

HYDERABAD BENCH

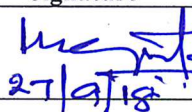
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PRESENT: HON'BLE SHRI K. ANANTHA PADMANBHA SWAMY – MEMBER
JUDICIAL


ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 27.09.2018 AT 10.30
AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP (CAA) NO. 418/230/HDB/2018 Connected With CA (CAA) NO. 572/230/HDB/2018
NAME OF THE COMPANY	Celon Laboratories Pvt Ltd (Demerged Co.) & Mviyes Pharma Ventures Pvt Ltd (Resulting Co.)
NAME OF THE PETITIONER(S)	
NAME OF THE RESPONDENT(S)	
UNDER SECTION	230

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
CS R. Ramakrishna Gupta	PCS	ramakrishna@ ma-cc.com 9845019915	 27/9/18

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
T. Sujan Kumar Reddy	Advocate	9160001435	

ORDER

PCS for Petitioner is present. Counsel for Respondent present.
Order pronounced in open court. Petition is allowed vide
separate order.


MEMBER JUDICIAL

Rk

**IN THE NATIONAL COMPANY LAW
TRIBUNAL HYDERABAD BENCH
HYDERABAD**

**CP(CAA)No.418/230/HDB/2018
Connected with
CA(CAA)No.572/230/HDB/2018**

Under Section 232 read with 230 of the Companies Act, 2013

In the matter of

1. Celon Laboratories Private Limited
Plot No.2, ALEAP Industrial Estate,
Gajularamaram, Hyderabad
Telangana – 500 072
.... 1st Petitioner/Demerged Company
2. MViyeS Pharma Ventures Private Limited
Plot No.2, ALEAP Industrial Estate,
Gajularamaram, Hyderabad
Telangana – 500 072.
.... 2nd Petitioner/Resulting Company

Order delivered on: 27 .09.2018

CORAM:

Hon'ble Shri K. AnanthaPadmanabhaSwamy, Member (J)

Parties Present:

For Petitioner(s): Mr. R. Ramakrishna Gupta, Practicing Company Secretary and authorised representative.

For Regional Director Mr. T. Sujan Kumar Reddy, CGSC

Per: **K. Anantha PadmanabhaSwamy, Member (J)**

ORDER

1. The present Company Petition bearing CP(CAA)No.418/230/HDB/2018 is filed by Celon Laboratories Private Limited (Demerged Company) and MViyeS Pharma Ventures Private Limited (Resulting Company), under Section 232 read with Section 230 of the Companies Act, 2013 r/w the Rule 15(1) of Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 seeking sanction of proposed Scheme of Arrangement ("Scheme" in short) between the Petitioner Companies and



their respective Shareholders, Secured Creditors, Unsecured Creditors/Trade Creditors and Employees of the Petitioner Companies.

2. The Petitioner Companies had filed CA(CAA)No.572/230/HDB/2018 before this Bench of the National Company Law Tribunal ("Tribunal"), seeking dispensation of convening meeting of Equity Shareholders of the Demerged Company and dispensation of convening meeting of Equity Shareholders, Secured Creditors, Unsecured/Trade Creditors of the Resulting Company, and to conduct meetings of the Secured Creditors, Unsecured/Trade Creditors of the Demerged Company. This Tribunal vide its Order dated 18.05.2018 on the above Company Application, dispensed with convening Meeting of the Equity Shareholders, Secured Creditors, Unsecured/Trade Creditors of the Resulting Company and appointed Shri Srinivas Rao Cherukuri, Advocate as Chairman for conducting meetings of the Equity Shareholders, Secured Creditors, Unsecured/Trade Creditors of the Demerged Company. Further, Mr. S.V. Satyanarayana, CAIIB appointed as scrutinizer for conducting the above said meetings.

3. In pursuance of the Order dated 18.05.2018, the meetings of the Equity Shareholders, Secured Creditors and Unsecured/Trade Creditors of the Demerged Company duly conducted on 25.06.2018 at 3 PM, 4 PM and 4.30 PM respectively at The Federation of Telangana and Andhra Pradesh Chamber of Commerce and Industry, 11-6-841, Federation House, Red Hills, Hyderabad – 500004. Shri Srinivas Rao Cherukuri, Advocate and Chairman of the above said meetings, has already filed his report. From the Report of the Chairman, it is seen that the meeting was attended by 30 (thirty) Equity Shareholders representing 96.35% of the total Equity Share Capital of the Demerged Company voted in favour of the Scheme of Arrangement. No Shareholders voted against the Scheme of Arrangement. With respect to Secured Creditors of the Demerged


Company, sole Secured Creditor i.e. ICICI Bank attended personally representing 100% of the total amount whose valuation is up to Rs.2,45,44,228.69 and voted in favour of the Scheme of Arrangement. Further, the meeting of the Unsecured/Trade Creditors was attended either personally or by proxy by 202 (Two Hundred and Two) Unsecured/Trade Creditors, wherein all attended personally representing 89.26% of the total amount whose valuation is upto Rs.22,88,46,405.81 voted in favour of the Scheme of Arrangement and none voted against the Scheme. Notice for conducting the above said meetings were served on the Regional Director, Registrar of Companies, Official Liquidator, the Chief Commissioner of Income Tax and Reserve Bank of India by hand on 28.05.2018.

4. The Petitioner Companies then filed the present Company Petition being CP(CAA)No.418/230/HDB/2018 before this Tribunal seeking sanction of the Scheme of Arrangement with appointed date as 01.04.2017.
5. Thereafter, this Tribunal admitted the Petitions and vide its order dated 08.08.2018 ordered that notice of the hearing of the Petitions shall be advertised in Daily Newspaper i.e. Business Standard (in English) and Nava Telangana (in Telugu). Accordingly, the Petitioner Companies published notice of hearing of the Petition in English News Paper i.e. Business Standard (Hyderabad edition) and Telugu News Paper i.e. Nava Telangana (Hyderabad edition) on 14.08.2018 respectively.
6. The Board of Directors and the management of the Demerged Company have proposed to demerge the "Demerged Business" carried through the Joint Venture Company and the Manufacturing Unit of the Demerged Company situated at Uppal (Demerged undertaking) to the Resulting Company for the following reasons:
 - a) The nature of risks and competition involved in relation to each of the on-going business are different and this arrangement will enable



differentiated management approach and focus in relation to the Demerged Undertaking to address the same efficiently and effectively.

- b) The Arrangement will provide opportunities for creating strategic partnerships and flexibility to fund raising for further growth and expansion and to create a business structure, thereby reaping benefits from possible growth opportunities.
- c) The overall objective of the Scheme of Arrangement is to formulate a dedicated/focused special purpose vehicle i.e. Resultant Company having greater capacity and conducting its operations more effectively and competitively.

- 7. By this Scheme it is proposed to demerge the Demerged Undertaking out of the Demerged Company and merge the same into the Resulting Company for the purpose of better, efficient and economical management, control and running of the respective businesses of the Demerged Company and the Resulting Company, and for further development and growth of the business of the Resultant Company and for administrative convenience. The Scheme will enable the Resultant Company to integrate its business operations with the Demerged Undertaking which will lead to synergies of operations and a stronger and wider base for future growth/expansion. The present Scheme of Arrangement will help monetize/unlock value of the Demerged Undertaking for all the stakeholders of both the Demerged Company and the Resulting Company.
- 8. Heard, Shri R. Ramakrishna Gupta, learned Practicing Company Secretary and authorised representative for the Petitioner Companies.
- 9. A Copy of the Petition is served on the Reserve Bank of India by Hand on 20.08.2018. 

10. The Reserve Bank of India in its Representation dated 27.06.2018, stated the following:-

“2. from the documents and filing available, the necessary pending compliance under FEMA 1999 are as under:-

(i) The shares of M/s Celon Organics Private Limited (an Indian Company) were reportedly acquired by Mr. Vimal Kumar Kavuru, an NRI without any consideration. On August 06, 2010 these shares were swapped with shares of M/s Celon Laboratories Private Limited. Mr. Vimal Kumar Kavuru was issued 358,417 equity shares of M/s Celon Laboratories Private Limited on 14.08.2010 in lieu of 716834 shares of M/s Celon Organics Private Limited as a part of a swap deal.

Since the transaction involved swapping of shares of two Indian Companies by an NRI, we had advised them to get post factor approval from DIPP, which is yet to be obtained by the Company.

(ii) Subsequently on July 20, 2012 M/s Celon Organics Private Limited merged with M/s Celon Laboratories Private Limited where there was no fresh allotment to the Non Resident Investor.

(iii) Another NRI, Shri Vijay Kumar Vasireddy on November 14, 2007 transferred INR 26,00,000 to the account of M/s DNA Biotech Limited with an instruction to transfer the amount to M/s Celon Laboratories Private Limited for issue of shares to the NR investor. He was issued shares of M/s Celon Laboratories Private Limited worth INR 23,00,000. The balance share application money of INR 3,00,000 has not yet been refunded by the company to the NRI which appears to be a violation of Schedule 4 of FEMA 20.

(iv) The Regional Director in his representation dated 01.03.2018, stated that no complaints, no investigations and no inspections are pending against the Petitioner Companies. It is further stated that the Directorate does not have any objection to the Scheme except that the Resulting Company has to increase its authorised share



capital to issue shares to the shareholders of the Demerged Company.

- 3. Further we state that wherever shares are issued pursuant to merger between Indian Companies, provisions of Regulation 9 of FEMA 20 (R) are to be complied with.*
 - 4. Any Cross border transaction related to scheme of arrangement or amalgamation under the Companies Act, 2013 should conform to provisions under FEMA 1999.*
 - 5. This communication is issued from the foreign exchange angle under the provisions of FEMA and should not be construed to convey the approval of any other statutory authority or Government under any other laws/regulations. If further approval or permission is required from any other regulatory authority or Government under the relevant laws/regulations, the same should be taken before effecting the transaction.*
11. The Demerged Company vide its reply dated 05.07.2018, to the objections raised by the RBI stated the following:-
- Mr. KavuruVimal Kumar (KVK) held 1830000 equity shares on non-repatriation basis in Colon Organics Private Limited. Further out of said 1830000 equity shares, 716834 equity shares were acquired by KVK from Mr. Vijay Kumar Vasireddy and Mrs. Vasireddy Hemalatha, without any consideration/sale proceeds on non-repatriation basis. On August 14, 2010, as a part of overall swap deal, KVK was issued and allotted on non-repatriation basis, 915000 equity shares in exchange ratio of 2:1 by Celon Laboratories Private Limited. As a part of the said swap deal, 358417 equity shares were issued on non-repatriation basis in lieu of 716834 equity shares held by KVK. Since KVK held the original 716834 equity shares on non-repatriation basis and in lieu of which he was issued 358417 equity shares also on non-repatriation basis, the Company was of the opinion that approval from the Department of*




Industrial Policy and Promotion "DIPP" was not required. Hence, the Company filed an application seeking clarification from DIPP dated April 7, 2018, on whether post facto approval for swap of shares on non-repatriation basis is required or not. We are awaiting the clarification from DIPP and in the event DIPP guides the Company to file the application for post facto approval, we shall obtain the same.

It is further submitted that Celon Organics Private Limited was amalgamated with Celon Laboratories Private Limited pursuant to a Scheme of amalgamation on July 20, 2012. Hence, existing shares stood cancelled and no fresh allotment was made to the non-resident investor.

It is also stated that Mr. Vijay Kumar Vasireddy (VKV), had transferred INR 26 lakhs on November 14, 2007, to the account of DNA Biotec Limited, with an instruction to transfer INR 23 lakhs to Celon Laboratories Private Limited, towards share application money. VKV was issued 230000 equity shares of the face value of INR 10/- per share for receipt of said share application money in Celon Laboratories Private Limited. Hence, no excess share application money was transferred on his behalf from DNA Biotec Limited to Celon Laboratories Private Limited. Further, the amount of INR 3 lakhs was left in DNA Biotec Limited for which KVK submitted a declaration to RBI waiving the refund of INR 3 lakhs. Also, a confirmation letter from DNA Biotec Limited was submitted to the RBI, to their satisfaction, in this regard. Since there is no excess share application money in Celon Laboratories Private Limited, it should not be regarded as a violation of Schedule 4 of FEMA 20.


It is further stated that we hereby confirm adherence of FEMA 20(R) and Companies Act, 2013 for any shares to be issued post approval of the demerger by Hon'ble National Company law Tribunal, Hyderabad Bench.



12. It is further submitted by the Demerged Company that the Department of Industrial Policy and Promotion (FDI Policy Section), Ministry of Commerce & Industry, Government of India vide their letter No.4733/FIFP/2018; dated 9th July, 2018 submitted that since the shares were allotted on non-repatriable basis to the erstwhile NRI, no approval of the Government is required. However, mode of payment was done through share swapping and hence the Demerged Company is advised to approach RBI for regularization of the transaction. Accordingly, the Demerged Company approached the RBI for regularization of the transaction, which is already in process.

13. This Bench at the hearing held on 03.09.2018, directed the Petitioner Companies to file an affidavit regarding regularization of the investment made by Mr. Vimal Kumar Kavuru. In compliance of the directions, the Demerged Company filed an Affidavit dated 05.09.2018, stating that investment/acquisition of 358417 equity shares of Rs.10/- each of 1st Petitioner Company/Demerged Company by Mr. Vimal Kumar Kavuru, Non-Resident India through share swap of 716834 Equity Shares of Celon Organics Private Limited held by him, the 1st Petitioner Company/Demerged Company shall hereby undertake to regularize the said investment/acquisition with Reserve Bank of India, if required and directed by RBI.

14. The Deputy Commissioner of Income-Tax, Central Circle-1(2), Hyderabad vide their letter dated 26.05.2018 submitted that information was received from the Investigation Wing of Income Tax Department, Mumbai with regard to bogus purchases. The case is re-opened under Section 147 of the IT Act, 1961 and the re-assessment proceedings are pending. Hence, the amalgamation of the assessee Company i.e. Celon Laboratories Limited with MViyeS Pharma Ventures Private Limited may be prejudicial to the interest of revenue.

15. With regard to the observations made by the Income Tax Department, the 1st Petitioner Company filed an Affidavit dated 14.09.2018 stating that under Clause 9.1 of the Scheme dealing with the Tax matters provides that all the taxes payable by the Demerged Company under the Income Tax Act, 1961, Goods and Services Tax Act, 2017 etc., and other applicable laws shall be on account of Resultant Company and shall be met by the Resultant Company and further undertake to make/pay the Income Tax or any other taxes, if any, assessed and demanded by the Income Tax Department.
16. The Regional Director (South East Region), Ministry of Corporate Affairs vide his representation dated 31.08.2018 stated that There are foreign shareholders in the Demerged Company and the Resultant company has to comply with the FEMA/RBI regards for issue of shares to these foreign shareholders. As per Section 232(6) of the Companies Act, 2013, the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not a date subsequent to the appointed date. However, Clause 1.10 of the Scheme is contrary to Section 232(6) and hence the petitioner shall undertake to carry out the scheme from the Appointed Date. Further, the Petitioner Company shall provide complete assets to be demerged with their book values for the record of Hon'ble NCLT. It is further submitted that in Part 'C' of the Scheme in Clause 10.3, the word "Capital Reserve" should be "Debited" and not "Credited".
17. With regard to the observations made by the Regional Director, the Petitioner Companies filed a Memo dated 14.09.2018 stating that The Scheme provides a pre-requisite clause as part of consideration for the proposed Demerger at Clause 5.1.5 of the Scheme appearing at Page No.261, which reads as follows: 

“5.1.5 Where the Equity Shares of the Resulting Company are required to be issued and allotted to non-resident shareholders of the Demerged Company, the issue of shares shall be in accordance with the provisions of the Foreign Exchange Management Act (FEMA), 1999 and the applicable rules and regulations made thereunder (for the time being in force, including, any statutory modifications, re-enactments or amendments made thereto from time to time”.

Further it is stated that with regard to the Scheme becoming effect from Appointed Date, there is an enabling Clause in the Scheme itself at Clause 3 appearing at page no.256, which provides that the Scheme operates from Appointed Date and not any other date. Further, both the Petitioners hereby undertake that the Scheme will be made effective from Appointed Date.

It is also stated that the Value of assets being transferred are given at Page No.290 (of the Valuation Report) of the Petition and stated in the Joint Petition at Page No.7 & 8.

It is further stated that the Clause 10.3 of the Scheme provides for Accounting Treatment post Demerger in the Books of Demerged Company. Further, it provides for the treatment, in a situation of Liabilities being more than Assets of the Demerged undertaking which are proposed to be transferred and its treatment when it has to re-state the Books from Appointed Date i.e. 01.04.2017. In the present case, the assets being transferred are investment in Joint Venture Company and the entire manufacturing unit at Uppal. In fact, no liabilities are proposed to be transferred to Resultant Company. Even ifwe take a hypothetical situation, where ‘Liabilities’ being transferred are more than ‘Assets’, the

Demerger Company gets benefitted with this treatment as more Liabilities vis-à-vis Assets are being reduced in the Balance Sheet of Demerged Company, which is a situation of Gain for the Demerger Company. Accordingly, the excess of Liabilities over Assets of the Demerged Undertaking, being a gain and capital in nature not revenue), shall be credited (added) to Capital Reserve, but not Debited (deducted) to Capital Reserve, appearing at the Liability side of the Balance Sheet. Further, there is no notified Accounting Standard dealing with the Demerger accounting. Hence Generally Accepted Accounting Principles (GAAPs) will be applicable in such cases. As per the GAAPs, the excess liabilities over assets being transferred, shall be either credited to capital reserve appearing in Liabilities side of the Balance Sheet or Debited to Goodwill (an Intangible Asset) appearing in the Assets Side of the Balance Sheet and the same was confirmed by the Statutory Auditors of the Company in their Certificate dated 24.01.2018 at Clause 7 appearing at Page No.383 of the Petition.

18. The Regional Director vide his letter dated 19.09.2018 while replying to the contentions of the Petitioner Companies submitted that Clause 10.3 of the Scheme appears to be correct and requested the Bench to kindly ignore the objections raised by them in that respect.
19. The Petitioner Companies enclosed a Certificate of Chartered Accountant stating that the Accounting Treatment proposed in the proposed Scheme is in conformity with Accounting Standard specified under Section 133 of the Companies Act, 2013 by the Central Government.
20. Considering the entire facts and circumstances of the case and on perusal of the Scheme and the documents produced on record, it appears that the Scheme of Arrangement appears to be fair and reasonable and is not contrary to public policy and not violative of any provisions of law. All



the statutory compliances have been made under Section 230 to 232 of the Companies Act, 2013.

21. In the result, the Petitionis allowed with the following directions:-

- a) The Scheme of Arrangement which is at Annexure – F (Page 244 to 279) to CP(CAA)No.418/230/HDB/2018 is hereby sanctioned and it is declared that the same shall be binding on Celon Laboratories Private Limited (Demerged Company) and MViyeS Pharma Ventures Private Limited (Resulting Company) and their respective Shareholders, Secured Creditors, Unsecured Creditors/Trade Creditors, Employees and all concerned under the Scheme.
- b) While approving the Scheme as above, it is further clarified that this order will not be construed as an order granting exemption from payment of stamp duty or taxes or any other charges, if payable, as per the relevant provisions of law or from any applicable permissions that may have to be obtained or, even compliances that may have to be made as per the mandate of law.
- c) All concerned authorities to act on a copy of this order along with the Scheme duly authenticated by the Registrar of this Tribunal. The Registrar of this Tribunal shall issue the certified copy of this order along with the Scheme immediately.
- d) The Petitioner Companies are directed to take appropriate steps to submit the said Scheme to Registrar of Companies within 30 days from the date of receipt of Copy of this order.
- e) The Petitioner Companies are directed to issue newspaper publication with respect to approval of Scheme of Arrangement, in the same newspapers in which previous publications were issued in order to ensure transparency/dissemination of complete information to all

concerned parties about the approval granted by the Tribunal for the Scheme as proposed.

- f) The Petitioner Companies are further directed to take all consequential and statutory steps required in pursuance of the approved Scheme of Arrangement under the Provisions of the Act.
- g) The Petitioner Companies are directed to strictly adhere to the above directions and applicable provisions of the Companies Act.
22. Accordingly, the Scheme stands sanctioned and the Company Petition i.e. CP(CAA)No.418/230/HDB/2018 stands disposed of.



K. ANANTHA PADMANABHA SWAMY
MEMBER (JUDICIAL)