

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH

CP (CAA) /2001/2018

In the matter of Companies Act 2013
and in the matter of Sections 232 read
with Section 230 of the Companies Act,
2013.

AND

In the matter of the Scheme of
Arrangement between
TIDAL LABORATORIES PRIVATE LIMITED
(DEMERGING COMPANY)

AND

TIDAL HEALTHCARE PRIVATE COMPANY
(RESULTING COMPANY)

TIDAL LABORATORIES PRIVATE LIMITED
First Applicant Company
(Demerging Company)

TIDAL HEALTHCARE PRIVATE LIMITED
Second Applicant Company
(Resulting Company)

Order delivered on 10th Sept 2018.

Coram: Hon'ble Bhaskara Pantula Mohan, Member (J)

Hon'ble V. Nallasenapathy, Member (T)

For the Petitioner(s): Mr. Ravindra Kumar Jain – Practicing CA

For the Regional Director: Mr. S. Ramakantha.

For the ROC: Mr. Neelambuj Sahai, CP.

Per: V. Nallasenapathy, Member (T)

ORDER

1. Heard the Authorised Representative of the Petitioner Companies. No objector has come before this Tribunal to oppose the Petition nor any party has controverted any of the averments made in the Petition.

2. The Joint Company Petition bearing CP.(CAA) /2001/MB/2018 is filed by M/S. TIDAL LABORATORIES Pvt Ltd(1st Petitioner / Demerging Company) and M/S TIDAL HEALTHCARE PVT LTD (2nd Petitioner / Resulting Company) under Sections 232 r/w section 230 of the Companies Act, 2013, by inter-alia seeking to sanction the Scheme of Arrangement , so as to be binding on all the Equity Shareholders / Members, Creditors and Employees of both the Demerging Company & Resulting Company etc. This Scheme inter-alia provides for lawful transfer of Domestic Sales Undertaking of the Demerging Company and vesting of the same in the Resulting Company:
3. The case was listed before this Bench on 21.3.2018, 16.7.2018, 2.8.2018, 23.8.2018, 30.8.2018, 6.9.2018 and 10.9.2018...
4. BRIEF FACTS OF CASE, WHICH ARE RELEVANT TO THE ISSUE IN QUESTION ARE SUBMITTED AS UNDER:
 - a) The Demerging Company is an unlisted Private Limited Company incorporated on 29.12.1994 under the provisions of the Companies Act, 1956.The Demerging Company has its Registered Office at A/101 Ghatkopar Industrial Estate, LBS Marg, Ghatkopar (West), Mumbai, Maharashtra- 400086.The Corporate Identity Number of the Demerging Company is U24230MH1994PTC084152.
 - b) Authorized Share Capital of Demerging Company Tidal Laboratories Pvt Ltd as on 31st March 2017 is 5,00,000 equity shares of Rs. 10/- each amounting to Rs. 50,00,000. Issued, subscribed and Paid up share capital is 4,76,020 equity Shares of Rs. 10/- each amounting to Rs. 47,60,200/- There has been no further change in the abovementioned Capital structure of the Companies, post the dates mentioned above, till date.
 - c) The Resulting Company is also an unlisted Private Limited Company incorporated on 19.10.2000 under the provisions of the Companies Act, 1956, originally as Neqtor Pharmaceutici Private Ltd. and subsequently name changed as Tidal Healthcare Private Ltd. The Resulting Company has its Registered Office at A/101, Ghatkopar Industrial Estate, LBS Marg, Ghatkopar (West), Mumbai, Maharashtra - 400086.The Corporate Identity

Number of the Resulting Company is U24239 MH2000PTC129259.

- d) Authorized Share Capital of Resulting Company is 2,00,000 equity shares of Rs. 10/- each amounting to Rs. 20,00,000. The Authorised Capital was increased from Rs 5,00,000 to Rs 20,00,000 on 13.1.2018 and ROC fees and stamp duty paid. Issued, subscribed and Paid up share capital is 50,000 equity Shares of Rs. 10/- each amounting to Rs. 5,00,000/-There has been no further change in the abovementioned Capital structure of the Companies, post the dates mentioned above, till date.
- e) Demerging Company is presently involved in (i)Pharmaceutical manufacturing, contract manufacturing, third party manufacturing, loan license manufacturing, with core area of operation being manufacturing (ii) Marketing & sales of pharmaceutical ethical products through domestic sales force and a compatible distribution network.
- f) Resulting company is engaged in Marketing & Sales and being geared up and positioned for running a pharmaceutical Domestic Marketing & Sales.....
5. The Learned Representative of the Applicant Companies submits that the Directors of both Demerging Company and Resulting Company believe that the proposed Arrangement will be for the benefit of both the Companies. Manufacturing and Marketing are two distinct separate core functions and each call for specialization to achieve excellence and the proposed Compromise or Arrangement will be a step in the right direction for the future superior performance of both the Companies.

The reasons and circumstances leading to and justifying the proposed Scheme of Arrangement and which make it beneficial for both the Companies concerned, including their Members and Creditors, Employees are as follows: -

- a. The Demerging Company presently has 3 (Three) Undertakings viz (i) Contract Manufacturing Undertaking (ii) Domestic sales undertaking and (iii) Proposed Export Undertaking. Each of the Undertakings has distinctive characteristics, incubation periods, life cycles, financial cycles and gross margins.

- b. The three undertakings of the Demerging Company neither promote synergy nor promote specialization. At the same time, it inhibits expansion in a systematic & planned manner, restricts focused varying qualitative attention each undertaking demands, thereby decreasing efficiency and effectiveness leading to heavy capacity underutilization of the manufacturing facility
- c. While the Contract Manufacturing business which is being carried out by the 'Contract Manufacturing Undertaking is referred to in the International parlance as the 'CRMO' (Contract Research & Manufacturing Organization) which business is more Research & Development and Technology oriented. This activity happens at the Factory and Laboratory level and Technical skill oriented.
- d. This undertaking is highly capital intensive and requires huge investment in setting up the unit. This undertaking also calls for annual investment on up-gradation of Plant & Machineries in line with the increasing & Newer Technologies. This Undertaking is highly regulated and involves regular inspection of Regulatory Authorities.
- e. Pharmaceutical Exports which is proposed to be taken up as a part of the Contract Manufacturing and Exports undertaking is also highly regulated.
- f. Because of the above reasons, the management of the Demerging Company is of the opinion that the demerger contemplated in the present scheme by segregating an undertaking involved with science driven culture from other undertaking involved with sales driven culture is in the right direction and will also help both businesses to grow at a faster pace than what is achieved at present.
- g. The Domestic Marketing & Sales Undertaking is totally a different category of business. In this undertaking, the market place is **INDIA**. Indian Domestic Market is operating as per medical specialty. The Field Medical Representatives personally visit Doctors, promote the brand and generate prescriptions.
- h. The Management of the Demerging Company has therefore decided that the segregation of the Domestic Marketing & Sales Undertaking, through the present restructuring, would be most appropriate in the circumstances to facilitate a

separate and better management focus for both businesses involved and thereby provide the distinct competencies required for achieving its full potential and greater success.

- i. The restructuring will inter-alia enable the Demerging Company to retain focus on it's Contract manufacturing and to initiate export activities and to expand its business in such activity which will therefore enable the Demerging Company to function in an effective, economical and efficient manner. The Resulting Company is desirous & being geared up for running a pharmaceutical marketing and sales business and must organize the required capital and other resources that are necessary for the purposes of absorbing the new business. Post implementation of the Scheme, the Resulting Company will be in a better position to raise capital, borrow money, attract suitable business partners/investors etc., to take its business to greater levels as the Board of the Resulting Company may deem fit.
 - j. The Scheme will enable both Companies to carry on their respective business separately more conveniently and advantageously with an independent management set-up and greater focus, attention and specialization.
6. The Authorised Representative of the Petitioner Companies further highlighted the salient features of the Compromise or Arrangement

(i) De-merger and transfer of the Transferred undertaking of the Demerging Company and vesting thereof in the Resulting Company

- With effect from the Appointed Date and upon this Scheme becoming effective on the Effective Date, subject to the provisions of this Scheme in relation to the modalities of transfer and vesting, stipulated and pursuant to Section 232(1)(b) of the Companies Act, the entire Transferred Undertaking of the Demerging Company shall be de-merged and transferred to and shall be vested in or shall be deemed to have been transferred to and vested in the Resulting Company, as a going concern, for all the estate, right, title and

interest of the Demerging Company therein without any further act or deed, with effect from the opening of business as on the Appointed Date, in accordance with the provisions of Section 2(19AA) of the Income-Tax Act, 1961, so as to become the property of the Resulting Company.

- The implementation of Demerger of Marketing and Sales function from Demerging Company to Resulting Company is governed by Professional valuation parameters.
- Accordingly, Factory/Manufacturing Assets such as Land, Building Plant & Machinery, Furniture, Fixtures, Fittings, Manufacturing Licences will continue with the Demerging Company.
- Trade Marks will pass on to and vests with the Resulting Company. The Trade Marks both registered and Pending for registration with the Demerging Company appended to the scheme of Arrangement under schedule-1 Pages 221 to 224 of the application shall be transferred to Resulting Company
- Reserves/Surplus and Unsecured loan will be allocated as per the valuation parameters.
- All the sales and service between Demerging company and Resulting company and vice versa will be treated as if no Demerger has taken place till the effective date. Sales Tax /service tax, Income Tax, GST will be assessed as if no Demerger has taken place up to the effective date.
- Profit as may arise till effective date will be apportioned as per valuation parameters.

(ii) ISSUE OF SHARES:

- Upon the Scheme becoming effective and in consideration of the transfer and vesting of the Transferred Undertaking in the Resulting Company pursuant to this Scheme, the Resulting Company shall without any further act or deed, issue and allot 9.5 equity share of Rs 10/- each credited as fully paid up of the Resulting Company for every 100 (Hundred) equity shares of 10/- each held by every member of the

Demerging Company in the said Company, the fractional entitlements therein, is rounded off to the nearest number. The Resulting Company shall issue and allot the aforesaid equity shares on the Record Date in terms of Valuation report issued by Chartered Accountant firm M/s Harish Hegde & co

- No fractional certificates/coupons shall be issued by the Resulting Company in respect of any fractional entitlements to which the members of the Demerging Company may be entitled and fractional entitlements therein will be rounded off to the nearest number.
- The new Equity Shares issued by the Resulting Company shall rank for dividend, voting rights and in all other respects pari-passu with the existing Equity Shares of the Resulting Company as on the date of allotment.

7. The Authorised Representative of the Petitioner Companies states the following additional features ..

- Both the Demerging Company and the Resulting Company have the same Shareholders, with majority stake, belonging to a single family.
- In addition, all the shareholders have the same percentage of holding in both the Companies in relation to the Capital.
- The Authorised Representative states that this aspect in principle, inherently & independently protects the shareholders interest, apart from the Resulting Company issuing its shares to shareholders of the Demerged Company in terms of a professional valuation process under Companies Act 2013.
- Demerging Company and Resulting Company are debt free
- Both Demerging Company and Resulting Company have no Bank Loan, no Public Deposit, or any other Secured Loans from any source.

- In the case of Demerging Company, even the unsecured creditors/Trade Creditors as on 31.3.2017, have since been paid

COMPLIANCE OF RULES UNDER COMPANIES ACT AND COMPLIANCE OF DIRECTION OF THIS TRIBUNAL

8. The Learned Representative of the Petitioner Companies submits that the Board of Directors of the Demerged Company & Resulting Company had approved the Scheme of Arrangement i.e. for transfer and Demerger of Marketing & Sales business of Demerged Company into Resulting Company with effect from 01.04.2017 by passing Board Resolution, which is annexed to the Scheme Petition
9. The Learned Representative of the Petitioner Companies states that the Petitioner Companies have complied with all the direction passed in the Company Scheme Application and the Company Scheme Petition has been filed in consonance with the Order passed in the Company Scheme Application
10. The Learned Representative and the Petitioner Companies further states that Petitioner Companies have complied with all requirements as per directions of this Tribunal and they have filed necessary Affidavits of Compliance in the Tribunal.
11. Moreover, the Applicant Companies through their Representative undertakes to comply with all statutory requirements, if any, as required under Company's 2013 and the said undertaking is accepted.

OBSERVATIONS OF REGIONAL DIRECTOR, MCA WESTERN REGION, MUMBAI

12. The Regional Director has filed his Representation dated 4.9.2018 requesting the Tribunal to take the representations on record & to consider the observations at Sr No IV (a) to (e) mentioned therein and pass such order or orders as deemed fit and proper in the facts and circumstances of the case

The observations of the Regional Director on the proposed scheme to be considered by this Tribunal in terms Sr No IV (a) to (e) are as under...

- (a) In addition to compliance of AS- 14 (IND AS -103) the Transferee Company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5 (IND AS-8) etc;
- (b) As per Part I Definitions Clause 1.2 of the scheme **"Appointed Date" means 1st April 2017 (01.04.2017)** or such other date as may be approved by the Tribunal or any other appropriate authority. In this regard, it is submitted in terms of provisions of section 232(6) of the Companies Act, 2013 it should be **April 01,2017**.
- (c) As per Part-I Definition Clause **1.4** of the scheme **"Effective Date"** in relation to the scheme means the last of the dates on which the certified copy of the order the order of this Hon'ble Tribunal under Sec 232(7) of companies Act 2013 is filed with ROC Mumbai. In this regard it is submitted that the **"Effective Date" shall be as per provisions of section 232 (6)** of the Companies Act, 2013 **and not** as specified in the above said clause of the scheme;
- (d) Hon'ble NCLT may kindly direct the petitioners to file an affidavit to the extent that the scheme enclosed to Company Application & Company petition, are one and same and there is no discrepancy/any change/changes are made, for changes if any, liberty be given Central Government to file further report if any required;
- (e) In view of the objection raised by the ROC Mumbai, mentioned at Para 12 above Hon'ble NCLT may pass appropriate orders/ orders as deem fit.

Quote .."PARA 12..**Status of ROC Report** ..ROC Mumbai vide report letter no ROC/STA/DG/129259/230-232/1271 dated 21.5.2018 has mentioned that there No Investigation, Inspection, inquiry proceedings are

pending and there is no complaint against the affairs of the company,

However, at para 32 he has stated that the demerged and resulting Company has not filed e form GNL 1 with all attachments with ROC

Further he stated the matter may be decided on merits"

....Unquote

13. In so far as the observations of the Regional Director, as stated in paragraph IV(a) of his report is concerned, the Petitioner Companies through their Authorised Representative undertake to comply with the applicable Accounting Standards, including AS 14 (IND AS 103) and AS 5(IND AS 8) and pass such accounting entries which are necessary in connection with the scheme.
14. In so far as the observation of the Regional Director, as stated in paragraph IV (b) of his report are concerned, the Petitioners through their Authorised Representative submit that the "Appointed Date" of the Scheme shall be 1.4.2017 in terms of provisions of Section 232(6) of the Companies Act, 2013.
15. In so far as the observation of the Regional Director, as stated in paragraph IV (c) of his report are concerned, the Petitioners through their Authorised Representative submit that the Effective Date shall be as per provisions of Sec 232(6) of the Companies Act 2013 and not as specified in clause 1.4 of the scheme.
16. In so far as the observation of the Regional Director, as stated in paragraph IV (d) of his report are concerned, the Petitioners through their Authorised Representative submit that the scheme enclosed to the Company Application & Company Petition are one and the same and there is no material discrepancy /change /changes are made, and the due process in the implementation will be adhered. For good order, Petitioners through their Authorised Representative have agreed to file, the requisite Affidavit on the lines directed in the RD's Report within a period of 5 working days from the date of this order.
17. In so far as the observation of the Regional Director, as stated in paragraph IV (e) of his report, with respect to Para 12 of ROC Report, are concerned, the Petitioners through their Authorised Representative submit that the objection of ROC forming part of RD's Report, was resolved & directives were complied on

5.9.2018, as soon a copy of RD's report was received by the Petitioner Companies on 4.9.2018, by filing on line e Form GNL 1, for both Demerged Company and Resulting Company with all applicable attachments and the applicable MCA acknowledgement is SRN H07534571 and SRN H07540867 dated 5.9.2018.

The observations made by the Regional Director have been explained by the Petitioner Companies in Para 13 to 17 above. The clarifications and undertakings given by the Petitioner Companies are accepted
In the result, the C.P(CAA) /2001MB/2018 is allowed with the following directions: -

1. Sanctioned the Scheme of Arrangement (enclosed at Page No.190 to 224 of the Joint Petition) with Appointed date as 01.04.2017, and it is ordered that the same is binding on all the Equity Shareholders / Members and Creditors (Secured & Unsecured) of both the Petitioner Companies
2. 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.

SD/-

V. Nallasenapathy
Member (T)

SD/-

Bhaskara Pantula Mohan
Member (J)