**Comp. A.No.80 of 2017**
**in**
**C.P.No.93 of 2016**

**SENTHILKUMAR RAMAMOORTHY J.**

This application is filed to direct the Respondent to implement the Scheme of Arrangement (the Scheme), which was sanctioned by the order dated 01.06.2016 of this Court.

2. I heard the learned senior counsel, Mr.R.Murari, for the Applicant and the learned counsel, Mr.Naveen Kumar Murthi, for the Respondent.

3. The learned senior counsel for the Applicant opened his submissions by stating that this application arises out of an investment by the Applicant in the share capital of the Respondent and proceeded to submit as follows. The Applicant subscribed to 16,896,084 shares of the Respondent by investing a sum of GBP 7,649,201.62. Later, the Applicant entered into a memorandum of understanding with the Respondent on 16.03.2012 (the First MoU) with regard to the repurchase of the shares. Subsequently, a second memorandum of understanding dated 18.11.2015 (the Second MoU) and a third memorandum of understanding dated 03.02.2016 (the Third MoU) were entered into in this regard. On the date of execution of the Third MoU, the first tranche, as per the Third MoU, was paid to the Applicant towards purchase of 59,13,629 shares at a net

consideration of INR 31,05,57,590. The Third MoU envisages that the Respondent would approach the High Court for sanction of a scheme of arrangement involving inter alia the buy back of shares by the Respondent. Amendments were made to the Articles of Association of the Respondent on or about 11.02.2016. The second tranche was to be paid between 31.05.2016 and 30.06.2016 but this amount was not paid. This was followed by the sanction of the Scheme between the first Respondent and Roverco Apparel Company Private Limited on 01.06.2016 in terms of which the shares of all the shareholders of the Respondent, including the Applicant, were to be bought back by the Respondent. Pursuant to the sanction of the Scheme, the Respondent issued an offer letter to all shareholders, including the Applicant, with regard to the buy back of equity shares. In response, the Applicant offered 1,09,82,455 shares at the offer price of Rs.52.52 per equity share. However, the Respondent failed to fulfil the obligation to pay the consideration within 30 days as per the Scheme.



4. In light of the non-compliance with the buy back time line, as per the sanctioned Scheme, the Applicant sent reminders to the Respondent and the Respondent requested for extension of time. Eventually, by email sent on 01.09.2016, the Applicant informed the Respondent that legal action would be taken in light of the failure to comply with the terms of

the Scheme. In response, the Respondent offered to pay a sum of 1.13 million GBP. This payment was made on 13.09.2016. On or about 26.09.2016, the Applicant filed an application for interim orders under Section 9 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act). By order dated 12.01.2017, this Court directed the Respondent to pay a sum of Rs. 5 crore and also directed the Respondent to produce financial statements.

5. Pursuant to the order dated 12.01.2017, the Respondent paid a sum of Rs.5 crore on 07.02.2017. After making the said payment, the Respondent proposed a settlement in installments. In addition, the Respondent filed an application for extension of time under the Scheme for implementing the buy back of shares. By order dated 11.12.2017, this Court directed the Respondent to make a payment of Rs. 10 crores on or before 12.02.2018. In compliance with the order dated 11.12.2017, the Respondent remitted a sum of GBP 1,104,819.77 on 16.02.2018. Thereafter, on 28.03.2018, the Respondent filed an affidavit setting out the details of properties, audited financial statements as on 31.03.2017 and stated that the outstanding sum of GBP 2,960,963 with interest would be paid in 11 installments with the first installment being paid within 60 days from the date of acceptance of the proposal. Upon receipt of this proposal, counter proposals were submitted by the Applicant. By order

dated 31.07.2018, this Court recorded an undertaking by the counsel for the Respondent that an initial payment of INR 2.5 crore would be made to the Applicant on or before 02.08.2018. A demand draft for the said amount was produced in Court on 02.08.2018. Thereafter, the matter was referred to mediation but the mediation failed. Meanwhile, the arbitration clause in the MOU was invoked and a petition was filed under Section 11 of the Arbitration Act before the Supreme Court of India on 06.08.2019. The said petition is pending adjudication.

6. After narrating the above facts, the learned senior counsel submitted that the Respondent had evidently failed to comply with the order of this Court sanctioning the Scheme and, therefore, this Court has jurisdiction to direct the Respondent to comply with the order by issuing appropriate directions in this regard. In answer to a question as to whether all the shares are still in the custody of the Applicant, the learned senior counsel for the Applicant replied in the affirmative.



7. In response, the learned counsel for the Respondent submitted that after the Scheme was approved, the Respondent faced acute financial difficulties. He further submitted that the parties entered into the Third MoU when the Scheme was pending before this Court but did not disclose the said Third MoU to the Court. By pointing out that the third MoU

contains an arbitration clause, he pointed out that the said arbitration clause was invoked by the Applicant and that the petition for appointment of an arbitrator is pending before the Supreme Court. In such circumstances, he contended that this Court should not exercise jurisdiction and that it is appropriate that parties resolve the dispute by resorting to arbitration. He also raised the preliminary objection that after the constitution of the NCLT under the Companies Act 2013, this Court should transfer the case to the NCLT and not exercise jurisdiction.

8. By way of rejoinder, Mr Murari submitted that the liability of the Respondent is admitted and recorded in the Scheme and the order of this Court sanctioning the Scheme. In addition, he pointed out that the statutory power under Section 392 (1) (b) of the Companies Act 1956 is vested exclusively in this Court and such power cannot be exercised by the NCLT. He also submitted that such statutory power cannot be exercised by the Arbitral Tribunal also. As regards the liability of the Respondent, he pointed out that a sum of Rs.28,36,86,874/- was paid and the outstanding liability is about Rs.42,63,80,911/-.

9. I considered the submissions of the learned senior counsel/counsel and examined the records. Even before the Scheme was sanctioned by this Court, on the date of execution of the Third MoU, it

appears that the first tranche, as per the Third MoU, was paid to the Applicant towards purchase of 59,13,629 shares from and out of 1,68,96,084 shares at a net consideration of INR 31,05,57,590. Upon such payment, the principal amount payable for the remaining 1,09,82,455 shares was a sum of INR 57,67,49,810 as on the date of the Third MoU. In view of the fact that this is an application to direct the Respondent to implement the Scheme, which was sanctioned by this Court on 01.06.2016, it is necessary to examine the Scheme especially with regard to the buyback obligation. Part – D of the Scheme deals with share purchase in the Resulting Company. Clauses 17 and 18 of the Scheme are particularly relevant in the context of this application and the said Clauses read as under:

> "17.The Resulting Company shall upon the Scheme coming into effect, purchase not more than 1,75,00,000 (One crore seventy five lakhs only) equity shares of the Resulting Company from its shareholders holding shares as on the Appointed Date, having the face value of Rs.10/- each fully paid-up, representing about 16.62% of the issued, subscribed and paid-up share capital of the Resulting Company as on the Effective Date, either in physical form or dematerialized form, for a consideration not exceeding Rs.75.77(Rupees Seventy five and decimal seventy seven only) per equity share, being the fair value per share based on the valuation report received from an

independent valuer viz. M/s.B.K.Ramadhyani & Co. LLP. In case the equity shares tendered by the shareholders of the Resulting Company exceed 1,75,00,000 shares forming part of the issued, subscribed and paid up equity share capital, the Resulting Company shall purchase the equity shares so tendered on a pro-rata basis shares restricting the total purchase of equity shares to not more than 1,75,00,000 shares forming part of the paid up shares capital of the Resulting Company. Any fraction arising on the purchase of the equity shares in the proportion mentioned above shall be rounded off to the nearest integer.

18. Upon the Scheme coming into effect, the Resulting Company shall send an option form to purchase the shares in accordance with Clause 18 of the Scheme to all its shareholders indicating the offer price for the purchase of the equity shares, within 5 (five) days from the Effective Date. To exercise the option as per Clause 18 of this Scheme, the shareholders of the Resulting Company shall return the duly-filled in option forms to the Resulting Company within 10(ten) days from the date of dispatch of such option forms to the shareholders by the Resulting Company. The Resulting Company shall within 15(fifteen) days of the receipt of the option forms and documents mentioned therein complete the verification of the option forms along with the relevant supporting documents received from its shareholders. Thereafter, the Resulting Company shall purchase equity shares

only from shareholders whose option forms and supporting documents are verified by the Resulting Company and considered to be valid. The consideration payable for the purchase of such equity shares tendered for purchase by the Resulting Company shall be discharged by the Resulting Company to the bank accounts of such shareholders with 30(thirty) days of the receipt of the valid option forms from such shareholders."

From the above Clauses, it is clear that the Respondent/Resulting Company was obligated to offer the shareholders of the Resulting Company the option to offer their shares to the Respondent/Resulting Company for buy back. From the perspective of the shareholders, a right is created to participate in the offer to purchase the shares but there is no obligation in that regard. Upon exercise of such option by the shareholders, including the Applicant, the Respondent is obligated to pay the consideration within thirty days from the date of receipt of valid options forms from the shareholders.

10. Pursuant to the sanction of the Scheme, the Respondent issued an offer letter to its shareholders on 06.07.2016. In the said letter of offer, it was stated that the letter of offer is being sent to eligible shareholders of the Respondent as on the Record Date in accordance with Clause 17 of the Scheme. It was further stated therein that the purchase of shares will be undertaken on a proportionate basis from the eligible

shareholders as on 01.07.2016(Record Date) holding equity shares as on 01.04.2015 for cash at a net price of Rs.52.52 per equity share (net of applicable taxes). Upon receipt of the said offer letter, the Applicant, by a reply dated 15.07.2016, enclosed the signed offer letter whereby it offered the remaining 1,09,82,455/- equity shares (1,68,96,084-59,13,629) for purchase by the Respondent. The details of the bank account of the Applicant were also provided in the said letter of acceptance of the offer. On perusal of the Scheme and the order of this Court, there is no doubt at all that the Respondent agreed to buy back the shares of the Applicant. Towards this end, part payments were made from time to time aggregating to a sum of INR 28,36,86,874. After reckoning the said payments, as per the Applicant, the outstanding liability is INR 42,63,80,911.

11. In this factual context, the preliminary objections of the Respondent should be considered. The first preliminary objection is that a Section 11 Petition is pending adjudication before the Supreme Court of India and that parties should be directed to resolve the dispute through arbitration. As correctly pointed out by the learned senior counsel for the Applicant, the power under Section 392 of the Companies Act is a statutory power and there is no reason why the said power should not be exercised when the admitted position is that this Court sanctioned the Scheme. Once the Scheme is sanctioned, the Court is empowered under

Section 392 of the Companies Act, 1956 to supervise the carrying out of the compromise or arrangement and to issue directions in regard to any matter as it considers necessary for the proper working of the compromise or arrangement. This provision was interpreted by the Hon'ble Supreme Court in ***S.K. Gupta v. K.P. Jain*, (1979) 3 SCC 54at page 62,** as under:

> ***"13.****When a scheme is being considered by the Court, in all its ramifications, for according its sanction, it would not be possible to comprehend all situations, eventualities and exigencies that may arise while implementing the scheme. When a detailed compromise and/or arrangement is worked out, hitches and impediments may arise and if there was no provision like the one in Section 392, the only obvious alternative would be to follow the cumbersome procedure as provided in Section 391(1) viz. again by approaching the class of creditors or members to whom the compromise and/ or arrangement was offered to accord their sanction to the steps to be taken for removing such hitches and impediments. This would be unduly cumbersome and time-consuming and, therefore, the legislature in its wisdom conferred power of widest amplitude on the High Court under Section 392 not only to give directions but to make such modification in the compromise and/ or arrangement as the Court may consider necessary, the only limit on the power of the Court being that such directions can be given and modifications can be made for the proper working of the compromise and/or arrangement. The purpose underlying Section 392 is to provide for effective working of the compromise and/or arrangement once sanctioned and over which the Court must exercise continuous supervision [see Section 392(1)], and if over a period there may arise obstacles, difficulties or*

*impediments, to remove them, again, not for any other purpose but for the proper working of the compromise and/or arrangement. This power either to give directions to overcome the difficulties or if the provisions of the scheme themselves create an impediment, to modify the provision to the extent necessary, can only be exercised so as to provide for smooth working of the compromise and/or arrangement. To effectuate this purpose the power of widest amplitude has been conferred on the High Court and this is a basic departure from the scheme of the U.K. Act in which provision analogous to Section 392 is absent. The sponsors of the scheme under Section 206 of the U.K. Act have tried to get over the difficulty by taking power in the scheme of compromise or arrangement to make alterations and modifications as proposed by the Court. But the legislature, foreseeing that a complex or complicated scheme of compromise or arrangement spread over a long period may face unforeseen and unanticipated obstacles, has conferred power of widest amplitude on the Court to give directions and, if necessary, to modify the scheme for the proper working of the compromise or arrangement. The only limitation on the power of the Court, as already mentioned, is that all such directions that the Court may consider appropriate to give or make such modifications in the scheme, must be for the proper working of the compromise and/or arrangement."*



From the above, it is evident that the power is wide and that the only limitation is that the power should be exercised with a view to implement the scheme. In light of the aforesaid legal position, I see no reason to decline to exercise the statutory power on account of the arbitration clause especially when the obligation to buy back the shares of the Applicant and the non-compliance with this obligation are undisputed.

12. The second preliminary objection is that this Court should transfer the proceeding to the NCLT under the Companies Act 2013. Section 434 of the Companies Act 2013 deals with the transfer of pending proceedings. The relevant Clause (c)of Sub-Section 1 and the relevant provisos read as under:

> *"all proceedings under the Companies Act, 1956 (1 of 1956) including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding-up of companies, pending immediately before such date before any District Court or High Court, shall be transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer"*.
>
> *"Provided further that only such proceedings relating to cases other than winding-up for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal"*
>
> *"Provided further that-*
>
> *(i) all proceedings under the Companies Act, 1956 other than the cases relating to winding-up of companies that are reserved for orders for allowing or otherwise such proceedings; shall be dealt with in accordance with the provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959."*

13. In this case, the Scheme was sanctioned by this Court

under Section 391 of the Companies Act, 1956. Therefore, this is a case where final orders were passed by this Court and this is an application under Section 392 of the Companies Act, 1956 to implement the earlier order of this Court. Indeed, the analogous provision to Section 392 in the Companies Act, 2013 is Section 231 and that section confers the power of supervision on the NCLT, over implementation of a scheme of compromise or arrangement, which is sanctioned by the NCLT under Section 230 of the Companies Act, 2013 and not in respect of schemes of compromise or arrangement that are sanctioned by this Court. Thus, it is clear that this application is not liable to be transferred and only this Court can exercise jurisdiction under Section 392 of the Companies Act, 1956. Therefore, the second preliminary objection that this case should be transferred to the NCLT is untenable.

14. In light of the fact that both the preliminary objections are rejected as untenable, the question that arises is the nature of the direction or order that is required to be passed on this application. The parties entered into memoranda of understanding, including the Third MoU that mandates that the Respondent herein shall buy back the BWCI Remainder Shares, as defined therein, and the last tranche consideration is specified therein as not exceeding INR 57,67,49,810. The Third MoU further provides for the payment of 10% as penalty upon default.

Nonetheless, the scope of this application is limited to the implementation of the Scheme as sanctioned by this Court and not the implementation of the Third MoU. As per the sanctioned Scheme, the Respondent was required to issue a letter of offer to its shareholders to buy back the shares. Pursuant thereto, an offer was made to the Applicant to buy back its shares. In exercise of the option, the Applicant offered 1,09,82,455 shares at the price of Rs.52.52 per equity share. Thereafter, the Respondent failed to comply with the obligation under Clause 18 of the Scheme to make payment towards the above within 30 days. This amounts to non-implementation of the Scheme and, therefore, I am inclined to exercise jurisdiction and issue directions in that regard. It is also clear that all the shares are still in the custody of the Applicant. Therefore, the Applicant has made out a case for a direction to the Respondent to pay the outstanding and buy back the shares. In the absence of an agreed statement of account, I am not indicating the outstanding amount herein. In light of the financial condition of the Respondent, I am inclined to grant 90 days to the Respondent for this purpose. Such extension of time shall, however, not preclude any claims, in this regard, by the Applicant in exercise of contractual rights before the appropriate forum. Once the aforesaid outstanding is paid, it is just and necessary that the Applicant should surrender the share certificates for destruction and provide or execute requisite documents, including for the purpose of complying with foreign exchange law. Therefore, this application is disposed of by issuing the following directions:

(i) the Respondent is directed to buy back the equity shares of the Applicant as per order dated 01.06.2016 of this Court in C.P. Nos.93 of 2016;

(ii) for the above purpose, the Respondent is directed to pay the amount outstanding, as per the signed offer letter of the Applicant, after reckoning payments made, in equivalent GBP to the Applicant within 90 days from the date of receipt of a copy of this order by making the necessary remittance to the bank account stipulated in the signed offer letter;

(iii) upon receipt of this amount, the Applicant is directed to hand over the original share certificates and provide or execute any other documents in that regard, including documents required under foreign exchange law within two weeks thereafter;

(iv) the parties are granted leave to re-apply if further directions are required.



**21.02.2020**

Speaking order
Index: Yes
Internet: Yes

**SENTHILKUMAR RAMAMOORTHY, J.**
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**Pre Delivery order**
**in**
**Comp. A.No.80 of 2017**
**in**
**C.P.No.93 of 2016**



**21.02.2020**