

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH (COURT- I) CHENNAI**

ATTENDANCE CUM ORDER SHEET OF THE HEARING
HELD ON **09.05.2024** THROUGH VIDEO CONFERENCING

PRESENT: HON'BLE SHRI. SANJIV JAIN, MEMBER (JUDICIAL)
HON'BLE SHRI. VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

APPLICATION NUMBER :
PETITION NUMBER : CP/63(CHE)/2021
NAME OF THE PETITIONER(S) : GMS Processor Pvt Ltd
NAME OF THE RESPONDENTS :
UNDER SECTION : Sec 230(2) of CA, 2013

ORDER

Present: Ld. Counsel Ms. Manjula Devi for Petitioner.

Vide separate order announced in Open Court, the petition is **dismissed**.

File be consigned to records.

Sd/-

(VENKATARAMAN SUBRAMANIAM)
MEMBER (TECHNICAL)

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Sd/-

(SANJIV JAIN)
MEMBER (JUDICIAL)

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH - I, CHENNAI
CP/63/CAA/2021 in CA/1210/CAA/2019**

Under Sections 230 to 232 of the Companies Act, 2013 r/w Rule 15 of
the Companies (Compromises, Arrangements and Amalgamations)
Rules, 2016.

In the matter of *Scheme of Arrangement (Demerger)*
Of

GMS PROCESSORS PRIVATE LIMITED
CIN: U17121TZ2002PTC010320
KIRAN GARDENARUL PURAM,
PALLADAM ROAD,
TIRUPUR, COIMBATORE-641 605

...Petitioner Company

And

Their Respective shareholders

Order pronounced on 9th May 2024.

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SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

For Applicant(s): K.S.Ravichandran, PCS

For Regional Director: Avinash Krishnan Ravi, Advocate

ORDER

(Heard Through VC)

This Company Petition has been filed by the petitioner company,
namely **G M S PROCESSORS PRIVATE LIMITED** (hereinafter "Petitioner

Company”) with its Shareholders under section 230-232 of Companies Act, 2013, and other applicable provisions of the Companies Act, 2013 read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 in relation to the Scheme of Arrangement (Demerger) (hereinafter referred to as the “SCHEME”) proposed by the Petitioner Company herein with its Shareholders. The said Scheme is also annexed as **Annexure 3** along with the typeset filed with the Application.

2. The Petitioner Company had filed First Motion Application vide CA(CAA)/1210(CHE)/2019 seeking directions as follows;

“1. For dispensing with convening, holding and conducting of the meeting of the Equity shareholders and secured Creditors of Applicant Company.

2. For dispensing with convening, holding and conducting of the meeting of the unsecured creditors of the applicant company.”

3. Based on such application moved under Sections 230-232 of the Companies Act, 2013, directions were issued by this Tribunal, vide order dated **04th March 2021**, dispensing the meetings of the Equity shareholders and Secured Creditors and Unsecured Creditors of the Applicant Company.

4. Subsequently, the second motion petition was filed before this Tribunal by the petitioner company on **13.04.2021** for sanction of the Scheme of Arrangement (Demerger) by this Tribunal.

5. In the second motion Petition filed by the Petitioner Company, this Tribunal vide order dated **01.09.2021** directed the Petitioner Company to issue notice to the Statutory / Regulatory Authorities viz. (i) Regional Director (Southern Region), Chennai (ii) RoC, Chennai, and (iii) Commissioner of Income Tax, and other sectoral regulators, who may govern the working of the respective companies, as well as for paper publication to be made in “Business Standard”, English (All India Edition) and “Makkal Kural” Tamil (Tamil Nadu Edition).

6. In compliance to the said directions issued by this Tribunal, the Petitioner Companies filed an affidavit of service before the Registry of this Tribunal on **22.10.2021** vide **SR No. 4752**. A perusal of the same discloses that the Petitioner Companies effected the paper publications as directed by the Tribunal in “Business Standard” (All India Edition) in English and “Makkal Kural” (Tamil Nadu Edition) in Tamil on 14.10.2021. It is also seen that notices were also served to (i) Regional Director, Southern Region, Chennai on 05th October 2021, (ii) Registrar of Companies, Chennai on 05th October 2021, (iii) Commissioner of

Income Tax on 05th October 2021, and the proof of the same by way of affidavits have been enclosed with the separate typed set. Pursuant to the service of notice of the petition following statutory authorities have responded as follows:

7. STATUTORY AUTHORITIES

7.1. REGIONAL DIRECTOR

The Regional Director, Southern Region (*hereinafter referred to as 'RD'*) Chennai has filed his Report dated 29.06.2022 *inter alia* making the following observations in Paragraphs 3,7,8,10,11 & 12 which are reproduced hereunder along with the responses of the Petitioner Company:

Para No	Observation by the Regional Director	Responses of the Petitioner Company
3	It is stated that as per Clause 2.2 of Part II of the Scheme, the Appointed Date is 31.03.2018, which is ante-dated beyond a year and is not in accordance with Sec. 232(6) of the Companies Act, 2013. It is prayed that this Tribunal direct the applicant to revise the Appointed Date or may determine an Appointed Date, as it thinks fit.	With respect to Para No.3 of the report, it is stated that the proposed scheme is proposed under Section 230 of the Companies Act, 2013 (the Act) and it is not proposed under Section 232 of the Act. Hence, I note that the MCA Circular F.No.7/12/2019/CL-1 dated 21st August, 2019 providing clarification on the "Appointed Date" applies specifically to the

		<p>schemes under Section 232. Be that as it may, the significance of the Appointed Date in the proposed scheme is that the during the financial year 2017-18 the Mutual Quit and Settlement Agreement dated 03.01.2017 between the company, its promoters (Mr.Govind C. Karnani and Mrs.Bindiya G. Karnani) and Mr.S.Selvakumar and his family members (who are shareholders) (Selvakumar Group) was implemented and exit was provided to them from the company. As the entire crux of the proposed scheme is to bring to effect the arrangement between the company and the promoters of the company to provide exit to Selvakumar Group from the company, the Appointed Date gains significance. As a consequence of the same, the Appointed Date is chosen as 31.03.2018 being the date on which the proposed Scheme upon sanction and implementation will take effect from that date.</p>
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7	<p>It is submitted that Clause M of the Scheme has stated about protection of employees of the Company. The Scheme does not affect in any way the Interest of the employees of the Company or the length of service of any of them and there will be no change to the terms and conditions of service applicable to them.</p>	<p>It is stated that only admitted fact are given therefore no reply is required.</p>
8	<p>It is stated that as per Clause D of the Scheme, the Scheme does not envisage issues of any shares at discount. The only consideration involved is payment of Rs. 11,00,00,000 to Selvakumar Group for acquiring their 25% shares by the company. It is stated that the consideration on the proposed arrangement is determined by the company and the shareholders alone, wherein no share valuation has taken place.</p>	<p>With respect to Para 8 of the RD Report, it is stated that as the scheme does not envisage issue of shares, there will be no change to the authorised, subscribed, and paid-up share capital of the company. This scheme of Arrangement was proposed to put to effect the arrangement between the company and the Promoters to provide exit to the Selvakumar Group, without which the operations of the company and its going concern nature would have been seriously prejudiced. After a series of mediation efforts and negotiations, it was agreed by Selvakumar Group to exit the company. Based on the mutual agreement, namely</p>

		<p>the Mutual Quit and Settlement Agreement dated 03.01.2017 it was agreed that the total consideration required to be paid to Selvakumar group to acquire their 25% stake in the company amounted to Rs. 11,00,00,000/-. The valuation thus so arrived is based on mutual negotiation between the parties to the agreement. Since the exit to be provided to Mr. Selvakumar Group does not result in any issue of shares and all it involves is only transfer of shares from the individual members of the Selvakumr Group to the promoters of the company, valuation of share does not arise.</p>
10	<p>It is stated that as per the report of ROC, Chennai, the Petitioner Company has filed its statutory returns upto 31.03.2021. ROC, Chennai has further stated that there is no prosecution /complaint /inspection or Investigation is pending against the Company involved in the scheme of arrangement.</p>	<p>It is stated that general submission regarding the accounting treatment and ROC report are given therefore no specific reply from the Petitioner company.</p>

11	<p>It is stated that the company might have bought back the shares from the selective applicant. However, it has not done so, instead the shares have been surrendered and then transferred to Dispute Resolution Trust meant for that purpose with condition that the shares shall be allotted to a selected person, who agrees to the conditions on the terms of sale.</p>	<p>With respect to para 11 of the RD Report, it is stated that the reasons for the inability of the company to propose a buy-back of shares is already discussed in the Scheme of Arrangement in Para No. B (6), (7) and (8) [Page No.30 of Application and Page No.77 of the Petition], which are self-explanatory and are reproduced hereunder:</p> <p><i>B(6) "A proposal on the part of the company to go for buy back of shares or enter into any scheme for selective reduction of capital could not materialise since both of the stated transactions would require sufficient time and sufficient surplus liquid funds in the hands of the company for being deployed in the transaction without affecting the day to day business needs of the company, Since the company running on a tight working capital budget and wafer-thin margins, the revenues are just sufficient to meet its operational costs, finance costs and pay the</i></p>
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		<p><i>dues of its suppliers, staff and workers”.</i></p> <p><i>B(7) "There was no scope for proceeding with a buy back of those shares, in view of the financials position, threat to solvency, inadequate financial ratios as regard the company which are not in consonance with the provisions of section 68 read with Rule 17 of the companies (Share Capital and Debentures), Rules, 2014."</i></p> <p><i>"B(8) In the era of Insolvency and Bankruptcy Code, 2016 any slight delay in meeting payment obligations to creditors, whether secured or unsecured, would put the company to additional risks. At the same time, the disputes were ballooning and allowing it to remain or to grow further would jeopardize the interest of the company bringing its operation to grinding halt."</i></p> <p>Considering all the above reasons mentioned in the scheme, the company thought fit to borrow loan and declare Resolution Trust to hold shares</p>
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12	<p>It is stated that the Petitioner Company has availed loan for settlement of the above surrender, which is also not permissible as per the provisions of Companies Act as the buy back or surrender need to be executed out of free reserves of the company only, which is also not there. The condition that the company shall be paying the Interest on the loan availed is also not acceptable, as the shares purchased from the shareholders are not in the hands of the company, it was actually parked in the Trust.</p>	<p>With respect to para 12 of the RD report, it is stated that proposed scheme does not propose a buy-back of shares. As stated earlier, the company is in-eligible to offer a buy-back as it cannot comply with the conditions under Section 68 read with Rule 17 of the companies (Share Capital and Debentures), Rules, 2014. The proposed scheme provides a time limit of 4 years from the date of bringing into effect of the scheme, within which the promoters have to pay off the loans borrowed by the company along with interests and costs which money is used to provide exit to Selvakumar Group or sell the shares lying in Trust to such person who is capable of paying of all the loan, interest and the costs associated with the loan in full. Until such time, the shares acquired from Selvakumar Group will lie in a Trust without any voting right.</p>

		<p>Accounting Standard IND AS 32 in Para 36 provides as under:</p> <p><i>"An entity's own equity instruments are not recognised as a financial asset regardless of the reason for which they are required. Paragraph 33 requires an entity that re-acquires its own equity instruments to deduct those equity instruments from equity. However, when an entity holds its own equity on behalf of a client, there is an agency relationship and as a result those holdings are not included in the entity's balance sheet"</i></p> <p>Accordingly, Para L of the scheme states that <i>"on coming into fore of the respective parts of the scheme, the accounting of transactions under this scheme shall be carried out in accordance with the Accounting Standards in terms of Section 129 of the Act."</i></p> <p>Further Para H of the scheme clarifies that <i>"the scheme does not provide for or result in reduction of capital or buy back of shares of the</i></p>
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		<p><i>company. The scheme only enables the transfer of title to the shares within the arrangement as stated in the scheme without prejudice to the interests of the company or its creditors or its shareholders."</i></p> <p>Hence, it is clarified that the proposed scheme is not in violation of any provisions of the Act or the Accounting Standards.</p>
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7.2. Thus, after examining the Scheme, except the observations made in para 3,8,11 & 12 of the Report, the Regional Director in its Report has submitted that they have decided not to make any objection to the Scheme.

8. The Learned PCS for the Applicant Company has relied upon the following Judgments in order to buttress his argument;

- a) *Miheer H. Mafatlal vs Mafatlal Industries Limited (1997) 1 SCC 579- Para 29*
- b) *Hindusthan Commercial Bank Ltd Vs. Hindusthan General Electrical Corporation (Private) Limited, (1959) SCC OnLine Cal 126- Para 26,27,35,36*
- c) *Navjivan Mills Co. Ltd., In re (1970) SCC OnLine Guj 42 - Para No. 28*
- d) *Maneckchowk and Ahmedabad Manufacturing Co. Ltd In re (1969) SCC OnLine Guj 22- Para No.76*
- e) *Re Sidhpur Mills Co.Ltd Miabhoy J (1961 SCC Online Guj 38) – Para 19*
- f) *Marshall Sons and Co. Vs Income Tax Officer (1997) 2 SCC 302- Para 14*

9. We have perused the reply of the Applicant to the Report of the Regional Director. The Judgments referred to by the Learned PCS for the Applicant Company do not apply to the facts of the present case, since in none of those Judgments the Company borrows money buys the shares and contemplate parking the shares in the Dispute Resolution Trust.

10. As noted in para 8 ,11 and 12 of the report of the RD, it is seen that a sum of Rs.11 Crores is sought to be paid by the company to a group of shareholders called the Selvakumar Group for acquiring 25% of their shares in their company. It is also required to be noted that the Petitioner Company has availed loan for settlement of the above sum, which is also not permissible as per the provisions of Companies Act, 2013 since buy back or surrender need to be executed out of free reserves of the company, which is not so in the present case. Eventhough the company has availed loan, it is stated that the promoters are paying interest, which is not acceptable since the shares purchased from the shareholders are not in the hands of the company, and it is actually parked in the Trust. Therefore, it is evident that the scheme envisages the payment of monies by the company to a shareholder group for a company to acquire its own shares which it will hold in some capacity

either by itself or through a trust which it would have funded. Further it is noted here that the Company has not done any valuation for the 25% shares and has *suo moto* arrived at a value of Rs.11 Crores. It is not known to the Tribunal whether the value of Rs.11 Crores for the 25% share of the Company is a fair value or not.

11. A company can only acquire its shares either through buyback of shares in terms of section 68 of the Companies Act, 2013 or repay money to the shareholders by way of reduction of capital in terms of section 66 of the Companies Act 2013. The present Scheme under Section 230 of the Companies Act, 2013 does not envisage the above two methods.

12. We are of the view that the present scheme under section 230 to 232 has been filed to overcome the conditions set out in section 68 and 66 of the Companies Act, 2013. Hence, the present scheme is in contravention of the provisions of Companies Act, 2013. The Hon'ble NCLAT in the matter of *Hotel City Plaza Pvt Ltd v Trivandrum Apollo Towers Pvt Ltd*. in *Company Appeal (AT)(CH) No. 28 of 2021* has held that the Hon'ble NCLT while approving a scheme under section 230-232 is not a simple rubber stamp authority but can go into questions of legality or illegality of the scheme.

“59. If the ‘Scheme’, is ‘unjust’, ‘unfair’, ‘unconscionable’ or an ‘illegal’ one, the ‘Court’ (now ‘Tribunal’), is justified in declining to ‘Sanction’ the ‘Scheme’, in the considered opinion of this ‘Tribunal’. No wonder, a ‘Tribunal’ / a ‘Court of Law’, is to bear in mind that the ‘fairness’ and ‘viability’ of the ‘Scheme’, qua the ‘right’ of ‘minority shareholders’, before according an ‘Approval’”

13. Thus, in view of the dispositive reasoning as mentioned supra, we are inclined to dismiss the Company Petition.

14. Accordingly, CP/63(CHE)/2021 stands **dismissed**. No costs.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)

Raymond