

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH

Company Appeal (AT) No. 16 of 2022

[Arising out of Order dated 08.12.2021 passed by the Tribunal/National Company Law Tribunal, New Delhi, Principal Bench in C.A. (CAA) – 116/ND/2021]

IN THE MATTER OF:

1. TCR Trading Private Limited

(CIN – U74900DL2010PTC360427)

Registered Office At :-

839, West End Mall, District Centre,
New Delhi – 110058.

Through its authorized signatory Sh.
Kulwant Singh.

...Appellant No. 1

2. Triage Industries Limited

(CIN-U26943DL1998PTC096861)

Registered Office At :-

215/9, Gali Lohran, 1st Floor,
Ajmeri Gate, New Delhi – 110006.

Through its authorized signatory Sh.
Kulwant Singh.

...Appellant No. 2

Versus

Tridev Advisory Services (P) Ltd.

Registered Office At :-

Flat No. – 705, Sector – D, Pkt.- 6, LIG
Kaveri, Vasant Kunj, Delhi – 110070. -

Through its authorized signatory Sh.
Kulwant Singh.

...Respondent

Present:

For Appellants : Mr. Rishabh Jain, Advocate.

For Respondent : Mr. Nikhil Verma, Advocate.

J U D G M E N T

(02.06.2023)

NARESH SALECHA, MEMBER (TECHNICAL)

- 1.** The present appeal has been filed under Section 421 of the Companies Act, 2013 against the 'impugned order' dated 08.12.2021 in C.A. (CAA)-116/ND/2021 passed by the 'Tribunal' (National Company Law Tribunal, New Delhi, Principal Bench).
- 2.** Heard the Counsel for Parties and perused the records made available.
- 3.** Learned Counsel for the Parties stated that the TCR Trading Pvt. Ltd./ Transferor Company No. 1 is being proposed to merge along with another transferor company, namely, Tridev Advisory Services Pvt. Ltd./ Transferor Company No. 2 into Triage Industries Pvt. Ltd./ Transferee Company (all three companies are related closely held family companies).
- 4.** Learned Counsel for the Parties stated that in order to reduce the expenses, bring efficient cash management and for consolidation of business, the three companies proposed a scheme of amalgamation and jointly filed the application before the 'Tribunal' for seeking dispensation of meeting of Shareholders of Transferor Companies No. 1 and 2 and Transferee Company, and also for the Unsecured and Secured Creditor of Transferor Companies No. 1 & 2. Learned Counsel for the Parties stated that the Transferee Company also sought direction for convening meeting(s) of Secured and Unsecured Creditors as their NOCs were not obtained.
- 5.** Learned Counsel for the Parties stated that the 'Tribunal' largely allowed the prayer made in the C.A. (CAA)- 116/ND/2021 but did not

dispense with meeting of Sole Secured Creditor of Appellant/ Transferor Company No. 1, whereas as per Section 230 (9) of the Companies Act, 2013 the 'Tribunal' could have dispensed with calling of such meeting.

6. Learned Counsel for the Parties further stated that since Transferee Company did not obtain NOC/ consent from its Secured and Unsecured Creditors, directions were sought from the Tribunal to convene the meeting of Creditors which was allowed but on the condition that voting on the proposed scheme through voting in person, whereas, in terms of Section 230(4) & (6) of the Companies Act, 2013 and Rule No. 9,10,13 of the Companies (Compromise, Arrangements and Amalgamations) Rule 2013, Proxies could have been allowed.

7. Learned Counsel for the Appellant stated that certain clerical errors crept into the 'impugned order', as detailed out in Para 7.21 of the Appeal filed before this 'Appellate Tribunal', which are required to be corrected by the 'Tribunal'.

8. In order to examine the prayers made to this 'Appellate Tribunal', it would be desirable to look into relevant portion of the 'impugned order' along with the relevant laws and regulations.

9. This 'Appellate Tribunal' has perused the 'impugned order' dated 08.12.2021 and notes the following relevant portions :-

"Under consideration is the Application No. C.A.(CAA) 116/ND/2021 filed under Sections 230 to 232 of the Companies Act, 2013. The prayer made is to dispense with the meeting of Shareholders and Creditors in relation to the Transferor Companies, dispensing with the meeting of Shareholders of the Transferee Company and convening

the meeting of Secured and Unsecured Creditors of the Transferee Company for approval of the **Scheme of Amalgamation**, which shall take effect from the Appointed Date of 01.04.2021.

13. That the consent of Secured and Unsecured creditors of the Transferee Company has not been obtained. Therefore, the separate meeting of the Secured and Unsecured Creditors of the Transferor Companies shall be convened in the following manner:

viii) The Voting shall be allowed on the proposed Scheme by **voting in person**, The chairman shall be responsible to report the result of the meeting within a period of 7 days of the date of the meeting with details of voting on the proposed Scheme.

18. That the 100% in value' of unsecured creditor of the Transferor Company No. 2 have given 'no objection' to the Scheme on respective affidavits. Therefore, the requirement of convening the Meetings of Unsecured Creditors in respect of the Transferor Company No. 2 is dispensed with.”

9. Similarly relevant laws and regulations are reads as under :-

“421. Appeal from orders of Tribunal (1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

(2) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed: Provided that the

Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(4) On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal”

“230. Power to compromise or make arrangements with creditors and members.

(4) A notice under sub-section (3) shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement

(6)Where, at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or

arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company.”

***(9)** 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.”*

Rule 9, 10 & 13 of the Companies (Compromise, Arrangements and Amalgamations) Rules, 2013

“9. Voting.—*The person who receives the notice may within one month from the date of receipt of the notice vote in the meeting either in person or through proxy or through postal ballot or through electronic means to the adoption of the scheme of compromise and arrangement.*

Explanation. *For the purposes of voting by persons who receive the notice as shareholder or creditor under this rule—*

(a) “shareholding” shall mean the shareholding of the members of the class who are entitled to vote on the proposal; and

(b) “outstanding debt” shall mean all debt owed by the company to the respective class or classes of creditors that remains outstanding as per the latest audited financial statement, or if such statement is more than six months old, as per provisional financial statement not preceding the date of application by more than six months.

10. Proxies.— (1) Voting by proxy shall be permitted, provided a proxy in the prescribed form duly signed by the person entitled to attend and vote at the meeting is filed with the company at its registered office not later than 48 hours before the meeting.

(2) Where a body corporate which is a member or creditor (including holder of debentures) of a company authorises any person to act as its representative at the meeting, of the members or creditors of the company, or of any class of them, as the case may be, a copy of the resolution of the Board of Directors or other governing body of such body corporate authorising such person to act as its representative at the meeting, and certified to be a true copy by a director, the manager, the secretary, or other authorised officer of such body corporate shall be lodged with the company at its registered office not later than 48 hours before the meeting.

(3) No person shall be appointed as a proxy who is a minor.

(4) The proxy of a member or creditor blind or incapable of writing may be accepted if such member or creditor has attached his signature or mark thereto in the presence of a witness who shall add to his signature his description and address : provided that all insertions in the proxy are in the handwriting of the witness and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request and in the presence of the member or creditor before he attached his signature or mark.

(5) The proxy of a member or creditor who does not know English may be accepted if it is executed in the manner prescribed in the preceding sub-rule and the witness

certifies that it was explained to the member or creditor in the language known to him, and gives the member's or creditor's name in English below the signature.

13. Result of the meeting to be decided by voting.—

(1) The voting at the meeting or meetings held in pursuance of the directions of the Tribunal under Rule 5 on all resolutions shall take place by poll or by voting through electronic means.

(2) The report of the result of the meeting under sub - rule (1) shall be in Form No. CAA. 4 and shall state accurately the number of creditors or class of creditors or the number of members or class of members, as the case may be, who were present and who voted at the meeting either in person or by proxy, and where applicable, who voted through electronic means, their individual values and the way they voted.

(Emphasis Supplied]

10. From the above, it is clear that as per Section 230(9) of the Companies Act, 2013, the Tribunal may dispense with the calling of a meeting of creditors 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. As the Appellant/Transferor Company No-1 is a closely held family company and sole unsecured creditor, had conceded to the scheme of Amalgamation by way of affidavit, therefore, in terms of section 230(9) of the Companies Act, 2013 the meeting of sole unsecured creditor of Appellant/Transferor

Company Appellant No-1 could have been dispensed with by the 'Tribunal' and as such we find merit in the averments of the 'Appellant'.

11. It is noted that Transferee company did not obtain the NoC/consent from its secured and unsecured creditors. Therefore, the directions were sought by Transferee Company from the 'Tribunal' to convene the meetings of its secured and unsecured creditors. The Tribunal in para 13 of the 'impugned order' gave the directions to convene the meeting, dispatch the notices of meeting along with the form of proxy but in Para 13 (viii) of the Impugned Order allowed the voting on the proposed scheme by voting in person but voting through proxy was not allowed. In this connection it is noted that voting by proxy is allowed by Section 230(4) & (6) of the Companies Act, 2013 and Rule 9, 10 & 13 of the Companies (Compromise, Arrangements and Amalgamations) Rules, 2013. As per Explanation to Rule 5(d) of the Companies (Compromises, Arrangements and Amalgamation Rules,) 2016 the Chairman, inter-alia shall, at the general meeting, at the end of discussions on the resolutions on which voting is to be held, allow voting by use of electronic voting system for all those members who are present at the general meeting but have not cast their votes by availing the remote e-voting facility. Hence, by not allowing to vote in other modes other than in person in meeting of secured and unsecured creditor of Transferee company as permitted as per Companies Act, 2013 and rules made thereunder to vote on resolution is not sustainable and the 'Tribunal' erred on this account.

12. It has also been brought to our notice that the couple of clerical/typographical errors seem to have entered into the ‘impugned order’ which are required to be corrected by the ‘Tribunal’.

13. In view of all above, the ‘impugned order’ deserves to be set aside with direction to look into all these issues in accordance with the law. The ‘Appeal’ succeeds and the concerned parties are directed to appear before the Tribunal on **10th July, 2023**. No costs. Interlocutory Applications, if any, are closed.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Naresh Salecha]
Member (Technical)**

Simran