NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH NEW DELHI

Company Appeal (AT) No. 293 of 2019

IN THE MATTER OF:

Brillio Technologies Pvt. Ltd.
Having its registered office at:
No. 58, 1st Main Road, Mini Forest,
JP Nagar, 3rd Phase, Bangalore
560078 **.... Appellant**

Vs.

1. **Registrar of Companies, Karnataka**
E Wing, 2nd Floor, Kendriya Sadan,
Koramangala,
Bangalore – 560095

.... Respondent No. 1

2. **Regional Director**
South Eastern Region,
Ministry of Corporate Affairs
3rd Floor, Corporate Bhavan,
BandlagaudaNagole,
Tattiannaram Village,
Hayatnagar Mandal,
Ranag Reddy District,
Hyderabad – 500068

... Respondent No. 2

Present

For Appellant: Mr. NPS Chawla & Ms. Sakshi Singh, Advocates.

For Respondents: Mr. P S Singh & Ms. Annu Singh, For R-1 & 2.

J U D G M E N T

Jarat Kumar Jain: J.

The Appellant 'Brillio Technologies Pvt. Ltd.' filed this Appeal against the order dated 28.08.2019 passed by National Company Law Tribunal, Bengaluru (In brief 'Tribunal') in CP No. 53/BB/2019 whereby Appellant's Application under Section 66 of the Companies Act, 2013 (In brief 'the Act') read with Rule 2 of National Company Law Tribunal (Procedure for Reduction of Share Capital of the Company) Rules, 2016 (In brief 'Rules') has been dismissed with the liberty to file a fresh Company Petition in accordance with law.

2. Brief facts for deciding this Appeal are that the Appellant 'Brillio Technologies Pvt. Ltd.' is a private Company incorporated on 19.05.1997 under the provisions of the Companies Act1956, in the name and style of Collabera Solutions Pvt. Ltd.On 03.01.2014. the name of the Company was changed to Brillio Technologies Pvt. Ltd. The registered office of the company is situated at No. 58, First Main Road, Mini Forest, J.P. Nagar, 3rd Phase, Bangalore. The main objects of the Company are to inter alia carry on business of publishing Multimedia Web-site for Companies, Corporations, Institutions individuals and entities including text, audio, video, images, graphics, animation and other forms of information representations etc.

3. The latest authorized share capital of the Company as on 31.03.2018 is as follows:-

Authorized Capital	
21,72,50,000 equity shares of Re. 1/- each 3,27,500 participatory convertible preference shares of Rs. 100/- each	21,72,50,000/- 3,27,50,000
Total	**25,00,00,000/-**
Issued, Subscribed and paid up capital	
21,72,50,000 equity shares of Re. 1/- each 3,27,500 participatory convertible preference shares of Rs. 100/- each	21,72,50,000/- 3,27,50,000/-
Total	**25,00,00,000/-**

4. The Summary of the assets and liabilities of the Company as per audited financial statements as on 31.03.2018 is as under:-

Liabilities	**Amount**	**Assets**	**Amount**
Shareholders' funds	1,46,19,94,204	Non-current Assets	74,84,48,062
Non-Current Liabilities	9,94,00,240	Current Assets	1,06,02,95,009
Current Liabilities	24,73,48,627		
Total	**1,80,87,43,071**	**Total**	**1,80,87,43,071**

5. The Appellant is a subsidiary of its current holding foreign Company i.e. M/S GCI Global Ventures, which holds 95.88% shares of the Company. The

Company had received requests from the non-promoter shareholders to provide them with an opportunity to dispose of their shareholding in the Company. As per Article 45 and 47 of the Articles of Association, the Company may, from time to time, by special resolution, reduce its capital and/or its securities premium in any manner permitted by law. Therefore, the Board of Directors decided to reduce the equity share capital of the Company.

6. The Board of Directors of the Company on 24.01.2019 resolved to reduce the equity share capital from the existing Rs. 21,72,50,000/- to 20,82,97,363/- by reducing 89,52,637/-equity shares of Re. 1/-each from non-promoter equity shareholders for a consideration of Rs. 5,61,33,034/- being 89,52,637/- equity shares of Re. 1/- each with premium of Rs. 5.27/- per share paid out of the Securities Premium Account. The Security Premium Account of Rs. 15,24,81,955/- shall accordingly be reduced to Rs. 10,53,01,558/-

7. Thereafter, an Extraordinary General Meeting was held on 04.02.2019, wherein by special resolution duly passed in accordance Section 66 (1) read with Section 114 of the Act, the 100% members present, voted in favour of the resolution for reduction of share capital of the Company.

8. The proposed reduction of equity share capital from selective group of equity shareholder involves repayment of excess capital which is not required for carrying on the main objects of the Company. Consequently, such reduction will not cause any prejudice to the Creditors of the Company. The

reduction of the equity share capital does not involve the diminution of any liability in respect of unpaid share capital. The Creditors of the Company are also in no way affected by the proposed reduction of equity share capital as there is no reduction in the amount payable to any of the creditors, no compromise or arrangement is contemplated with the creditors and there is no reduction in the security, which the creditors may have in the Company. Further, the proposed reduction of equity share capital would not in any way adversely affect the ordinary operations of the Company or the ability of the Company to honour its commitments or to pay its debts in the ordinary course of its business. Subsequent to approval of the proposed reduction of equity share capital by the Tribunal, the proposed capital structure of the company will be as follows:-

Authorized Capital	
21,72,50,000 equity shares of Re. 1/- each 3,27,500 participatory convertible preference shares of Rs. 100/- each	21,72,50,000/- 3,27,50,000/-
Total	**25,00,00,000/-**
Issued, Subscribed and paid up capital	
20,82,97,363 equity shares of Re. 1/- each 3,27,500 participatory convertible preference shares of Rs. 100/- each	20,82,97,363/- 3,27,50,000/-
Total	**24,10,47,363/-**

9. As on 08.02.2019 there are no secured creditors, however, there are 186 unsecured creditors of the Company. There are no arrears in repayment of any deposits or interest payable thereon as on the date of Petition and that a declaration to the same effect has been filed by the Directors of the Company. The Auditors have verified and have certified the aforesaid facts.

10. The Auditors of the Company have also verified the Accounting Treatment and have given a certificate dated 21.02.2019 stating that the Accounting Treatment for reduction is inconformity with the Accounting Standards under Section 133 of the Act.

11. The Tribunal vide order dated 14.03.2019 has directed to issue notices to the Regional Director, Registrar of Companies, Creditors of the Company and directing the Company to cause the paper publication in "The Hindu" and "Udayavani". The Director of the Company filed an Affidavit dated 08.05.2019 has stated that notices have been served on the ROC, Regional Director and all the unsecured creditors and the notice has been published in daily newspaper on 29.03.2019.

12. The Registrar of Companies, Karnataka has filed Report dated 19th June 2019 after reiterating the facts of the case, inter alia making observations as follows:

> i. The Company is a subsidiary of foreign company, viz., M/s. GCI Global Ventures holding 94.44% shares of the Company.
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> ii. The Company has not filed the valuation report in support of the valuation arrived.

iii. As per the master data of the company, one open charge is pending against the company. However, as per the petition there are no secured creditor. The company may be directed to clarify the same.

iv. As per the Petition the amount to be paid out will be kept in separate Escrow Account for three years and the amount unpaid will be transferred to IEPF. Whereas as per Section 125 such amount cannot be transferred to IEPF. The Company may be asked to pay the difference amount to the members in case Hon'ble Court agree with the proposal of reduction.

v. In case the payment is to be made to any foreigner/foreign entity, the company has to comply with the provision of RBI/FEMA regulations.

vi. The company need to extend the proposed scheme to all the non-promoters and not to the selective non-promoters. Approval of all non-promoters may be sought before the Scheme is allowed.

vii. There are no prosecutions, technical scrutiny and complaints pending against the company.

13. The Regional Director, Ministry of Corporate Affairs, South-East Region, Hyderabad represented by Registrar of Companies has filed Affidavit dated 02.07.2019 inter alia making the following observations:

a) That the articles No. 45 and 47 of the AOA allows the Company for the Scheme of Reduction.

b) That the Company has passed special resolution dated 04.02.2019 for reduction of share capital u/s 66(1) read with section 52 of the Act.

c) As per Balance Sheet as at 31-03-2017, 31-03-2018, and 31.01.2019 the Company has shown a Profit of Rs. 4,11,67,088/-, Rs. 5,10,22,964/- and Rs. 5,91,59,446/- respectively.

d) The Scheme of Reduction of Capital, upon request from Non-promoter Shareholders to dispose off their shareholding in the Company, the Board of Directors decided to provide Liquidity to the Non- Promoter shareholders by a selective reduction in the equity share capital and also to make the Company Wholly Owned Subsidiary of its current holding Company and also return the Excess Capital to them.

e) The Company has Related Party Transactions during the years 2017-18. Necessary compliance under Section 188 of the Companies Act, 2013 may be done by the Company.

f) As per Scheme of Reduction of capital of the Company, the Company intends to pay off 89,52,637 equity shares to Non-resident individuals, Mutual funds, FII, Corporate bodies and individuals. Hence the company is required to comply with the provisions of FEMA/RBI Rules.

g) The Paid up capital of the Company is above Rs. 5 Crores and the Company has not appointed the Whole Time Secretary. Hence the Company may be advised to comply with the Provisions of Section 203 read with Rule 8A of the Companies

(Appointment and remuneration of managerial personnel) Rules 2014 and be directed to file adjudication application with the Registrar of Companies and adjudicate the offence.

h) As per the Scheme of Reduction of Capital the Company intends to pay off the Non-Promoter group i.e., to a selective group of Shareholders, and the Scheme is not across all the Shareholders. The Company ought to have offered the Scheme to all Shareholders.

i) The Scheme of Reduction of Capital, the Company intends to pay non- promoter equity shareholders for a consideration of Rs. 5,61,33,034/- being 89,52,637 equity shares of Re.1/- each with premium of Rs. 5.27/- per share paid out of the Securities Premium Account, thereby reducing to the Securities Premium Account from Rs. 15,24,81,955/- to Rs. 10,53,01,558/-.

j). The Securities Premium Account can be utilized only for the conditions provided in Section 52(2) of the Act. Whereas the company intends to pay off the Non-promoter equity shareholders i.e., 89,52.637 with premium of Rs. 5.27/- from and out of the SPA which is against the provisions of Section 52 of the Act.

k) As per the Balance Sheet as at 31.03.2018, the company has Long Term Borrowings to the tune of Rs. 22,51,360/- and Loans and Advances to the tune of Rs. 32.11.98.156/-. The Company needs to comply with the provisions of Section 185 &186 of the Act.

l) There were dues payable to the statutory authorities, hence, the company may furnish NOC from the statutory authorities before approval of the Scheme of Reduction of Capital.

m) As per reply of the Company. 7 members having 20.98.35.163 equity shares have attended the meeting and voted in favour the scheme of reduction of capital and none voted against the scheme. Whereas as per the scheme issued and paid capital of the company is 20,82,97,363 equity shares of Re.1/- each,theCompany may be advised to clarify as to the difference in the figures as stated above.

n) The Company has furnished the Certificate dated 21.02.2019 of S.R. Batliboi& Associates LLP, Chartered Accountants, which is certifying that proposed Accounting Treatment by the Company in reduction of share capital is in conformity with Accounting Standards under section 133 of Act.

o) The company has furnished a certificate dated 28.03.2019 for S.R. Batliboi& Associates LLP, Chartered Accountants certifying that the company do not have Secured Creditors and also given a certificate stating that the Company is having 186 Unsecured Creditors amounting to Rs. 14,31,11,022. No objection to the Scheme by these Unsecured Creditors be furnished by the Company before approval of the Scheme.

p) The Company has furnished a certificate dated 21.02.2019 from S.R. Batliboi& Associates LLP, Chartered Accountants, certifying that the company has not accepted any deposits from the public and hence there are no arrears in repayment of deposits or the interests thereon.

q) The Company has not filed the valuation report in support of the valuation arrived.

r) As per the master data of the company, one open charge is pending against the company. However, as per the petition there are no secured creditor. The Company may be directed to clarify the same.

s) As per the Scheme of reduction, the amount to be paid out will be kept in separate Escrows Account for three years and the amount remained unpaid will be transferred to IEPF. Whereas as per Section 125 such amount cannot be transferred to IEPF. The Company may be directed to clarify the same.

t) The Scheme of reduction is not across the border and is only for a selective group of members (Non-Promoter group) and intends to pay off at a premium of Rs. 5.27/- from and out of the Securities Premium Account which is not tenable as per the provisions of Section 52 of the Companies Act, 2013 and the company ought to have gone for buy back of shares instead of the present petition.

14. The Authorized Signatory of the company has filed a detailed Reply Affidavit dated 27.06.2019 alongwith the list of shareholders and valuation report in response to the report of RoC.

15. The Authorized Signatory of the Company has filed a Reply Affidavit dated 04.07.2019 alongwith the independent auditors report for 2017-18, acknowledgment of E-Form-32, notice in form RSC- 2 and its acknowledgment, acknowledgment of form RSC-5 and valuation report in response to the Regional Directors reports.

16. Subsequently, the Regional Director, Ministry of Corporate Affairs, South -East Region, Hyderabad represented by RoC has filed Additional affidavit dated 02.08.2019. The Authorized Signatory of the Company has filed a reply affidavit dated 02.08.2019 in response to the Additional Affidavit of Regional Director.

17. The Counsel for the Company has filed a Memo regarding Fema/RBI Regulations.

18. Ld. Tribunal observed that no objections have been received from creditors and consent affidavits on their behalf has not been produced. Ld.

Tribunal held that as per Section 52 (2) of the Act, Security Premium Account may be used only for the purpose specifically provided under Section 52 (2) of the Act. Selective reduction in equity share capital to a particular group involving non-promoter shareholders and bringing the company as a wholly owned subsidiary of its current holding company and also return excess of capital to them. This is an arrangement between the company and shareholders or a class of them and hence, it is not covered under Section 66 of the Act. However, the case may be covered under Sections 230-232 of the Act. Wherein compromise or arrangement between the Company and its creditors or any class of them or between a Company and its members or any class of them is permissible. Therefore, the Company failed to make out any case under Section 66 of the Act and thus, the petition is dismissed with the liberty to file appropriate application as per extant provisions of the Act.

19. Being aggrieved with this order, the Appellant has filed this Appeal.

20. Ld. Counsel for the Appellant submitted that there is no mandatory requirement to secure consent affidavits from the creditors under Section 66 of the Act or Rules. Section 66(2) of the Act, provides that Tribunal shall give notice of every application made under Section 66(1) to the Central Government, ROC, SEBI and Creditors of the Company and shall take into consideration the representation, if any, made to it. Accordingly, the Tribunal while its order dated 14.03.2019 directed to issue individual notice to Respondents and Creditors and also directed to cause newspaper publication

in “The Hindu” and “Udayavani” and file proof of the same. The order of the Tribunal was fully complied with and as per Rule 3(1) of the Rules, notices in Form No. RSC-3through speed post were duly sent to all the running creditors as existing on that date. (See compliance Affidavit alongwith date of notice and date of delivery page 266 to 288 Vol. 2 Appeal Paper Book) The last notice was served to one of the creditors on 29.04.2019. After service of notice no representation was received from the creditors for a period of three months from the date of receipt of notice, it shall be presumed that they have no objection to the reduction of capital. However, Ld. Tribunal has erroneously held that consent affidavit from creditors has not been obtained.

21. Ld. Counsel for the Appellant further submitted that the same bench of the Tribunal in identical facts in the case of M/s Yokogawa India Ltd. Vs. The Registrar of Companies CP No. 482/BB/2018 (Para 3 and 4 at page 94 of Written Submissions Diary No. 22749) without filing the consent affidavits of the creditors, vide order dated 09.05.2019has approved and confirmed the reduction of the share capital of the Company. Similarly, in the case of Onicra Credit Information Company Ltd. CP 376/ND/2017 (Para 10 and 11 at page 74 and 76 in Written Submissions Diary No. 22749) NCLT Delhi Bench has held that there is no mandatory requirement prescribed under the Act and the Rules for obtaining consent from creditors for seeking confirmation to the reduction of share capital.

22. Ld. Counsel for the Appellant submitted that the Securities Premium Account (SPA) can be utilized for reduction of share capital. SPA is quasi-capital and section 52(1) specifically provides that SPA has to be treated as if it was the paid up share capital of the Company. Such Account can be statutorily utilized for the purposes set out in Section 52(2) and (3) of the Act and hence reduced without Tribunal's approval but for other purposes it can be utilized by resort to the reduction of share capital. For this purpose, cited the Judgments of Hon'ble High Court of Delhi [In re. Nestle India Ltd. (2008) 4 Comp. LJ 490 (DL)] In this case, it is held that the amount laying in SPA, for their application, must comply to the provisions reduction of share capital of the Company except when the Application is one or more of the four specific instances in Section 78 of the Companies Act, 1956.The High Court of Rajasthan reiterated the same view in Vaibhav Global Ltd. (Company Petition No. 4 of 2016).

23. Ld. Counsel for the Appellant submitted that the reduction of share capital of the Appellant Company is being proposed consequent to request received from non-promoter shareholders, who have no liquidity. Apart from non-promoter shareholders, only M/s GCI Global Ventures Company holds 95.88% share of the Appellant Company, which has categorically agreed to the reduction. Further, non-promoter shareholders are being paid face value plus premium for their shares. Section 66 of the Act, provides that subject to confirmation by the Tribunal on an application by the Company having share capital may by a special resolution, reduce the share capital in any manner.

Clause (a), (b) of Section 66(1) of the Act are mere illustrations and not the only manner in which share capital may be reduced. In support cited the Judgment of Hon'ble Bombay High Court in the case of Sandvik Asia Ltd. Vs. Bharat Kumar Padamsi & Ors. (2009) SCC Online Bom. 541 and Hon'ble Delhi High Court in the case of Re. Reckitt Benchkiser (India) Ltd. (2005) SCC Online Del. 674.

24. It is further submitted that only reduction of share capital cannot be constituted as arrangement or compromise under Sections 230 and 232 of the Act. The reduction of share capital envisaged in the instant case squarely falls within the purview of Section 66 of the Act. Compromise and arrangement under Section 230 and 232 of the Act, are much broader terms then reduction of share capital under Section 66 of the Act. He placed reliance on the Judgment of Hon'ble High Court of Gujarat in the case of (In re. Maneckchowk and Ahmadabad Manufacturing Company Ltd.)(1969 SCC Online Guj. 22) and the Judgment of this Appellate Tribunal in the case of R. Systems International Ltd. Company Appeal(AT) No. 416 of 2017.

25. Ld. Counsel for the Appellant also submitted that the Act makes provision for reduction of share capital simpliciter without it being part of any scheme of compromise and arrangement. The Option of buyback of shares is less beneficial for the shareholders who requested the exist opportunity for the following reasons:

(i) Offer for buyback lapses after 30 days, if the offer goes unnoticed by any shareholders the opportunity for such exist is lost.

(ii) Once the buyback is accomplished no issue of similar kind of securities can be undertaken for six months as it may affect business and investments.
(iii) The entire process of reduction is more transparent and fair because the approval of ROC, RD and Tribunal is mandatory.

26. It is submitted that Hon'ble Supreme Court in the case of Mihir H. Mafat Lal Vs. Mafat Lal Industries (1997) 1 SCC 579 held that the power of Court is supervisory not appellate in nature and that scrutiny of the scheme of reduction is best left to the parties in the realm of commercial democracy. Thus, the impugned order is liable to be set-aside.

27. Per Contra Ld. Counsel for the Respondents submitted that the Appellant Company seeking to reduce the capital selective method wherein selected non-promoters were taken into consideration but not the whole non-promoters of the Appellant Company. Hence, its decision is biased towards the creditors which will reduce the credibility of the Appellant Company for the prospective investors.

28. It is further submitted that Financial Statements of the Company does not show any kind of accumulated loss which will prompt the Appellant Company to reduce the capital. Instead of taking the route of reduction of capital by the way of pick and choose formula, company may go for buyback of shares.

29. It is also submitted that 171 non-promoter shareholders were untraceable thereby no consent has been taken from them. Claim of such shareholders has not been secured or determined. Hence, without taking

consent from such shareholders and securing their rights will prejudice their shareholding in future.

30. It is further submitted that in the EGM even though special resolution has been passed with the intention to reduce the capital but no proper genuine reason has been given by the Appellant Company to substantiate their proposed reduction of share capital. The Pick and choose formula has been adopted to eliminate the role of non-promoter minority shareholders. No reason has been given as to why Appellant Company has not offered this scheme to all class of shareholders.

31. Ld. Counsel for the Respondents submitted that funds lying in the Security Premium Account (SPA) can only be used for the dedicated purpose but not for the purpose of reduction of share capital and sub-Section 2 of Section 52 of the Act, clearly states that in which manner funds can be utilized.

32. It is also submitted that in view of the facts and circumstances of the case the interest of minority shareholders has not been protected in the scheme of reduction of share capital, therefore, the Appeal may kindly be dismissed with cost.

33. After hearing Ld. Counsel for the parties, we have minutely examined the record.

34. The grounds of dismissal of the Petition and issues raised by the Ld. Counsel for the Respondents in the arguments are as under:-

(i) No proper genuine reason has been given for reduction of share capital.
(ii) Consent affidavit from creditors has not been obtained.
(iii) Security Premium Account cannot be utilized for making payment to the non-promoter shareholders.
(iv)Consent from 171 non-promoters shareholders who were not traceable, has not been obtained and claim of such shareholders has not been secured or determined.
(v) Selective reduction of shareholders is not permissible.
(vi) The Petition for reduction of capital under Section 66 of the Act, is not maintainable. However, it may be filed under Section 230-232 of the Act.

Ground No. i.

35. Ld. Counsel for the Respondents in his Written Submissions raised a ground that no proper genuine reason has been given for reduction of share capital and the Financial Statements does not show any kind of accumulated loss. In Para 8 of the Petition, it is specifically pleaded that:

> "8. The Petitioner Company had received the request in the past from the non-promoter shareholders to provide them with an opportunity to dispose of their shareholding in the Petitioner Company and provide liquidity to the shares held by them in the petitioner company. Taking to request of the non-promoter shareholders into consideration, the board of directors decided to provide liquidity to the non-promoter shareholders by a selective reduction in the equity share capital of the petitioner company. Also, the proposed reduction of equity share capital is to make the petitioner company a wholly owned subsidiary of its current holding company and also to return the excess capital to the non-promoter equity shareholders."

36. In support of this pleadings the Appellant has filed certain emails received from the non-promoter shareholders with the request to provide them an opportunity to dispose of their shareholding in the petitioner company. (Please see Pg. 500 to 509 Vol. 3 of Appeal Paper Book)

37. There is no law that a Company can reduce its capital only to reduce any kind of accumulated loss.

38. With the aforesaid it cannot be said that the Appellant Company has not given any genuine reason for reduction of share capital.

Ground No. ii

39. Now we have considered that whether obtaining of consent affidavit from the creditors is required. It is useful to refer the relevant Provisions, Sub-Section 3 of Section 66 of the Act, reads as under:

> (*3*) The Tribunal may, if it is satisfied that the debt or claim of every creditor of the company has been discharged or determined or has been secured or his consent is obtained,make an order confirming the reduction of share capital on such terms and conditions as it deems fit:
>
> Provided that no application for reduction of share capital shall be sanctioned by the Tribunal unless the accounting treatment, proposed by the company for such reduction is inconformity with the accounting standards specified in section 133 or any other provision of this Act and a certificate to that effect by the company's auditor has been filed with the Tribunal.

40. Sub-Rule 6 of Rule 3 of National Company Law Tribunal (Procedure for Reduction of Share Capital of Company) Rules 2016 reads as under:-

> "(6) Where the Tribunal is satisfied that the debt or claim of every creditor has been discharged or determined or has been secured or his consent is obtained, it may dispense with the requirement of giving notice to creditors or publication of notice under this rule or both."

41. The debt or claim of every creditor. (i) has been discharged or (ii) determined or (iii) has been secured or (iv) his consent is obtained, if any one condition is satisfied then the Tribunal may dispense with the requirement of giving notice to creditors or publication of notice under this rule or both.

42. In this Case, the Tribunal vide its order dated 14.03.2019 (@ Pg. 265 Vol. 2 of Paper Book) directed to serve notice to the Creditors of the Company and to cause paper publication in "the Hindu" English daily, Bengaluru edition and

"Udayavani" Kannada daily, Bengaluru edition and file proof of Service in the registry well before the next date of hearing i.e. 21.06.2019.

43. In compliance Jayanth Selvappullai, Director of the Company filed an Affidavit in Form No. RSC-5 confirming the dispatch and publication of the notice. (As per Rule 3 (5) of Rules) In Para 4 of the Affidavit name of unsecured creditors, date of issue of notice in form RSC-3, speed post acknowledgement No., Speed post delivery date, is mentioned. Thus, it is clear that the Company has given notice to all the creditors individually and notice was also published in aforesaid daily newspapers.

44. Ld. Counsel for the Appellant has made it clear that the last notice was delivered to one of the unsecured creditors on 29.04.2019 and hence, three month's period stipulated in Section 66 (2) of the Act, has long passed before the passing of the impugned order on 28.08.2019. Admittedly, after service of notice, no representation has been received from the creditors within three months. Therefore, as per proviso to Section 66(2) of the Act, it shall be presumed that they have no objection to the reduction.

45. Thus, we are of the view that the observation of Ld. Tribunal in Para 11 of the impugned order "It is observed that while objections have not been received from creditors, neither has any consent affidavits on their behalf been produced. With regard to reduction of share capital." is erroneous.

Ground No. iii

46. Ld. Tribunal held that SPA cannot be utilized for making payment to non-promoter shareholders. In this regard, we would like to refer the Judgment of Hon'ble High Court of Delhi in re. Nestle India Ltd. (Supra) it is held as under:-

> 19. At the outset, I consider it appropriate to analyze the relevant provisions of the Act on my own. The aspect of issue of shares at a premium or at a discount is dealt with in the Act in Sections 78, 79 & 79A. I am only concerned with Section 78 for the present. Section 78(1) states that the premium collected by the company while issuing shares shall be transferred to a separate account called the "Securities Premium Account". The manner in which the amount lying in the "Securities Premium Account" can be utilized and the purposes for which it can be utilized is also provided for by Section 78. Section 78(1) states that the "Securities Premium Account" would be regulated by the provisions of the Act, which deal with the aspect of reduction in the securities capital of a company. However, the provisions of the Act relating to reduction of securities capital would not apply to the "Securities Premium Account", when the same is utilized as provided in the Section itself. Section 78(2) enumerates four specific purposes for which the amount lying in the "Securities Premium Account" may be applied "notwithstanding anything in sub-Section (1)". This means, that the provisions of the Act relating to the reduction of the securities capital are not applicable where the application of the "Securities Premium Account" is for one or more of the four specific purposes enumerated in Section 78(2). A co-joint reading of Section 78(1) and 78(2) of the Act, therefore, leads to the inference that the amounts lying in the "Securities Premium Account", for their application, must comply with the provisions in the Act relating to reduction of securities capital of a company, except when the application of the "Securities Premium Account" is for one or more or the four specific instances enumerated in sub-Section (2) of Section 78. When the application of the "Securities Premium Account" is for one or more of the four specific purposes enumerated in Section 78(2), no further compliance with any of the provisions of the Act relating to reduction of securities capital of a company is necessary and the amount lying in the "Securities Premium Account" can be straightaway be applied for all or any of the said four specific purposes.
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> 20. The argument of the Regional Director (NR) is that the "Securities Premium Account" can be applied only for the specific four purposes mentioned in Section 78(2) of the Act and for no other purpose. To support this interpretation, the learned counsel for the Regional Director, Ms. Manisha Dhir, heavily relies on the use of the expression "notwithstanding anything in sub-Section(1)" to submit that sub-Section (2) of Section 78 overrides everything stated in sub- section(1), in relation to the application of the "Securities Premium Account".
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> 21. In my view, the interpretation advanced by learned counsel for the Regional Director (NR) is not correct. If the interpretation as advanced by

> the Regional Director (NR) is accepted, it would render otiose the provisions contained in sub-Section (1) of Section 78. The entire Section 78 has to be read as a whole and all the sub-Sections of this Section have to be read and interpreted so as to give a meaningful interpretation. Sub-Section (1) & (2) of Section 78 when read together clearly show that they form part of the same scheme. As aforesaid, the scheme is that the amounts collected as premium while issuing shares, which are required to be transferred to a separate account called the "Securities Premium Account" are governed by provisions of the Act relating to reduction of securities capital of a company. That is the general rule. However, an exception is carved out. The exception is that the provisions of the Act relating to reduction in securities capital would not apply "as provided in this section". Therefore, in respect of the specific applications of the "Securities Premium Account" provided in sub-section (2) of Section 78, the general procedure prescribed in sub-section(1) of Section 78 would not apply. If the submission of Ms. Manisha Dhir, Advocate, is accepted that the Securities Premium Account can be utilized only for the four specific purposes, which are enumerated in Section 78(2) and for no other purpose, it could lead to absurd situations. Take for instance, the case of a company which has issued shares at a premium and which does not have any unissued shares, which it proposes to issue as bonus share or any outstanding preliminary expenses which could be written off or any expenses towards commission or discount paid or allowed on issue of shares or debentures of the company, which could be written off and any obligation for payment of premium on redemption of any redeemable preference shares or debentures of the company. If the submission of the learned counsel for the Regional Director (NR) is accepted, it would mean that such a company, which does not have any outstanding obligation or liability of the kind enumerated in clause(a) to (d) of Section 78(2), can never hope to be able to apply the amount lying in the "Securities Premium Account", and that the same should continue to remain locked till a situation arises wherein the company can utilize it in terms of sub-Section (2) of Section 78. Such an interpretation would give rise to absurd and impracticable results. That does not appear to be the purpose of Section 78(2) of the Act. Sub-Section(2) of Section 78 is engrafted so as to provide greater flexibility to a company, and reduce the need to comply with the rigors of procedure provided for in sub-Section (1) of Section 78 in certain specific cases of application of the "Share Premium Account". The object of Section 78 does not appear to be to unnecessarily and unreasonably limit the flexibility that a company enjoys in dealing with the "Securities Premium Account" by limiting its application only to the four specific instances mentioned in sub-Section (2) of Section 78.

47. Hon'ble High Court of Rajasthan in the case of Vaibhav Global Ltd (Supra) held as under:-

> 15. From a reading of Section 52 of the Act of 2013 it is apparent that this provision equates a Share Premium Account of a company to its paid up share capital. For specified purposes as set out in subsection (2) and (3), the Share Premium Account can be statutorily utilised without any approval of a court. For other purposes the provisions of Sections 100-104 of the Act of 1956 have to be adopted, and approval of the court sought for

the reduction of paid up share capital of the company. Section 52 of the Act of 2013 therefore does not disbar/ prohibit application/ utilisation of the share premium account treated thereunder as paid up capital for purposes other than the purposes set out in clauses (a) to (e) of Section 52(2) and Section 52(3) of the Act of 2013. Contrarily it actively so permits as evident from its plain language. And when so done the reduction of the share premium account has to be compliant with Sections 100-104 of the Act of 1956.

16. The provisions for reduction of share capital presently obtaining are Section 100 to 105 of the Act of 1956. Section 100(1) of the Act of 1956 states that where the Articles of a company provide and where a special resolution of its equity shareholders has been passed a company can reduce its share capital in any way. This general power is followed by illustrative cases where the share capital can be reduced. The illustrations however do not negate reduction of share capital for other purposes. The special resolution for reduction of share capital passed by the requisite majority of equity shareholders has however to be approved by the court. As such where reduction of share capital of a company authorised by its Articles of Association is supported by a special resolution of equity shareholders, the court of which approval is sought is merely to evaluate whether it is reasonable, just and fair and not prejudicial to the interest of the shareholders, creditors or any other stakeholders of the company. If the aforesaid conditions are satisfied, it is not for the ROC or the company court to sit over the judgment of the requisite majority of shareholders as if in appeal.

17. In the instant case Article 10 of the Articles of Association of the petitioner company allows reduction of share capital in any manner. In the exercise of the aforesaid powers the equity shareholders with requisite majority have passed the special resolution for the purpose of adjustment of accumulated loss of the petitioner company as on 31-3-2015 against the company's Securities Premium Account which is treated as paid up share capital under Section 52 of the Act of 2013.

18. In the context of aforesaid legal position obtaining from the interpretation of Section 52 of the Act of 2013 and Sections 101-104 of the Act of 1956, I find wholly untenable the contention of Mr. K.J. Mehta appearing for the ROC that the share premium account albeit deemed to be part of paid up share capital as per Section 52 of the Act of 2013 cannot be utilized for the purpose of adjustment of accumulated loss of the petitioner company. The aforesaid conclusion as to utilisation of the Securities Premium Account for any purpose outside Section 52(2) of the Act of 2013-(old Section 78 of the Act of 1956) after due approval of the requisite majority of equity shareholders finds support from the judgment of the Andhrapradesh High Court in the case of re:Hyderabad Industries Limited [2004 (3) ALD 832]. A similar view has been taken in the case of re: Prashanth Textiles (P) Ltd [(2015) 192 Company Cases 184 (Madras)]. So too in the case of re-Koyo Bearings India Private Limited [Manu (ka) 3792/2015] and in the case of Tmeic Power Electronics Systems India Private Limited [Manu/Ka/ 2570/ 2014]. This legal position is also buttressed by the judgment in the case of re-DSM Anti Infectives India Limited [Manu/PH/3561/2010], which followed the ratio in the case of Hindalco Industries Limited [(2009)151 Company Cases 446] where the Bombay High court held that since all the shareholders had consented for

> the utilisation of the securities premium account towards the BRR account, it could be so utilised as the purposes set out in then extant Section 78 of the Act of 1956 (new section 52 of the Act of 2013) were in any event merely illustrative. Such was also the view of the Calcutta High court in the case of Ushacomm India (P) Ltd. [(2006) 2 CHN 473] where the scheme for reduction of the securities premium account for the business reconstruction of the petitioner company was approved. Finally in the case of re: Zee Telefilms Ltd. [2004(6) Bom. Comp. Cases 270] the Mumbai High court having considered the scheme and purpose of reduction of share premium found no illegality or breach of any provision of law in approving its reduction where it was just, fair and proper and wholly within the framework of the law.

48. Hon'ble High Court of Gujarat whilst allowing the reduction of share capital by reducing the Share/Securities Premium Account in Re. Alembic Ltd. (2007) SCC Online Guj. 242 held as under:-

> "6. It is further pointed out in the Petition that the proposed reduction does not involve diminution of any liability or repayment of paid up capital. In fact, no reduction is envisaged in the issue, subscribed or paid up share capital of the company. Since, the share premium account forms the part of the capital in the terms of section 78 of the Companies Act 1956, the utilization of the amount laying in this account also needs to be treated as reduction of capital. In view this, while admitting the petition this court granted dispensation of the procedure as required under Section 101 (2) of the Act and under Rules 48 to 64 of the Companies (Court) Rules 1959."

49. Hon'ble High Court of Delhi in Nestle India Ltd. (Supra) and Hon'ble High Court of Gujarat in Alembic Ltd. (Supra) dealt with Section 78 of the Companies Act, 1956 whereas Hon'ble High Court of Rajasthan in the case of Vaibhav Global Ltd. (Supra) dealt with Section 52 of the Companies Act, 2013. Section 72 of the Companies Act, 1956 and Section 52 of the Companies Act, 2013 both provisions are more or less same.

50. In the light of the aforesaid Judgments, we are of the view that the SPA can be utilized for making payment to non-promoter shareholders. We are unable to convince with the submissions made by Ld. Counsel for the

Respondents that the amount laying the SPA can be applied by the company, only for the purposes which are specifically provided in sub-Section 2 of Section 52 of the Act and for no other purpose.

Ground No. iv

51. In response to observation of the RoC that as per Section 125 of the Act, the amount to be paid out cannot be kept in Investor Education and Protection Fund (IEPF). The Petitioner Company has a total of 171 non-promoter shareholders, majority of them are untraceable, in this regard, in the Petition it is specifically mentioned that the amount to be paid to the untraceable non-promoter shareholders will be kept in an Escrow Account for a period of three years and any amount remaining unclaimed in the Escrow Account for more than three years pursuant to capital reduction would be transferred to the Investor Education and Protection Fund (IEPF). Section 125 of the Act provides that the amount in the unpaid dividend account of the companies is to be transferred to the IEPF under Section 124 (5) of the Act.

52. It seems that Ld. Tribunal was satisfied with the aforesaid provision in the scheme, therefore, the Petition has not been dismissed on this ground, we are also agree with the Ld. Tribunal. Thus, we find no force in the argument of Ld. Counsel for the Respondents.

Ground No. v

53. Now we have considered whether selective reduction (non-promoter shareholders) of share capital of the Appellant Company is permissible. As per

Section 66 of the Act, reduction of share capital can be done in 'any manner'. Clause (a) & (b) of Section 66 of the Act, mere illustration and not the only manner in which share capital may be reduced. For the purpose it is useful to refer the Judgment of Hon'ble Bombay High Court in the case of Sandvik Asia Ltd. (Supra) In this case the company had proposed a resolution for reduction of paid equity share capital. The Resolution was to the effect that the share capital of the Company be reduced by paying off /returning to the holders of equity share other than the promoters at rate of Rs. 850 per share i.e. Rs. 100 by way of face value plus Rs. 750 premiums per share, whereby extinguishing all such share. The Petition was opposed by the Respondents who are non-promoter shareholders of the Company. Hon'ble Division Bench held as under:-

> "8. Perusal of Section 100 further shows that a company can reduce its share capital in any way.

54. In the present case, it is nobody's case that the special resolution passed by the company is invalid or has not been passed by following the procedure laid down by the Act. It is also nobody's case that in the Article of the Association of the Company there is no provision authorizing the company to reduce its share capital. It is also nobody's case that the amount i.e. being offered to the non-promoter shareholders is not just or fair. The only objections is that the scheme for reduction of share capital proposed by the special resolution wipes out a class of shareholders namely the non-promoter shareholders and this, according to the objector, is unfair and inequitable. The question, therefore, i.e to the consider is whether the special resolution this

proposes to wipes out a class of shareholders after paying them just compensation can be termed as unfair and inequitable.

55. Hon'ble Bombay High Court in the case of Sandvik Asia Ltd. (Supra) dealt a petition in which the petition for reduction of share capital of the company be reduced by paying off/returning to the non-promoter shareholders of the company was dismissed by the Ld. Single Judge against that order appeal filed before the Division Bench the Petition was opposed by the Respondents who are non-promoter shareholders of the company, Division Bench held as under:-

> "7. The law relating to reduction of share capital of a company is contained in Sections 100 to 105 of the Companies Act. Section 100 authorizes the company limited by shares having a share capital, if so, authorized by its Article of Association by special resolution to reduce its shares capital in any way. So a company can reduce its share capital, (i) if there is a provision in its Article of Association permitting it to do so. (ii) If it has passed a special resolution for that purposes and, (iii) if such a resolution sanctioned by the Court
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> ....
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> 16. In our opinion, the above quoted observations of the House of Lords from its judgment in the case of Poole, referred to above, squarely apply to the present case. In our opinion, once it is established that the non-promoter shareholders are being paid faire value of their shares, at no point of time it is even suggested by them that the amount i.ebeing paid is any way less and that even overwhelming majority of the non-promoter shareholders having voted in favour of the Resolution shows that the court will not be justified in with holding its sanctioned to the resolution. As the Supreme Court has recognized that the Judgment of House of Lords in the case of British American Trustee and financial corporation Ltd. Is a leading Judgment on this subject, we are justified in considering ourselves bound by the law laid down in that judgment. As we find that there is similarity in the facts in which the observation is made in the judgment in the case of British and American Trustee and Finance Corporation, we will be well advised to follow the law laid down in that case. In our opinion, therefore, the Ld. Single Judge was in error in declining to grant sanction to the special resolution.

56. Hon'ble High Court of Delhi in the case of Reckitt Benckiser (India) Ltd. (Supra). After considering many Judgments held as under:-

> 21. The principles, which can be distilled from the aforesaid judicial dicta, are summarized as under:
>
> (i) The question of reduction of share capital is treated as matter of domestic concern, i.e. it is the decision of the majority which prevails.
>
> (ii) If majority by special resolution decides to reduce share capital of the company, it has also right to decide as to how this reduction should be carried into effect.
>
> (iii) While reducing the share capital company can decide to extinguish some of its shares without dealing in the same manner as with all other shares of the same class. Consequently, it is purely a domestic matter and is to be decided as to whether each member shall have his share proportionately reduced, or whether some members shall retain their shares unreduced, the shares of others being extinguished totally, receiving a just equivalent.
>
> (iv) The company limited by shares is permitted to reduce its share capital in any manner, meaning thereby a selective reduction is permissible within the framework of law (see Re. Denver Hotel Co., 1893 (1) Chancery Division 495).
>
> (v) When the matter comes to the Court, before confirming the proposed reduction the Court has to be satisfied that (i) there is no unfair or inequitable transaction and (ii) all the creditors entitled to object to the reduction have either consented or been paid or secured.
> .....
> .....
>
> 30. In the present case, admittedly requirements as contained in (i) to (iv) of para 21 have been complied with. Most of the arguments of the objectors stand answered in view of the principles of law laid down in the aforesaid judgments. It is clear that majority shareholders have decided to reduce the share capital. Normally, decision of the majority is to prevail. It is also their right to decide the manner in which the shareholding is to be reduced and in the process they can decide to target a particular group (of course it is to be seen that this is not with mala fide and unfair motive which aspect is discussed hereinafter). Thus such a step cannot be treated as buying back the shares and the provisions of Section 77A of the Act would not be attracted. Similarly there is no question of following provisions of Section 391 of the Act, although in the instant case even the procedure prescribed therein has been substantially followed. Likewise, provisions of Article 300A of the Constitution of India would not be attracted.

57. In the light of aforesaid proposition of law we can safely held that selective reduction is permissible if the non-promoter shareholders are being paid fair value of their shares. In the present case, none of the non-promoter

shareholders of the Company have raised objection about the valuation of their shares. It is nobody's case that the proposed reduction is unfair or inequitable. It is also made clear that the proposed reduction is for whole non-promoter shareholders of the company.

Ground No. vi

58. Ld. Tribunal in Para 17 of the impugned order held as under:

> "The present Petition moreover, also involves selective reduction in equity share capital to a particular group involving non-promoter shareholders and bring the petitioner company as wholly owned subsidiary of its current holding company and also return excess of capital to them. This is an arrangement between the company and shareholders or a class of them and hence it is also not covered under Section 66 of the Act."

59. Hon'ble Gujarat High Court in re. Maneckchowk and Ahmadabad Manufacturing Company Ltd. (Supra) while dealing a case under Section 391 (2) of the Companies Act, 1956, for sanctioning a scheme for compromise and arrangement between the creditors and members of the Company and the compromise proposed by the Company dealt with the scope of Section 391 of the Companies Act, 1956. (Section 230 of the Companies Act, 2013) held as under :-

> 23.....
> .....
> Section 391 provides a complete code of putting through a scheme of compromise and arrangement which may even include reorganisation of share capital subject to the well recognized exception that. if reorganization of share capital included reduction of share capital, the prescribed procedure for effecting the same must be gone through in view of rule 85 before the scheme could be sanctioned. If rule 85 were not enacted, obviously, reduction of share capital could have been effected as part of the scheme of compromise and arrangement without going through the procedure prescribed in section 100 onwards. The very fact that a specific rule had to be enacted for this purpose indicates that section 391 is a complete code providing for all those things which can be included in a scheme of

compromise and arrangement and all those things can be brought about by the procedure prescribed in section 391 onwards. The nature of compromise that can be entered into under section 391 is not defined. The definition of reorganization of capital is an inclusive definition which would not exclude reduction of share capital or increase of share capital which would also be a kind of reorganization of the share capital of a company. If section 391 was subject to other provisions of the Act every time the scheme of compromise and arrangement is put forth for the sanction of the court, if it includes things for which specific. provisions are made and that will have to be gone through before the scheme is sanctioned, it would result in unnecessary duplication of. procedure and would be cumbersome. On the contrary, it appears that if the creditors and members of the company arrive at a certain compromise which the court considers fair, it can be@sanctioned under section 391 despite the fact that for some of those things included in the compromise another procedure is prescribed in the Companies Act and a which has not been carried out. It, therefore, appears that section 391 is a complete code which provides for sanctioning of thescheme of compromise and arrangement. If such a scheme of compromise and arrangement includes increase of share capital, it can be done as a part of the reorganization of the share capital, which would be part of the arrangement that would be brought about between the company and its members. In case of reduction of share capital, in view of rule 85, the procedure prescribed under section 100 and onwards will have to be gone through. Looking at the matter from a slightly different angle, it appears that section 391 is a special provision for sanction of a scheme of reconstruction of companies, of amalgamation of companies and for a scheme of compromise and arrangement. The scheme of compromise and arrangement, or for that matter even the scheme of amalgamation of two companies, may envisage reorganisation of share capital of one or the other company. The Companies Act no doubt makes provision for reduction of share capital simpliciter, increase of share capital simpliciter, or fresh issue of capital simpliciter without its being part of any scheme of compromise and arrangement. The scheme of compromise and arrangement can be brought about only between the company which is liable to be wound up under the Companies Act and its members or creditors. The special provision contained in section 391, namely, sanction of the scheme of compromise and arrangement would in my opinion exclude general provisions for reduction of share capital or for issue of fresh capital. It is well settled that a special provision should be given effect to the extent of its scope, leaving the general provision to control cases where the special provision does not apply : vide South India Corporation (P.) Ltd. v. Secretary Board of Revenue ([1964] 15 S.T.C. 74; A.I.R. 1963 S.C. 207) and C. Rajgopalachari v. Corporation of Madras ([A.I.R. 1964 S.C. 1172), Therefore, it appears that the provisions contained in section 391 is a complete code. As a necessary corollary, if the scheme of compromise and arrangement includes reorganization of share capital except reduction of share capital, it can be sanctioned as a part of the scheme of compromise and arrangement. In the case of reduction of share capital as part of the scheme of compromise and arrangement, rule 85 will have to be given full effect. The scheme has been approved by a statutory majority as will be presently pointed out and if the scheme is to be sanctioned as part of such a scheme, reorganisation of the share capital except the reduction of share capital can be sanction. It will, of course, be necessary to find out whether the procedure prescribed for effecting reduction of share capital has been gone through or not.

60. With the aforesaid citation, we hold that Section 66 of the Companies Act, 2013 makes provision for reduction of share capital simpliciter without it being part of any scheme of compromise and arrangement. The option of buyback of shares as provided in Section 68 of the Act, is less beneficial for the shareholders who have requested the exit opportunity.

61. Admittedly, there is a provision in Article 45 and 47 of the Article of Association that the company may by special resolution reduced its capital and in the EGM held on 04.02.2019 a special resolution was duly passed for reduction of share capital. The Appellant Company has pleaded the genuine reason for reduction of share capital and has secured the rights of 171 non-promoter shareholders who are not traceable.

62. With the aforesaid we are of the view that the Tribunal has erroneously held that the Application for reduction of share is not maintainable under Section 66 of the Act, consent affidavits from the creditors is mandatory for reduction of share capital, SPA cannot be utilized for making payment to non-promoter shareholders, consent from 171 non-promoter shareholders who are not traceable is required, selective reduction of shareholders of non-promoter shareholders is not permissible. The Tribunal has dismissed the Application on untenable grounds. Therefore, we hereby set aside the impugned order passed by the Tribunal.

63. Thus, the reduction of equity share capital resolved on 04.02.2019 by the special resolution set out in Paragraph 11 of the Petition is hereby confirmed.

So also the proposed form of minutes at Annexure 'J' of the Petition is approved.

64. The Company is permitted to register the minutes of EGM held on 04.02.2019 as per Section 66 (5) of the Companies Act.

65. It is hereby directed to the Company to publish about the reduction of share capital in two newspapers namely "the Hindu" in English Language and "Udayavani" Kannada both having circulation in the State of Karnataka within 30 days of the Registration.

66. The Company is directed to deliver the certified copy of this Judgment alongwith aforesaid minutes to the Registrar of Companies, Karnataka and all the statutory authorities concerned with the Company, within 30 days of the receipt of this Judgment.

The Appeal is allowed as indicated above, however, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Mr. Kanthi Narahari]
Member (Technical)

New Delhi
19th April, 2021

SC