NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT) NO.144 OF 2024

(Arising out of judgement and order dated 10th April, 2024 passed by the National Company Law Tribunal Ahmedabad Bench in CP(CAA)22/NCLT/AHM/2023 in CA (CAA) No.1/NCLT/AHM/2923)

In the matter of;

Oriental Carbon & Chemicals Ltd,
Plot No.30-33, Survey No.77
Nishant Park, Village Nana Kapaya
District Mundra, Kachchh 370415
Gujarat Appellant

Vs

OCCL Ltd
Plot No.30-33, Survey No.77
Nishant Park, Village Nana Kapaya
District Mundra
Kachchh 370415
Gujarat Respondent

For Appellant::Mr Arun Kathpalia, Sr Advocate, MR Prateek Kumar, Mr. Mehul Shah, Ms Raveena Rai, Mr Rushabh Dala, Mr Kshitiz, Advocates.

For Respondent:Mr. Vikrant N Goyal, Advocate.

ORDER

27.05.2024: The present Appeal has been filed by Oriental Carbon & Chemicals Limited ("Appellant" or "Demerged Company") under Section 421 of the Companies Act, 2013 ("2013 Act"), against an order dated 10 April 2024 ("Impugned Order") by the National Company Law Tribunal, Ahmedabad Bench ("Ld. NCLT") in C.P. (CAA) 22/NCLT/AHM/2023 ("Petition") in C.A. (CAA) No. 1/NCLT/AHM/2023 ("Company Application"). The Impugned Order, while approving a Scheme of Arrangement of Demerger ("Scheme") between the Appellant and OCCL Limited (referred to as the Respondent or

Resulting Company), *modified the terms of the Scheme by altering the Appointed Date to the date of pronouncement of the Impugned Order.*

2. The Appellant, Oriental Carbon & Chemicals Limited, has its registered office in Gujarat and is engaged primarily in manufacturing and selling chemicals and investments, it is a publicly listed company on the National Stock Exchange of India and BSE. The Respondent, OCCL Limited, a wholly owned subsidiary of the Appellant, was incorporated in Gujarat in 2022 for chemical business operations. The Appellant and Respondent are collectively referred to as Parties.

3. The Scheme filed before the Ld. NCLT seeks to demerge the Demerged Undertaking from the Appellant to the Respondent on a going concern basis, with the aim to create separate entities focusing on specific business verticals, thereby enhancing operational efficiency and growth opportunities.

4. The Appointed Date, defined in the Scheme as an Effective Date or as decided by the Parties, was agreed upon by the Board of Directors of both companies to be the Effective Date. This decision was vetted by the regulatory statutory authorities before giving their no-objection letters and was also approved by the shareholders and creditors. Despite the absence of objections from stakeholders or regulatory bodies, it is alleged the Ld. NCLT by way of the impugned order, modified the Appointed Date based on an incorrect interpretation of legal precedent and directed it to be the date of pronouncement of the impugned order. This modification deviates from the agreed terms of the Scheme and disregards Circular No. 09/2019 issued by the Ministry of Corporate Affairs. The present Appeal challenges the Impugned

Order to an extent of this modification for being erroneous and without legal basis.

5. Before proceeding further let us examine the relevant provisions of the Scheme. The Scheme is Annexure *A-5* and it defines an appointed date as under:-

> ***"Appointed Date"*** *means the Effective Date or such other date as may be decided by the Board of the Parties;*
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> ***"Effective Date"*** *means the date on which last of the conditions specified in Clause 19(Conditions Precedent) of the Scheme are complied with or waived, as applicable."*
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> ***19. CONDITIONS PRECEDENT***
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> *19.1 Unless otherwise decided (or waived) by the relevant Parties, the Scheme is conditional upon and subject to the following conditions precedent:*
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> > *19.1.1 obtaining no-objection letter from Stock Exchanges in relation to the Scheme under Regulation 37 of the SEBI LODR Regulations;*
> >
> > *19.1.2 approval of the Scheme by the requisite majority of each class of shareholders and such other classes of Persons of the Parties, as applicable or as may be required under the Act and as may be directed by the Tribunal;*
> >
> > *19.1.3 the sanctions and orders of the Tribunal, under Sections 230 to 232 of the Act being obtained by the Parties; and*
> >
> > *19.1.4 certified/ authenticated copies of the orders of the Tribunal, sanctioning the Scheme. being filed with the Roe having jurisdiction over the Parties.*
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> *19.2 It is hereby clarified that submission of this Scheme to the Tribunal and to the Appropriate Authorities for their respective approvals is without prejudice to all rights, interests, titles or defences that the respective Parties may have under or pursuant to all Applicable Laws. 19.3 On the approval of this Scheme by the shareholders and such other classes of Persons of the said Parties, if any, the shareholders and classes of Persons shall also be deemed to have resolved and accorded all relevant consents under the Act or otherwise to the same extent applicable in relation to the demerger, capital reduction set out in this Scheme, related matters and this Scheme itself.*

6. Now let us examine how the Scheme has been dealt with by the impugned order. It holds as follows:

> ***15. OBSERVATIONS OF THIS TRIBUNAL***
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> *15.1 After analysing the Scheme in detail, this Tribunal is of the considered view that the scheme as contemplated amongst the Petitioner Companies seems to be prima facie beneficial to the Company and will not be in any way detrimental to the interest of the shareholders of the Company. Considering the record placed before this Tribunal and since all the requisite statutory compliances have been fulfilled, this Tribunal sanctions the Scheme of Demerger appended at "**Annexure I**** *of the Demerging Company and Resulting Company to the typed set filed along with the Company Petition as well as the prayer made therein.*
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> *15.2 The Learned Counsel for the Petitioner Companies submitted that no investigation/proceedings are pending against the Demerged or Resulting Company under section 210-217, 219, 220, 223, 224, 225, 226 & 227 of the Companies Act, 2013. Further, no winding up petition is pending against the Petitioner Companies under the provisions of the Companies Act, 2013.*
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> *15.3 Notwithstanding the above, if there is any deficiency found or, violation committed qua any enactment, statutory rule or regulation, the sanction granted by this Tribunal will not ^ come in the way of action being taken, albeit, in accordance with law, against the concerned persons, directors and officials of the petitioners.*
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> *15.4 While approving the Scheme as above, it is clarified that this order should not be construed as an order in any way granting approval of the said loan assignments and exemption from payment of stamp duly, taxes or any other charges, if any, payment is due or required in accordance with law or in respect to any permission/compliance with any other requirement which may be specifically required under any law. 15.5 Further it becomes relevant to discuss that in Company Petition CAA-284/ND/2018 vide Order dated 12.11.2018, the NCLT New Delhi has made the following observations with regard to the right of the IT Department in the Scheme of Amalgamation: -*
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> > *"taking into consideration the clauses contained in the Scheme in relation to liability to tax and also as insisted upon by the Income Tax and in terms of the decision in RE: Vodafone Essar Gujarat Limited v. Department of*

Income Tax (2013)353 ITR 222 (Guj) and the same being also affirmed by the Hon'ble Supreme Court and as reported in (2016) 66 tcixmann.com.374(SC) from which it is seen that at the time of declining the SLPs filed by the revenue, however stating to the following effect vide its order dated April 15,2015 that the Department is entitled to take out appropriate proceedings for recovery of any statutory dues from the transferor or transferee or any other person who is liable for payment of such tax dues, the said protection be afforded is granted. With the above observations, the petition stands allowed and the scheme of amalgamation is sanctioned."

16. ***THIS TRIBUNAL DO FURTHER ORDER:***

i. The Scheme of Arrangement in the nature of Demerger as annexed herewith as "Annexure A" is hereby sanctioned and it is declared that the same shall be binding on the Demerged Company, the Resulting Company, and their Shareholders and Creditors and all concerned under the Scheme.

ii. Hon'ble NCLAT in the matter of Sterlite Ports Ltd. Vs Regional Director Southern Region [Comp. Appeal (AT)(CH) No. 99 of 2023] held that NCLT has powers under rule 11 of the NCLT Rules, 2016, to fix the Appointed Date, which would be beneficial to the Scheme of Amalgamation

iii. In view of the above we hereby exercise the powers of rule 11 and hence direct that the Appointed Date is to be considered from the date of pronouncement of this order. As according to our view the remaining steps as envisaged under additional affidavit dated 07.03.2024 are only procedural steps/ ministerial acts which will follow post the pronouncement of the present order and effective date cannot be kept open.

7. Thus the crux of the impugned order would show the Ld. NCLT has found the scheme *prima facie* beneficial to the company and not in any way detrimental to the interest of the shareholders of the company. The Ld. NCLT also notes all requisite statutory compliances have been fulfilled and accordingly the Ld. Tribunal had sanctioned the Scheme of Demerger after finding that no investigation/proceedings are pending against the demerged

or resulting company and no winding up petition is pending against the petitioner companies under the provisions of Companies Act.

8. However, citing ***Sterlite Ports Ltd Vs. Regional Director Southern Regional (Company Appeal (AT) (CH) No.99/2024,*** the Ld. NCLT went ahead to say under rule 11 of NCLT Rules, 2016, it has the power to fix the appointed date to the scheme on amalgamation and as such it changed the appointed date as per the Scheme of Amalgamation *viz.* to be considered from the date of pronouncement of the impugned order.

9. It is this part of the order which is challenged before us. It is alleged the change of appointed date is based upon wrong interpretation of law and with no reasoning.

10. 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:*
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> > *"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.*
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> *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.*

11. 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."*

12. 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 have a supervisory jurisdiction.

13. Considering the above we thus hold there was no reason to change the appointed date as was given in the scheme of merger and even the reliance on ***Sterlite Port (Supra)*** was incorrect since in the said case the definition of the term "Appointed Date" itself gave an authority to the Ld. NCLT to fix a date other than the date fixed by the Scheme but though the NCLT had fixed another date than the Appointed Date yet in the cited case this Tribunal retained the Appointed Date to be the one as fixed under the Scheme.

14. Thus in the circumstances the appeal is allowed holding the Appointed Date be the date as fixed by the scheme *per* para 5 above and it shall not be *the date of pronouncement* as is held by the Ld. NCLT.

15. The appeal is accordingly disposed of. Pending IAs, if any, are also disposed of.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Ajai Das Mehrotra)
Member (Technical)

Bm/md