IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Through Physical Hearing/ VC Mode (Hybrid)

I.A (C.A).No.12 of 2022 in
C.P(CAA).No.17/BB/2021
U/s.230(12) of the Companies Act, 2013
R/w. Rule 11 of the
National Company Law Tribunal Rules, 2016

In the matter of:

1) Shri Shreans Daga
S/o Late Pramod Daga
R/a D7, 17TH Floor, Mittal Grandeur,
Khatau Road, Cuffe Parade, Mumbai – 400005
....Applicant No.1

2) Shri Niraj Daga
S/o Late Vinodkumar Harakchand Daga
R/a Flat nos. 2302/2402 at Vivaria, Tower A,
Sane Guruji Marg, Jacob Circle Mumbai – 400011
....Applicant No.2

3) Shri Kaushik Daga
S/o Parshva Kumar Daga
R/a Flat No. 4301, 43rd Floow,
South Tower, Imperial Towers,
MP Mills Compund, Next to Mahendra Heights
Tardeo Mumbai – 400034
....Applicant No.3

4) Smt Rashi Daga
D/o Hasti Mal Jain
R/a C-207/208, Ashok Towers CHSL,
Dr. S. S. Rao Road, Parel, Mumbai- 400012
....Applicant No.4

AND

1) IBM India Private Limited,
No.12, Subramanya Arcade,
Bannerghatta Main Road,
Bengaluru – 560029
....Respondent No.1

2) Kyndryl Solutions Private Limited
Formerly Called;
Grand Ocean Managed Infrastructure Serviced Pvt Ltd
Bannerghatta Main Road, Bengaluru – 560029
Respondent No.2

Order delivered on:19/04/2024

Coram: 1. Hon'ble Shri K. Biswal, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

For the Applicant : Shri Manmohan P.N

For the Respondent No.1 : Shri Pramod N (Sr. Adv)
For the Respondent No.2 : Shri Harish N (Sr. Adv)
With Ayush Agarwala, Ms Megharani Chand

O R D E R

Per: Manoj Kumar Dubey, Member (Technical)

1. This Application has been filed by Shri Shreans Daga and others (hereinafter referred to as 'Applicants'), on 16/09/2022, **U/s. 230(12)** of the Companies Act, 2013 (hereinafter referred to as the 'Act') R/w. Rule 11 of the NCLT Rules, 2016 against M/s. IBM India Private Limited and Other (hereinafter referred to as the 'Respondents'), *interalia* praying to Recall the order dated 06/08/2021 passed in CP (CAA) No.17/BB/2021 and declare that the scheme of demerger of respondents as null and void.

2. Brief facts of the case, as mentioned in the Application, *inter alia* stating as follows:

i. The Applicants herein are the creditors of the demerged company. The applicants were the shareholders comprising of 92.99% in Sanovi Technologies Pvt Ltd (hereinafter referred to as "STPL"). The applicants entered into Sale Purchase Agreement (SPA) dated 26/10/2016 with the Respondent No.1 and the entire shareholding of the STPL was transferred to Respondent No.1.

ii. That as per the SPA, Clause 10, the Respondent was obligated to provide Company Revenues Statement to the Applicants and required to pay consideration as per the terms of the SPA. The Respondent No.1 made unfair deductions of a sum of Rs 10,11,45,150/- from the total consideration which was payable consequent to the Share purchase Agreement.

iii. Due to the arisen disputes the Applicants herein issued legal notice dated 28/08/2018 invoking the arbitration clause of the agreement to the Respondent No .1, which was replied by the Respondent No.2

vide its letter dated 14/09/2018. Thereafter, the applicants filed CMP NO. 362/2018 before the Hon'ble High Court of Karnataka, which was subsequently withdrawn on account of settlement proposal of the Respondent No.1

iv. Due to the failure on the part of the Respondent No.1 to settle the matter, the Applicants once again approached the Hon'ble High Court of Karnataka on 15/10/2020 in CMP 184/2019, wherein an Arbitral Tribunal comprising of 3 members was constituted. Thereafter, the applicants filed the Claim Petition in AC No.81/2021.

v. When things stood thus, the Respondent No.1 filed an application in AC No.81/2021 seeking to be substituted by Kyndryl Solutions Private Limited on the ground that Respondent No.1 has been demerged and the MIS Business of Respondent No.1 is transferred to Kyndryl Solutions Pvt Ltd. The Arbitral Tribunal vide Order dated 01/04/2022 allowed the application filed by the Respondent No.1 and ordered that it be substituted by the resulting company i.e Kyndryl Solutions Pvt Ltd.

vi. The applicants are in belief that the debt due to the applicants from the 1st Respondent – i.e the amounts admittedly deducted being Rs 9,68,94,668/- is more than 5% of its total outstanding debt. Hence, the Respondent No.1 ought to have disclosed the same and notice ought to have been issued to the applicants. Since the statutory prerequisites have not been complied with and the order of sanction for the Demerger has been obtained by supressing material facts, the order is liable to be recalled.

3. The Ld. Counsel for the Respondents have filed their Objections vide Diary No. 2324, dated 27/04/2023, contending as follows:

i. The present application is filed by the applicants only to bypass the order passed by the Arbitration Tribunal on 01/04/2022, wherein the Arbitration Tribunal has allowed the substitution of Respondent No.2 in AC 81/2021. Since the AC Act does not allow any challenge against such order, the applicants herein are trying to indirectly overcome the finding of Arbitration Tribunal.

ii. Since the Respondent No.1 has not been wound up and only a part of the Respondent No.1 i.e MIS business is demerged and vested in the Respondent No.2, clause 8.1 of the Scheme provides that any pending litigation in relation to the Demerged Undertaking shall not

abate and shall be continued, prosecuted and enforced by or against the Respondent No.2. Accordingly, Respondent No.2 has been substituted for Respondent No.1.

iii. Further the Respondents deny that the Applicants are the Creditors of the Company and the notice ought to have issued for the applicants under Section 230(3) of the Act during the proceedings for approval of the Scheme of Demerger. That since the debt due itself is an contention of dispute with the Arbitration Tribunal, the applicants herein cannot be held to be the creditors of the Company. In any event the date of meeting of shareholders and creditors and for the hearing before this Hon'ble Tribunal were published in the newspaper for the information of the stakeholders of the Respondent No.1, and hence they cannot claim that they were unaware of the said Scheme before the Tribunal.

4. The Applicants have filed rejoinder vide Diary No 4566 dated 01/09/2023, & Written Submission vide Diary No 856 dated 07/02/2024 alleging that the failure on the part of the Respondent to include the name of the Applicants in the books cannot be the basis to deny the claims of the Applicants. Moreover, the claim and records of applicants being the creditors are with Respondents and the Respondents have failed to provide the documents. On the one hand the Respondents have approached this Tribunal while contesting the Arbitration proceedings and further the affidavit in Arbitration proceedings was only given after the approval of the Scheme which reflects the act of the connivance of the Respondents. Moreover, it is claimed that since the Applicants are residents of Mumbai and the said newspaper publication was issued in the Bengaluru, hence the public notice cannot be construed as service of notice.

5. The Ld. Counsel for the Respondent No.2 has filed written submissions vide Diary No.669 dated 31/01/2024, contending as hereunder.

i. The present Application has been filed Under Section 230(12) of the Companies Act, 2013, which provides for an application in the event of grievances with respect to 'take over,' The impugned order passed by the Hon'ble Tribunal was with respect to Demerger of the Respondents No.1 and is not in relation to a takeover and hence such application is not maintainable under section 230(12) of the Act.

ii. It is submitted that only those persons whose names appear in the books of accounts/financials of a company can be treated as creditors

of a company, which is not the case of the Applicants. Moreover, based on a claim pending adjudication, the Applicants cannot claim to be a creditor of the Respondents for the purposes of recalling the Order, reliance is place on *Vikrant tyres Limited v. Nil ILR 2003 Kar 3885, Sarthak Industries Limited v British Motor Car Co. Company Scheme Petition No.377/2011, dated 26/09/2011*

iii. Section 230(4), interalia, provides that only the creditors with 5% or more of the outstanding debt amount are eligible to object to the scheme. Further, in the event, if a Scheme is approved by a substantial or over-whelming majority of the creditors, then also non-issuance of notice to a creditor would not affect the Scheme and its approval, ref; *in re: Sistema Shyam Teleservices Ltd, 2016 SCC Online Raj 6482*

iv. The present Application has been filed on 15/09/2022 while the first Public Notice was issued on 08/02/2021(20 months prior to the filing of the Application). In fact, even the substitution application in the arbitration proceedings to Respondent No.2 on record in place of Respondent No.1 was filed on 06/12/2021. In any event, Public Notices were issued for the meeting of creditors on 16/03/2021.

v. However, on a plain reading of the Scheme it is apparent that the same provided that any legal proceedings pending in the effective date of the Scheme would not be abated or discontinued or be prejudicially affected by reason of the Scheme and that such proceeding would be continued by or against Respondent No.2. Moreover, Respondent No.2 while getting substituted (in place of Respondent No.1) in the arbitration proceedings also have given an undertaking, inter alia, to the effect that it shall abide by the orders of the Arbitral Tribunal.

6. Heard Ld. Counsel for the Applicant and for the Respondents. We have carefully perused the pleadings of the parties and extant provisions of the Companies Act, 2013 and the relevant legal provision in this regard.

7. Since the Applicants' claim is currently ongoing before the Arbitral Tribunal in AC 81/2021, this Tribunal's observations and conclusions are limited to determining the recall of the CP(CAA) 17/2021 and is not for addressing the party’s disputed claim.

8. The Applicants have filed the present application under Section 230(12) of the Companies Act, 2013. The extract of section 230(12) is produced herewith for ready reference:

"(12) An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit"

On bare reading of the sub-clause 12 it is evident that "any aggrieved" party has the liberty to approach the Tribunal with respect to "takeover" of the Companies. Therefore this application is liable to be dismissed *in limine* since the application seeking the recall was in respect of an Approval of a "Scheme of Demerger," and not with regard to any "Takeover of Companies." Therefore, the application has been filed under a section which is not applicable at all, and accordingly the same is not maintainable.

9. Without prejudice to the above finding regarding non-maintainability of this application, the main contention of the Applicant herein is that they being the creditor of the Respondent No.1 company, notice as per Section 230(3) of the Companies Act, 2013 ought to have served on them. In this regard it is pertinent to mention that the Applicants have not provided any proof or record that shows that the Applicants are the creditors of the Respondent No.1 Company on the impugned date. In this regard reliance is placed on the decision of Hon'ble High Court of Karnataka in the case of *Vikrant Tyres Limited v. Nil, 2003 SCC OnLine Kar 566,* wherein it was held that, "*If a debt is disputed and it is the subject matter of litigation and if total value of such debt makes no significant difference to the total amount of debt due by the company and if a substantial or overwhelming majority of creditors approve a scheme, non-issue of notice to such a creditor would not effect the meeting held or resolutions approved in such meeting. In this background, it is necessary to know what is the right of the creditor even if such a notice has been issued and if he had appeared in such a meeting In the case of Mahalaxmi Cotton Mills Ltd. which arise under the Companies Act of 1913 it has been held that for the purposes of an application for sanctioning a scheme of arrangement under Section 153, the creditors whose names appear in the books of the company should be considered as creditors and their votes should be taken*

into account. Creditors whose names do not appear in the books have to show to the satisfaction of the Court that they are creditors"

The applicants herein cannot be regarded as creditors of the respondent company because they were not reflected as such in the Books of the company on the relevant date, the dispute had not yet been resolved, the claim against the respondents has not yet been crystallised, and they have not produced any additional evidence to support their position as the company's creditors as on the relevant date.

10. Moreover, the CA certificate filed by the Petitioner Company in CP(CAA) 05/2021 @ page 241 Annexure M does not reflect the name of the Applicants herein as the 'Creditors' of the Respondent No.1 Company. Be that as it may, the notice of convening of meeting was dispensed by this Tribunal vide its Order dated 28/01/2021 and accordingly, Public Notice by News paper was issued and meeting was held on 16/03/2021, however the Applicants herein did not make any contention before this Tribunal or at the meeting held at the relevant point of time. Moreover, as per the Chairperson's report Annexed at Page 358, filed in CP(CAA) 17/2021, 100% of the Creditors of Respondent No.1 had given their consent for approval of the Scheme. Reliance is placed on *Vikrant Tyres Limited* (Supra), wherein it is held that, "*When a statutory majority of creditors approve the scheme, a creditor or minority of creditors cannot be permitted to veto the majority view and block the approval of the scheme, as that is precisely the reason why the petition is filed before Court for sanction and once sanction is granted the majority view is respected, and by the order of sanction, the minority is bound by such scheme. Therefore, the non-issue of a notice to a creditor would not vitiate a meeting convened with the permission of the Court under Section 391(2) of the Act.*" The applicants, without providing any hard evidence assert that the sum owed to them exceeded five percent of Respondent No. 1's total outstanding debt. Nevertheless, 100% of the unsecured creditors as per the book of accounts have approved the Demerger Scheme. Given the aforementioned ruling, when the majority still supports the approval of the merger and the same has already been approved, it cannot be recalled at such a late stage after approval.

11. Further, the demerger is with respect to separation of Managed Infrastructure Service (MIS) part of the Respondent No.1 Company. However, the Share Purchase agreement between the Applicants and IBM

was for the purchase of shares of STPL, which is a third party for a totally independent transaction; and not in question/contention for the SCHEME OF DEMERGER. Once the Share Purchase agreement was executed the Applicants herein became the erstwhile shareholders of the third party Company. In this regard, the Applicants herein have completely failed to prove that the approval of the Demerger of the MIS unit of Respondent No.1 Company, would be adversial to the claims of the Applicants in the Arbitration Tribunal. In this connection, it is noted that if the Arbitral Proceedings arrive at the finding that the Respondents are entitled to pay to the Applicants, the Respondent No.2 herein has already filed the affidavit with the Arbitral Tribunal dated 15/03/2022, wherein it is clearly undertaken that it shall not at any point adversely affect the findings of the Tribunal; and deny its liability to provided CSRS (Company Solution Revenue Statement). The contents of this affidavit reads as under:

"One of the contentions taken in the objections is that the liability/obligation (if any) to provide the CSRS in terms of Clause 10.01 of the Share Purchase Agreement dated 26.10.2016 ("SPA") is only on the Respondent (IBM India Private Limited) and the Scheme is an attempt to overcome this alleged liability/obligation. All the contentions taken in the Objections are totally frivolous and baseless. Considering the nature and tenor of the Objections, and strictly, without prejudice to Kyndryl's rights, claims and contentions in law, Kyndryl states that in the event that this Hon'ble Tribunal arrives at a finding that the Claimants are entitled to receive the CSRS Certificate, Kyndryl shall not at any stage take a contention that since it was not a party to the SPA it will not be in a position to furnish the CSRS Certificate, and further, shall, subject to the right of appeal and contentions available under law inter-alia on the point of alleged obligation to provide the CSRS under the SPA, furnish the CSRS to Claimants in terms of Clause 10.01 of the SRA."

After considering the affidavit, the Arbitral Tribunal vide Order dated 01.04.2022 has allowed the substitution of the Respondent No.1 (IBM India Private Limited) with Respondent No.2 (Kyndryl Solutions Private Limited) with reference to the above referred dispute related to the Share Purchase Agreement of STPL. It is also pointed out by the Respondent that this Application has been preferred on 15.09.2022, whereas, the first public notice in the impugned matter for approval of the Demerger Scheme was issued on 08.02.2021 and this substitution Application in the Arbitration proceedings was filed on 06.12.2021. Even the public notice for meeting of the Creditors for the Demerger Scheme was issued

on 16.03.2021. Thus the Applicants had ample opportunity to raise objections/claims regarding the Share Purchase Agreement at the appropriate period of time, which they did not prefer.

12. Considering the above facts and circumstances of the case, we are of the considered opinion that this Application is not maintainable on account of multiple reasons as has been discussed above. **In light of the above, I.A(CA) 12/2022 is dismissed.**

Sd/-

MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

Sd/-

K. BISWAL
MEMBER (JUDICIAL)