

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

**Present: SHRI R.VARADHARAJAN, MEMBER (JUDICIAL)**

**CAA (127)/ ND/ 2017**

**CONNECTED WITH**

**COMPANY APPLICATION (MAIN) NO. 30 (PB) OF 2017**

**IN THE MATTER OF SECTIONS 230-232 OF THE COMPANIES ACT, 2013**

**AND**

**IN THE MATTER OF SCHEME OF AMALGAMATION**

**BETWEEN**

**KOBELCO CRANES INDIA PRIVATE LIMITED**

Company registered under the Companies Act, 1956

Having Registered Office at:

C-20, South Extension, Part-II

New Delhi-110 049

CIN NO: U29292DL2010FTC206640

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

**KOBELCO CONSTRUCTION EQUIPMENT INDIA PRIVATE LIMITED**

Company registered under the Companies Act, 1956

Having Registered Office at:

C-20, South Extension, Part-II

New Delhi-110 049

CIN NO: U45200DL2006PTC155770

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

**AND**

**Their respective Shareholders and Creditors**

**ADVOCATE FOR THE PETITIONERS: Mr. Mahesh Agarwal, Advocate**  
**Mr. Raghav Pandey, Advocate**  
**Mr. Rajeev Kumar, Advocate**

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

**Prosecutor**

## ORDER

Order Delivered on: 18.09.2017

1. This petition filed by the companies above named is coming up finally before us on 04.09.2017 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/ Petitioner Company No.1 with the Transferee/ Petitioner Company No.2. 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 Tribunal in CA (M) 30/PB/2017. The Tribunal vide its order dated 10.04.2017 and as modified vide order dated 24.04.2017, was pleased to dispense with the requirement of convening the meetings of the equity shareholders and secured creditors of the Petitioner Companies in view of their consents having been obtained and produced before it or there was none therefore the necessity of convening the meeting did not arise as the case may be. In relation to the unsecured creditors of the Petitioner Companies, the Tribunal directed the petitioner companies to convene the meeting for obtaining their approval for the sanction of the scheme.
2. Under the circumstances, the petitioners have filed their joint petitions for sanction of the Scheme of Amalgamation before the Tribunal under the present



provisions, subsequent to the order of dispensation and convening of the meetings ordered by the Tribunal on 10.04.2017 and as modified as stated above.

3. On 21.07.2017, the Tribunal ordered Notice in the Second Motion petition in CAA 127/ND/2017 moved by the petitioners under Sections 230-232 of the Companies Act, 2013 in connection with the scheme of amalgamation, to the Registrar of Companies, Regional Director, Official Liquidator, Income Tax Authorities and RBI. The Petitioners were also directed vide said order to carry out publication in the newspapers "Statesman" in English (Delhi Edition) and "Jansatta" in Hindi (Delhi Edition).
4. The petitioners, it is seen from the records have filed an affidavit dated 18<sup>th</sup> August, 2017 in relation to the compliance of the orders passed by the Tribunal dated 21.07.2017 and a perusal of the same discloses that the petitioners have effected the paper publication as directed by the Tribunal in one issue of the 'Statesman' in English edition and 'Jansatta' in Hindi edition on 17.08.2017. 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, Income Tax Department and Official Liquidator on 28.07.2017 in compliance with the order dated 21.07.2017 and in proof of the same acknowledgement made by the respective offices have also been enclosed.
5. The representative of the Official Liquidator has filed an affidavit dated 23.08.2017 stating that the office of Official Liquidator does not have any objection to the scheme being approved. However, it has been highlighted by the Official Liquidator that there is





tax assessment which is pending in case of Transferor and Transferee Companies. The income tax department has raised demand of Rs. 38,86,040 for the F.Y.2011-2012; Rs. 3,66,99,985 for F.Y. 2012-2013; Rs.14, 05,03,440 for the F.Y. 2013-2014 in respect of Transfer Pricing in case of Transferor Company and in case of Transferee Company demand of Rs. 3,11,54,965 for the F.Y. 2006-2007; Rs. 8,49,89,760 for F.Y. 2007-2008; Rs. 6,74,80,940 for F.Y. 2009—2010; Rs. 12, 74,03,850 for F.Y.2010-11 and Rs.3,00,30,040 for the F.Y.2012-2013. Further, it has also been mentioned that both petitioner companies are having foreign shareholders, so they should be directed to comply with FEMA.

6. In response to the Official Liquidator's observation, the transferor companies have filed an additional affidavit dated 1<sup>st</sup> September, 2017 stating that they have undertaken that all the pending assessment proceedings and tax liabilities of the Transferor Company shall stand transferred to the Transferee Company and shall become tax liabilities of the Transferee Company. They have also further added that the indicative post-merger net worth of the Transferee Company as on the Appointed date shall be Rs. 220 crore, which dispels any doubt on the ability of the Transferee Company to pay the tax demands of both the Transferor Company and the Transferee Company post the merger.
7. Further, Regional Director, Northern Region has also filed an Affidavit dated 24<sup>th</sup> August, 2017 and have stated that there is no objection to the sanction of the Scheme. However Regional Director stated that Registrar of Companies at para 32 of their report observed that the Transferor Company is a subsidiary of Kobelco Construction Machinery Co. Ltd Japan therefore, it should be asked to comply with RBI guidelines as required under FEMA for the proposed consideration to be paid to the said company/entity.



8. In response to the Regional Director's observation, both the Companies have filed an additional affidavit stating that they are undertaking to comply with the provisions of the FEMA/ RBI as may be applicable.
9. A perusal of the affidavit of service shows that notice to the Income Tax officer, Delhi had been duly sent and served on 28.07.2017. Similarly RBI had been also served on 28.07.2017. However, from the record of this Tribunal, it is seen that no observations had been received from these authorities even after expiry of the period of 30 days and hence this Tribunal presumes by virtue of section 230 (5) of Companies Act, 2013 that these authorities does not have objection to the sanction of the scheme.
10. That the Petitioner Companies have complied with proviso to Section 230 (7) proviso/ Section 232 (3) by filing the certificate of the Company's Auditor's relating to compliance with Accounting Standards prescribed under section 133 of the Act.
11. The counsel for Petitioners states that they have not received any objections from the 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 and the objections of RD and OL having satisfactorily been explained and as well as conceded as such by the Learned representatives of RD and OL, this Tribunal sanctions the scheme of amalgamation annexed as Annexure -P-1 with the Company Petition as well as the prayer made therein.





12. 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.

13. 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 including arising out of Transfer Pricing, 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 as per clause 13 of the scheme, all the employees of the Transferor Company 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.

(5) 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 15 of the SCHEME OF AMALGAMATION herein the shares in the transferee company to which they are entitled under the said SCHEME OF AMALGAMATION;

(6) Both the Transferor Company and Transferee 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 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 Company 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)