

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
NEW DELHI**

Present: SHRI R.VARADHARAJAN, MEMBER (JUDICIAL)

COMPANY PETITION NO. 502 OF 2015

CONNECTED WITH

COMPANY APPLICATION (MAIN) NO. 96 OF 2015

(TRANSFERRED FROM THE FILE OF HON'BLE HIGH COURT OF DELHI)

IN THE MATTER OF SECTION 391 & 394 OF

THE COMPANIES ACT, 1956

(PRESENTLY SECTIONS 230-232 OF THE COMPANIES ACT, 2013)

AND

IN THE MATTER OF SCHEME OF AMALGAMATION

BETWEEN

NU-RUBBER PRODUCTS PRIVATE LIMITED

Having registered office at:

G-32, Arya Nagar Appts.,

Plot No.91, IP Extension,

Patparganj, Delhi-110092

...TRANSFEROR COMPANY/ PETITIONER



WITH

NU-CORK PRODUCTS PRIVATE LIMITED

Having registered office at:

B-132, Anand Vihar,

Delhi-110092

... TRANSFEREE COMPANY / PETITIONER

AND

Their respective Shareholders and Creditors

ADVOCATE FOR THE PETITIONERS: Mr. Rakesh Kumar, Advocate
Ms. Megha Aggarwal, PCS

FOR REGIONAL DIRECTOR, (NR), MCA: Mr. Manish Raj, Company Prosecutor

FOR OFFICIAL LIQUIDATOR: Ms. Chetana Kandpal, Company Prosecutor,
Office of Official Liquidator, Delhi

Order Reserved on: 26th, July, 2017

Order Delivered on: 25th August, 2017

ORDER

1. This petition filed by the companies above named is coming up finally before us on 26.07.2017 for the purpose of the approval of the scheme of arrangement, as contemplated between the companies and its shareholders by way of amalgamation of the Transferor Company / Petitioner, with the Transferee Company/ Petitioner. A perusal of the petition discloses that initially the application seeking the dispensation of the meetings of equity shareholders, secured and unsecured creditors were filed before the Hon'ble High Court of Delhi in CA (M) 96/2015. The Hon'ble High Court of Delhi vide its order dated 25.05.2015, was pleased to dispense with the requirement of convening the meetings of the equity shareholders, secured creditors and unsecured creditors of both the Petitioner Companies, in view of their consents having been obtained and produced before it or there was none in either of the companies as the case may be.
2. Under the circumstances, the petitioners have filed their joint petitions for sanction of the Scheme of Amalgamation before the Hon'ble High Court of Delhi under the erstwhile provisions, subsequent to the order of dispensation of the meeting as ordered by the Hon'ble High Court of Delhi on 25.05.2015.
3. The Hon'ble High Court of Delhi ordered Notice in the Second Motion petition in C.P. No.502 /2015 moved by the petitioners under Sections 391 to 394 of the Companies Act, 1956 read with relevant Rules of the Companies (Court)



Rules, 1959 in connection with the scheme of amalgamation on 10.08.2015, to the Registrar of Companies, Regional Director and the Official Liquidator. The Petitioners were also directed vide said order to carry out publication in the newspapers "Financial Express" in English edition and "Jansatta" in Hindi Edition.

4. While the joint petition in C.P.No. 502 of 2015 was pending disposal, since the provisions relating to compromises, arrangements and amalgamation as contemplated under Sections 230-232 had been notified w.e.f. 15.12.2016 wherein the power to consider such schemes have now been vested with the National Company Law Tribunal, the Hon'ble High Court of Delhi pursuant to the notification bearing No. DL.33004/99 dated 7.12.2016 issued by the Ministry of Corporate Affairs has transferred/transmitted the records of the above petition to this Tribunal vide order dated 03.03.2017, for our consideration.
5. In view of the above, the petition of Second Motion as above filed by the petitioners jointly before the Hon'ble High Court and subsequently transferred is taken up for final consideration by us. The petitioners, it is seen from the records have filed an affidavit dated 05.01.2016 in relation to the compliance of the orders passed by the Hon'ble High Court of Delhi dated 10.08.2015 and a perusal of the same discloses that the petitioners have effected the paper publication as directed by the Hon'ble High Court of Delhi in one issue of the 'Financial Express' in English edition and 'Jansatta in Hindi edition on 17th November, 2015. Further, it has also been stated by the Learned Counsel for the Petitioner Companies that notices have been issued to the Regional Director, Northern Region, Registrar of Companies as well as to the Official



Liquidator on 3rd September, 2015 attached to the High Court, Delhi in compliance with the order dated 10.08.2015 and in proof of the same acknowledgement made by the respective offices have also been enclosed.

6. The representative of the Official Liquidator vide affidavit dated 10.03.2016 represents that the office of Official Liquidator does not have any objection to the scheme being approved.
7. Further, Regional Director, Northern Region has also filed an Affidavit dated 14.01.2016 in which it has made certain observations. The Regional Director vide its para 7 of the report stated that Registrar of Companies has made following observations which in effect are as follows:
 - i) The date of the Board meeting in which share exchange ratio was approved precedes the date of valuation report given by the chartered accountant in as much as the date of Board Meeting approving the share exchange ratio is seen as 05.10.2014 whereas the valuation report is dated 04.12.2014.
 - ii) A further anomaly pointed out by the RD in its report is that while the Applicant Company had conducted four Board Meetings as per Form in AOC-4 during the year 2014-15, the Board meeting approving the share



exchange does not figure as one in the four meetings conducted.

- iii) A similar objection is raised as in para (ii) above in relation to the Transferee Company with the meeting date being 25.09.2014.
- iv) Further, it is pointed out that in para 27 of the petition, the Transferor Company is averred to be a loss making company whereas at per para 7 of the Valuation Report, it is certified by the Chartered Accountant to be a profit making company.
- v) It is also brought to the notice in the report that as per Annexure A/10 to the petition, the Transferee Company had 9 shareholders holding 1127000 equity shares as on 10.10.2014 whereas as per form MGT-7 (Annual Return) filed by the Transferee Company as on 31.12.2015 it has been disclosed that since the closure date of last financial year there has been no transfer of shares and accordingly it is disclosed that the list of shareholders as on 31.03.2015 comprises only of 8 shareholders.

The variation in number of shareholders and their shareholding in the company prima facie, it is



contended indicates that either the company has submitted wrong information to the Hon'ble Court or made false disclosure and statement to the regulatory authority in MGT-7 on MCA-21 Portal. In respect of shareholders of the Transferor Company and their shareholding, no comments it is stated can be offered as it has not filed its Annual Return 2014 onwards.

- vi) It has been further observed that neither the Transferor Company nor Transferee Company have filed their due Annual Return & Balance Sheet for the financial year ended 31.03.2014 and the Transferor Company has not filed its latest audited accounts for the financial years 2013-14 as well, prima facie violating the provisions of section 92 & 137 r/w 403 of the Companies Act, 2013.
- vii) Both the captioned companies have filed MGT-14 on 16.10.2014 regarding adoption of the annual financial statements for the year ended 31.3.2014 in their Board meeting held on 05.09.2014. However, as per AOC-4 referred to above, no such meeting was held on 05.09.2014 in the Transferee Company. Since




Transferor Company has not yet filed AOC-4, the same facts could not be ascertained.

- viii) In terms of the provisions of Section 117(3) r/w 179(3) of the Companies Act, 2013, both these companies are required to file the resolution (eform MGT-14) in respect of the proposed Scheme of Amalgamation with this office within thirty days of passing the resolution whereas none of the said companies have yet filed such resolution prima facie violating the provisions of section 117(3) of the Companies Act, 2013.

Based on the above facts, it is contended that the scheme indicates non-compliance of various provisions of the Companies Act, 2013 and rules made thereunder as well as misrepresentation of material facts regarding passing of resolutions for the proposed Scheme of Amalgamation.

8. The petitioner Companies have filed a detailed reply by way of an affidavit dated 8th September, 2016 to the observations made by the RoC through Regional Director. Having perused, the same it is seen that in relation to the valuation report the valuer has



given a letter whereby it is admitted that there is a typographical error in relation to the date mentioned in Valuation report as 04.12.2014 instead of 04.10.2014. Some credence  should be given to the Independent Practicing professional and hence we accept the explanation in relation to the date of the meeting and the date of Valuation report. Further in relation to the confusion of whether the Transferor Company is profit making or loss making, upon a careful perusal of the audited balance sheet filed by Applicant Company in first motion for the year ended 31st March, 2014 discloses that while the Transferor Company is a loss making company for the relevant year, the Transferee Company is a profit making company. Hence taking into consideration the letter of independent professional dated 23.03.2016, the same is accepted as reasonable explanation for lapse.

9. It is further submitted by the petitioners that mistake has also been committed in the submission of the Director's Report, as well as the Balance Sheet as at 31.03.2015, i.e. E-Form AOC-4 filed with the Registrar of Companies (ROC), which is not reflecting that the date of the Board Meeting of the Transferee Company held on 05.10.2014, on which date the exchange ratio for the Scheme of Amalgamation was approved. The Transferee Company have now uploaded the new rectified E-Form i.e., MGT-7, indicating the holding of its Board Meeting on 05.10.2014, in addition to holding of its Board Meetings on 16.06.2014, 08.09.2014, 25.11.2015 and 12.01.2015, as specified in the previously filed E-Form, i.e., AOC-4, by it. Since, the E-Form AOC-4 could not be rectified once it is uploaded with the ROC, therefore, the fact of holding the Board Meeting on 05.10.2014 of the Transferee Company has now been reflected in the new E-Form MGT-7 (Annual Return of the Transferee Company), now being uploaded with the ROC. It is submitted that the Transferee Company had factually approved the Scheme in its meeting held on

25.09.2014, and that it has inadvertently omitted to mention the said Board Meeting held for approval of the Scheme. The Transferee Company has now rectified the said mistake by uploading a fresh E-Form MGT-7, which reflects the date of Board Meeting of the Board of Directors of the Transferee Company held for approving the Scheme on 25.09.2014.

10. In relation to the list of shareholders in numbers not tallying, it is seen from the first motion application that total number of shareholders is disclosed as 9 (nine). However, in relation to ROC, if there is any inconsistency in the numbers, the authority is at liberty to take such action as it may deem necessary.

11. It is also required to be taken into consideration that as per the statement of the Petitioners in their reply it is stated that both the Transferor and Transferee Companies have filed their due Annual Return and Balance Sheet for the financial year ended 31.03.2014 and the Transferor Company has also filed its audited accounts for the financial year 2013-14, by paying the additional fees with the ROC. The details of said filing by the Transferor and Transferee company through E-Form is mentioned herein below:-

Filing by the Transferor Company:-

S.No.	Type of Document	Purpose	Date of Filing	For the Financial year
1.	Form 23AC	Balance Sheet	13.01.2016	31.03.2014
2.	Form 23ACA	Profit and Loss Account	13.01.2016	31.03.2014
3.	Form 20B-Sch.V	Annual Return	13.01.2016	31.03.2014

Filing by the Transferee Company:-

S.No.	Type of Document	Purpose	Date of Filing	For the Financial year
1.	Form 23AC	Balance Sheet	12.01.2016	31.03.2014
2.	Form 23ACA	Profit and Loss Account	12.01.2016	31.03.2014
3.	Form 20B-Sch.V	Annual Return	12.01.2016	31.03.2014
4.	Form 66	Compliance Certificate	11.01.2016	31.03.2014

It is also submitted that the aforesaid non-compliance and/or mistake committed by the Transferor and the Transferee Company are completely unintentional and inadvertently committed. The Transferor and the Transferee Company undertakes to take care in the future for maintaining and filing the secretarial and other statutory records, with the statutory authorities. The above details with proof of filing is taken note of.

12. It is stated that the date of Board Meeting of the Transferee Company held for the purpose of adoption of the annual financial statements for the year ended 31.03.2014 has been inadvertently omitted to mention in the E-Form AOC-4 filed by the Transferee Company. The Transferee Company has now filed a new E-Form MGT-7 rectifying the

mistake and now the said Board Meeting of the Transferee Company dated 05.10.2014 is being reflected in the new E-Form MGT-7.

13. That the Transferor Company has filed the compounding application for the default made by it in not filing the E-Form MGT-14. The said compounding application is still pending for approval before the statutory authority. The Transferor Company undertakes to file the E-Form MGT-14 as soon as the compounding application is approved by the authorities. The above undertaking is taken on record and the petitioners will be strictly required to adhere to their undertakings.

14. In relation to the Transferee Company it is stated that the approval letter of the said compounding application has been received from the Ministry of Corporate Affairs and the Petitioner/ Transferee Company has filed E-form INC-28, for registering the approval letter/order passed by the Ministry of Corporate Affairs vide SRN: G16465924 dated 28.10.2016. The Petitioner/Transferee Company has further filed MGT-14 vide SRN No. :G20259347 dated 07.11.2016, for registering the resolution passed by the Board of Directors for approving the merger of the Petitioner/Transferee Company and the Petitioner/Transferor Company ". The said fact is taken note off.

In view of the above observations of the RD/ ROC which has been explained or otherwise complied with and in the circumstances the objections stands closed.



However, it is made clear that this order does not in any way absolve the petitioner companies of lapses from any statutory compliances nor does it curtail in any way the power of the Registrar of Companies in otherwise dealing with such lapses as may statutorily required to be dealt with.

15. Upon further perusal of the representation of Regional Director it discloses that notice to the Principal Commission of Income Tax, Delhi had been duly sent and that no specific comments/ observation have been received raising any objections.
16. The petitioner companies have filed the certificate from the respective Company's auditor dated 25.05.17 in compliance of proviso to sections 230 (7) and 232 (3) of Companies Act, 2013.
17. The counsel for Petitioners had stated that they have not received any objections from any third party and public at large for the purpose of sanction to the present Scheme of Amalgamation. The above statement is taken on record. In view of absence of any other objections having been placed on record before this Tribunal and since all the requisite statutory compliances having been fulfilled, this Tribunal sanctions the scheme of amalgamation annexed as **Annexure P-1** with the Company Petition as well as the prayer made therein.
18. Notwithstanding the above, if there is any deficiency found or, violation committed qua any enactment, statutory rule or regulation, the sanction granted by this court will not



come in the way of action being taken, albeit, in accordance with law, against the concerned persons, directors and officials of the petitioners.

19. While approving the Scheme as above, it is clarified that this order should not be construed as an order in any way granting exemption from payment of stamp duty, taxes or any other charges, if any payment in accordance with law or in respect to any permission/compliance with any other requirement which may be specifically required under any law.

THIS TRIBUNAL DO FURTHER ORDER

- (1) That all the property, rights and powers of the Transferor Company be transferred without further act or deed to the Transferee company and accordingly the same shall pursuant to section 232 of the Act, be transferred to and vest in the Transferee company for all the estate and interest of the Transferor Company therein but subject nevertheless to all charges now affecting the same; and
- (2) That all the liabilities and duties of the Transferor Company be transferred without further act or deed to the Transferee company and accordingly the same shall pursuant to section 232 of the Act, be transferred to and become the liabilities and duties of the Transferee company; and
- (3) That all proceedings now pending by or against the Transferor Company be continued by or against the Transferee company; and



- (4) That the Transferee Company do without further application allot to such members of the Transferor Company, as have not given such notice of dissent, as is required by clause 13 of the SCHEME OF AMALGAMATION herein the shares in the transferee company to which they are entitled under the said SCHEME OF AMALGAMATION; and
- (5) That as per clause 13 of the scheme, all the employees of the Transferor Companies in service on date immediately preceding the date on which the scheme finally take effect shall become the employees of the Transferee company without any break or interruption in their service.
- (6) Both the Transferor Companies shall within thirty days of the date of the receipt of this order cause a certified copy of this order to be delivered to the Registrar of Companies for registration and on such certified copy being so delivered the Transferor Company shall be dissolved and the Registrar of Companies shall place all documents relating to the Transferor Companies and registered with him on the file kept by him in relation to the Transferee company and the files relating to the said both companies shall be consolidated accordingly.
- (7) That any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary.

U.D Mehta


(R.VARADHARAJAN)
MEMBER (JUDICIAL)