In the National Company Law Tribunal,

Kolkata Bench, Kolkata

CP. (CAA) 426(KB) 2019

connected with

CA (CAA) 914(KB) 2018

In the matter of:

A petition under Section 230 to Section 232 of the Companies Act, 2013 read with the provisions of The Companies (Compromise, Arrangement and Amalgamation) Rules, 2016;

And

In the matter of:

Silversand Distributors Limited, a Company within the meaning of the Companies Act, 2013bearing CIN U51909WB2016PLC210426 and having its Registered Office at Room No. - 709A, 7th Floor 16, Strand Road, Kolkata 700001 in the State of West Bengal

And

Prarthana Sales Private Limited, a Company within the meaning of the Companies Act, 2013 bearing CIN U52190WB2011PTC157333and having its Registered Office at 16, Strand Road, 7th Floor, Room No. - 709A, Kolkata 700001 in the State of West Bengal

And

1. Silversand Distributors Limited,

…….Applicant/ Transferor Company

2. Prarthana Sales Private Limited

……..Applicant/ Transferee Company

Coram: Shri Rajasekhar V.K., Member (Judicial)

Shri Harish Chander Suri, Member (Technical)

Appearances (via Video Conference):

For the Applicants :

Ms. Madhuri Pandey, PCS

Date of Hearing	:	28th June 2021
Date of Pronouncement of the Order	:	16th July, 2021

ORDER

Per : Rajasekhar VK, Member(Judicial)

1. This Company Petition has been filed by the Petitioners, namely, Silversand Distributors Limited, the Transferor Company, with Prarthana Sales Private Limited, the Transferee Company, under section 230-232 of the Companies Act, 2013, read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, for sanctioning the Scheme of Amalgamation proposed between the Transferor Company and the Transferee Company. A copy of the Scheme has been annexed as "**Annexure-E**" in the petition.

2. The object of this petition is to obtain the approval of the Hon'ble Tribunal for sanctioning the Scheme of Amalgamation of the Petitioner Companies, namely, Silversand Distributors Limited, the Transferor Company, with Prarthana Sales Private Limited, the Transferee Company,wherein all the assets, properties, rights and claims whatsoever of the Transferor Company and their entire undertaking together with all their rights and obligations relating thereto are proposed to be transferred to and vested in the Transferee Company and on the terms and conditions fully stated in the Scheme of Amalgamation, which has been annexed with the petition.

3. From the records it is seen that the First Motion application seeking directions for dispensing of the meeting of the equity shareholders and creditors were filed before the Tribunal in CA(CAA)914/KB/2018. Based on such application moved under the provisions under sections 230-232 of the Companies Act, 2013, directions were issued by the Tribunal on 5th February, 2019 wherein the meetings of the Equity Shareholders and creditors of the Petitioner Companies were dispensed with, in view of the receipt of the consent letters from the Equity Shareholders and the Creditors, along with the affidavits, for the approval of the Scheme of Amalgamation or there being none which obviated the necessity of convening of the meeting.

4. In compliance with the Order dated 5th February, 2019, passed by the Tribunal in CA(CAA) No. 914/KB/2018, the petitioners served notices to the Central Government through Regional Director, Registrar of Companies, West Bengal and other sectoral Regulatory Authorities.

5. In compliance of the Order dated 5th February, 2010, joint publication in form NCLT 3A, was made in the newspapers English daily, "Financial Express" and in vernacular language, "Aajkal" on 4th July, 2019.

6. In compliance of the aforesaid Order, an affidavit was filed on behalf of the Company, along with the copies of e-mail sent to the necessary statutory authorities, to the Tribunal on 20th February, 2019.

7. It is stated that there are no proceedings pending under Section 235 to 251 of the Companies Act, 1956 and Section 217, 219, 221, 224 and 225 of the Companies Act, 2013 against any of the Petitioners companies.

8. The circumstances which justify and necessitate the said Scheme of Amalgamation are, inter alia, as follows :

a) Both the Petitioner Companies are in the same management and are controlled and managed by the same promoter group.
b) The Scheme of Amalgamation has been proposed to consolidate the group structure and provide advantages of synergies in business activities.
c) The business of the Transferor Company and the Transferee Company can be combined and carried forward conveniently with the combined strength of both the Petitioner Companies.
d) The amalgamation will enable the amalgamated company to broad base their business activities under the roof of the Transferee Company;
e) The amalgamation will result in usual economies of scale including reduction in overhead expenses relating to management and administration in better and more productive utilization of various resources and the business of the companies can be conveniently and advantageously combined together and in general business of the Companies concerned will be carried on more economically and profitably under the said Scheme of Amalgamation.
f) The said Scheme of Amalgamation will enable the establishment of a larger company with larger resources and a larger capital base enabling further development of the business of the Companies concerned. The aforesaid Scheme of Amalgamation will also enable the undertakings and business of the said Petitioner Companies to obtain greater facilities possessed and enjoyed by one large company compared with a number of small companies for raising capital, securing and conducting trade on favorable terms and other benefits;
g) The said Scheme of Amalgamation will contribute in furthering and fulfilling the objects of the companies concerned and in the growth and development of these businesses.
h) The said Scheme of Amalgamation will strengthen and consolidate the position of the amalgamated Company and will enable the amalgamated Company to increase its profitability.
i) The said Scheme of Amalgamation will enable the undertakings concerned to pool their resources and to expand their activities;

j) The said Scheme of Amalgamation will enable the Companies concerned to rationalize and streamline their management, business and finances and to eliminate duplication of work to their common advantages;

k) The said Scheme of Amalgamation will have beneficial results for the Companies concerned, their shareholders, employees and all concerned.

9. The Regional Director, Eastern Region, Ministry of Corporate Affairs, Kolkata has filed three affidavits, first one affirmed on 5th August 2019, second one affirmed on 6th January, 2020 and third one affirmed on 12th February 2020.

The observations of the Regional Director in the affidavit affirmed on 5th August 2019, are as below :

" a) Clause 13.2 of the scheme is not clearly worded to ascertain compliance with the provisions of section 232(3)(i) of the Companies Act, 2013 and it does not clearly provide that why no fee shall be paid for clubbing of the authorized capital of transferor companies with that of the transferee company. The applicant company should submit a verified statement showing clubbing of the authorized capital and the extent of adjustment of fees already paid by the Transferor companies on their respective authorized capital, to ascertain whether any further fee is payable in terms of the provisions of section 232(3)(i) of the Companies Act 2013. The scheme should also be modified properly.

b) Appointed date, according to the scheme, is 1st April 2017 which is much old a date. The Transferor Company should identify and quantify the assets and liabilities which are sought to be transferred to the transferee company under merger or demerger. This identification & quantification of assets and liabilities should be done as on Appointed Date. This identification gives certainty to the scheme, as members of both the companies get a clear idea about what is going to be transferred. But if the Appointed Date is of long past the relevance for identifying what is going to be transferred gets lost as the components and character of the assets and liabilities may change even materially within the long time interval period.

c) According to clause 12.3 of the scheme the excess or deficit, if any, arising after recording the entries, shall be included in the Capital Reserve account or Goodwill, as applicable, in the books of the Transferee Company. But the scheme appears to be having the ingredients of pooling of interest and in paragraph 9.1 of the scheme it is stated that the Transferee Company shall account for the scheme in accordance with Pooling of interest method. But contrary to Accounting Standard-14, in clause 14(c) of the scheme the differences between net assets transferred from the transferor companies and the value of shares to be issued by the transferee company is envisaged to be adjusted with Capital Reserves, instead of the general reserves. Hence the scheme contains distorted accounting treatment contrary to the Accounting Standard arid hence is defective.

d) In continuation of the submission in point no 2(c) hereinabove it is submitted that whereas in terms of the proviso to sub-section (3) of section 232 of the Companies Act 2013 the "Auditor" of the company is required to give a certificate before Hon'ble Tribunal to the effect that the accounting treatment proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed in section 133 of the Act, the applicant, in Annexure-L of the Petition, has provided a certificate a Chartered Accountant, Shri Amit N Sheth for Amit Sheth and Associates, who is/was not the "Auditor" of the Transferee Company.From 01.04.2014 to 18.03.2019, "Agarwal & Associates", Chartered Accountants were Auditor of the Transferee Company and on 29.05.2019, Krishna Kumar & Company were appointed Auditors. In view thereof the applicant company has attracted penal consequences in terms of the provisions of section 232(8) of the Companies Act 2013, in respect of which Hon'ble Tribunal may kindly issue instruction for taking penal actions.

e) Clause 11.2 tantamount to buy back of shares. But nothing stated about compliance of section 68 contrary to the provisions of section 230(10) of the Companies Act 2013.

f) It is submitted that as per instructions of the Ministry of Corporate Affairs, New Delhi, a copy of the scheme was forwarded to the Income Tax Department on 19-02-2019 with a request to forward their comments/ observational objections if any, on the proposed scheme of amalgamation within 15 days, and no reply has been received by this Directorate from the said Authority till date."

The observations of the Regional Director in the affidavit affirmed on 6th January 2020, are as below:-

" a) That as per the paragraph 3(i) of Rejoinder dated 26.12.2019 in respect of 2(a) it is stated that the applicant companies have duly paid the fees whenever there is increase in their authorized capital since incorporation and submitted the statement showing clubbing of authorized capital. However, the Hon'ble Tribunal may kindly decide the matter on its merits.

b) That as per the paragraph 3(ii) of Rejoinder dated 26.12.2019 in respect of 2(b) it is stated that the appointed date as mentioned in the scheme is 01.04.2017 and the net changes in position of Assets and Liabilities between 01.04.2017 and 01.04.2019 are annexed to the rejoinder. But it is not clarified that why the Appointed Date should remain as 1st April 2017, which is quite older date.

c) That as per the paragraph 3(iii) of Rejoinder dated 26.12.2019 in respect of 2(c) it is stated that the amalgamation of the Transferor Companies with Transferee Company shall be accounted as per 'the pooling of interest method' prescribed under Accounting Standard 14 – 'Accounting for Amalgamations' issued by the Institute of Chartered Accountants of India and notified by the Central Government and the applicant companies suitable changes in the clause 12.3 and 12.4 of the scheme and submitted the copy of the same.

d) That as per the paragraph 3(iv) of Rejoinder dated 26.12.2019 in respect of 2(d) it is stated that the Transferee Company i.e. Prarthana Sales Private Limited had provided the certificate from the practicing Chartered Accountant firm i.e. Amit Sheth and Associates due to non-availability of the company's statutory auditor in the city and urgency in filing the application before the Hon'ble Tribunal, Kolkata Bench. Subsequent company submitted the certificate from the company's statutory auditor with respect to the accounting treatment.

e) That as per the paragraph 3(v) of Rejoinder dated 26.12.2019 in respect of 2(e) it is stated that the disposal of fraction shares which would not, even come to one share and hence the contents of clause 11 .2 of the scheme doesn't tantamount to buy back of shares and therefore nothing has been stated in the scheme of amalgamation about the compliance of section 68 of the Companies Act, 2013. There is no clarity in the said contention under supporting is provided regarding how many fractional shares are involved, how many resultant consolidated shares would emerge and how the disposal of said shares and distribution of process do not tantamount to section 68 of the Act."

The observations of the Regional Director in the affidavit affirmed on 12th February 2020, are as below :

" a) That as per the paragraph 3(ii) of Rejoinder dated 17.01.2020 in respect of 2(b) of earlier affidavit relating to appointed date it is stated that the appointed date as mentioned in the scheme is 01.04.2017 and the same has been clarified by the Ministry of Corporate Affairs vide its General Circular no. 09/2019 dated 21.08.2019, wherein it is stated that calendar date or may be tied to the occurrence of an event such as, the fulfillment of a precondition that the parties to the scheme may have agreed upon. However, the same may be perused by the Hon'ble Tribunal and may pass the order deem fit and proper.

b) That Clause 11.2 of the scheme provides for payment of cash to shareholders of the Transferor Company against their fractional entitlement of shares. It tantamounts to buy back of shares since the shareholders would get their fractional shares exchanged by cash. Share does not mean share certificate but it means a set of right and liabilities. Fractional share entitlement is share itself and payment of cash against such share results into buy back of shares. The scheme does not narrate that the provisions of section 68 of the Companies Act 2013 shall be complied with and hence this clause is repugnant to the provisions of section 230(10) of the Act.

A landmark case in which the meaning of share has been clearly postulated is CIT v. Standard Vacuum Oil Co. where the Supreme Court of India said that

"by a share in a company is meant not any sum of money but an interest measured by a sum of money and made up of diverse rights conferred on its holders by the articles of the Company which constitute a contract between him and the company." In another case, Bucha F. Guzdar v. Commissioner of Income Tax, Bombay, the Supreme Court defined share as "the right to participate in the profits made by a company while it is a going concern and declares a dividend, and in the assets of the company when it is wound up." Therefore, a share, or share capital, is not a sum of money, and not just the interest of the shareholder in a company, but also represents a set of rights and liabilities.

Therefore, getting paid in cash against the share, be in fraction also, tantamounts to buy back of shares. But the scheme does not narrate that the provisions of section 68 of the Companies Act 2013 shall be complied with and hence this clause is repugnant to the provisions of section 230(10) of the Act. The scheme is therefore flawed."

10. The Petitioners have filed three rejoinders, first rejoinder on 26th December 2019, second rejoinder on 17th January 2020 and third rejoinder on 13th February 2020 to the reply affidavit filed by the Central Government, as on 05th August 2019, 06th January 2020 and 12th February 2020, respectively, as mentioned below :

" With regard to observations of the Central Government, as stated in the said affidavit dated 05th August 2019, we hereby submit as follows :

a) With regard to statements in Paragraph 2 (a), we say that the transferee company is not required to pay any fee for the increase in authorized capital by way of clubbing of the authorized capital of the transferor company. Both the applicant companies have duly paid the fees whenever there is increase in their authorized capital since incorporation, the receipt of the same is annexed herewith and marked as **Annexure A.** Further, a statement showing clubbing of authorized capital is annexed herewith and marked as **Annexure B.**

b) With regard to the statements in Paragraph 2(b), we say that the Appointed Date as mentioned in the scheme is 01st April, 2017. As clarified by the Ministry of Corporate Affairs in respect to the provision of Section 232(6), 'appointed date' may either be a specific calendar date or may be tied to the occurrence of an event such as, the fulfillment of a precondition that the parties to the scheme may have agreed upon. Further, the applicants have already submitted the application on 11.06.2018 in itself before the Hon'ble National Company Law Tribunal, Kolkata Bench. Net position of assets and liabilities as on appointed date and net changes in the position of assets and liabilities between 01.04.2017 and 01.04.2019 is annexed herewith and marked as **Annexure C.**

c) With regard to the statements in Paragraph 2(c), we say that the amalgamation of the Transferor Companies with the Transferee Company shall be accounted as per 'the pooling of interest method' prescribed under Accounting Standard 14 - 'Accounting for Amalgamations' issued by the Institute of Chartered Accountants of India and notified by the Central Government. Suitable changes have been made in clause 12.3 and 12.4 of the scheme, same is annexed and marked as **Annexure D** as follows :

> *"12.3 The difference between the assets and value of liabilities together with accumulated losses of the Transferor Companies transferred to the Transferee Company under this Scheme, as reduced by the aggregate paid-up value of the New Equity Shares issued and allotted by the Transferee Company to the shareholders of the Transferor Companies pursuant to this Scheme, shall be adjusted in reserves in the books of the Transferee Company."*
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> *"12.4 In case of any difference in accounting policy between the Transferor Companies and the Transferee Company, the impact of the same till the amalgamation will be quantified and adjusted in the*

General Reserve of the transferee Company and the same shall be dealt with in accordance with Generally Accepted Accounting ("GAAP") and applicable Accounting Standards, so as to ensure that the financial statements of the Transferee Company reflect the correct financial position on the basis of consistent accounting policy."

d) With regard to the statements in Paragraph 2(d), we say that certainly "Agarwal & Associates", Chartered Accountants were the statutory auditors of the company for the period 01.04.2014 to 18.03.2019 and from 01.04.2019 "Krishna Kumar & Company" were appointed as the statutory auditor's of the Transferee Company. The Transferee Company i.e, Prarthana Sales Private Limited had provided the certificate from the Practicing Chartered Accountant firm i.e, Amit Sheth and Associates due to non-availability of the company's statutory auditor in the city and urgency in filing the application before the Hon'ble National Company Law Tribunal, Kolkata Bench. However, now we have rectified our mistake and have attached the certificate from the company's statutory auditor with respect to the accounting treatment proposed, that the Scheme of Amalgamation is in conformity with the prescribed Accounting Standards; the same is annexed and marked as **Annexure E.**

e) With regard to the statements in Paragraph 2(e), we say that we have read clause 11.2 of the scheme of Amalgamation again and on thorough analysis of the same, we conclude that clause 11.2 deals with disposal of fraction shares which would not even come to one share and hence we may say that the contents of the clause 11.2 of the scheme doesn't tantamount to buy back of shares and therefore nothing has been stated in the scheme of Amalgamation about the compliance of section 68 of the Companies Act 2013.

f) With regard to the statements in Paragraph 2(f), we say that the statements contained therein, are affirmations and submissions by the respondent to this Hon'ble Tribunal and do not require any reply on the same."

"With regard to observations of the Central Government, as stated in the said affidavit dated 06th January 2020, we hereby submit as follows:

a) With regard to statements in Paragraph 2 (a), we say that the statements contained therein, are affirmations and submissions by the respondent to this Hon'ble Tribunal and do not require any reply on the same.

b) With regard to the statements in Paragraph 2(b), we say that the Appointed Date as mentioned in the scheme is 01st April, 2017. As clarified by the Ministry of Corporate Affairs in General Circular No. 09/2019 dated 21st August, 2019 in respect to the provision of Section 232(6) of the Companies Act' 2013, 'appointed date' may either be a specific calendar date or may be tied to the occurrence of an event such as, the fulfillment of a precondition that the parties to the scheme may have agreed upon. Further, in the instant case, the applicants have agreed to keep the Appointed Date as on 01.04.2017. A copy of the said circular issued by Ministry of Corporate Affairsis annexed herewith and marked as **Annexure A.**

c) With regard to the statements in Paragraph 2(c), we say that the statements contained therein, are affirmations and submissions by the respondent to this Hon'ble Tribunal and do not require any reply on the same.

d) With regard to the statements in Paragraph 2(d), we say that the statements contained therein, are affirmations and submissions by the respondent to this Hon'ble Tribunal and do not require any reply on the same.

e) With regard to the statements in Paragraph 2(e), we hereby undertake that post sanctioning of scheme of merger, at the time of allotment of shares to the shareholders of Transferor Company in the Transferee Company, if any share would come in fraction, will be settled in cash, same is also mentioned in clause 11.2 of the scheme.

Further, we say that, clause 11.2 of the scheme of Amalgamation specifically deals with the disposal of fractional shares which would not even come to one share. We hereby undertake that, post sanctioning of scheme of merger, at the time of allotment of shares to the shareholders of the Transferor Company, if shares would come in fraction, would be settled in cash. Detailed calculation of shares to be issued to Transferor Company, subsequent to sanctioning of scheme of Merger is enumerated herein below for your quick reference :

Number of Shares to be allotted to the shareholders of Transferor Company post Merger:

Share Holder's Name	**Existing Shares**	**Swap ratio**	**Number of shares to be allotted**
Anand Prakash Kejriwal	2,47,500	The shareholders of SSDL will get 0.40 shares in PSPL for every 67.98 shares held in SSDL	1,456.31
Jyoti Kejriwal	2,50,000	The shareholders of SSDL will get 0.40 shares in PSPL for every 67.98 shares held in SSDL	1,471.02
Bhagwati Devi Kejriwal	500	The shareholders of SSDL will get 0.40 shares in PSPL for every 67.98 shares held in SSDL	2.94
B L Kejriwal & Sons	500	The shareholders of SSDL will get 0.40 shares in PSPL for every 67.98 shares held in SSDL	2.94
A P Kejriwal & Sons	500	The shareholders of SSDL will get 0.40 shares in PSPL	2.94

		for every 67.98 shares held in SSDL	
Narsingh Mercantile Pvt. Ltd.	500	The shareholders of SSDL will get 0.40 shares in PSPL for every 67.98 shares held in SSDL	2.94
Priyam Agarwal	500	The shareholders of SSDL will get 0.40 shares in PSPL for every 67.98 shares held in SSDL	2.94

"With regard to observations of the Central Government as stated in the said affidavit dated 12th February 2020, we hereby submit as follows :

a) With regard to the statements in Paragraph 2(b), we undertake that, in case any shareholder's holding in the Transferor Company is such that the shareholder becomes entitled to a fraction of an equity share of the Transferee Company, the Transferee Company shall round off all fractional entitlements to the next whole number above the fractional entitlement and issue such number of securities to the relevant shareholders……"

11. The Official Liquidator attached to the High Court, Calcutta submitted its Report on 18th July, 2019, wherein he has stated that he is of the opinion that the affairs of the Transferor Companies do not appear to have been conducted in a manner prejudicial to the interest of its members or to public interest as per the provisions of the Companies Act, 1956/ the Companies Act, 2013, whichever is applicable.

12. Heard the Ld. Authorised representative of the Petitioner Companies and the approvals accorded by the members and creditors of the Petitioner Companies to the Scheme and the affidavits filed by the Regional Director, Eastern Region, Ministry of Corporate Affairs, the rejoinders filed by the Petitioner Companies to the observation of the Regional Director and the rejoinder thereto, there appears to be no impediment in sanctioning the present Scheme. The Petitioners shall abide by the undertakings given in their affidavits.

13. Consequently, since all the requisite statutory compliances have been fulfilled, the Company Petition, bearing CP (CAA) No. 426/KB/2019, connected with CA(CAA) No. 914/KB/2018, is hereby allowed and the Scheme is sanctioned on the following terms under Section 230 & 232 of the Companies Act, 2013 :

ORDER

a. The Scheme of Amalgamation, annexed with the petition, as "Annexure-E", is sanctioned by this Tribunal, to be binding with effect from 01.04.2017, on the Transferor Company with the Transferee Company and their respective shareholders and all concerned.

b. All properties, rights and interest of the Transferor Company are transferred to and vested without further act or deed in the Transferee Company, pursuant to Section 232 of the Companies Act, 2013, read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

c. All the liabilities and duties of the Transferor Company are transferred without further act or deed in the Transferee Company, pursuant to Section 232 of the Companies Act, 2013, read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

d. That all the proceedings and/or suit appeals now pending by or against Transferor Company shall be continued by or against Transferee Company.

e. The Transferee Company do issue and allot shares to the shareholders of Transferor Company, as envisaged in the said Scheme of Amalgamation and for that, if necessary, to increase the authorised share capital.

f. The Transferor Company shall stand dissolved without winding up from the appointed date.

g. The schedule of assets in respect to the Transferor Companies be filed within a period of 60 days from the date of this Order.

h. In the event any of the Petitioner Companies supplies a computerized printout of the said scheme of Amalgamation in acceptable form in the Registry concerned, is hereby directed to append such computerized

printouts upon verification to the certificate copy of this Order, without insisting on a handwritten copy thereof.

i. The petitioner Companies, respectively, do, within 30 days after the receipt of the certified copy of this Order, cause a certified copy thereof to be delivered to the Registrar of Companies, West Bengal.

14. The CP No. 426/KB/2019, connected with CA (CAA) No. 914/KB/2018, is disposed off, accordingly.

15. Urgent certified copies of this Order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rajasekhar V.K)
Member (Judicial)

Signed on this, the 16th day of July, 2021

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