

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HON'BLE SMT. JUSTICE T. RAJANI

O.S.A. Nos.8 and 9 of 2017

DATED:18-04-2017

O.S.A. No.8 of 2017

Asmitha Microfin Limited
Hyderabad,
Represented by its Authorized Signatory ... Appellant

And

O.S.A. No.9 of 2017

Between:

Share Microfin Limited
Hyderabad,
Represented by its Authorized Signatory ... Appellant

And

M/s. Aditya Birla Finance Limited
Hyderabad
Represented by its Chief Manager-cum-
Authorized Signatory ... Objecting Creditor

COUNSEL FOR THE APPELLANTS : Mr. S. Niranjan Reddy, Senior Counsel,
for Ms. Rubaina S. Khatoon

COUNSEL FOR THE OBJECTING
CREDITOR : Mr. Ch. Ramesh Babu

THE COURT MADE THE FOLLOWING:

COMMON JUDGMENT: *(per the Hon'ble Sri Justice C.V. Nagarjuna Reddy)*

These two appeals arise out of common order dt.03.02.2017 passed by the learned Company Judge in Company Petition Nos.200 and 201 of 2016 respectively.

2. The brief facts leading to the institution of these appeals are as follows. The appellants are public limited companies. The appellant in O.S.A. No.8 of 2017 – Asmitha Microfin Limited (for short, “ASML”) was incorporated on 26.02.2001 and the appellant in O.S.A. No.9 of 2017 – Share Microfin Limited (for short, “SHARE”) was incorporated on 20.04.1999. The details of the issued, subscribed and paid up share capital have been referred in the order under appeals. As they do not have relevance in the context of adjudicating these appeals, it is not necessary to refer the same in this judgment. It will suffice to note that both the companies are engaged in the business of providing financial and support services to the marginalized sections of society, particularly underserved rural and urban women across India. In the wake of enactment of the Andhra Pradesh Micro Finance Institutions (Regulation of Money Lending) Act, 2010, by the erstwhile State of Andhra Pradesh, imposing fetters on loan disbursement and recovery process for micro finance institutions in the undivided State of Andhra Pradesh, presently comprising the States of Andhra Pradesh and Telangana (conveniently referred to as “the two Telugu speaking States”) there was drastic fall in the revenues of both the companies in the two Telugu speaking States. As the companies were required to service their repayment obligations to their creditors out of the recoveries derived from the States other than the two Telugu speaking States, the appellants proposed to segregate their respective businesses to consolidate their position.

3. The Board of Directors of both the appellants' Companies held a joint meeting on 31.3.2016 and approved the scheme of arrangement. The salient features of the scheme are that the SHARE demerges its two Telugu speaking States' business into a Demerged Undertaking which in turn merges into ASML, that ASML demerges its rest of India business other than the two Telugu speaking States into a Demerged Undertaking which merges with SHARE and the operations of ASML post sanction of the scheme are confined to the two Telugu speaking States and SHARE would do the business in the rest of India. That the shareholders of ASML would be allotted equity shares in SHARE in the ratio of 1:1.0956 and the shareholders of SHARE would be allotted equity shares in ASML in the ratio of 1:1.1541. That 89.2004% of the total outstanding Optionally Convertible Cumulative Redeemable Preference Shares (OCCRPS) issued by the SHARE would be cancelled and 5.7996% of the total outstanding OCCRPS issued by SHARE would be converted into equity shares. That out of the total outstanding debt, INR 422,98,77,843 of ASML, an amount of INR 247,06,65,820 would be converted into 24,70,66,582 OCCRPS, that 0.0320% of the total outstanding OCCRPS issued by ASML would be converted into equity shares and that in lieu of cancellation of OCCRPS issued by SHARE, 57,45,71,293 OCCRPS would be issued by ASML to the Corporate Debt Restructuring (CDR) Lenders of SHARE.

4. Both the appellants have filed separate Company Application Nos.480 and 481 of 2016 for convening meetings of the equity shareholders, preference shareholders and creditors of the appellants – companies. The meeting of the shareholders of ASML was held on 30.5.2016 and that of preference shareholders and creditors were held on 31.5.2016. The meeting of the shareholders of SHARE was held on

1.6.2016 and that of preference shareholders and creditors were held on 2.6.2017. After holding the meetings, the respective Chairpersons have filed their reports, consequent upon which Company Application Nos.480 and 481 of 2016 were closed by the learned Company Judge by order dt.14.6.2016. After disposal of the said company applications, the appellants have filed Company Petition Nos.200 and 201 of 2016 respectively for sanctioning and confirming the scheme of arrangement so as to bind on all the members, employees and creditors of both the companies.

5. Upon admission of the company petitions, notices were issued and publication thereof in the newspapers was also made. In pursuance of the notices, HDFC Bank Limited has filed Company Application Nos.1277 and 1278 of 2016 in Company Petition Nos.200 and 201 of 2016 respectively submitting their objections to the scheme. M/s. Aditya Birla Finance Limited (ABFL) also filed Company Application No.1342 of 2016 in Company Petition No.201 of 2016 seeking its impleadment as respondent and adjudicate the objections raised by it. Multiple objections were raised by both the HDFC Bank Limited and M/s. ABFL.

6. The HDFC Bank has mounted a serious attack on the scheme on several grounds. One of the main grounds raised by it was that its registered office has not received notice as a result of which it had no notice of holding of the meeting of the creditors. It has further pleaded that the CDR Empowered Group (CDR EG) has not approved the scheme of arrangement and that therefore both the companies are not entitled to go ahead with the scheme of arrangement.

7. As regards ABFL, it has pleaded that it has disbursed a sum of Rs.50.00 crores in August and September 2010 to SHARE, that the said

company was unable to maintain the repayment schedule of the term loan, that the ABFL is a part of the lenders who approved the CDR package with effect from 01.04.2011, that as per the said package the outstanding amount payable to it was fixed at Rs.36.00 crores as on 01.04.2011 and that the said amount was restructured as Rs.23.02 crores towards term loan and Rs.12.98 crores towards OCCRPSs. That as on 31.03.2015 SHARE is due and payable a sum of Rs.27.80 crores to the ABFL and that under the scheme of arrangement a sum of Rs.18.18 crores out of the said amount is proposed to be transferred to ASML and the balance of Rs.9.19 crores was proposed to be transferred to SHARE.

8. Based on the respective pleadings of the parties, the learned Company Judge framed the following issues.

1. *“Whether a company, whose financial position has become weak by the liabilities being more than the assets is entitled to enter into a scheme of arrangement under Section 391 of the Companies Act?”*
2. *Whether the scheme of arrangement was approved by the requisite majority of shareholders, preferential creditors and creditors?*
3. *Whether this Court has got jurisdiction to modify the scheme of arrangement proposed by the Board of Directors of the Companies involved in it and approved by the shareholders, creditors and others in the meeting held for the purpose of considering the scheme of arrangement and if so whether the proposed scheme of arrangement requires any modification in the light of the objections raised by the objectors?”*

9. The learned Company Judge held point Nos.1 and 2 in favour of the appellants. With regard to point No.3, he held that though the scheme has secured the required majority of the creditors, the CDR EG did not have the opportunity of considering the actual scheme, that the HDFC Bank is one of the members of the CDR EG, that there was no

clarity regarding the stand taken by the CDR EG as a whole in its meeting convened for the proposal of the appellants for the scheme of arrangement, that the creditors are none other than the Bankers, who do business with the public money and that the Court not having expertise, cannot give any conclusive finding except placing the matter before the CDR EG on the decision with regard to the scheme of arrangement, though legal requirements were met substantially. The learned Judge while tentatively sanctioning the scheme, however, made the same subject to the approval of the CDR EG. He has further directed that if the CDR EG approves the scheme by evaluating the financial implications, the final order in the Company Petitions shall be delivered to the Registrar of Companies within thirty days upon which appropriate action has to be taken by the Registrar and in case the CDR EG does not approve the scheme and suggests any modifications, the same shall be taken into account and the modified scheme of arrangement shall be placed before this Court for its sanction. Feeling aggrieved by this order, the appellants have filed these appeals, while ABFL has not filed any appeal. At this juncture, it needs to be noted that the HDFC Bank filed O.S.A. Nos.11 and 12 of 2017 partly aggrieved by common order of the Company Court. After detailed hearing of the cases by us, the same were adjourned for further hearing. On the adjourned date, Mr. S. Ravi, learned Senior Counsel appearing for the HDFC Bank submitted that an understanding was reached between the bank and the appellants herein, following which the HDFC Bank is agreeable for sanctioning of the scheme and that it was withdrawing all its objections to the proposed scheme. The learned Senior Counsel accordingly requested to dismiss the appeals placing on record the stand of the company that they are withdrawing all the

objections. Accordingly, by order passed on 28.3.2017, this Court has dismissed the OSAs as withdrawn and also placed on record the submission of the learned Senior Counsel that the bank is withdrawing all its objections to the scheme of arrangement.

10. Mr. S. Niranjan Reddy, learned Senior Counsel, submitted that under Sections 391 and 394 of the Companies Act, 1956 (for short, 'the Act'), the Company Court's jurisdiction is peripheral and supervisory, and not appellate. That it is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court; that the Court does not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise, as the same would be in the realm of corporate and commercial wisdom of the parties concerned; that the Court has neither the expertise, nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority, that the Company Court will act as an umpire in the game of cricket and it will only ensure that the game is played fairly by both parties and that it will not substitute its decision with that of the will of the majority stakeholders. In support of his submissions, the learned counsel placed heavy reliance on the judgment of the Supreme Court in *Miheer H. Mafatlal v. Mafatlal Industries Limited*¹. The learned Senior Counsel further submitted that members of the CDR EG have attended the creditors meeting and voted in favour of the scheme and that having exercised their right to participate in the creditors meeting convened to discuss the scheme, the CDR EG has

¹ (1997) 1 SCC 579

no further right to independently examine the scheme. The approval or otherwise of the scheme, argued the learned Senior Counsel, falls within the jurisdiction of the Company Court and that the scheme under Sections 391 and 394 of the Act does not envisage a situation where the scheme sanctioned by the Company Court could be made subject to the approval by an external agency such as CDR EG. The learned Senior Counsel accordingly submitted that the purported tentative sanction made by the learned Company Judge shall be treated as the final sanction and the part of the order under appeals by which the learned Judge had empowered the CDR EG to approve the scheme, with further directions either to forward the scheme to the Registrar of Companies or placing of modified scheme again for its sanction, is liable to be set aside.

11. Opposing the above submissions, Mr. Ch. Ramesh Babu, learned counsel for ABFL submitted that while ABFL has advanced loan to SHARE, it is entitled to recover Rs.27.80 crores as on 31.3.2015 and as a result of the aforementioned apportionment of the debt, Rs.18.18 crores have been allotted to ASML whose operations are proposed to be confined only to the two Telugu speaking States where the expected recoveries are almost nil and that if the scheme is approved it will result in serious financial loss to ABFL. He has further submitted that there is no majority of the value of the creditors and the shareholders to the proposed scheme of arrangement due to the reason that one of the major creditors/shareholders of SHARE, i.e., Small Industries Development Bank of India (SIDBI) voted in favour of the scheme subject to certain conditions/objections and that unless the conditional acceptance of the SIDBI is not complied with by SHARE, the said acceptance cannot be treated as unqualified acceptance/support to the proposed scheme of

arrangement and therefore the vote of SIDBI shall be taken as against the scheme, in which event the value of votes falls below the required majority. He has commended the conclusion drawn by the learned Company Judge that since the Court does not have expertise to decide whether the scheme is against the interests of any of the shareholders, it is appropriate to leave the final approval to the CDR EG.

12. Having regard to the rival submissions of the learned counsel for the parties, the following points emerge for consideration and adjudication.

1. Whether the order of the learned Company Court to the extent it has subjected sanction of the scheme to the approval by the CDR EG, is sustainable?
2. Whether the ABFL's objections deserve to be considered in these appeals and if so, do they have any merit?

Re Point No.1

13. Under Section 391 of the Act, the Company Court is vested with the jurisdiction to sanction the scheme of arrangement, if 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 as per the direction of the Court and if the majority in number representing three-fourths in value of the creditors, or class of creditors, or members or class of members as the case may be, present and voting either in person or, where proxies are allowed by the Rules, by proxies, at the meeting, agrees to any compromise or arrangement. Such compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the members, and also on the company.

14. In *Miheer H. Mafatlal* (1 supra), the Apex Court has lucidly explained the jurisdiction of the Company Court under Sections 391 and 393 of the Act. The Supreme Court recognised the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the court. The Supreme Court has further held that the Company Court certainly would not act as a Court of appeal and sit in judgment over the informed view of the concerned parties to the compromise, as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Apex Court has delineated the restrictive scope of jurisdiction of the Company Court by observing that the Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by requisite majority. While describing the Company Court's jurisdiction as peripheral and supervisory and not appellate, it has likened the Company Court's role to an umpire in the game of cricket who has to see that both the teams play their game fairly and according to the rules and do not overstep the limits. It has further observed that "subject to that how best the game is to be played is left to the players and not to the umpire." Having made these observations, the Supreme Court, however, recognised the power of the Court to interfere with the scheme wherever it finds that it is unconscionable or illegal or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. In such cases, held the Supreme Court, that the Company Court cannot act as a rubber stamp and automatically put its seal of approval on such a scheme.

It has further held that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors.

15. A careful reading of the plain language of provisions of Section 391 of the Act would reveal that the jurisdiction to sanction a scheme is conferred exclusively on the Company Court. No other agency is involved in the decision-making process under this provision. A majority by three-fourths of the value of the creditors, or class of creditors, or members, or class of members present and voting is a *sine qua non* for a scheme to be sanctioned. Ordinarily, when the scheme is supported by the requisite majority, the Company Court would not refuse sanction unless it finds the scheme unconscionable or illegal or otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Even while examining this aspect, the Court will not delve deep into the commercial wisdom exercised by the creditors or members of the company and it examines the scheme only at a peripheral level.

16. The learned Judge returned a finding that the scheme of compromise was approved by three-fourth majority of the members and creditors who attended the meeting. Having so held, the Court further observed that the objection against the proposed scheme of arrangement, reducing equity share capital from 6,44,13,50,000/- to 32,20,67,500 and conversion of the shares of OCCRPS into ordinary shares giving up their preferential and security coverage by the SHARE, has not been met by the promoters. The Court further observed that “though this Court is not in agreement with the contention raised by the objector that the procedure prescribed for reduction of share capital was not valid, the reduction of share capital as aforesaid and conversion of OCCRPS into ordinary equity shares would have major impact on the status of the lenders”. The

learned Judge further observed that in the case of ASML, the percentage of votes by its creditors satisfies the technical compliance of Section 391 of the Act. Adverting to the objections of the HDFC, the Court observed that it is one of the members of the CDR EG, that there is no clarity with regard to the stand taken by the CDR EG as a whole, though some of the members attended the meetings of the creditors convened by this Court and supported the resolution, that in the absence of any expertise, the Court is unable to give any conclusive finding regarding the justifiability or otherwise of the reduction in the equity, conversion of OCCRPS into ordinary equity shares and as the CDR EG itself deferred its decision in view of pendency of the company petitions and the scheme was not evaluated by the said group and as the HDFC bank has raised objections, the scheme was tentatively sanctioned subject to the approval by the CDR EG.

17. A careful analysis of the order of the Company Court would reveal that serious objections by HDFC, one of the members of the CDR EG, weighed with the Court in referring the sanctioned scheme for the approval by the CDR EG. Now the scenario has completely changed as the HDFC Bank has not only withdrawn its appeals, but also all its objections to the scheme. In view of this changed circumstance, in *stricto sensu*, it is wholly unnecessary to refer the scheme to CDR EG. On this ground alone, this point must be answered in favour of the appellants.

18. Even otherwise, we are of the opinion that reference to CDR EG for approval falls outside the statutory scheme under Section 391 of the Act. As noted above, it is only the Court which is conferred with the exclusive jurisdiction to examine the scheme and decide as to whether it must be sanctioned or not. This jurisdiction, as explained in *Miheer H. Mafatlal* (1

supra), is only peripheral and not appellate. That Court does not have expertise to examine the schemes of arrangement, is well recognized by the Courts in a catena of judgments, including *Miheer H. Mafatlal* (1 supra). However, for this reason, the Court cannot involve an outside agency as a supplementary decision maker to apply its expertise which the Company Court otherwise lacks. In other words, with due respect, we feel that involving an outside agency in the matter of sanctioning/approval of a scheme under Section 391 of the Act amounts to abdication of its functions by the Company Court. Once the scheme is supported by the requisite majority, all that the Company Court needs to examine is whether the scheme is unconscionable or it is unfair to any minority shareholders or creditors. Unless a finding in this regard is rendered against the scheme, the Court has no option other than sanctioning the same. Except the finding that the reduction of share capital and conversion of OCCRPS into ordinary equity shares would have a major impact on the status of the lenders, the learned Company Court has not rendered any finding as to whether such reduction is either unconscionable or unfair.

19. The learned Senior Counsel for the appellants has made strenuous efforts to justify reduction of equity share capital and conversion of OCCRPS into ordinary equity shares at length. He has submitted that every scheme of arrangement is bound to have some adverse impact on the stakeholders, be it members or creditors of the company, one way or the other, but if the requisite majority of the shareholders, members and creditors in their commercial wisdom supported the scheme, few objectors cannot stall its sanction on the ground that their interests are adversely affected. As noted above, the only objector that has remained in the field

is ABFL, which pleaded that if the scheme is sanctioned there is a likelihood of its losing Rs.18.18 crores. It is, however, not the pleaded case of the ABFL that the scheme has shown discrimination among the individual or any class of creditors. On the contrary, it is an admitted fact that all the creditors are treated equally. Indeed, the proponents of the scheme pleaded that in order to bail out the companies from the acute financial problems, the scheme is evolved and that if the scheme is not sanctioned both the companies are likely to be wound up which would cause enormous damage to the interests of all the members as well as the creditors. This plea of the appellants is not controverted by the ABFL.

20. In our opinion, the question of unconscionableness or unfairness in the scheme would arise if any of the individual or class of members or creditors are treated with discrimination or unfairness or their interests are sought to be jeopardized. When all the members and creditors are treated equally and when advantages and disadvantages flowing from the scheme are on even keel to all, such scheme cannot be termed as unconscionable or unfair more so, in commercial wisdom, both the companies felt that the proposed arrangement is the best possible one to wriggle them out of the financial troubles and such scheme is supported by requisite majority. In this view of the matter, we are of the opinion that the objector has not made out a case for refusal of the sanction of the scheme. Therefore, in our view, it is wholly unnecessary to refer the proposed scheme for examination by CDR EG. On the analysis as above, point No.1 is answered in favour of the appellants.

Re Point No.2

21. The foremost objection of ABFL is that the scheme is not approved by majority creditors. This fulcrum of the plea is SIDBI's letter

dt.2.6.2016 wherein it gave its approval for the proposed scheme subject to the condition of increasing SHARE's offer of higher conversion of preference shares into equity to SIDBI's satisfaction. Though this objection was referred in the order under appeal, no specific finding was rendered thereon.

22. It is noteworthy that the ABFL has not filed appeal against the order of the Company Court and it has also not filed any cross-appeal on this aspect. Even otherwise, we do not intend to stand on technicalities and instead we choose to examine this aspect on merits. It is an undisputed fact that SIDBI has voted in favour of the scheme in the creditors meeting held on 02.6.2016. It has issued a separate letter on the same day stipulating a condition for agreeing for proposed scheme. Therefore, we find ourselves in agreement with the submission of the learned Senior Counsel that the separate letter addressed by the SIDBI cannot be treated as a conditional vote. The learned Senior Counsel argued that in its subsequent letter dt.12.9.2016, the SIDBI has reiterated its support to the scheme. Alternatively he has submitted that even assuming that SIDBI has given conditional approval, its votes are to be ignored and that even in such event, the scheme is supported by requisite majority. In support of his submission, he has placed reliance on the judgments *In Re Kirloskar Electric Co. Ltd.*² and *In Re Swift Formulations Private Limited*³.

23. *In Re Kirloskar Electric Co. Ltd.* (2 supra) the Karnataka High Court while considering the words 'present' and 'voting' in sub-section (2) of Section 391 of the Act, held that a member present and voting may remain neutral, indifferent, unbiased or impartial not engaged on either

² [2003] 116 Company Cases 413 (Kar.)

³ Manu/PH/0147/2004

side; that voting has to be either in the affirmative or negative, i.e., 'yes' or 'no' on the ballot paper or voting paper, and that one is not supposed to write anything except putting 'yes' or 'no' either in favour of the proposition or against the proposition. The Court further held that in addition to 'yes' or 'no', if any suggestion, condition, reservation or stipulation is written stating that the expression of the will or opinion either for or against the proposition is subject to those things, then the votes have to be necessarily treated as invalid or void, as such votes are no votes leading either way.

24. We are in respectful agreement with the aforesaid view of the Karnataka High Court which fully supports the submission of the learned Senior Counsel that even if the letter dt.2.6.2016 is construed as conditional voting, at the worst the vote of the SIDBI will not be treated in favour of the proposed scheme. In no event its vote can be treated as a negative vote. The learned Senior Counsel submitted that in such a situation the SIDBI voting value is liable to be deducted from the total percentage of votes cast in favour of the appellants and that even so the appellants secured more than 75% of the votes of the creditors present and voting. This submission is not controverted by the learned counsel for the ABFL. In the light of the above discussion, we hold that this objection raised by the ABFL is without any merit. Point No.2 is answered accordingly.

25. For the aforementioned reasons, the order of the Company Judge to the extent of referring the scheme for approval of the CDR EG is set aside and the scheme of arrangement between ASML and SHARE is sanctioned with effect from the appointed date. The appellants shall, within thirty days of receipt of a copy of this judgment, cause a certified

copy of the same to be delivered to the Registrar of Companies, Hyderabad, and take all other consequential actions in pursuance of the approval of the proposed scheme of arrangement.

26. The appeals are accordingly allowed to the extent indicated above.

As a sequel to disposal of the appeals, Application Nos.149 and 150 of 2017 filed in the appeals respectively, shall stand disposed of as infructuous.

C.V. NAGARJUNA REDDY, J

T. RAJANI, J

18-04-2017

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Note: LR copies to be marked.

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