National Company Law Appellate Tribunal,
Principal Bench, New Delhi
Company Appeal (AT) No. 19 of 2021

(Arising out of order dated 10th December, 2020 passed by National Company Law Tribunal, Ahmedabad Bench in CA (CAA) No. 50 of 2020.)

IN THE MATTER OF:

Ambuja Cements Limited
A Company registered under the Companies Act, 1956
And having its registered office at
P.O. Ambuja Nagar Tal, Kodinar,
District Gir Somnath, Gujarat-362715 **...Appellant**

Present:

For Appellant: **Mr. Sarthak Gupta, Ms.Pragati Banka, Mr. K. Datta and Ms. Mukti Choudhary, Advocates.**

J U D G M E N T

(06th April, 2021)

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present Appeal arises against the order passed by the Learned National Company Law Tribunal (in short **'NCLT'**), Ahmedabad Bench, Court – II in CA (CAA) 50 of 2020 dated 10.12.2020, whereby the Learned NCLT did not allow dispensation of the meeting of the Equity Shareholders and Creditors of the Appellant Company.

Brief Facts:

2. Shri Krishnendu Datta, Learned Counsel appearing for the Appellant submitted that the Hon'ble Tribunal, (NCLT) wrongfully rejected the plea of the Appellant Company for dispensing with the meeting of the Equity Shareholders, Secured Creditors and Unsecured Creditors of the Appellant Company.

3. He submitted that the Appellant filed the Petition before the Learned NCLT Praying the Bench to dispense with the conduct of meetings of the Equity Shareholders and Creditors of the Appellant Company and sought necessary directions to be issued in the matter.

4. Learned Counsel for the Appellant submitted that the Appellant Company was incorporated on 20.10.1981 under the provisions of the Companies Act, 1956 and status of the Appellant Company was changed from Private to Public Ltd. Company. He submitted that the Appellant Company is a Public Ltd. Company with its Equity shares listed on Bombay Stock Exchange Ltd., National Stock Exchange of India Ltd. and Luxembourg Stock Exchange.

5. While so a scheme of Merger of **'*DIRK India Pvt. Ltd.*'** (Amalgamating Company) with the Appellant Company (Amalgamated Company) under Section 230 of the Companies Act, 2013 was approved by the Board of Directors. As per the said Scheme the ***'DIRK India Pvt. Ltd'***.(Amalgamating Company) i.e.

Transferor Company amalgamates with Appellant Company i.e. Transferee Company.

6. Learned Counsel for the Appellant submits that the Transferor Company filed an Application before the Hon'ble NCLT Mumbai Bench, and the Application was allowed as prayed for. Since the Appellant Company registered under the Jurisdiction of Gujarat State, in view of the Jurisdiction the Appellant Company filed the Petition before the NCLT Ahmedabad Bench.

7. It is further submitted that the Board of Directors of the Appellant Company passed a resolution at the board meeting held on 11.10.2019 for approval of the proposed scheme of amalgamation.

8. Learned Counsel further submitted that the rationale of the Scheme is as follows:

> *"The nature of business carried on by the Amalgamating Company is complimentary to the business carried on by the Amalgamated Company,*
>
> > *a) The Amalgamating Company has the business of processing fly ash into Pozzo-crete which will now be extended to the Amalgamated Company.*
> > *b) Simplify management Structure leading to better administration and reduction in cost from more focused operational efforts, simplification of business process and elimination of duplication and rationalisation of administrative functions*

> *and reduction in multiplicity of legal and regulatory compliances.*
>
> *c) Pooling of resources (including manpower, management and administration and marketing resources) of the aforesaid companies resulting in, synergies of operations and optimisation of logistics, resulting in more productive utilisation of said resources, savings in cost and operational efficiencies.*
>
> *d) Strengthening financial position and increased leverage capacity of the merged entity.*
>
> *e) In view of the aforesaid, the Board of Directors (as hereinafter defined) of the amalgamating company and the Board of Directors of the Amalgamated company have considered and proposed the amalgamation the entire undertaking and business of the Amalgamating Company with the Amalgamated Company."*

9. Learned Counsel submitted that the Transferor Company i.e. ***'DIRK India Pvt. Ltd.'*** as stated supra filed a Company Application No. (CAA) 753 of 2020 under Section 230-232 of the Companies Act,2013 seeking dispensation of the meeting of Equity Shareholders and Creditors of the Transferor Company before the Learned NCLT, Mumbai. Learned Tribunal, was allowed the Application vide order dated 12.03.2020. Learned Counsel submitted that a scheme was between a wholly owned subsidiary, i.e. transferor Company which is a 100 % subsidiary of the Appellant Company (Transferee Company).

10. Learned Counsel submitted that the Authorised Share Capital of the Appellant Company as on 31.12.2018 is Rs. 8000 Crores and the Preference

Shares are Rs. 150 Crores. The issued, subscribed and paid up Capital of the Appellant Company is Rs. 397.13 Crores.

11. It is submitted that the transferor Company was incorporated on 29.05.2020 under the provisions of the Companies Act, 1956 as a Private Ltd. Company in the State of Maharashtra. Therefore, the Transferor Company filed Application before the Learned NCLT, Mumbai seeking dispensation with the meetings of the Secured and Unsecured Creditors and Equity Shareholders of the Company. The Equity Shares of the Transferor Company are not listed on any Stock Exchange, the entire Share Capital of the Transferor Company is held by the Appellant Company. The Transferor Company is a 100% a subsidiary of the Appellant Company. As on 31.03.2019, the authorised share capital of the Transferor Company is Rs. 3,50,00,000/-. The issued, subscribed and Paid up capital is Rs. 2,07,53,830/-. It is submitted that there are no existing commitments, obligations or arrangements by the Transferor Company.

12. The main object of Merger is to acquire the Transferor Company in order to meet its growing infrastructure requirements. Accordingly, Scheme was devised for the amalgamation.

13. The Learned Counsel further submits that the basis on which the dispensation was sought is that the Transferor Company is a 100% wholly

owned Subsidiary of the Appellant Company. The Share Capital of the Transferor Company reflected in the Appellant Company's Balance Sheet. The net worth of the Appellant Company is Rs. 22,714,00,00,000/-. While so net worth of the transferor company is Rs. 2,07,53,830/-.

14. The Learned Counsel submitted that the net worth of the Appellant Company is highly positive and there are no Secured Creditors in the Appellant Company. However, there are Unsecured Creditors in the Appellant Company which are only Trade Creditors for an amount of Rs. 1,108 Crores as on 31.03.2020.

15. Learned Counsel submitted that Transferor Company being a wholly owned subsidiary of the Appellant, it need not issue any shares to the shareholders. Hence, the scheme would not result in any dilution in the shareholding of the Appellant Company. Learned Counsel further submitted that there is no reorganisation of the share capital of the Transferee Company that since 100% share capital of the Transferor Company is held by the Appellant and there is no reorganisation in either its shareholding or its debt position. Because shareholders of the holding Company are nothing but the shareholders of the Subsidiary Company. The Appellant being the Transferee Company, its existence will remain as before without any change, either to its shareholding pattern or to its debt position.

16. Learned Counsel further submitted that under the scheme there is no compromise or arrangement with the shareholders or creditors and no sacrifice of any amounts due to the Creditors. Hence, the Scheme would not prejudicially affect the creditors or shareholders of the Appellant Company.

17. Learned Counsel by way of Grounds of Appeal submitted that the Learned Tribunal failed to appreciate the fact that the Merger by absorption is between the wholly owned Subsidiary and its holding Company, and followed, due process of Law and Procedure under the Companies Act, 2013. Further, Learned Counsel submitted that the Hon'ble Tribunal failed to appreciate the fact that the Transferor Company is a wholly owned Subsidiary of the Appellant Company and thereby the entire share capital of the transferor Company is held by the Appellant Company. Further, the Hon'ble Tribunal failed to appreciate the fact that Assets and Liabilities of the transferee Company are already reflected in the Balance Sheet of the Appellant Company and the Appellant Company would not incur any Liabilities post effectiveness of the scheme.

18. Learned Counsel further submitted that no new shares are being issued by the Appellant Company and the scheme would not result in dilution of the shareholding of the Appellant Company.

19. The Learned Counsel submitted that the first essential requirement is the existence of the proposal for compromise or arrangement in case like the

present one. The Companies need not propose the meeting with the Members or Creditors as held by the Hon'ble Bombay High Court and various Benches of the NCLT's.

20. In support of his submissions he relied upon the Judgment of the Hon'ble Bombay High Court in the matter of ***'Mahaamba Investment Ltd.' vs. 'IDI Ltd.'*** (2001) SCC Online Bom 1174.

21. In view of the Submissions as made the Learned Counsel prayed this Tribunal to dispense with the meeting of the shareholders and Creditors and thereby set aside the impugned order passed by the Hon'ble NCLT.

22. Heard Learned Counsel for the Appellant, perused the pleadings and documents and citations relied upon by him. The Learned NCLT rejected the dispensation of the meeting of the Equity Shareholder and the Creditors of the Company for the reason that the Appellant Company i.e. Transferor Company has large no. of shareholders and creditors and none of them have filed their consent and no objection towards the scheme of merger/amalgamation as such due to want of such written consent by way of 'Affidavit' from the shareholder/Creditor and hold that prayer for dispensation of the meeting cannot be allowed.

23. We have perused the scheme of merger approved by the Board of Directors of the Transferor and Transferee Company. The scheme apart from

the other clause envisage that, the under taking and business of the amalgamating Company i.e. transferor Company as a going concern. It is important to note that clause 3.15.2 of the scheme envisages that all debts, liabilities, borrowing will be undertaken by the transferee i.e. Appellant Company.

24. As stated supra it is an admitted fact that the Transferor Company(amalgamating Company) is 100% Subsidiary of the amalgamated Company /transferee Company and there is no change in the structure of the transferor Company. Further, clause 6.1.2 of the scheme under the heading transfer and vesting of undertaking, it is clear that all the liabilities of the amalgamating Company immediately before the amalgamation become the liabilities of the amalgamated Company by virtue of the amalgamation.

25. Clause 13 of the scheme of merger envisages that all the workmen and employees of the transferor Company in permanent service on the effective date shall become the staff, workmen and employees of the transferee Company.

26. We are of the view that from the above scheme the liabilities of the transferor Company will be undertaken by the Appellant Company and there is no dilution in the shareholding of the Appellant Company. From the certificate issued by the Chartered Accountant it seems that the Appellant Company have no secured creditors as on 31.03.2020. Further, it is on record that the net

worth Pre- merger of the Appellant Company as per the certificate issued by the Chartered Accountant shows Rs. 22,750.15 Crores. While so, the net worth of Appellant Company post merger will be Rs. 22,714.77 crores. From the perusal of the certificate issued by the Chartered Accountant the net worth of the Appellant Company is positive.

27. From the pleadings it is seen that the Transferor Company filed an Application bearing no. CA (CAA) 753 of 2020 before the Learned NCLT, Mumbai and the Learned NCLT vide order dated 12.03.2020 dispensed with the meetings of the Equity Shareholder and Unsecured Creditors. However, as stated Supra the Transferor Company registered in the State of Maharashtra therefore, the Transferor Company filed its Application before the Learned NCLT, Mumbai having a territorial Jurisdiction. It is also stated in the pleadings that the rights of Secured and Unsecured Creditors are not affected. There is no compromise or arrangement with them. As stated Supra, there are no Secured Creditors of the Appellant Company. However, there are Unsecured Creditors of the Appellant Company to the value of Rs. 1108 Crores. Learned Counsel for the Appellant submitted that as per Section 179(3(i) of the Companies Act,2013 the Board of Directors has powers to exercise including the approval of amalgamation, merger or re-construction.

28. Learned Counsel also submitted that the Appellant Company is not doing any Acts covered under Section 180 of the Companies Act, 2013 where

the said provision prescribe restriction of Powers of Board. However, there is no restriction under Section 180 of the Companies Act to enter into a scheme of approval of it as long as Company does not sell, lease or dispose of its undertakings, does not propose to invest in Securities trust.

29. From the perusal of the pleadings it is amply clear that the Appellant Company is a 100% holding of its Subsidiary i.e. the transferor Company. Therefore, there is no issuance of any new shares, there is no reorganisation of share capital of the Appellant Company and no arrangement wherein shareholders have to compromise with creditors of the Transferor Company. Further, we have also seen that the net worth of the Appellant Company is highly positive in compare to the net worth of the Transferor Company.

30. We have perused the Judgment relied upon by the Learned Counsel for the Appellant in the matter of ***'Mahaamba Investments Ltd.' vs. 'IDI Ltd.'***. The Hon'ble High Court of Bombay held at paragraph 5 & 6 as under:

> *"5. In the present case, having regard to the relevant clauses of the proposed scheme and particularly the provision whereby no new shares are sought to be issued to the members of the transferor company by the transferee company, the scheme will not affect the members of the transferee company. The creditors of the transferee company are not likely to be affected by the scheme in view of the financial position of the transferee company. In paragraphs 13 and 14 of the affidavit in support of the company application, the financial position of the transferor*

> *and transferee companies has been set out and which would show that in so far as the transferor company is concerned, it has an excess of assets over liabilities to the extent of Rs. 508 lakhs whereas in the case of the transferee company, there is an excess of assets over liabilities to the extent of Rs. 6,900 lakhs.*
> *6. In the circumstances, the office objection is accordingly disposed of with the clarification that filing of a separate petition by the transferee company is not necessary, in the facts and circumstances of the present case."*

31. The Hon'ble High Court in the above Judgment even held that filing of separate Petition by the transferee company is not necessary. The Learned Counsel for the Appellant relied upon the Judgment and submitted that since the Transferor Company had already filed an Application before the Hon'ble NCLT, Mumbai and the Hon'ble NCLT, Mumbai allowed the Application by dispensing with the meeting of shareholders and creditors. He submitted that as per the above Judgment it is not necessary even to file a separate Application by the Transferee Company which is a 100% holding of its subsidiary i.e. Transferor Company. The Learned Counsel also relied upon the Judgment of the Hon'ble High Court of Bombay in the matter of ***'Eurokids India Pvt. Ltd.'*** (C.S.D. No. 911 of 2014) dated 19.12.2014.

32. The Hon'ble High Court also held that filing of separate Application under Section 391 and 394 of the Companies Act, 1956 by the transferee Company was dispensed with. The relevant paragraph is reproduced here under:

> *"The Applicant Company is wholly owned subsidiary of the Transferee Company and there is no re-organization of share capital of the Transferee Company and no new shares are being issued by the Transferee Company as all shares will be cancelled as per Clause 5 of the Scheme and rights of creditors of Transferee Company are not affected as mention in para 19 of the Affidavit in support of Summons for Direction and also in view of observations made by this court in Mahaamba Investment Ltd vs. IDI Ltd. (2001) 105 Co cases page 16 to 18, the filing of separate Company Summons for Direction and Company Scheme Petition under Section 391 and 394 of the Companies Act, 1956 by Eurokids International Private Limited, the Transferee Company is dispensed with."*

33. The Learned Counsel for the Appellant submitted that the Bench which passed the impugned order dispensed with the meeting of the shareholders and creditors in CA (CAA) No.96 of 2019 dated 09.09.2019 in the matter of ***'Vodafone Idea Ltd.'*** The Learned Counsel submitted that the facts of that case are similar to the facts of the present case. In the above order the Learned Tribunal by considering the facts and Citations held that the meetings of Secured and Unsecured creditors of the Applicant transferee company has been dispensed with. He submitted that the quorum which passed the order in ***'Vodafone Idea Ltd.'*** is the same quorum which passed the impugned order. It is apparent that the facts are similar in both the cases but the Learned NCLT Ahmedabad Bench did not follow its own order passed in ***'Vodafone Idea Ltd.'*** Supra in the present case is illegal. The Learned Counsel for the Appellant

submitted that it is contrary to the Principles of Judicial Discipline. For better appreciation we reproduce the relevant paragraph of the order passed by the Learned NCLT in ***'Vodafone Idea Ltd.'***

> *"13. It is submitted that the Applicant Transferee Company is a listed Public Limited Company and both the Transferor Companies being the wholly owned subsidiary of the Applicant Transferee Company; no shares are required to be issued or allotted as consideration for the proposed amalgamation. It is submitted that in the instant case there is no arrangement by the Applicant Transferee Company with its shareholders. Further, the rights of the shareholders of the Applicant Transferee Company are not affected as no new shares are being issued to the shareholders of the Transferor Companies and the proposed Scheme does not involve any re organisation of the share Capital. In the circumstances, as there is no arrangement with the Equity Shareholders of the Applicant Transferee Company, the rights of the said shareholders are not affected by the present Scheme and therefore, no meeting of the Equity Shareholders of the Applicant Transferee Company is required to be convened. In view of the given facts, this Bench is of the view that there is no requirement to convene and hold the meeting of the Equity Shareholders of the Applicant Transferee Company and accordingly, the meeting of Equity Shareholders of the Applicant Transferee Company is hereby dispensed.......*
>
> *17. Considering the averments as mentioned above and having considered the entire facts on record that both the Transferor Companies are*

> *wholly owned subsidiaries of the Applicant Transferee Company and as no compromise is offered by the Applicant Transferee Company under the Scheme of Amalgamation to the creditors and considering the fact that the net worth of the Companies including the Applicant Transferee Company is positive, it is deemed appropriate to order that meetings of the Secured Creditors (including secured debenture holders) and Unsecured Creditors (including unsecured debenture holders) of the Applicant Transferee Company are not required to be held and are hereby dispensed with."*

34. We have carefully gone through the Judgment passed by the Learned NCLT and we are of the view that the Learned NCLT ought to have taken into consideration the order passed in ***'Vodafone Idea Ltd.'*** in the present case filed by the Appellant before it.

35. In view of the similar facts in both the cases the Learned Counsel for the Appellant relied upon the Judgment of this Tribunal to show that Judicial precedents need to be followed as observed in the matter of ***'DLF Phase –IV Commercial Developers Limited & Ors.'*** in CA (AT) No. 180 of 2019. This Tribunal while dealing with the merits of the case held as under:

> *"8. Keeping in view the foregoing and all relevant considerations as also the settled law on the subject, the impugned order falling within the purview of per incuriam cannot be supported. The Tribunal should have applied its mind in the light of judicial precedents brought to its notice by way of an affidavit, and in the event of the views*

> *expressed by the Coordinate or Larger Benches being squarely applicable, followed the same. Such application of mind being abysmally absent, the impugned order is unsustainable and has to be set aside to the extent it relates to directions for convening of the meetings of Unsecured Creditors of Appellant No. 4 and the meetings of the Equity Shareholders, Secured and Unsecured Creditors of Appellant No.5."*

36. We are of the view that the NCLT Ahmedabad Bench ought to have taken into consideration the order of the coordinate Bench and also the Order passed by it in ***'Vodafone Idea Ltd.'*** while dealing with similar facts involved in both the cases. Further, the Learned Counsel relied upon the Judgment of the Hon'ble Supreme Court in the matter of ***'Gammon India Ltd.' vs. 'Commissioner of Customs'*** Mumbai in (2011) 12 SCC 499, to show that the precedent law must be followed by all concerned, deviation from the same should be only on a procedure known to law. Hon'ble Supreme Court held as under:

> "*35.It needs to be emphasised that if a Bench of a tribunal, in an identical fact situation, is permitted to come to a conclusion directly opposed to the conclusion reached by another Bench of the tribunal on an earlier occasion, that will be destructive of the institutional integrity itself. What is important is the tribunal as an institution and not the personality of the members constituting it. If a Bench of the Tribunal wishes to take a view different from the one taken by the earlier Bench, Propriety demands that it should place the matter before the President of the*

Tribunal so that the case is referred to a larger Bench, for which provision exists in the Act itself."
"36. In this behalf, the following observations by a three- Judge Bench of this court in Sub-Inspector Rooplal v. Ltd. Governor are quite apposite: (SCC p. 654, para 12)
"12. At the outset, we must express our serious dissatisfaction in regard to the manner in which a coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A coordinate Bench of a court cannot pronounce judgment contrary to declaration of law made by another Bench. It can

> *only refer it to a larger Bench if it disagrees with the earlier pronouncement."*
> *We respectfully concur with these observations and are confident that all the courts and various tribunals in the country shall follow these salutary observations in letter and spirit.*

37. From the above Judgment of the Hon'ble High Court of Bombay in the matter of ***'Mahaamba Investments Ltd.'vs 'IDI Ltd.',*** whereby it is clear that an Application filed by the Transferor Company or Transferee Company, a separate Application is not necessary by the Transferee/Transferor Company. Further, this Tribunal in the matter of ***'DLF Phase –IV Commercial Developers Ltd. & Ors.'*** dispensed with the meetings of the Creditors and shareholders. However, the facts of the DLF matter are little different i.e. in the DLF matter the written consent was obtained by way of an 'Affidavit'. This Tribunal allowed the Appeal by setting aside the order of the Tribunal where the Learned Tribunal rejected the approval seeking the dispensation of the meetings of creditors and shareholders. However, in the present case we are of the view that the Learned Tribunal ought to have dispensed with the meetings of the Equity shareholders and Creditors of the Appellant Company. The only objection taken by the Learned NCLT that no written consent by way of an Affidavit' of the Shareholders and Creditors, were filed.

38. We are of the view that as held by the Hon'ble Supreme Court that a Coordinate Bench of a court cannot pronounce Judgement contrary to declaration of law by another Bench. In the Present case, the Tribunal (NCLT)

Ahmedabad Bench erred in not following its own order passed in ***'Vodafone Idea Ltd.'***, Wherein similar facts are involved in both the cases.

Conclusion:

39. In view of the forgoing reasons we set aside the order of the Learned NCLT dated 10.12.2020 in CA (CAA) No. 50 of 2020.Accordingly, we dispense with the meetings of the Equity shareholder, Secured and Unsecured Creditors of the Appellant Company. The matter is remanded back to the NCLT for further Consideration.

40. Accordingly the Appeal is allowed. No Orders as to Cost.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

New Delhi
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