IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

IA 15 of CSP 680/2017

Under section 230-232 of the CA, 2013

In the matter of
Aay Kay Global Ltd.
....Applicant

v/s.

Mahindra Two Wheelers Ltd.
....Respondent/
Orig. Petitioner

Order delivered on 18.10.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Applicant : Ms. Isha Manian, Adv.
For the Respondent : Mr. Hemant Sethi, Adv.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Order pronounced on 25.09.2017

This applicant, holding 7.12% of share capital of the Petitioner company (Transferor Company) raises objection to the Scheme of Demerger of the two wheeler business of the petitioner to merge with the Petitioner's holding company Mahindra & Mahindra Ltd.

2. The applicant says the petitioner company is a step-down subsidiary of the resulting company (Mahindra & Mahindra Ltd). The majority stake in the petitioner company is owned by Mahindra Vehicle Manufacturers Ltd which holds 92.25% of the shareholding of the petitioner company. The applicant company first invested a sum of USD 46 million in the petitioner company in February, 2014 by purchasing 1,10,95,640 equity shares aggregating to 10.29% of the paid up share capital of the petitioner company in pursuance of it on 20.2.2014, a Shareholders Agreement was executed between the petitioner company, the applicant company and the resulting company. Thereafter, the shareholding has come down to 7.12%.

3. The applicant initially came to know the petitioner's intention to merge two wheelers undertaking into Mahindra & Mahindra Ltd in the month of July, 2016, ever since, this applicant had expressed serious reservations on multiple occasions regarding the valuation at which proposed transfer of the two wheelers business of the petitioner into its parent company, i.e. resulting company. In the discussion between the petitioner officers and the applicant, the applicant realised that the valuation method proposed to be adopted by the petitioner would result in 80% drop in the valuation of the petitioner company and below the face value of the shares resulting huge impairment to the applicant's investment. In view of the same, the applicant highlighted to the petitioner that it is incorrect to value the two wheeler business as a slump sale rather than as a going concern. The applicant said that it has to be valued basing on revenue multiples, as it is the basis on which such businesses are valued. The same has been put to the petitioner by email dated 26.10.2016 but whereas the petitioner in its reply dated 29.10.2016 did not specifically comment upon the applicant's concern regarding valuation of the petitioner business and the rationale behind the proposed merger. While it was going so, on 25.11.2016, the applicant received notice-cum-agenda for the proposed Board Meeting of the petitioner to be held on 3.12.2016 at the petitioner's office at Worli, Mumbai with one of the business items for approval of the proposed scheme of demerger. To that meeting, since the investor (Mr. Shirish Saraf) was unable to participate, one Sheetal Gupta attended as an observer on the applicant behalf. The applicant says that this petitioner did not disclose this valuation report dated 3.12.2016 in the board meeting except presenting a PowerPoint in the Board Meeting but the same had not been sent to the applicant director at any point of time. When the representative of the Applicant Director tried to engage in the discussion on valuation report, the representative was asked to step out of the meeting. On the same date i.e. 3.12.2016, applicant director addressed an email to Mr. Anand Mahindra forwarding the comments of the applicant's nominee on the conduct in the said board meeting. The applicant replied to the petitioner on 4.12.2016 reiterating its concerns with respect to the valuation in the proposed Scheme. Since the

petitioner failed to address the concerns of the applicant, it was compelled to again address a letter on 23.1.2017 recording its objections with respect to the valuation as well as the process leading to the approval of the valuation in the board meeting dated 3.12.2016. Of course, to which the reply came from the petitioner trying to justify the valuation report ignoring the concerns the applicant raised in respect to the valuation report. Like this, while there was back and forth correspondence between the petitioner and the applicant, the petitioner and the resulting company submitted the draft scheme of the arrangement before this Tribunal and obtained orders on 5.4.2017 for conducting shareholders meeting. Accordingly, on 13.6.2017, shareholders meeting was held, wherein it has voted in favour of the scheme purely in view of the expressed obligation on the applicant under Clause 5.1.2.1 of the Shareholders Agreement by giving a clarification that the applicant would continue to have serious reservation with respect to the Scheme approved in the meeting.

4. The applicant Counsel submits that this applicant and Emerging India Fund being a Shareholder, other than promoters of the company, their interest will obviously remain different from the promoters thereby they have to be treated as separate class to protect their economic interest in respect to the swap ratio according to which shares would be allotted to this applicant and EIF. The applicant Counsel submits that MVML is not offered any shares in the resulting company as it is a subsidiary of the resulting company, whereas, the other shareholders, i.e. the applicant herein and EIF, are offered shares in the swap ratio of 465:1 purportedly based on the valuation report to which the applicant has serious objections. The applicant Counsel further submits, if the public shareholders are treated as part of the promoter shareholders, they being less than 10%, they could not ensure their economic interest protected in the company though they themselves is a class apart from the promoters' class. It is reiterated if there are different groups within the class with different rights and interest from rest of the class and the interest of which will be effected differently by the Scheme, such groups must be treated as separate class for the purpose of the Scheme.

5. The applicant Counsel states that it has no objection in principle to the Scheme of demerger, the only grievance of the applicant is the swap ratio formulated basing on a valuation report which has been fiercely opposed.

6. The applicant Counsel says that it is prejudicial to the interest of the applicant because this valuation has been done on peer-to-peer basis, it has to take into consideration of the other companies which are into two wheeler business. Peer comparison is one of the most widely used and accepted methods of equity analysis used by professional analysts and by individual investors. While doing valuation on peer-to-peer basis, the valuer purposively excluded Eicher Motors Ltd stating that it is impossible to segregate the capitalisation of the truck and motor cycle business of Eicher Motors Ltd. but whereas it has taken into consideration TVS Motors Ltd., Bajaj, Hero Motor Corp. and TVS by excluding Eicher Motors Ltd which has been exceedingly doing well in two wheeler segment. He further submits that the valuer has strangely ascribed 66% weightage to TVS Motors Ltd instead of weighing the companies in the comparable peer set equally, as is the common practice without taking any forward looking projections into consideration.

7. In view of the above, the applicant Counsel submits that the Scheme contemplated with a swap ratio – one share of the resulting company is equivalent to 465 shares of the transferor company is arbitrary and capricious. Henceforth, the applicant prays this Bench to reject the Scheme or alternatively direct for a fresh valuation to be carried out by an independent valuer to be appointed by this Bench.

8. To which, the Petitioner has filed reply and the Counsel of the Petitioner argued that to raise any objection for the approval of the Scheme, the person must not have less than 10% of the shareholding as per the last audited financial statements of the petitioner company. Since the applicant company admittedly not having 10% of the shareholding, there can't be any locus to this applicant to raise this objection soon after voting in favour of the scheme in the shareholders meeting held on 13.6.2017. Though this applicant raised objection to the scheme before National Stock Exchange of India, The Bombay Stock

Exchange and the Securities Exchange Board of India, all these Regulators disregarded the objection raised by this applicant. Classification of members or creditors in the Scheme matters solely dependent upon the nature of the rights the respective shareholders enjoying. To make a classification in the shareholders, one class of members right shall be different from the class of other shareholders, in the present case, the promoter shareholders as well as the public shareholders are the equity shareholders, that being the case, the equity shareholder, i.e. the applicant and EIF poising as different class need not be looked into as no classification can be set out in between the promoter shareholders and public shareholders. In this case, though the petitioner was required to appoint only single valuer for the purpose of undertaking a valuation, the petitioner appointed two valuers for this purpose. The petitioner contends that it is a settled proposition of law that once the exchange ratio and the valuation has been worked out by the recognised firms of chartered accountants, so long as there is no apparent mistake in the valuation, this Bench ought not to substitute valuation and/or exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders.

9. For the main grievance of the applicant being on valuation of the assets of the company, the Petitioner counsel has stated that the Chartered Accountants exercised "comparable companies multiplies" method as well as "discounted cash flow", the Counsel says that the two valuers have utilised revenue multiples based on the comparable peer companies like Hero Motor Corp., Bajaj Auto Ltd, TVS Motors Company Ltd. The reason given by the counsel for excluding Eicher Motors Ltd is, the comparable peer set used by the valuers is that Eicher is engaged in a mix of commercial vehicles and motor cycles both contribute nearly 50%, equal to the total assets of EML, and since EML is not engaged in the manufacture of scooters, the valuers ignored Eicher for the purpose of comparability of the values. On the contention of the applicant in respect to the two wheeler Mojo (250-300 CC), the petitioner counsel submits that the petitioner's mojo (between 250 CC - 300 CC) having the highest cubic capacity of the petitioner's two wheeler products has only 1%

sales out of total sales of the petitioner in the Financial Year 2015-16. None of the companies included in the comparable peer set (Hero, Bajaj and TVS) has any appreciable sales in plus 300 CC segment during the relevant reference period (FY 2015-16). It is also pertinent to note that Bajaj Dominar having a 400CC capacity was launched only in Jan, 2017. The sales of Dominar was also less than 0.3% of the total assets of the F.Y. 2015-16.

10. The Counsel has given two principal reasons for valuer applying higher weightage (66.7%) to TVS in comparison to Baja and Hero – (1) its product mix (motor Cycles and Scooters) and (2) that it had the lowest revenue amongst the comparable companies in India and also a single digit EBITDA margin (-7%), whereas the petitioner EBITDA margin is significantly lower. The Counsel says all this information has been provided to the Directors in the meeting dated 3.12.2016. In this context, the Counsel stated that the petitioner is significantly smaller as compared to the comparable peers, moreover, the petitioner growth has receded over the past two years vis-à-vis companies which have grown the past years and that as per the current projections the maintainable EBITA margins were expected to be 6% as against within current weighted average EBITA margins of the comparable companies, i.e. 11%.

11. In view of these reasons, the applicant principally has no locus to file these objections before this Bench, however, the valuation report filed by the petitioner being based on the revenue multiples, by taking peer companies into consideration, this applicant could not have said this valuation as incorrect.

12. On hearing the submissions of either side, it appears that the main thrust of the applicant is that since the applicant is not a promoter shareholder and being a public shareholder with minority shareholding, they must have been treated as separate class from promoters group, second point is that ignoring Eicher Motors while preparing valuation report basing on peer-to peer basis, is bad in law adversely affecting economic interest of the applicant.

13. It is an admitted fact that this applicant's shareholding is less than 10%, it has admittedly voted in favour of the resolution, besides this, this Bench has already held that the applicants being equity shareholders as that of promoter

shareholders. And both groups will have equal bearing in respect to the losses in the company. Class concept cannot be introduced simply because this Applicant will also incur losses along with promoter group or solely on the ground the applicant is a minority shareholder.

14. As to valuation aspect is concerned, since Eicher Group is doing business in motor cycle segment and tractor business, that company business normally cannot be compared with this company by counting it as peer group. Since this company is admittedly a loss making company for the last two years, we wonder how the petitioner company scooter business consecutively running in losses can be compared to Eicher Motors which has been exceedingly doing well in motor cycle segment? Everybody may not know about Eicher Motors, but everybody knows "Bullet" motorcycle. These two businesses are incomparable in the present situation. Therefore, the objection of the applicant is hereby rejected on legal as well as factual aspect.

15. The Applicant / Shareholder relied upon an English decision given by a Chancery Division in "Re Hellenic & General Trust Ltd." (1975) 3All ER to say that when the interest of different group of ordinary shareholders is different then obviously each group has to be treated as separate class to hold separate meeting in respect to the scheme proposed, in the given case, since the interest of the minority shareholders has not been treated as separate class, the resolution passed for approval of this scheme with a majority voting of the Mahindra shall be declared as invalid.

16. On perusal of the case supra, it appears that scheme of arrangement takes place under section 206 of the Companies Act, 1948 relating to the ordinary shares of the company. When we have gone into the facts of the case supra, we have noticed there is a company carrying business as an investment trust applied for sanction of the court to a scheme of arrangement under section 206 of English Companies Act relating to the ordinary shares of the said company. Those shares were held as to 53.1% by another company (MIT), which was a wholly owned subsidiary of a Bank (Hambros) and as to 13.95% by the National Bank of Greece SA (NBG). By the proposed arrangement, the

ordinary shares of the company were to be cancelled and new ordinary shares were to be issued to Hambros with the result that the company would become a wholly owned subsidiary or Hambros. The former shareholders of the company were to be compensated in cash for the loss of their shares. The offer price was 48p per share which was said to represent the true net asset value of the shares. On that basis, it was between 20 – 25% more than the shareholder would have been able to obtain elsewhere. However, the scheme when through, NBG would become liable to a very substantial capital gain Tax in Greece. At the meeting of the ordinary shareholders summoned by the court, 91% of the shareholders by value attended and voted. **MIT voted in favour of the arrangement and NBG voted against it.** A resolution in favour of the proposal was carried by the requisite majority of ¾th in value of the class present and voting, but without the votes of MIT the resolution would not have been carried against the opposition of NBG. NBG opposed the company petition for the sanction of the court.

17. There is another section under English Act i.e. section 209 providing safeguard for minority shareholder in the event of a takeover bid and in a proper case provides machinery for a small minority shareholders to be obliged to accept a takeover against their wishes. This section provides that where a scheme or contract involving the transfer of shares in a company to another company has been approved by the holders of not less than nine-tenths of value of the shares whose transfer is involved, the transferee company may give notice to any dissenting shareholder, and then, unless on an application made by the dissenting shareholder, the court thinks fit to order otherwise, shall be entitled and bound to acquire those shares on the terms of the takeover bid. This judgment decides if the present arrangement had been carried under section 209, MIT as a subsidiary of Hambros would have been expressively forbidden to join in any approval for the purposes of section 209, and in any event, the National Bank could not have been obliged to sell because they hold 10% of the ordinary shares of the company. The other reality in this case is Hambros is purchaser making an offer, in a situation like this, when vendors meet to discuss and vote whether or not to accept the offer, it is incongruous

that the loudest voice in theory and the most significant vote in practice should come from the wholly owned subsidiary of the purchaser. No one can be both vendor or a purchaser, therefore, for the purpose of the class meeting in the present case, MIT were in the camp of the purchaser.

18. But in our Companies Act there is no section like section 209 of the English act, therefore, the analogy applied in the above case is not applicable to the present case. Second thing is in Indian Company jurisprudence, minority shareholders are never treated as separate class as long as they belong to one category. On the top of it, in the present case, the Applicant Counsel himself agreed that no other method of valuation will fetch more value to the valuation other than the valuation followed by the Petitioner company. Peer to peer valuation does not mean that a profit making company has to be taken into consideration to value the shares of a company consecutively making losses. Here Eicher Motors has two components, one Motor Cycle unit and another Tractor unit. When both are doing exceedingly well, how can it be fair to take the company into count just for the sake of giving more valuation to the shares of a company which is consecutively making loss?

19. Apart from this, to counter this argument, the Petitioner counsel relied upon Reliance Petroleum, In re (Company Cases Vol. 119, Page No. 566, Gujarat High Court), Vadlamudi Rama Rao v. Asian Coffee Ltd. (2000 CLC 1356), Hindustan Lever Employees' Union v. Hindustan Lever Ltd. (AIR 1995 Supreme Court 470), Miheer H. Mafatlal v. Mafatlal Industries Ltd. (1997) 1 SCC 579, Ram Kohli v. Indrama Investment Pvt. Ltd. Select holiday Resorts Ltd. (2014) (186 Comp Cas 358), Tata Advanced Materials Ltd. Bangalore represented by its General manager Finance and Company Secretary Sasidhar S.K. (2016 Indlaw KAR, 3607) to say that the jurisdiction of the court in granting scheme is supervisory and not Appellate in nature and court cannot normally interfere with the commercial wisdom of the parties who have taken an informed decision in the meeting, to say that there cannot be a class within class of shareholder. Moreover, the objector in this case has given his approval to the scheme in the present case whereby there could not be any occasion for him to give his approval in the meeting thereafter come before this Bench to

raise objection for this scheme, besides this, objectors' shareholding is less than 10% henceforth, in any event, the objection raised by the Applicant to this scheme is devoid of merit. Henceforth, this issue is decided against the Applicant/Objector.

20. When this bench has put it to the applicant as to whether the companies' valuation would become higher than this valuation, if any other method of valuation is followed, to which, the counsel had candidly stated there would not be any higher valuation even if other methods have been taken into consideration.

21. Since this company is admittedly a loss making company for the last two years, and no other valuation method admittedly will not derive value more than the value fixed in the valuation report, the valuation report relied upon the petitioner does not warrant interference of this Bench.

Accordingly, Intervention Application is hereby rejected.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B. S.V. PRAKASH KUMAR
Member (Judicial)