

Case Comment

Is NCLT Empowered with Dispensing of Meeting in Amalgamation?

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Abstract

The case analyses the order of National Company Law Tribunal in JVA Trading Pvt. Ltd. and C&S Electric Limited dated 13 January 2017 with respect to the dispensation of members meeting in case of 'compromise, arrangement and amalgamations' under the Companies Act, 2013. The tribunal ousted itself of the power to dispense with the same claiming that the Act and the rules made there under have not clothed it with such a power. The case presented before the tribunal was for the amalgamation of JVA Trading Private Limited and C&S Electric Limited as per the provisions of Companies Act, 2013. This submission in the form of case comment has critically analysed the position taken by the tribunal vis-a-vis the parallel position of high court in terms of previous companies act. The submission also briefly points out the recommendation of certain committees for dispensing with the members meeting when the drafting of new companies act was in progress. Moreover, the views have been put-forth with regard to the consequences of such a stance of tribunal on the timelines for conclusion of transactions in the nature of 'compromise, arrangement and amalgamations'. In conclusion, the case comment puts the opinion that this decision is going to put unnecessary burden on the company entering into such transactions when the holding of members meeting has been reduced to a mere formality.

Keywords: *Company Tribunal, Companies Act, JVA Trading, amalgamations, arrangement, compromise.*

I. Introduction

Originally, the scheme of amalgamation as under the previous Companies Act, 1956 ("Old Act") would be exercised in pursuance of Section 391-394 of the Old Act. The High Court under the provisions of the same has been given the power to order for meeting of members or creditors as the case may be if an application has been received for the same or if a company is in liquidation.

Pursuant to Section 391 of the said act, it reads as, "Where a compromise or arrangement is proposed... the High Court 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, order a meeting of the creditors or 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 High Court directs."

The power is explicitly clear under the Old Act. However, the High Court in India have on many occasions gone out of their way and dispensed with the above mentioned provision in certain circumstances of a case, providing for an exception wherein the need for calling of meeting was not considered necessary. Such view as for instance was taken by the Karnataka High Court where it said that 'the court was able to dispense with such meeting if the number of shareholders was small and had signified their consent.'¹ Further, "it is quite true that when an application for convening a meeting of the shareholders or creditors is presented before the court, the court has the option to reject it summararily. If it does not, the court has to pass orders in that application."²

Taking the above view of the High Court, the issue to call off the meeting in arrangement has been quite vehemently put forth by them. With the new Companies Act, 2013 ("Act") the same

power to call for meeting vests with the National Company Law Tribunal (“NCLT”) which recently started its functioning on July, 2016. The provisions for ‘compromises, arrangements and amalgamations’ are dealt in Section 230-240 of the Act. Further, Section 230 to 233 and 235 to 240 has been notified with effect from 15 December 2016 giving the power to NCLT. Considering the change in authority of courts under new and old companies act for overseeing the scheme of ‘compromises, arrangements, or amalgamations’, would there be a change in the position taken by the Tribunal for dispensing with the need for calling of meetings for members or creditors as had been done by the High Court’s came up for consideration in one of the first instances of schemes of arrangement put forth before the Tribunal in JVA Trading Pvt. Ltd. and C&S Electric Limited³ in its order dated 13 January 2017.

II. Issue

An application was filed with the Tribunal by the companies namely JVA Trading Private Limited (“**Transferor Company**”) and C&S Electric Limited (“**Transferee Company**”) under Section 230-232 and other applicable provisions for the scheme of amalgamation proposed between the said parties. The said Transferor Company has four equity shareholders all of whom gave the consent for Scheme of Amalgamation constituting 100% in value and number. Thus, relief from the court was sought for dispensing with requirement for convening with the meeting of Equity Shareholders of the Transferor Company and also to dispense with the requirement of issue of notice and publication of the same along with someother reliefs as were considered necessary.

III. Held

The Tribunal straightforwardly rejected the relief sought for dispensing with the meeting claiming it does not have power under the Act to do so. In the words of the tribunal, it said that *“In relation to the dispensation of the meeting of the equity shareholders of the Transferor Company is concerned we are not inclined to grant dispensation taking into consideration the provisions of the Companies Act, 2013 and the rules framed there under both of which expressly do not clothe this Tribunal with the power of dispensation in relation to the meeting of shareholders/members.”*

On the one hand it rejected the claim for relief from holding the members meeting, it however allowed as under Section 230(9) of the Companies Act, 2013 to dispense with calling of creditor’s meeting. It said that *“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 and does not provide for the dispensation of the meeting of members.*

Further, the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 more specifically Rule 5 which provides for directions to be issued by this Tribunal discloses that determining the class or classes of creditors or of members meeting or meetings have to be held for considering the proposed compromise or arrangement; or dispensing with the meeting or meetings for any class or classes of creditors in terms of sub-section (9) of section 230.”

Keeping in view the above provisions, dispensation of the meetings of members of the company cannot be entertained. In into consideration the above, the following directions are issued in relation to calling, convening, and holding of the meeting...”

While taking this decision, it has taken a different route then one taken by the High Court previously in several of its decisions for the scheme of amalgamation ousting itself of the power to get away with the calling of meeting of members.

IV. Consequences

The tribunal has restricted itself from having the same quantum of powers as had been enjoyed by the High Court before it has started functioning. It would necessarily have the impact of delay in implementation of these 'compromises, arrangement and amalgamation' when every member of the Company proposing to enter into such transaction has given its consent evidently and the holding of the meeting has been reduced to a mere formality.

It is important to note here that Rule 24(2) of the Companies (Compromise, Arrangements and Amalgamation) Rules, 2016 have provided the Tribunal with the power to dispense with any procedure prescribed under the said rules. It read as- *"The Tribunal may pass any direction(s) or order dispense with any procedure prescribed by these rules in pursuance of the object for implementation of the scheme of arrangement or compromise or restricting or otherwise except on those matters specifically provided in the act."*

While it seems that the power has been provided to the NCLT to dispense with the meeting of members for amalgamation, it has chosen to overlook the said rules while interpreting the provision of Section 230(9) of the Act and is of the view that dispensing with the meeting of creditors is allowed since it has been made a specific part of the Companies Act but has ousted the possibility of dispensing with member's meeting of which the Companies Act 2013 is silent.

V. Background of The Companies Act

An important point of discussion that has come up here is the purpose behind not providing for dispensing of member's meeting under the Act and the rules made thereunder while the same is provided for creditor's meeting. An outline of the previous standing on the same issue of dispensing with the meeting should be mentioned here for further clarity. The Standing Committee on Finance for the year 2009-2010 in its 21st report for the Companies Bill, 2009 commented on the issue of meeting and said that *"It also needs to be clarified if written consent is received from the requisite number of members or creditors, the requirement to hold a meeting could be dispensed with, as the meeting proposed in the clause is, in effect, to obtain the approval of the members or creditors"*⁴ However, these recommendations were not acceptable to the Ministry of Corporate Affairs with the reasoning that *"Meeting should be held so that the information about the merger, amalgamation should be there in the knowledge of the members"*⁵ Further the Standing Committee on Finance for the year 2009-2010 recommended that *"A similar provision may be provided dispensing with the meeting of shareholders of closely held companies if they agree and confirm by affidavit the scheme of compromise and arrangement"*. The recommendation was rejected with the following reasoning that *"The members and creditors stand on different footing so far as protection of their interests are concerned. The meetings of members are considered to be essential for such important matters to ensure corporate democracy and principle of participation in important decision makings."*⁶

VI. Criticism

The NCLT had failed to take into account the position of law as had been taken by several high courts in India. The Old Act itself did not provide for dispensing with the meeting of shareholders. However, high courts had made the interpretation of Section 391 differently by providing for dispensing of shareholder's meeting. In spite of this, even if considering that the NCLT does not have power under the Companies Act to dispense with the meeting of shareholders; an observation of Calcutta High Court⁷ has to be taken into account. While commenting on Section 391 of the Old Act, it said that

“The court has no power to dispense with holding of meetings in view of Mafatlal (Supra). But section 391, itself vests a power in the court to call, hold and conduct meetings in such manner as it thinks fit. Therefore, the section itself arms the court with the power to dispense with some requirements when the case requires, but not to dispense with holding of meetings altogether. Therefore, the Act empowers the court to relax the procedure for convening and holding meetings provided in the Company (Court) Rules 1959 without dispensing with them, altogether.

Further the court observed that in case where a company is closely held or is a family company or has a small number of shareholders or creditors who have signified their consent in the petition, or when the financial position of the company is such that it would be unable to bear the expenses for advertising, convening and holding of a meeting, strictly according to the Rules, the court may call a meeting on such terms as it things fit dispensing with some of the formalities, considering each case on its merits.”

Moreover, in S.M. Holding Finance (P) Ltd.⁸, a Single Judge of the Karnataka High Court, whilst dealing with a scheme of arrangement and/or compromise proposed by the company in liquidation, to discharge its debts, observed that Section 391(2) of the Act is not prohibitory but directory in character, unlike its proviso and it would suffice if there is substantial compliance thereof.

The four shareholders of the Transferor Company had given their consent for the Scheme of Arrangement constituting 100% of value and number. In such a situation, wherein the holding of meeting has been reduced to a mere formality, the NCLT should have used certain discretion to the applicants by allowing them if not getting away with the meeting altogether, relaxations of certain procedures for holding of the said meeting.

VII. Conclusion

Even though we consider the legal issues that have been involved in the case at present, it is going to create certain practical problems in the industry wherein the prospective transferors or acquires under the scheme of arrangement would have to undergo unnecessary expenses costing them both time and money when every shareholder of the company is in agreement for some prospective arrangements or amalgamations etc. In view of the same, the decision of the NCLT should be reconsidered. Otherwise, a pattern of these judgments is going to create hindrances in the corporate industry.

References

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