

**THE NATIONAL COMPANY LAW TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
COMPANY PETITION NO. 201/2016**

IN

COMPANY APPLICATION (M) NO. 129/2015

Judgment pronounced on: 08.06.2020

Coram:

**SHRI B.S.V. PRAKASH KUMAR,
HON'BLE ACTG. PRESIDENT**

&

**SHRI NARENDER KUMAR BHOLA,
HON'BLE MEMBER (TECHNICAL)**

In the matter of:

Petition u/s 391-394 of the Companies Act, 1956 read with Section 232 to 234
and other applicable provisions of the Companies Act, 2013

In the matter of

Scheme of Amalgamation

Between

SKYWAY VENTURES LIMITED

.....Petitioner Company No.1/Transferor Company

AND

SAI INDUSTRIES LIMITED

.....Petitioner Company No.2/Transferee
Company

For Petitioner: Mr. P Nagesh, Mr. Shivam Wadhwa, Mr. Harshal Kumar,
Advocates

For the RD & OL: Tania Sharma, Advocate

For the ITD: Lakshmi Gurung, Advocate

For SEBI: Neelima Tripathi Advocate

ORDER

SHRI B.S.V. PRAKASH KUMAR, ACTG. PRESIDENT

1. This petition has been filed by the Petitioner Companies under Companies Act, 1956 for the purpose of the approval of the Scheme of Amalgamation between the Petitioner Company No.1/Transferor Company and the Petitioner No.2 Company/Transferee Company. The copy of the Scheme of Amalgamation (hereinafter referred to as the "Scheme") has been placed on record. The Petition was transferred to this bench vide order dated 13.03.2017 passed by the Hon'ble High Court of Delhi.
2. A perusal of the Petition discloses that initially the First Motion application seeking directions for dispensing with the convening of

the meetings of the Secured Creditors and Unsecured Creditors of the Petitioner No.1 Company/Transferor Company and the Petitioner No.2 Company/Transferee Company and for convening the meetings of the Equity Shareholders of Petitioner No. 1/ Transferor Company and Petitioner No.2 /Transferee Company was filed before the Hon'ble High Court of Delhi vide Company Application (M) No. 129/2015 and based on such application moved under Sections 391-394 of the Companies Act, 1956, the meetings of the Secured Creditors and Unsecured Creditors of the Petitioner No.1 Company/ Transferor Company and Petitioner No.2 Company/Transferee Company were dispensed with and the meetings of the Equity Shareholders of the Petitioner No.1 Company/Transferor Company and Petitioner No.2 Company/Transferee Company were directed to be convened on 25.09.2015. The shareholders of both the companies approved the scheme of Amalgamation at the duly convened meetings.

3. Thereafter, by order dated 09.03.2016 passed by the Hon'ble Delhi High Court the Petitioner Companies were directed to carry out publication in the newspapers "Business Standard" (English, Delhi edition) and "Jansatta" (Hindi, Delhi edition). In addition to the public notice, notices were directed to be served on the Central Government through Regional Director (Northern Region),

Registrar of Companies, NCT of Delhi, the Income Tax Department, Official Liquidator and to such other sectoral Regulate Authorities who are likely to be affected by this Scheme.

4. It is seen from the records; the Petitioner Companies have filed an affidavit dated 29.07.2016 affirming compliance of the order passed by the Hon'ble High Court of Delhi dated 09.03.2016. A perusal of the affidavit discloses that the Petitioner Companies have affected the newspaper publication as directed in one issue of the "Business Standard" English edition as well as in "Jansatta" Hindi edition on 23.03.2016 in relation to the date of hearing of the petition. Further, the affidavit also discloses that copies of the petition have been duly served to the Registrar of Companies, Central Government through Regional Director and Income Tax Department and Official Liquidator in compliance of the order and in proof of the same acknowledgement made by the respective offices have also been enclosed. The Petitions were transferred to this bench vide order dated 13.03.2017 passed by the Hon'ble Delhi High Court.
5. The Regional Director, the Official Liquidator, the Income tax Department have filed their respective reports/observations. The Official Liquidator vide his report dated July 2016 at Para 6 states that he has not received any complaint against the proposed scheme

of Amalgamation from any person and in Para 8 it is submitted that the affairs of the Transferor Company do not appear to have been conducted in a manner prejudicial to the interest of its members or to the public interest.


6. The Regional Director in his report even though has pointed out to the observations on the proposed scheme, as however, has categorically mentioned in the last para of the report that “after having examined the scheme/reply of the Petitioner Companies, the office of the Deponent is inclined to accept the report of Registrar of Companies and has no objection to the sanction of the scheme subject to the objections, if any raised by the Reserve Bank of India and SEBI”. It is noted that the Reserve Bank of India has not filed any objection to the scheme of Amalgamation even though the copy of the petition was served to them through courier dated 27.05.2016.
7. The Income Tax Department filed its reports in respect to both the Transferor and Transferee company. In the report submitted in respect to the Transferor Company, the Income Tax Department states that there is no demand outstanding against the Transferor Company. Therefore, the Income Tax Department has no objection to the sanction of the scheme. In so far as the Transferee Company is concerned, the Income Tax Department has pointed out that for the assessment year 2006-07 there is a Fringe Benefit Tax demand



of Rs. 301/- and in so far as assessment year of 2007-08 there is a Fringe Benefit Tax demand of Rs. 229/-. The Transferee Company has paid the abovementioned Fringe Benefit Tax on 07.05.2018 and has handed over the payment proof to the Counsel for the Income Tax Department in the court. Therefore, there can be no objection from the Income Tax Department in respect of the Transferee Company also. The counsel for the Petitioner companies however has stated that the Income Tax Department has unfettered rights to recover interest, taxes and take proceedings in future in accordance with law. However, if such proceedings are taken, the petitioner companies have the right to defend the same even after the scheme is approved by this bench. This bench is therefore of the view that the interest of the Income Tax Department is protected.

8. SEBI in its report dated 29.12.2014 made the following observations:
 - a. *Listing benefit is being achieved which appears not to be in compliance with the requirements of SCR Rules, 1957 and SEBI ICDR Regulations 2019.*
 - b. *Substantial acquisition and change in control SIL is being achieved without providing an exit opportunity which appears to be an attempt to circumvent obligations under SEBI takeover Regulations.*



- c. *The public shareholding of SIL is being diluted which appears not to be in accordance with the provisions of SCR Rules 1957 and Listing Agreement.*
- d. *Shareholding is being increased through Preferential Allotment which appears to be an attempt to by-pass the Preferential issue guidelines under ICDR.*
9. The Petitioner Companies filed a detailed affidavit on 04.09.2017. The Petitioner submitted that the report of SEBI dated 29.12.2014 was forwarded to the Transferee Company by Bombay Stock Exchange vide its letter dated 01.01.2015 and the same was received around 03.01.2015. The First Motion Petition was filed on 30.05.2015 before the Hon'ble High Court of Delhi before the expiry of 6 months from the purported validity of the observation of SEBI. After removing objections, the First Motion Petition was re-filed on 14.07.2015 before the Hon'ble High Court of Delhi. The contention that the application was filed by the Transferee Company after a period of 6 months is therefore incorrect. Further in concluding para of the observation of SEBI dated 29.12.2014, SEBI states "The above comments/observations do not preclude the company from filing the draft scheme with the Hon'ble High Court for sanction".
10. Firstly, Regulation 19A states that every listed company shall maintain public shareholding of at least 25% and Regulation 19A
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(2) states that if at any time the public share-holding in a listed company falls below 25% such company shall bring the public share-holding to 25% within a maximum period of 12 months from the date of such fall. The Transferee listed company in the explanatory statement attached under Section 393 of the Companies Act, 1956 attached to the notice of its convening of its meeting of its shareholders at Point 9(b) stated that the public shareholding will remain above 25% to be precise as per the post-merger shareholding pattern required as per Rule 19A of SCR Regulations and clause 40A of the listing agreement. In any event the post-merger public shareholding of the Transferee Listed Company is around 82.55% as indicated in Page 22 of the affidavit in response filed by the Petitioners dated 14.08.2017. Even otherwise Rule 19A (2) gives one year's time for a listed company to allow the public-shareholding to come up to 25% within a maximum period of 12 months from the date of such fall, if any. Therefore, SEBI's contention at 8.3 of their report that the public shareholding of the Transferee Company is being diluted appears to be incorrect. Further, SCR Rules do not apply to the Transferor Company which is an unlisted company.

11. Secondly, there is no legal prohibition under the SEBI Act prohibiting an unlisted company to merge with a listed company.



The SEBI Takeover Regulations, in particular Regulation 10(1)(d)(II) specifically exempts acquisitions from the obligations to make an open offer under Regulation 3 and Regulation 4 in the event of an acquisition pursuant to a scheme of arrangement which takes place pursuant to an order of a Tribunal approving a scheme of amalgamation, merger or demerger. The Transferee Company in the explanatory statement to its shareholders has clearly mentioned that the existing shareholders of the Transferee Company would continue to have their shares listed on the Bombay Stock Exchange and they have the ready option to exit from the Transferee Company any time before and after the merger by selling off their shares in open market. Therefore, there is no restriction on the exit opportunity to the shareholders of the Transferee Listed Company. Therefore, SEBI's contention that the change in control of the Transferee Company is being achieved without providing an exit opportunity to the public shareholders is not correct.

Thirdly, the public shareholders of the listed Transferee Company have approved the scheme after reading the explanatory statement annexed to the notice convening the meeting of the shareholders wherein the pre and post amalgamation shareholding pattern of the listed Transferee Company was disclosed. It was also mentioned that the public shareholding would remain above 25% as per the post-



merger shareholding pattern required as per Rule 19A of SCRR and Clause 40A of the Listing Agreement.

Lastly, the allotment of shares is not an attempt to by-pass the Preferential Allotment under ICDR regulations as Regulation 70(B) states that Chapter VII relating to preferential issue shall not apply where the preferential issue of equity shares is made pursuant to a scheme approved by High Court or Tribunal under section 232 to 234 of the Companies Act, 2013 whichever is applicable. Further under the scheme approved by the shareholders of the Listed Company, all the shareholders of the Transferor Company without any preference are getting one share of Rs.10/- each for every one share held of Rs.10/- each held by the shareholders of the Unlisted Transferor Company. Therefore, the issue and allotment of shares by the Listed Transferee Company to the shareholders of the Transferor Company being pursuant to a scheme approved by the Tribunal under section 232 to 234 of the Companies Act, 2013, the provisions of Chapter VII (Preferential Issue of Equity Shares) under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 does not apply. The contention at Para 8.4 of the SEBI report is therefore, misplaced as allotment of shares pursuant to a sanction of scheme of



amalgamation by a Tribunal cannot be held to be an attempt to bypass Preferential issue guidelines under ICDR.

12. Therefore, in the light of the above submissions, SEBI's contention that the scheme is against public interest deserves to be ignored by this Tribunal especially when the Transferor Company's Net Asset Value is Rs. 14,25,15,386/- as compared to the negative Net Asset Value of the Transferee Company at Rs. (-)24,11,070/- as per the books of the Transferor and Transferee Companies before the appointed date.
13. The counsel for the Petitioners also pointed out that several High Courts as well as the Hon'ble NCLT, in a number of cases, have been approving the scheme of Amalgamations between an unlisted company as a transferor company with a listed company as there is no prohibition under the SEBI Act, SCR Rules, Takeover Regulations and ICDR Regulation.
14. The counsel for the Petitioners made further reference to the judgement passed by the Hon'ble Bombay High Court in the case of *Trip Merchantile and Trading Limited* [2015 SCC Online Bombay 6360] wherein at Para 29 the Hon'ble High Court reiterated: -



15. “29. The real questions, which, on the basis of the above analysis, arise in the matter are:
- (a) *Whether the scheme is designed to violate any provision of law or contravene any public policy;*
 - (b) *Whether the scheme displays any bad faith vis-à-vis any of the stakeholders including the minority shareholders or creditors who have not voted on the scheme;*
 - (c) *Whether the scheme is, on the whole, just, fair and reasonable; and*
 - (d) *Whether the scheme prejudicially affects public interest in any way.”*

16. During hearing the counsel for SEBI, in substance, reiterated the submissions as already made in SEBI’s report dated 29.12.2014 and submitted that the scheme was violative of SEBI Act, ICDR Regulations and SCR Regulations etc.

17. Having examined the scheme and the observations made by SEBI and after hearing the counsel for the Petitioner companies and counsel for SEBI this bench is of the considered view that the scheme of Amalgamation does not violate any provisions of law or contravene any public policy. There is no specific prohibition under the SEBI Act and the various regulations framed thereunder for an unlisted company to be merged with a listed company. The scheme



is in the interest of the shareholders of the Transferee Company because of the consolidation of the Net Worth of the Transferor Company which is a profit-making company. The Scheme overall is just, fair and reasonable and does not prejudicially affect the interest of the public in any manner. This bench has not received any objections from any of the members of the public opposing the Scheme of Amalgamation.

18. It is pertinent to state here that at the time of final hearing, the Ld. Counsels on behalf of the Income Tax Department and Central Government through Regional Director and Counsel for the Official Liquidator have not raised any objection in respect of the approval of the Scheme.
19. The Petitioner has affirmed that no proceeding for inspection, inquiry, or investigation under the provisions of the Companies Act, 2013 or under the provisions of Companies Act, 1956 is pending against the Petitioner Company.
20. It is also submitted in the Petition that the appointed date of the Scheme shall be effective from Appointed Date i.e. 01.04.2014.
21. Certificate of Statutory auditor of the Petitioner Companies have been placed on record to the effect that Accounting Treatment



proposed in the Scheme of Demerger is in conformity with the Accounting Standard notified by the Central Government as specified under the provisions of Section 133 of the Companies Act, 2013.

22. In view of the foregoing, upon considering the approval accorded by the members and creditors of the Petitioner Companies to the proposed Scheme and the report filed by the Central Government through Regional Director, Northern Region, Ministry of Corporate Affairs, Official Liquidator and Income Tax Department and as there are no objection received from any quarter except the objections from SEBI which we have already considered in this order, there appears to be no impediment in sanctioning the present Scheme.
23. Consequently, sanction is hereby granted to the Scheme under Section 230-232 of the Companies Act, 2013. The Petitioner Companies shall however remain bound to comply with the statutory requirements in accordance with law.
24. Notwithstanding the above, if there is any deficiency found or, violation committed qua any enactment, statutory rule or regulation, the sanction granted by this Tribunal to the Scheme will not come in any way of action being taken, albeit, in accordance with law,

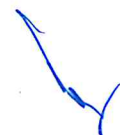


against the concerned persons, directors and officials of the Petitioner.

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

26. **THIS TRIBUNAL DO FURTHER ORDER:**

1. That the Transferor Company shall stand dissolved without following the process of winding-up; and
2. 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 Companies Act, 2013, be transferred to and vest in the Transferee Company; and
3. That all the liabilities and dues 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 dues of the Transferee Company; and



4. That all proceedings now pending by or against the Transferor Company, be continued by or against the Transferee Company; and
5. That all the employees of the Transferor Company, in service, on the date immediately preceding the date on which the Scheme takes effect, i.e., the effective date shall become the employees of the Transferee Company on such date without any break or interruption in service and upon terms and condition not less favorable than those subsisting in the Transferor Company on the said date.
6. The Petitioner Companies to lodge a copy of this order and the Scheme duly certified by Deputy Registrar or Assistant Registrar, as the case may be, National Company Law Tribunal, Principal Bench, with the concerned Superintendent of Stamps for the purpose of adjudication of stamp duty payable, if any, on the same, within 60 Days from date of receipt of copy of order.
7. That Petitioner Company 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 concerned Registrar of Companies for registration and on such certified copy being so delivered the Transferor Company shall be dissolved and the concerned Registrar of Companies shall place all documents relating to the Transferor Company on the file kept by him in relation to the Transferee Company and the files relating to both the Companies shall be consolidated accordingly; and



8. That any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary.

The Petition stands disposed of in the above terms.



(B.S.V. PRAKASH KUMAR)

ACTG. PRESIDENT



(NARENDER KUMAR BHOLA)

MEMBER (TECHNICAL)