers as stipulated under Section 231 of the Act read with Rule 17(1) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ('Rules') to sanction any proposed modification to the Scheme of arrangement or compromise as the case may be. The provisions Section 231 of the Act and Rule 17(1) of the Rules are set out below:

“231. Power of Tribunal to enforce compromise or arrangement.—(1) Where the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company, it—

(a) shall have power to supervise the implementation of the compromise or arrangement; and
 (b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or **make such modifications in the compromise or arrangement** as it may consider necessary for the proper implementation of the compromise or arrangement.

17. Order on petition. — (1) Where the Tribunal sanctions the compromise or arrangement, the order shall include such directions in regard to any matter or **such modifications in the compromise or arrangement** as the Tribunal may think fit to make for the proper working of the compromise or arrangement.”

12. It is alleged despite the Ld NCLT having the requisite jurisdiction to modify the scheme and the modification being miniscule for which all relevant approvals were duly obtained, the Ld NCLT dismissed the Application on

erroneous grounds holding the “*Share exchange ratio is substantially altered*” and consequentially the Applicants have substantially changed the terms and conditions of the original Scheme. It is argued the aforesaid findings are wholly erroneous both in fact and in law. First as the change in the share exchange ratio is minuscule; the change being from 2.0242 to 2.0225 in respect of Transferor Company No. 1 and 2.7998 to 2.7915 in respect of Transferor Company No. 2. Further this minuscule change in swap ratio has been *duly approved by the concerned shareholders whose consents were duly placed on record*. The said change in swap ratio has no significant effect on the Scheme and changes no other parameter.

13. It is alleged the said amendment has no impact on the creditors whatsoever as the only modification is a miniscule change in the swap ratio with the shareholders alone. Therefore, on the modification, no approval is required from the creditors who have otherwise fully approved the Scheme. It was also submitted that notices are required to be given to statutory authorities, and they will get a chance to submit their objections, if any, during proceedings for Second Motion and final approval of the Scheme by NCLT. Heard.

14. In ‘Bengal Tea Industries & Ors. v. UOI’ Manu/WB/0451/1987; ‘Sargon Geosynthetics Limited v. Maccaferri Environmental Solutions Private Limited’ 2008 SCC OnLine P&H 906; ‘Vodafone Digilink Limited’ Co. Appl. (M) No. 147/2012; ‘ICICI Bank Limited’ CA No. 606 of 2001; ‘Mahaamba Investments Ltd. Vs. IDI Limited’ CA (Lodg.) No. 1047 of 2000 etc.it was observed if the scheme does not provide for any arrangement with creditors,

their consent is not required. There exists a catena of judgements all advertent to settled principles of law namely wherein if a scheme does not provide for any arrangement with creditors, then their consent towards the scheme can be dispensed with. The same squarely is applicable to the facts and circumstances of the present case.

15. We have gone through the record. No major amendment has been proposed to the scheme. The only change which has occurred is a *miniscule* change in the *swap ratio* of the Transferor Companies. Admittedly the Scheme is reasonable, just and fair to all the stakeholders of the respective Companies and in accordance with all extant laws. The Ld. NCLT while dismissing the said CA has completely ignored a string of precedents wherein amendments of much greater significance were proposed to the original Scheme, which were subsequently amended and sanctioned in the modified Scheme. We also note that notices will be issued to statutory authorities and they will get opportunity to file their objections, if any, during proceedings for Second Motion and final approval of the scheme.

16. In '*Gera Developments Private Limited*' I.A. NO. 1018 OF 2020 in CP(CAA) No. 923/ 2020 in CA(CAA) 4041 of 2019, the Petitioner Companies proposed modifications to the original scheme by abandoning the transfer of an entire undertaking. The proposed amendment effectively curtailed the Scheme to only two Petitioner Companies and their shareholders as opposed to three Petitioner Companies in the original Scheme. The said scheme was duly sanctioned by Ld NCLT Mumbai Bench.

17. In '*Maccaferri Environmental Solutions Private Limited*' IA No. 3250/2019 in CP (CAA) No.2114/MB.I/2019, sanction was sought to amend

the scheme by changing the appointed date *which also necessitated a change in the swap ratio*. Sanction was accorded to the same by the Ld NCLT Mumbai bench and the proposed amendments were allowed.

18. In 'Oberoi Constructions Limited' C.P. (CAA) No. 27/MB/C-III/2023 Along with C.A. /335/C-III/MB/2023, amendments were sought to the original Scheme to the effect that amongst the five petitioner companies, the fourth and the fifth petitioner companies sought exclusion from the merger as they did not intend to merge due to commercial and regulatory reasons. The modified scheme thereafter was only for the merger of the remaining three petitioner companies. In said case, the equity shares of the Transferee Company No. 5 were listed on stock exchange. Sanction was granted to the modified scheme by the Ld. NCLT Mumbai Bench.

19. Further in 'Eaton Industries Private Limited' CP No. 148 of 2016 connected with Company Summons For Direction No. 71 of 2016, modification was sought with respect to the following three aspects: **i.** Deletion of Part-C of the scheme relating to buyback of shares of the Transferor Company; **ii.** Exclusion/ deletion of one of the Transferor Companies from the scheme and **iii.** Modification of clause 13.2 which entailed the assets and liabilities of the Petitioner Company being recorded at fair value in the case of tangible and intangible assets whereas residuary assets and liabilities were to be recorded at book value. The aforementioned modifications to the Scheme were sanctioned by the Ld.NCLT, Mumbai Bench.

20. Thus based on the judicial precedents cited above, the amendment can therefore be done at any stage. In '*Hamburg Sud India Private Limited CA*

(CAA)/290/MB-IV/2022', the Ld NCLT Mumbai while seized of a First Motion Petition passed directions for changing the valuation and the swap ratio.

21. Admittedly the present modification to scheme will not require any further / revised adherence in so far as the regulations for inbound merger are concerned. Further, as per FEMA Notification No. FEMA.389/2018-RB dated March 20, 2018 'Foreign Exchange Management (Cross Border Merger) Regulations, 2018', point 9(1) states any transaction on account of a cross-border merger undertaken in accordance with these Regulations shall be deemed to have prior approval of the Reserve Bank of India as required under Rule 25A of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016. Hence, the proposed modification would also need no additional approval from Reserve Bank of India.

22. Lastly the CA was heard on 04.04.2024 and impugned Order was passed on 22.04.2024 i.e. after a period of almost 6 months from the date of filing of the said CA. An inordinate amount of time has already elapsed for concluding the proceedings before the Ld NCLT. The Ld NCLT in the interest of time and justice, should have considered the deemed approval of the shareholders as stated in their consent affidavits or in the alternate could have issued directions for tendering fresh consent affidavits rather than dismissing the said CA in limine and asking to file First Motion afresh. Filing the first motion application afresh will rather amount to non-compliance of the MCA Circular FNO./7/12/2019/CL-I relevant contents are as under":-.

"C. Where the 'appointed date' is chosen as a specific calendar date, it may precede the date of filing of the application for scheme of merger/amalgamation in NCLT. However, if the 'appointed date' is significantly ante-dated beyond a year from the date of filing, the justification for the same would have to be

specifically brought out in the scheme and it should not be against public interest.”

23 *If the impugned order is allowed to sustain then the scheme will have to be remodified to reflect such justification which will result into another round of lengthy compliances all of which would have to be undertaken for the third time.*

24. Thus, in view of the above facts, the Impugned Order is liable to be set aside and the Appeal with the prayers stands allowed.

25. Pending applications are disposed of.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Dated: 19.07.2024

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