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Reliance-Future Retail Acquisition: Approval of Scheme in Light of Role of the Courts in the Scheme of Arrangement

Adnan Danish[a]

[a]National Law Institute University, Bhopal, India

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In a recent tussle between the Global Giant Amazon and Indian jumbo Reliance regarding the acquisition of Future Retail by Reliance Industries Ltd. The NCLT gave nod to conduct the meeting for the shareholders and Creditors of Future Retail Ltd., Wherein the shareholderswere in favour of the acquisition which was not supported by the Creditors. This blog will look into the legal provisions of the Scheme of arrangements as given under relevant provisions of the Companies Act, 2013. The scheme of arrangement clearly states that in a condition where suchcreditors or class of creditors having 90% value is required to agree and confirm by way of affidavit to the scheme of arrangements and if the affidavit has not been obtained from the creditors, the scheme should be approved by a majority of person representing three fourth of the creditors and members. If this one of the several conditions as laid down in the Act is not fulfilled, then the Company cannot go with the acquisition process. When we put our insight into the powers of the Court to question or scrutinize the scheme, then it is very limited innature as the Court cannot look minutely into business intricacies and commercial wisdom as applied by the shareholders and Creditors for a business to survive and flourish, Courts only act like an umpire in a Cricket Game which looks into the aspects of fair play and legality.

Keywords: *acquisition, scheme, nclt, shareholders, company, legality.*

INTRODUCTION

The recent event where the Indian Giant Reliance Industries Ltd; informed the stock exchange board that it has called off the Future Retail deal after Future Group secured creditors voted against it. The acquisition plan that was announced in 2020 for 24,371 crores was alsoa cause of battle between American Giant Amazon and Kishore Biyani's founded Future Retail.[1] Now, decoding the legal concerns that pushed the Indian Giant on the backfoot. On 28th February 2022, the Mumbai bench of the National Company Law Tribunal passed an order allowing the Future Group to convene a meeting of its Future Shareholder and creditors to seektheir approval for its acquisition, this draws our attention toward the process of effectuating a Merger and Acquisition through the scheme of arrangement (Section 230-232 of the Companies Act,2013) through NCLT Route and what can the court's role be after the approvalof the scheme by the class of shareholders and Creditors.

LEGAL PROVISION

So, when we look through the process of effectuating a scheme of arrangements under Section 230-232 of the Companies Act, 2013, it highlights the most important point that the companies undergoing a scheme of arrangement have the powers under the object clause of their memorandum of association to undergo such scheme of arrangement. Then the second process deals with the approval of the draft scheme by the Board of Directors and that resolution passed in theboard meeting is to be filed with the registrar of the company in the form of MGT 14 and withthat, the third process deals with filing application with the NCLT -1 with other documents suchas a notice of admission in form No. NCLT-2, an affidavit in NCLT-6, a copy of the scheme of arrangement and fees prescribed as per in the Schedule of fees, this application should disclose to NCLT the basis on which each class of members and creditors have been identified for the approval of the scheme of arrangement between the two companies.

Fourth, a notice of the meeting must be given in accordance with NCLT orders and sent to each member, creditor, and holder of debentures at their respective addresses in the form of CAA 2.

[1] Dev Chatterjee, 'NCLT allows Reliance Retail's shareholders to hold meetings for Future deal' (*Business Standard*, 19 October 2021) <https://www.business-standard.com/article/companies/nclt-allows-reliance-retail-shareholders-to-hold-meetings-for-future-deal-121101800966_1.html> accessed 25 September 2022

This notice must also include the scheme of arrangement and other pertinent information and documents as specified in the section. Additionally, a chairperson is appointed for the meeting of the company that publishes the advertisement and the notices of the meeting, and they must file an affidavit before the NCLT, which should be in not less than 7 days before the date fixed for the meeting or the date of the first meeting. Further, the issue of notices and the advertisement must be in consonance with the mode of sending which means that the procedure of sending notice shall be sent by the Chairperson, who is appointed specifically for the meeting, and the appointed chairperson can send the notice by a registered post, speed post, or hand- delivery, or by courier or by mail, or any other mode, it can be other modes also as directed by NCLT.

The publishment of the notice should be done on the website in not less than 30 days before the meeting day has been fixed and the provision for the listed company is that the document or notice should be sent to the Stock Exchange Board of India(SEBI) and respective stock exchanges where the company is listed and this procedure should also be done in not less than 30 days before the date of the meeting is fixed, with that the notice of meeting should be advertised and published in an English Paper, there should also be publishment of notices in a vernacular newspaper where the securities are or are listed and this procedure should also be done in not less than 30 days before the date is fixed for the meeting. In a situation where there will be a separate meeting for the class of creditors or members, then a joint advertisement for such a meeting should be given.

The calling of a meeting of creditors or class of creditors can be dispensed in a situation where "such creditors or class of creditors having 90% value is required to agree and confirm by way of affidavit to the scheme of arrangements and if the affidavit has not been obtained from the creditors, the scheme should be approved by a majority of person representing three fourth of the creditors and members."Fifthly and one of the most important stages is the approval of the scheme by the majority of the person representing 3/4th in the value creditors or class of creditors or member or class of members as the case may be. If the 3/4th value of the creditors and members agree on the compromiseor arrangement in accordance with the order of NCLT, the scheme shall be a company, the creditors, and the members of the company.

Then the next stage is the notice to the regulating authorities like the CAA3 along with the copy scheme of arrangement shall be sent to the Central Government, the Income Tax Authorities other sectoral authorities, the registrar of companies or authorities as required by the NCLT. The seventh process is that the chairperson of the concerned meeting, as the time fixed by NCLT or the situation where no time is fixed then within three days after the meeting is concluded, shouldhand report to NCLT, the companies then file the petition for confirming the Scheme of Arrangement in form CAA5, the date and Notice is fixed by NCLT and the order on the petitioncomes where NCLT sanction or modifies the compromise and arrangement.

Now, when we draw insight into the Reliance- Future scheme of the arrangement, the future retail failed to get approval from three- fourth or seventy-five percent approval from its class of creditors here namely the secured creditors, nearly seventy percent of the secured creditors rejected the deal and Ten percent secured creditors supported it as the deal was not supported by the majority this led the Reliance to call off the deal.

ROLE OF CREDITORS IN THE SCHEME OF ARRANGEMENT

When we talk about the word arrangement, then it is of Prime importance and its meaning is not the same and limited to the scope of or synonymous to compromise, it is the procedure under Section 230-234 of the Companies Act, 2013 for obtaining NCLT approval for compromise orarrangement between a company and its creditors or class of creditors, the scheme favours thespecial majority, where the special majority of creditors or class of creditors is required for the approval. The NCLT approves the scheme once it has been proved by a majority of Seventy- Five Percent in value of the creditors in question. There are number of cases dealt with by various Courts in India regarding the rights of secured creditors in the scheme of arrangement. In the case of ICICI Ltd. Re, the facts of the case were that the transferor company prepared a scheme of merger with its subsidiary company, it sought direction for convening the meetings of its equityshareholders and with respect to the creditors no direction was sought for convening the meeting, the creditors contended that no notice was given to them but the applicant gave the submission that if any objection was raised by any creditors at the time of hearing of petitionit would raise no objection and that the notice of the hearing would be given in newspaper, thecourt held that it is bound to call the meeting of the creditors related to the

proposed arrangement.[2]

For instance, ***Kashinath Dikshit and Anr. v Surgicals and Pharmaceuticals,***[3] wherein the shareholder who came forward was "*simply an intermediary in aiding the second petitioner to purchase the assets of the company in liquidation*," the Karnataka High Court rejected the scheme for lack of bona fides. Before approving a plan of arrangement, the court must determine if it is a genuine compromise or solution for the resurrection of the firm in liquidation for the benefit of its members and creditors. The role of creditors becomes important because when a company, usually the company whichis getting merged or acquired ensures that all its assets and liabilities should also pass away to the company who is taking it, so it might be a possible situation where the interest of creditors havenot been taken into consideration by the company who has acquired or merged it, further the law has also taken into consideration the interest of the minority creditors so much so that thecreditor with an outstanding debt of at least 5% of the total outstanding debt of the acquired or merged company can object to the merger scheme before the National Law Tribunal.

Further, in the case of ***Rajeev v Appearance,***[4] the High Court of Gujarat observed that if the process of the scheme of arrangement has not been followed by the company properly, here primarily the important procedures like the company need to disclose each and every latest material fact to the creditors which are important for the scheme of arrangement and which can alter the interest of the creditors like the latest financial situation of the company, also the latest auditor's reports on the account of the company and the pendency of the proceedings if any which is inrelation of the company. With these we can fairly conclude that the role of creditors in the scheme of arrangement is also important, without securing 75% of the vote of the class of creditors a company cannot goahead with the scheme of arrangements, the creditors' decisions are final and conclusive and the court checks whether the scheme of arrangement is done in a free and fair manner in accordance with the law. The company cannot proceed with the scheme of arrangement processwithout taking into consideration the creditors.

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[2] *ICICI Bank Ltd. v Unknown* (2002) 36 SCL 682 Bom

[3] *Kashinath Dikshit and Anr v Surgicals and Pharmaceuticals* ILR (2002) KAR 5191

[4] *Rajeev v Appearance* (2008) 275

THE ROLE OF COURTS IN THE APPROVAL OF THE SCHEME

When we look into the position of courts in the approval of the scheme, then in the case of ***Miheer H. Mafatlal v Mafatlal Industries Ltd.,***[5] wherein this case, when the majority of the creditors or members or respective classes have approved the scheme, the legitimacy of the majority was questioned, the question before the Court was that whether it has jurisdiction to carefully scrutinize the scheme. The Supreme Court ruled that the court lacks the expertise to thoroughly examine the business rationale used by the creditors and members of the company who have ratified the scheme by a majority, and the Company Court can jurisdiction over the same is a role of supervisory in nature and not appellate in nature. Here, the court performs the role of a cricket umpire who must ensure that both teams adhere to the rules and do not go beyond them. Since the players are solely responsible for how the game is played and the umpire has no involvement, the court's role is made very obvious. Therefore, the Court cannot examine the scheme made for its approval in order to determine whether the parties could have come up with a better scheme or not. The observation made by courts upheld the commercial democracy, and the court did not penetrate into the realm of concerned creditors and members of the company, as the abovementioned respective class in a scheme of arrangement acts on the economic and commercial interests.

The court will consider the following factors: first, whether the statute's requirements have been met; second, whether those in attendance fairly represented the class; third, whether the arrangement is such that an honest and intelligent person who belongs to the class would find it acceptable; and fourth, whether the majority of the class is acting in good faith and is not coercing the minority.

In the case of ***In Re: Ion Exchange (India) Ltd.***[6], Justice D.Y. Chandrachud of the court said, "Corporate restructuring is one of the means that can be employed to meet the challenges and problems that businesses confront. In these cases, the law should be slow to retard or impede the discretion of corporate enterprise as it needs to adapt itself to the need of changing times so that it can be at par with the increasing competitiveness. The Court is not sitting as an

[5] *Miheer H. Mafatlal v Mafatlal Industries Ltd.* AIR 1997 SC 506
[6] *Ion Exchange (India) Limited v Unknown* (2001) 4 BOMLR 86

appellate authority.

Further Hon'ble Supreme Court in the case of ***Hindustan Lever Ltd.***[7], wherein the three learned judges, Justice Sen speaking on behalf of himself and CJ Venkatachaliah, the court made the observation in this connection in Para 3 and 6 of the Report, the court remarked that the Court should look into the factors like the scheme of merger or amalgamation should not be contrary to Public Interest, Nothing but the broad and general principles inherent in any compromise or settlement reached between parties—that it should not be unfair, against public policy, or unconscionable—serve as the foundation of such satisfaction. The courts have developed the "prudent business management test," or the idea that a plan shouldn't be used as a way to get around the law when corporations merge. None other than the broad and general principles inherent in any compromise or settlement entered into between parties—that it should not be against public policy or unconscionable—serve as the fundamental tenet of such satisfaction. The courts' evolving "prudent business management test," or the idea that a plan shouldn't be a way to get around the law, applies to company mergers.

In the recent case of ***MEL Windmills Pvt. Ltd. v Mineral Enterprises Ltd & Anr.***[8], The case's basic facts are that it involved a demerger scheme involving a corporation that had ongoing investigations into its mining operations. There was no de-merger of the mining industry. A request for the suspension of the meetings of the members and creditors was made by the company to the Bangalore Bench. The NCLT evaluated the merits of the plan as well as the open investigations before rejecting the application. A challenge to the Order was brought to the NCLAT. The appeal tribunal overturned the judgement of the lower court, noting that it is abundantly evident that the tribunal is not compelled to review the merits of the proposed compromise or arrangement at the time that a meeting of creditors or members is called for that purpose. Any such concession made by the Tribunal would be in violation of the rule enshrined in Section 230 (1) of the Act and would be outside of its purview.

[7] *Hindustan Lever Employees Union v Hindustan Lever Ltd* (1995) Supp. (1) SCC 499
[8] *MEL Windmills Pvt. Ltd. v Mineral Enterprises Ltd & Anr* (2019) Appeal (AT No. 04/2019)

CONCLUSION

Clearly, the above-mentioned judgements gives us insight that the role of the Court is very limited with respect to the scheme of the arrangement, it only looks into certain issues which should be taken into consideration like whether the interest of minorities was taken into considerationor not, whether the process of corporate restructuring was done in a legal manner without violating rules as prescribed by law, the court does not delve into the aspects of corporate andbusiness acumen.