

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH-III
NEW DELHI**

C.P.CA(CAA)-120/ND/2017

Section: Section 230-232 and other applicable provisions of the Companies Act, 2013 read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

In the matter of Scheme of Amalgamation

OF

**Mega Airways Limited
(Transferor Applicant Company)**

WITH

**Mega Corporation Limited
(Transferee Applicant Company)**



MEMO OF PARTIES

Mega Airways Limited
108, First Floor,
Taimoor Nagar,
Opp. New Friends Colony,
New Delhi-110025

(Transferor Applicant Company)

Mega Corporation Limited
108, First Floor,
Taimoor Nagar,
Opp. New Friends Colony,
New Delhi-110025

(Transferee Applicant Company)

Coram:

R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)

Counsel for the Petitioners: :Mr.Mukesh Sukhija,Advocate
With Ms.Pooja Bhatia, PCS

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Order delivered on: 04.12.2017

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ORDER

A joint application has been filed under Sections 230-232 of Companies Act, 2013, and other applicable provisions of the Companies Act, 2013 read with Companies(Compromises, Arrangements and Amalgamations) Rules, 2016 by the applicant companies above named in relation to the Scheme of Arrangement by way of Amalgamation (hereinafter referred to as the "SCHEME") proposed between the applicants. The said Scheme is also annexed as Annexure "A-3" to the application. The applicants above named have preferred the instant application in effect for the following purpose as evident from the reliefs sought for in the Application, namely:

- (i) Dispense with convening the meeting of Shareholders and unsecured creditors of the Applicant Transferor Company.
- (ii) Dispense with convening the meeting of Shareholders and unsecured creditors of the Applicant Transferee Company.

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- (iii) Allow the Applicant Companies to make Petition u/s 230, 232 of the Companies Act, 2013 for approval of the Scheme of Amalgamation of Mega Airways Limited with Mega Corporation Limited.
- (iv) Direct service of Notice of this Application on (a)the Central Government through the office of the Regional Director, Northern Region, Ministry of Corporate Affairs, New Delhi; (b) the Registrar of Companies, Delhi and Haryana, New Delhi; (c) The Official Liquidator, Ministry of Corporate Affairs, New Delhi; (d) the Income Tax Department, New Delhi; (e) the Bombay Stock Exchange; and (f) the Reserve Bank of India.
- (v) To pass such order as this Hon'ble Bench may deem fit.

2. An Affidavit in support of the above application sworn for and on behalf of the Applicant Companies by one Mr. Surendra Chhalani, Director in both the companies has been filed. Counsel for the joint applicants took us through the averments made in the application as well as the typed set of documents annexed therewith. Learned Counsel represents that the Scheme does not contemplate any corporate debt restructuring exercise as



contemplated under Section 230(2) of the Act. It is further represented that a joint application filed by the applicants are maintainable in view of Rule 3(2) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and it is also represented that the registered office of both the applicant companies are situated within the territorial jurisdiction of this Tribunal and falling within the purview of Registrar of Companies, NCT, New Delhi. The Transferor Company it is represented is the wholly owned subsidiary of the Transferee Company and that presently the Transferor Company is not carrying on any business. Both the transferor and transferee companies have annexed their charter documents as well as the audited financial statements for the year ended 31.03.2017 and in addition unaudited provisional accounts for the period ended 30.06.2017. It is also represented that the board of directors of both the transferor and transferee companies have unanimously approved the proposed Scheme on 07th July 2017.

3. In relation to Mega Airways Limited being the Transferor Company in the Scheme marked as Annexure- "A-3", it is represented that it is having 8 Equity Shareholders and that seven of them are nominees of the Transferee Company and all of them have given their consents by way of affidavit. It is further represented by the Ld. Counsel for Applicants that the Transferor Company has no Secured Creditor and Unsecured Creditor as on 30.6.2017. In relation to the shareholders of the Transferor Company dispensation is



sought for from convening and holding of the meetings in view of consent affidavits being obtained and filed.

4. In relation to Mega Corporation Limited being Transferee Company in the Scheme marked as Annexure-"A-3", Ld. Counsel represents that the company is a listed Company on the Bombay Stock Exchange having 4752 Equity Shareholders. It is further represented by the Ld. Counsel for Applicants that the Transferee Company has no Secured Creditor and has 18 Unsecured Creditors. In relation to both the Equity Shareholders as well as Unsecured Creditors of the Transferee Company, dispensation of the meetings for the purpose of obtaining their approval to the proposed Scheme of Amalgamation is sought for on the premise that as the Scheme of Amalgamation is between the Holding company and its wholly owned subsidiary and that there is no allotment of shares contemplated under the Scheme of Amalgamation. Further, it is also represented that the accounting treatment as contemplated in the Scheme is by way of pooling of interests method which has also been certified by the statutory auditors of the respective companies. In relation to the above submission that even though the Transferee Company being a listed Company, in view of the Scheme of Amalgamation being contemplated is between the Holding Company and its subsidiary and that the meetings as contemplated under the provisions of Companies Act, 2013 can be dispensed with, reliance is placed on several



decisions including the one passed by the Hon'ble High Court of Punjab & Haryana at Chandigarh in Company Petition No. 153 of 2013 dated 22.11.2013 under the erstwhile provisions of Companies Act, 1956. When this Tribunal queried about the procedure prescribed specifically under Section 233 of the Companies Act, 2013 as applicable to schemes involving holding and subsidiary companies, the reply of the Counsel for Applicants was that as per Section 233(14) it is only an optional procedure and that the Applicant Companies can either come under the procedure as prescribed under Section 233 or have resort to Section 230 and 232 of the Companies Act, 2013 (i.e.) come before this Tribunal seeking sanction of the Scheme of Amalgamation, as per their choice.

5. In relation to the territorial jurisdiction, Ld. Counsel for the applicant companies submit that since the registered office of the respective companies fall within the purview of Registrar of Companies, NCT, New Delhi, this Tribunal has the necessary territorial jurisdiction to entertain the joint application.

6. This Tribunal however is not convinced by the representation put forth on behalf of the Petitioners/applicants that in the cases where the relationship between the Transferor and Transferee Company is that of a



wholly owned subsidiary and a holding Company and that in the absence of any share exchange contemplated, then meeting should be dispensed with as was done by the Courts earlier under the provisions of Companies Act, 1956. It is pertinent to note that under the erstwhile provisions of Companies Act, 1956, provisions which are analogous to Section 233 of the Companies Act, 2013 were not available for the companies to avail of. Hence taking into consideration the facts and circumstances of the case, Courts were permitting dispensation as per exigencies of the situation. However, in order to obviate the necessity of conforming to the lengthy procedure as prescribed and to obviously cut down on procedural delays in compliance as prescribed under Section 230 to 232 of the Companies Act, 2013 analogous in most respects to the procedure prescribed (under Section 391 to 394) of the earlier Act of 1956, under the present dispensation speedier procedure has been framed under Section 233 which is to the following effect:-

233. (1) Notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following, namely:—

(a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued



by the transferor company or companies and the transferee company;

(b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. of the total number of shares;

(c) each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and

(d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

(2) The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

(3) On the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.

(4) If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days:

Provided that if no such communication is made, it shall be presumed that he has no objection to the scheme.

(5) If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal within a period of sixty days of the receipt of the scheme under subsection (2) stating its objections and requesting that the Tribunal may consider the scheme under section 232.

(6) On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may



direct accordingly or it may confirm the scheme by passing such order as it deems fit:

Provided that if the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.

(7) A copy of the order under sub-section (6) confirming the scheme shall be communicated to the Registrar having jurisdiction over the transferee company and the persons concerned and the Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where transferor company or companies were situated.

(8) The registration of the scheme under sub-section (3) or sub-section (7) shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.

(9) The registration of the scheme shall have the following effects, namely:—

(a) transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company;

(b) the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company;

(c) legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and

(d) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company.

(10) A transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.

(11) The transferee company shall file an application with the Registrar along with the scheme registered, indicating the



revised authorised capital and pay the prescribed fees due on revised capital:

Provided that the fee, if any, paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorised capital enhanced by the merger or amalgamation.

(12) The provisions of this section shall mutatis mutandis apply to a company or companies specified in sub-section (1) in respect of a scheme of compromise or arrangement referred to in section 230 or division or transfer of a company referred to clause (b) of subsection (1) of section 232.

(13) The Central Government may provide for the merger or amalgamation of companies in such manner as may be prescribed.

(14) A company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation.

7. From a perusal of the above provisions of Section 233 of the 2013 Act, it is quite evident that the procedure prescribed thereunder is less cumbersome and hence much more speedier and cost efficient as compared to the procedure prescribed under Section 230-232 of the Act and the simplified procedure has been made applicable essentially in relation to two categories of schemes of merger or amalgamations namely:-

- (1) Between two or more small companies; or
- (2) Between a holding company and its wholly-owned subsidiary company.



8. Thus the intent of the legislature is quite clear in the sense that while on the one hand it wants to cut down on the formalities required for compliance in relation to small companies and companies having the relationship of holding and wholly owned subsidiary, on the other hand it also wants to de-clog and unburden this Tribunal of dealing with matters of routine nature as compared to matters over which this Tribunal is required to focus and exercise its energies in dealing with it.

9. Now turning to the provisions of Section 233 of the 2013 Act, it is pertinent to note that the said Section 233, opens with the words "Notwithstanding the provisions of Section 230 and Section 232" and under the given circumstances virtually seeks to keep aside the provisions of Section 230 to 232 provided the conditions prescribed thereunder i.e Section 233 are satisfied thus obviating the companies specified thereunder contemplating a scheme of merger or amalgamation between or amongst themselves from approaching this Tribunal. However, it is the submission of the Learned Counsel for the Petitioner that ignoring the provisions of Section 233(1) of the Act, by virtue of sub-section (14) of Section 233 of the Act, a Company covered under the Section may seek to come under the provisions of Section 230 to 232 for the approval of any scheme for merger or amalgamation. If the said submission is taken at face value, then the provisions of Section 233 and the opening words used in Section 233 of the



Act is to be effectively considered as otiose. However, that cannot be the intent of the Legislature, taking into consideration that while interpreting a statute, each and every word enacted as contained in statute has to be considered as having been enacted with a purpose and intent and with wisdom behoved on the Legislature which enacted the statute. In the circumstances the opening words as contained in sub-Section (1) of Section 233 as well as sub-Section 14 of Section 233 is required to be harmoniously read so as not to render the provision as superfluous and keeping that in view it will be seen that even though a Scheme of Merger or Amalgamation may be contemplated between companies whose relationship is that of the one envisaged in Section 233 of the Act, however may not satisfy one or more of the conditions prescribed therein, for (e.g.) in relation to clause (c) of sub-Section (1) of Section 233 pertaining to solvency test. Under the said circumstances, the companies involved in the Scheme should not be denied with an opportunity to seek sanction of their Scheme and hence a recourse or fall back has been provided by virtue of sub-Section (14) of Section 233 of the Act. Hence the Applicants/Petitioners have to show the reasons as to what prevents them from approaching the named authority prescribed in Section 233 of the Act for the sanction of the Scheme between companies envisaged thereunder and instead take recourse to this Tribunal for sanction.

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10. However, it is seen that no such reasons have been given in the instant application by the companies involved in the Scheme of Merger or Amalgamation. Further it is also to be seen that once the applicant companies elect to approach this Tribunal instead of taking recourse to the provisions of Section 233 of the Act, it consciously subjects itself to the rigors of the provisions of Section 230 to 232 of the Act of 2013 read along with attendant rules framed thereunder. Even though in some instances this Tribunal had dispensed with meetings, however they are far and few and even in the said cases it has been dispensed with in view of them being private limited companies and also closely held having miniscule number of shareholders and consents having been also obtained and produced.

11. However, in the instant case the same is not the position and the Transferee Company is a widely held Public Company, whose shares are also listed. The decision cited by the Applicants Counsel, of the Hon'ble NCLT, Bombay in Re: Housing Development Finance Corporation Ltd. & Ors. in CSA No.243 of 2017 can be distinguished in view of Section 233 of the Companies Act, 2013 and its elucidation in relation to scope and amplitude as above.

12. Thus in relation to dispensation of the meetings of shareholders and unsecured creditors of the Transferee Company the same being a widely



held listed company having 4752 shareholders and with 18 unsecured creditors from whom consents have not been obtained and produced, this Tribunal is not willing to accede to the request of the applicant companies for dispensation of the meetings of shareholders and unsecured creditors of the Transferee Company. It is required to be noted that only when the meetings, be it the shareholders or creditors, when called, convened and held, gives rise to exchange of information, between the company and its shareholders and other stakeholders of the companies which is sine quo non for effective Corporate Governance, particularly in relation to the Schemes as the one contemplated herein even when it is between a holding and wholly owned subsidiary. It is also to be seen that even in the simplified procedure prescribed under Section 233 of the Act the meetings of shareholders have not been dispensed with and this Tribunal, hence is of the view, particularly in relation to the Transferee Company, being a widely held public company as well as listed Company in stock exchange, that the dispensation as sought for, is not to be granted and hence in relation to Transferee Company, the meeting of the shareholders and Unsecured Creditors is directed to be convened and for this purpose following directions are issued, namely:-



13) In relation to Transferor Company:

Meetings of the equity shareholders, secured creditors and unsecured creditors for the approval of the Scheme of Amalgamation is dispensed with in view of consents having been obtained and produced or there being none, as the case may be

In relation to Transferee Company:

(i) (a) With respect to equity shareholders:

Meeting of the equity shareholders of the Transferee Company is directed to be held at 10:00 AM on 29th January, 2018 at the registered office of the Transferee Company or if not convenient at a suitable place as may be chosen by the Applicants of which prior approval shall be sought from this Tribunal within a period of 7 days from the date of this order and prior to the issue of notices.

(ii) (b) With respect to unsecured creditors:

Meeting of the unsecured creditors of the Transferee Company is directed to be held at 12:00 Noon on 29th January, 2018 at the registered office of the Transferee Company or if not convenient at a suitable place as may be chosen by the Applicants of which prior approval shall be sought from this Tribunal within a period of 7 days from the date of this order prior to issue of notices.



(iii) (c) With respect to Secured Creditors:-

Meeting stands dispensed with in view of there being none as represented by the Applicant/Transferee Company.

14. The quorum for the meeting of the equity shareholders shall be 800 in Nos. or 20% in value terms and in relation to unsecured creditors shall be 10 in Nos or 25% in value terms.

ii) In case the quorum as noted above for the above meetings of the Applicant/ Transferee Company is not present at the meeting, then the meeting shall be adjourned by half an hour, and thereafter the persons present and voting shall be deemed to constitute the quorum. For the purpose of computing the quorum the valid proxies shall also be considered, if the proxy in the prescribed form, duly signed by the person entitled to attend and vote at the meeting, is filed with the registered office of the Applicant/ Transferee Company at least 48 hours before the meetings. The Chairperson and Alternate Chairperson appointed herein along with Scrutinizer shall ensure that the proxy registers are properly maintained.



However, every endeavor should be made by the applicant / Transferee Company to attain at least the quorum fixed, if not more in relation to approval of the scheme.

iii) Mr. Manoj Kumar Garg, Advocate (Mobile 9811411861) is appointed as the Chairperson and Ms. Varsha Banerjee, Advocate (Mobile 9818286508) is appointed as the Alternate Chairperson for the meeting of equity Shareholders and Unsecured Creditors as may have been directed to be convened by this Tribunal as above of the Applicant/ Transferee Company.

iv) The fee of the Chairperson for the aforesaid meetings shall be Rs. 1,00,000/- and the fee of the Alternate Chairperson shall be Rs. 50,000/- in addition to meeting their incidental expenses. Mr. Rajiv K. Adlakha, Company Secretary (Mobile 9312257946/9810023612) is appointed as a Scrutinizer and would be entitled to fee of Rs. 50,000 for services in addition to meeting incidental expenses. The Chairpersons will file their reports within a week from the date of holding of the above said meetings.

v) That individual notices of the above said meetings shall be sent by the Applicant/ Transferee Company through registered post or speed post or through courier or through e-mail, 30 days in advance before the scheduled date of the meeting, indicating the day, date, the place and the time as aforesaid, together with a copy of Scheme of Amalgamation, copy of explanatory statement, required to be sent under the Companies Act, 2013



and the prescribed form of proxy shall also be sent along and in addition to the above any other documents as may be prescribed under the Act or rules may also be duly sent with the notice.

vi) That the Applicant/ Transferee Company shall publish advertisement with a gap of atleast 30 clear days before the aforesaid meetings, indicating the day, date and the place and time as aforesaid, to be published in the English Daily Business Standard in English, and Jansatta in Vernacular stating the copies of Scheme of Amalgamation, the Explanatory Statement required to be furnished pursuant to Section 230 of the Companies Act, 2013 and the form of proxy shall be provided free of charge at the registered office of Applicant/ Transferee Company.

vii) Voting shall be allowed on the proposed Scheme by voting in person, by proxy, through postal ballot or through electronic means as may be applicable to the respective companies under the Act and rules framed there under. The Chairperson shall as aforesaid be responsible to report the result of the meeting within two weeks of the conclusion of the meeting with details of voting on the proposed scheme.

viii) The companies shall individually send notice to Central Government, the Income Tax Authorities, Registrar of Companies NCT Delhi & Haryana, Official Liquidator and Regional Director, stock Exchanges in which the shares are listed, RBI as well as other sectoral regulators who




may have significant bearing on the operation of the applicant companies or the Scheme per se along with copy of required documents and disclosures required under the provisions of Companies Act, 2013 read with Companies (Compromises, Arrangements, Amalgamations) Rules, 2016.

ix) The applicant companies shall further furnish copy of the Scheme free of charge within 1 day of any requisition for the Scheme made by every creditor or member of all the companies entitled to attend the meetings as aforesaid.

x) The authorized representative of the Applicant Companies shall furnish an affidavit of service of notice of meetings and publication of advertisement and compliance of all directions contained herein at least a week before the proposed meetings.

xi) All the aforesaid directions are to be complied with strictly in accordance with the applicable law including forms and formats contained in the Companies (Compromises, Arrangements, Amalgamations) Rules, 2016 as well as the provisions of the Companies Act, 2013 by the Applicants.

The application stands allowed on the aforesaid terms.


4/12/17
(K.VARADHARAJAN)
MEMBER(JUDICIAL)

U.D.Mehta
.11.2017