NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

COMPANY APPEAL (AT) NO.190 OF 2023

(Arising out of judgement and order dated 14th July, 2023 passed by the NCLT, Mumbai in CP (CAA)85/MB/2021 in CA (CAA)4044/MB/2019)

In the matter of:

Marathon Nextgen Townships Pvt Ltd
Marathon Max, Junction of Mulund
Goregaon Link Road,
Mulund (W), Mumbai 400080 Appellant No.1

Marathon Nextgen Realty Ltd
Marathon Futurex, N.M. Joshi Marg,
Lower Parel Mumbai
Maharashtra 400013 Appellant No.2

Vs

Regional Director,
Western Region,
Ministry of Corporate Affairs,
Govt of India, Everest Building,
100 Marine Drive,
Mumbai 400002
Maharashtra Respondent

For Appellant:Mr Tishampati Sen, Ms Ridhi Sancheti, Mr Ashish Parwani, Ms Geetika Makhija, Mr. Anurag Anand and Mr Mukul Kulhari, Advocates.
For Respondent:Mr. Durga Dutta, Ms Rashi Verma, Advocates.

ORDER
HYBRID MODE

29.05.2024: The present appeal has been filed by the Appellants against an order dated 14th July, 2023 passed by Ld. National Company Law Tribunal, Mumbai in CP (CAA)85/MB/2021 in CA (CAA)4044/MB/2019).

2. The appellant is aggrieved of the fact that the Ld. NCLT while admitting the scheme of arrangement between the parties has unilaterally changed the appointed date from 1.4.2019 to 1.4.2020. It is submitted the Appellant No.1 is a wholly owned subsidiary of Appellant No.2 and was interalia engaged in

the business of construction, development, and sale of commercial and residential real estate projects.

3. In the year 2019, the group companies to which the Appellants belong were in the process of undergoing corporate restructuring. Appellant No.2, pursuant to the group restructuring, infused in Appellant No.1 an amount of Rs.126,33,00,000 (Rupees one hundred and twenty-six crores and thirty-three lakhs only) by means of subscription of 12,633 units of 7% Unsecured Non-Convertible Debentures of Rs.1,00,000 each ("Debentures") issued by Appellant No.1.

4. The Appellants, pursuant to the group restructuring, had also proposed to merge and amalgamate Appellant No.1 with Appellant No.2 and accordingly, the Appellants taking into consideration the accounting, financial and taxation aspects of the restructuring at group level and in consideration of issue, allotment, and subscription of Debentures by the Appellants in the manner stated above determined the Appointed Date for merger of Appellant No.1 with Appellant No.2 as April 01, 2019.

5. The Appellants, to give effect to the proposed amalgamation, filed an application with the Hon'ble National Company Law Tribunal, Mumbai Bench vide Company Scheme Application number CA(CAA)/4044/MB/2019 (admitted on February 06, 2020) and Company Scheme Petition CP(CAA)/85/MB/2021 (admitted on August 24, 2021).

6. The matter was listed on several occasions on the board for hearing but could not be heard due to several reasons including paucity of time. The Appellant Companies, in view of the same also filed interlocutory applications praying for urgent hearing of the matter.

7 The Hon'ble NCLT, thereafter, in consideration of the approval of shareholders of the Appellants and basis the report of the applicable regulatory authorities, approved the Scheme of Amalgamation of Marathon Nextgen Townships Private Limited with Marathon Nextgen Realty Limited ("Scheme") vide its order dated July 14, 2023. The Hon'ble NCLT, however, while approving the Scheme directed the Appellants to revise the Appointed Date from April 01, 2019, to April 01, 2020, without providing any cogent reasons. It held "the appointed date" is proposed as 01.04.2019 which is ante dated more than 2 years. Hence the appointed date be amended to 01.04.2020.

8. Heard

9. Section 232(6) of the Companies Act, 2013 read as under:-

> *"(6) The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date."*

10. Further General Circular No.09/2019 of 21st August, 2019, issued by Ministry of Corporate Affairs read as under:--

> *To All Regional Directors,*
> *All Registrars of Companies,*
> *All Stakeholders.*
> *Subject: Clarification under section 232(6) of the Companies Act, 2013*
> *Sir,*
> *Several queries have been received in the Ministry with respect to interpretation of the provision of section 232(6) of the Companies Act, 2013 (Act). Clarification has been sought on whether it is mandatory to indicate a specific calendar date as 'appointed date' in the schemes referred to in the section. Further, requests have also been received to confirm whether the 'acquisition date' for the purpose of Ind-AS 103 (Business combinations) would be the 'appointed date' referred to in section 232(6)……*

6. In view of the above, it is hereby clarified that:

a) The provision of section 232(6) of the Act enables the companies in question to choose and state in the scheme an 'appointed date'. This date may be a specific calendar date or may be tied to the occurrence of an event such as grant of license by a competent authority or fulfilment of any preconditions agreed upon by the parties, or meeting any other requirement as agreed upon between the parties, etc., which are relevant to the scheme.

c) where the 'appointed date' is chosen as a specific calendar date, it may precede the date of filing of the application for scheme of merger/ amalgamation in NCLT. However, if the 'appointed date' is significantly ante-dated beyond a year from the date of filing, the justification for the same would have to be specifically brought out in the scheme and it should not be against public interest.

11. A bare perusal of the impugned order would show the said order is passed by the Ld. NCLT relying upon the General Circular No.9 of 2019 dated 21st August, 2019 as above, more particularly its Clause *(c)* of para 6, which is reproduced above. However, the Learned NCLT failed to notice the application for the scheme of merger was filed on 1st December, 2019 and in terms of the said para *6(c)* of the Circular (Supra), the appointed date was fixed at 01.04.2019, *which was within a year of filing of the Scheme*. Hence, even as per sub-para *(c)* of para *6* there was no need to change the Appointed Date. Even otherwise, as per the said sub-para, if the Appointed Date was ante dated beyond a year from the date of filing, which in the present case it is not, then also only justification would have to be obtained from the applicants that it is not against public interest. Para *IV (b)* of para 7 of the impugned order would show the reasoning of setting out the Appointed Date by the appellant as 01.04.2019 was as under:-

"In respect of the observation of the Regional Director, Western Region, Mumbai in paragraph IV(b) of their Representation, I

> *would like to say that, the Scheme sets out a specific date i.e. 1st April, 2019 and was filed within one year from the set Appointed date i.e. on December 1, 2019. It is clarified that for accounting purposes the 'appointed date' shall also deemed to be the 'acquisition date' and the date of transfer of control for the purposes of confirming to the accounting standards (including Ind-AS 103 Business Combinations)."*

12. Admittedly the petition was filed in December 2019 but owing to the outbreak of Covid pandemic there has been a delay beyond anybody's control in the sanction of the scheme, but despite that the Appointed Date should have been kept as 01.04.2019.

13. More so, the Regional Director during the course of final hearing has submitted the explanation/clarification given by the applicant companies were found satisfactory and they have no objection to the scheme of merger. Admittedly all other statutory compliances were fulfilled showing the Appointed Date as 01.04.2019 and hence there was no reason as to why it would have been amended to 01.04.2020 by merely saying it is ante dated more than two years, when in fact the petition was filed in December, 2019 and the 'Appointed Date' was well within one year of filing of the Scheme. Thus, we are not inclined to support to the reasoning given by the Ld. NCLT.

14. In ***Accelyst Solutions Pvt Ltd Vs Freecharge Payment Technologies Pvt Ltd, Company appeal (AT) No.15 of 2021,*** this Appellate Tribunal has held as under:-

> *12. Now, we have considered the scope and ambit of the jurisdiction of the Tribunal while exercising its power in sanctioning the scheme of amalgamation. It is useful to refer the Judgment of Hon'ble Supreme Court in the Case of Miheer H. Mafatlal (Supra). This Judgment has been approved by the*

Hon'ble Supreme Court in the case of Hindustan Lever (Supra) and at para 11 & 12 held that:

> *"11. While exercising its power in sanctioning a scheme of arrangement, the Court has to examine as to whether the provisions of the statute have been complied with. Once the Court finds that the parameters set out in Section 394 of the Companies Act have been met then the Court would have no further jurisdiction to sit in appeal over the commercial wisdom of the class of persons who with their eyes open give their approval, even if, in the view of the Court better scheme could have been framed. This aspect was examined in detail by this Court in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., 1997 (1) SCC 579. The Court laid down the following broad contours of the jurisdiction of the company court in granting sanction to the scheme as follows:-*
>
> > *1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.*
> >
> > *9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. 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. 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. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who*

> *has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392. Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. The supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. Two broad principles underlying a scheme of amalgamation which have been brought out in this judgment are: 1. That the order passed by the Court amalgamating the company is based on a compromise or arrangement arrived at between the parties; and 2. That the jurisdiction of the company court while sanctioning the scheme is supervisory only, i.e., to observe that the procedure set out in the Act is met and complied with and that the proposed scheme of compromise or arrangement is not violative of any provision of law, unconscionable or contrary to public policy. The Court is not to exercise the appellate jurisdiction and examine the commercial wisdom of the compromise or arrangement arrived at between the parties. The role of the court is that of an umpire in a game to see that the teams play their role as per rules and do not overstep the limits. Subject to that how best the game is to be played is left to the players and not to the umpire. Both these principles indicate that there is no adjudication by the court on the merits as such."*

15. With the aforesaid, it is clear that the Appellant Company has fulfilled all the requisite statutory compliances. However, Ld. NCLT modified the Appointed date considering the valuation report which is subsequent to the Appointed date. While modifying the Appointed date Ld. NCLT has not considered that the Appointed date 07.10.2017 is approved by the NCLT, Delhi vide order dated 22.10.2019 passed in CP No. CAA/144/ND/2018 in respect of Transferee Company.

The alteration of the Appointed date would render all calculations awry, none of the shareholder opposed the Appointed date proposed in the scheme of amalgamation. In identical facts Hon'ble High Court of Gujrat in the Case of O.J. Appeal No. 65 of 2009 in CP No. 100 of 2009 in Re. Shree Balaji Cinevision India Pvt. Ltd. decided on 23.09.2009 held that:

> *"We have perused the Judgment of the Ld. Company Judge. We do agree with the Ld. Company Judge that the Company Court has discretion to make modification in the proposed scheme of compromise, arrangement etc. However, such discretion is required to be exercised for cogent reasons. We do agree with Mr Soparkar that the Ld. Company Judge had no reason to modify the Appointed date proposed inthe scheme of amalgamation. We also agree that the alteration in the appointed date would affect the calculations and would have financial implications.*
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> *For the aforesaid reasons, we allow these appeals. The modification made by the Ld. Company Judge in respect of the Appointed date proposed in the scheme of amalgamation is set aside. The scheme of the amalgamation as proposed is sanctioned.*

16. With the aforesaid, we are of the considered view that the exercising jurisdiction by the NCLT Mumbai to modify the Appointed date from 07.10.2017 to 01.04.2018 in the facts of this case was unwarranted. Thus, the impugned order so far as the modification of Appointed date is concerned is set aside and the Appointed date as per the scheme is fixed 07.10.2017, which is approved by the shareholder of the Appellant Company.

15. Further in ***Shree Balaji Cinevision (India) Pvt Ltd V 2009 SCC Online Guj 12183*** the Court held as follows:-

> "*5. We have perused the judgement of the learned Company Judge. We do agree with the learned company judge that the Company Court has discretion to make modification in the proposed scheme of compromise, arrangement etc. However, such discretion is required to be exercised for cogent reasons. We do agree with Mr. Soparkar that the learned company judge had no reason to modify the appointed Date proposed in the scheme of amalgamation. We also agree that the alteration in*

> *the appointed Date would affect the calculations and would have financial implications."*

16. A bare perusal of the aforesaid judgements would show while sanctioning the scheme of arrangement if the Court comes to a conclusion that the provisions of statute have been complied with; and that there is no violation of any provision of law, or the proposed scheme of compromise or arrangement is not unquestionable, unconscionable or contrary to public policy, then the NCLT has no further jurisdiction to sit in appeal over the commercial wisdom of the class of person who with their eyes open have given their approval, even if, the Court is of the view that better scheme could have been framed. Further we also agree the alterations in the Appointed Date would affect the calculation and would have a serious financial implication. Hence if the parameters for sanctioning the scheme are complete, then the Tribunal would only be left with supervisory jurisdiction.

17. Thus we are in agreement with the learned counsel for the appellant that the Appointed Date should remain as 01.04.2019 instead of 01.04.2020 for the reasons stated above in paras No.10 to 16.

18. The appeal is thus allowed. Pending applications, if any, are disposed of. No order as to costs

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Bm/md