

Power to Dispense with Meetings of Shareholders and Creditors in a Scheme of Arrangement

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For a very long time, there was an ambiguity regarding the National Company Law Tribunal's (NCLT) power to dispense with the meetings of shareholders and creditors in an amalgamation or arrangement, especially in a scenario where the 'majority' of the aforementioned stakeholders have given their written consent to such dispensation. There was no 'settled' position of law that 'consent' can be a vital factor for dispensation of meetings. The origins of this confusion can be traced back to the erstwhile [Companies Act of 1956](#) and the accompanying [Company \(Court\) Rules, 1959](#) which did not have any particular provision that empowered the judicial authority to dispense with the meetings for considering the scheme of arrangement.

There have been conflicting decisions rendered by different benches of the NCLT on this specific issue. While some benches had dispensed with shareholder and creditor meetings in situations where consent affidavits were submitted, other benches disagreed with this position of law and have held the opposite, thereby denying themselves the jurisdiction to dispense with such meetings even in a scenario where 100% written consents were obtained from the concerned members and creditors. Professor Umakanth Varottil in one of his earlier [posts](#) on this Blog had explained a case involving the latter scenario.

The NCLT Bench at Chandigarh had, in one of its decisions, declined dispensation of the meetings of shareholders and creditors of the applicant company in a case which involved the merger of two companies wherein the transferor company was a wholly owned subsidiary of the transferee company. The NCLT Chandigarh Bench was of the opinion that the concerned sections in the present [Companies Act, 2013](#) do not allow for such dispensation. In a recent [landmark decision](#), the National Company Law Appellate Tribunal (NCLAT) has set aside this decision of NCLT Chandigarh while observing that the Chandigarh Bench should have followed a previous full bench judgment of NCLT Kolkata which held the exact opposite. Before delving into the judgments of NCLT Chandigarh and NCLT Kolkata it would be pertinent to examine the exiting jurisprudence on this matter.

Earlier Jurisprudence of the High Courts

The specific provisions under the 1956 Act, which dealt with the schemes of arrangement, were from section 391 to section 394. Section 391 empowered the High Court to convene a meeting in a manner as the court deemed fit while sub-section (2) of this provision contained the procedure to hold such a meeting. It must be remembered that before 15 December 2016 the power to sanction such arrangements vested with the High Court carrying appropriate jurisdiction over the company. After dissolution of the Company Law Board the NCLT was constituted with effect from 1 June 2016. The provisions under the 1956 Act relating to compromises and arrangements were effective until 14 December 2016. However, from 15 December 2016, after the introduction of various sections under the current Act, a company was no longer required to take permissions from the High Court, and instead this power of approval was transferred to the NCLTs.

In the past, High Courts have usually dispensed with the meetings of shareholders and creditors in cases where a majority of members had granted their consent in writing. In *Callidora Merchantiles Pvt. Ltd.* (2010), the applicants argued that a meeting of shareholders should be dispensed with as there were only two shareholders, both of whom gave their written consents for the same. The learned judge of the Calcutta High Court in this case perused section 391 of the 1956 Act and also noted that the Calcutta High Court Original Side Rules does follow the practice of dispensing with the formalities in appropriate cases, when the facts of the case so demand or when justice so requires. It was also acknowledged that while the court does not have an express statutory power to dispense with the meeting, it may dispense with all the statutory formalities in the interests of justice.

A similar judgment was passed by the Calcutta High Court in *Singhal Enterprises P. Ltd* wherein, after a critical analysis of the wording of section 391, the learned judge held that the language and intention of the Act expressly states that a meeting of shareholders or creditors must be held. Moreover, this statutory requirement cannot be dispensed especially in light of the fact that a penalty clause for the same is envisaged under sub-section 4 of Section 393. However, the learned judge took note of the fact that the wording of section 391 – ‘*that such meeting may be held and conducted in such manner as the court directs*’ does give some space to the court. Thus, while the court does not enjoy an absolute liberty to dispense with the meetings of the members, it can, in certain situations, go to the extent of relaxing procedural formalities.

On the other hand, in *Adobe Properties v. AMP Motors Pvt. Ltd*, the Delhi High Court pointed towards the relevance of the expression ‘may’ in sub-section (1) of section 391 in the 1956 Act which confers discretionary power on the court. This discretionary authority may be in the form of a power to dispense with the requirement of convening meetings of shareholders and creditors of the company proposing a scheme of compromise or arrangement. This power was interpreted to be of a wide nature which enabled the High Court to approve a scheme which was beneficial for the company and its shareholders and creditors without imposing unnecessary and cumbersome procedural formalities on the stakeholders.

In *Mazda Theatres Pvt. Ltd. v. New Bank of India*, the Delhi High Court was dealing with a scenario wherein the shareholders’ approval was obtained informally and not in a meeting convened by the Court. While chalking out certain exceptions to the general rule under section 391 of the 1956 Act, the Court held that a general meeting can dispensed if a written resolution is obtained from all the members. It went on to hold that calling of a formal meeting cannot be said to be the only manner in which section 391 can be complied with.

The Delhi High Court in *Adobe Properties* additionally stated that the court may dispense with the requirement of convening a meeting when the company which is a wholly owned subsidiary is being amalgamated with its holding company and [1] there is no variation of rights of the shareholders and/or creditors of the holding company, [2] the rights of the creditors of the holding company remain unaffected, and [3] if the written consent for dispensation of the said meeting is obtained from a majority of such members and/or creditors, or a class thereof, as the case may be, for the proposed scheme.

Existing NCLT Decisions

The new provision under the current Act which deals with the NCLT’s powers to dispense with a shareholder and creditor meeting with regards to an amalgamation or arrangement is sub-section (9) of section 230. In *JVA Trading Pvt. Ltd and C & S Electric Ltd.*, JVA Trading Private Limited, the transferor company, and C&S Electric Limited, the transferee company, filed an application before the NCLT Principal Bench (New Delhi) under sections 230 and 232 of the Act read with the Companies (Compromise, Arrangements and Amalgamation) Rules, 2016 (“CAA Rules”) wherein it prayed to allow dispensation of meeting with regards to its scheme of amalgamation. The Bench held that its power under section 230(9) for granting dispensation of the meeting is limited only to the creditors meeting and therefore it could not, in any way, dispense the meeting of shareholders even in this scenario where the consent of all the shareholders had been obtained by the company.

In another merger case, *Coffee Day Overseas Pvt. Ltd. with Coffee Day Enterprises Ltd.*, the transferor company made an application before NCLT Bengaluru Bench for dispensing with shareholder and creditor meetings for the reason that it had only two shareholders and two unsecured creditors. The Bench relied on the consent letters from the shareholders and creditors in dispensing with the formal requirement of conducting a meeting. Additionally, it stated that the shareholders and creditors would retain their right to contend at the time of approval of the scheme.

In a full bench decision of NCLT Kolkata Bench in *Jupiter Alloys & Steel (India) Ltd. with Jupiter Wagons Ltd* the applicant companies had a few shareholders all of whom had submitted written consents in support of the dispensation of the shareholder meeting. Moreover, the Bench was convinced that the amalgamation would lead to a positive net worth and the creditors would not be affected in any manner. It was held that the requirement of convening the meetings of shareholders and creditors of the company may be dispensed with if the Bench is satisfied in all respects. Accordingly, the shareholder meeting was dispensed.

The DLF Case

In the present case, *DLF Phase – IV Commercial Developers (Transferor 1), DLF Real Estate (Transferor 2), DLF Residential Builders Ltd (Transferor 3), DLF Utilities Ltd. (Demerged Company) with DLF Limited (Transferee Company)*, the transferor company filed an application before the NCLT Chandigarh Bench praying for the dispensation of the meetings of unsecured creditors of the demerging company and shareholders and unsecured creditors of the transferee company.

The transferor company argued that its scheme of amalgamation is between wholly owned subsidiaries and their holding company. Therefore, going by the established precedent in NCLT Kolkata's decision discussed earlier, such a dispensation could be allowed. The Chandigarh Bench, however, disagreed and held that first, the Companies Act, 2013 did not provide for such powers of dispensation of meetings and, second, section 230(9) of the Act only refers to creditors.

The appellants sought dispensation on the basis of written consents from shareholders and unsecured creditors of the transferor company. The NCLT exercised its discretion and dispensed with calling of their meetings. However, it declined dispensation for unsecured creditors in respect of the demerged company and for equity shareholders, secured as well as unsecured creditors of the transferee company, since written consent was not obtained from them.

NCLAT's Decision and Conclusion

The NCLAT took note of the fact that the proposed amalgamation scheme under sections 230 to 232 of the Act would not result in any dilution in the shareholding of shareholders of transferee company, which had a high positive net worth. Moreover, it took serious note of the fact that the Chandigarh Tribunal had ignored the full bench decision of the Kolkata Tribunal even after it was brought to the former's notice.

The NCLAT strongly criticized the Chandigarh Bench for not following established precedents and therefore, not adhering to the judicial discipline of maintaining consistency in legal reasoning. Accordingly, the appeal was allowed, and the matter was sent back to the Chandigarh Bench for fresh consideration based on established legal precedents as set by co-ordinate and larger benches. In a situation when judicial decisions had become inconsistent and various tribunals were giving conflicting opinions, one should welcome the NCLAT's decision which clarifies the ambiguity on this point of law.

– *Anirban Chanda*