

**IN THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"**

**CA(CAA)No.25/Chd/Hry/2017
along with CA No. 11 of 2018**

**Under Sections 230 to 232
of the Companies Act, 2013**

IN THE MATTER OF SCHEME OF AMALGAMATION OF :

TOTIPOTENTSC SCIENTIFIC PRODUCT PRIVATE LIMITED

having its registered office at
Unit No. 312A, Sun City Success Tower,
Golf Course Extension Road, Sector 65,
Gurugram, Haryana- 122001.
PAN: AACCT8911E

... Applicant Company No 1/Transferor Company

WITH

TOTIPOTENTRX CELL THERAPY PRIVATE LIMITED

having its registered office at
Unit No. 312A, Sun City Success Tower,
Golf Course Extension Road, Sector 65,
Gurugram, Haryana- 122001.
Haryana -122016.
PAN: AADCT7194G

... Applicant Company No 2/Transferee Company

Judgement delivered on 12-01-2018

Coram: HON'BLE MR.JUSTICE R.P. NAGRATH, MEMBER (JUDICIAL)

For the Applicant-Companies: Ms. Priyanka Duggal, Practising Chartered
Accountant

JUDGEMENT (ORAL)

This is a joint First Motion application filed by Applicant-Companies; namely M/s TotipotentSC Scientific Product Private Limited, Transferor Company (for brevity, to be called as Applicant Company 1) and M/s TotipotentRX Cell Therapy Private Limited, Transferee Company (for brevity, to be called as Applicant Company 2), jointly, described in short as

'Applicant Companies' under Sections 230-232 and other applicable provisions of the Companies Act, 2013 (for brevity, the 'Act') read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (for brevity, the 'Rules') in connection with the proposed Scheme of Amalgamation (for brevity, the 'Scheme'), Annexure P-1 of the applicant companies as supported by affidavits of Mr. Sanjay Belwal, the Authorised Representative of the Applicant Companies for seeking appropriate orders/directions for convening/ dispensing with the meetings of the applicant-companies.

2. The Board of Directors of the applicant-companies approved the Scheme by passing Board resolutions dated 06.09.2017 subject to sanctioning of the same by the Tribunal. Vide the Board resolutions (Annexure P-6 and Annexure P-16), Mr. Sanjay Belwal was authorised to do all acts and things as may be considered necessary and expedient in relation to the implementation of the Scheme. The application is duly supported by affidavits filed in respect of both these companies by Mr. Sanjay Belwal as the Authorised Representative.

3. As per the Memorandum and Articles of Association (Annexure P-3), the main objects of the Transferor Company are to import, export, trade, deal, all ways, act as distributors of the equipments, tools, apparatus and to carry out the research as in house, contract research in relation to stem cell, genetic therapy and related medical fields for the research and advancement of heart care, veterinary sciences and to import, export, trade, deal in all ways act as distributors of the equipment tools, apparatus and to carry out the research as in house, contract research in

relation to bio-tech, pharmaceutical, life science, agriculture science and environmental science etc.

4. The Transferor Company was incorporated under the Companies Act, 1956 as a private limited company on 28.03.2008 vide CIN U73100TN 2008PTC067088. The registered office of the company was shifted from State of Tamil Nadu to the State of Haryana and a new Certificate of Incorporation was issued on 26.10.2010 by the Registrar of Companies, NCT of Delhi & Haryana, New Delhi and a new CIN No. was issued i.e. U73100HR 2008PTC041429 which is at Annexure P-2.

5. When the petition was filed i.e. on 27.10.2017 registered office of both the companies was at Plot No. 857, Udyog Vihar, Phase V, Gurgaon, Haryana-122016 but when the matter was listed on 08.01.2018, the authorized representative of the Applicant-Companies informed that the companies have changed their registered office and sought time for filing necessary application along with amended Memo of Parties. In compliance therewith, Applicant-Companies have filed CA No. 11/2018 with the prayer for placing on record amended Memo of Parties of the Applicant-companies with fresh application in Form NCLT 1 along with affidavits of the authorized representatives of both the companies. Copy of Form INC 22 filed with the Registrar of Companies informing the change of address of registered office of both the companies at Unit No. 312A, Suncity Success Tower, Golf Course Extension Road, Sector 65, Gurugram, Haryana-122001 which is also the address now mentioned in the amended application of both the companies. The same has been taken on record. Since the registered offices of both the companies are situated at Gurugram in the State of

Haryana, the matter, therefore, falls within the territorial jurisdiction of this Tribunal.

6. The authorized share capital of the Transferor company as on 15.07.2017 is ₹2,50,00,000/- comprising of 25 lakhs equity shares of ₹10/- each and the issued, subscribed and paid-up share capital is ₹1,70,00,000/- divided into 17,00,000 equity shares of ₹10/- each.

7. As per the Memorandum and Articles of Association (Annexure P-13), the main objects of the Transferee Company are to harvest, collect, purify, cryopreserve, and bank human cells useful for cellular therapy applications and to carry out said services for hire, in-house research or contract research related to the processing and purification of cells, the banking of cells and preparation of cells for transplant and to conduct clinical trials including carrying out said directly and indirectly related services for hire, in-house, or under a contract basis as a Contract Research Organization (CRO) etc.

8. The Transferee-Company was incorporated as a private limited company vide Certificate of Incorporation dated 28.01.2011 U74140HR2011PTC041964 issued by the Registrar of Companies, NCT of Delhi & Haryana, New Delhi. The Certificate of Incorporation is at Annexure P- 12.

9. The authorized share capital of the Transferee company as on 15.07.2017 is ₹4,25,00,000/- comprising of 42,50,000 equity shares of ₹10/- each and the issued, subscribed and paid-up share capital is ₹3,73,70,650/- divided into 37,37,065 equity shares of ₹10/- each.

10. It is stated that there has been no change in the issued, subscribed and paid up share capital of the Applicant-Companies after 15.07.2017. It is also stated that the equity shares of both the Companies are not listed on any Stock Exchange.

11. Learned authorized representative for the Applicant Companies represents that the 'Scheme' does not envisage any corporate debt restructuring. There is no proposal to restructure and also does not propose to undertake any reduction of share capital of any of the Applicant-Companies.

12. This joint application has been filed with the following prayers:-

- a) *Pass an order dispensing with the requirement of convening meetings of the shareholders of both the petitioners and also dispensing with the requirement of issue and publication of notices for the same;*
- b) *Pass an order dispensing with the requirement of convening the meetings of debenture holder of Petitioner-Company 2, secured creditors of both the petitioners and unsecured creditors of both the petitioners including the requirement of issue and publication of notices for the same;*
- c) *Issue directions for service of notice of dispensation of such meetings to the Regional Director, Central Government, the Income Tax authorities, the Reserve Bank of India, the Registrar of Companies & the Official Liquidator.*

- d) *Issue such other orders or directions as this Hon'ble NCLT may deem fit and proper in the facts and circumstances of the present case.*
- e) *Issue directions for permitting the filing of application, petition, other documents as may be required for the purpose of sanctioning the Proposed Scheme of Amalgamation of TotipotentSC Scientific Product Private Limited with TotipotentRX Cell Therapy Private Limited and between their respective shareholders and creditors.*
- f) *It is also prayed that both the Petitioners may kindly be exempted from filing certified copies and true typed copies of Annexures P-1 to P-24 and permission to file photocopies thereof may kindly be granted, in the interest of justice."*

13. It is stated that as on 01.04.2017, the Transferor Company has two (2) equity shareholders as per the list Annexure P-7 and both of them have given their consents. It is submitted that the major shareholder M/s. CESCO Therapeutics Inc. holding 16,99,900 equity shares has given its consent by way of an affidavit. The other M/s. Next Generation Recruiting Inc. holding 100 shares being foreign shareholder incorporated in the United States of America (USA) has given its consent on the corporate Letter Head which is duly supported by an extract of the Board resolution and duly witnessed and certified by the Notary public of State of California, USA. Both the consent are attached as Annexure P-8 (Page nos. 282 to 294).

14. The Transferee-Company similarly has the same equity shareholders two in number as on 9.10.2017 and the list of shareholders of the Transferee-Company is attached as Annexure P-17. M/s. CESCO

Therapeutics Inc. holding 3736965 shares whereas the other is the shareholder having 100 shares. The shareholders of both the companies being the same, it is submitted by the Authorised Representative that while one shareholder has given its consent by way of an affidavit, the other shareholder being foreign shareholder incorporated in the United States of America (USA), has given his consent on the corporate Letter Head which is duly supported by an extract of the Board resolution and duly witnessed and certified by the Notary Public of State of California, USA. Both the consent are attached as part of Annexure P-18 (Page nos. 453 to 462).

15. It is further stated that there are no secured creditors of any of the applicant companies as on the cut-off date i.e. 15.07.2017. The certificate of Chartered Accountants of the Applicant-Companies to this effect is attached are at Annexures P-10 and P-21 respectively.

16. It is further submitted that Transferor-Company, as on 15.07.2017 as per the list Annexure P-9, has sixteen (16) unsecured creditors of ₹1,71,90,768 in value, out of which the affidavit of Mr. Sanjay Belwal, authorized signatory of CESCA Therapeutics Inc., one of the unsecured creditor with a total outstanding amount of ₹77,59,433/- has given his consent by way of affidavit for dispensation of the meeting of unsecured creditors. However, the consent of a foreign unsecured creditor, Medirution Co. Ltd with a total outstanding amount of ₹ 86,06,644 as on 15.07.2017 has been obtained on the Letter Head and not on affidavit. Moreover, the resolution of M/s. Medirution Company Limited giving consent is dated 01.12.2016 which is thus a very old document. The Applicant-Companies rather approved the Scheme for being presented to this Tribunal vide their

respective resolutions dated 06.09.2017. Therefore, the prayer for dispensation of meeting of unsecured creditors of Transferor-Company cannot be accepted.

17. The Transferee-Company, as on 15.07.2017 as per the list Annexure P-20, has one hundred four (104) unsecured creditors and ₹3,07,38,705/- in value. The Transferor-Company is also one of the unsecured creditors on whose behalf the affidavit of Mr. Venkatesh Ponemone, Director has been filed giving consent for dispensation of the meeting of unsecured creditors along with the copy of resolution of the Company dated 06.09.2017. On behalf of the other unsecured creditor i.e. CESCO Therapeutics Inc., the affidavit of Mr. Sanjay Belwal is attached giving consent for dispensation of the meeting with the resolution of this unsecured creditor dated 06.09.2017. In this regard, it would be relevant to refer to Section 230 (9) of the Companies Act, 2013 which reads as under:-

“The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least 90% value, agree and confirm, by way of affidavit, to the Scheme of Compromise or Arrangement.”

18. It has been further submitted that Transferee-Company, as on 15.07.2017 as per the list at Annexure P-20, has one debenture-holder and sole debenture-holder i.e. TotipotentSC Scientific Product Private Limited, being 100% in value has given its consent by way of affidavit for dispensation of the meeting as per Annexure P-19.

19. I have heard the Authorized Representative for the Applicant-Companies and perused the records and the supporting documents/papers

filed along with the Scheme contemplated between the Applicant-Companies with the assistance of authorized representative for the Applicant-Companies.

20. The circumstances which justify and necessitate the proposed Scheme of the Applicant-Companies are as follows:

- i. "Consolidation of subsidiary Indian Companies of parent US Company and creation of single robust entity to facilitate strengthened balance sheets of Indian operations pursuant to the proposed scheme.*
- ii. Efficiency in cash management, unfettered access to cash flow generated by the combined businesses, integrated and complimentary in nature.*
- iii. Benefit of the operational synergies to the combined entity in various operational areas can be put to the best advantage of all the stakeholders.*
- iv. Cost savings from more focused operational efforts, rationalization and standardization and simplification of the business processes.*
- v. Elimination of duplication and rationalization of administrative expenses.*
- vi. The said scheme will enable the Petitioners to obtain greater facilities possessed and enjoyed by one consolidated company as compared with two stand-alone companies for raising capital, securing and conducting business on favorable terms and other benefits."*

21. The Authorized Representative further submitted that valuation report of shares has also been annexed as Annexure P-24. The following Share Exchange Ratio has been proposed in the aforesaid report:

“45 (Forty Five) equity shares of Transferee Company of ₹10 each fully paid for every 100 (Hundred) equity shares of Transferor Company of ₹ 10 each fully paid.”

22. The Authorized Representative for the Applicant Companies further represented that in respect of the Transferor-Company and Transferee-Company, the audited financial statements upto 31.03.2017 and unaudited financial statements upto 15.07.2017 are at Annexures P-4 and P-14.

23. The Scheme (Annexure P-1) also deals with and takes care of the interest of staff, workmen and employees of the Transferor-Company by virtue of Clause 8.1 which is as under:-

“Upon the Scheme becoming effective, all the employees of the Transferor-Company as on the Effective Date, shall become and be deemed to have become the employees of the Transferee-Company on the terms and conditions not less favourable than those on which they were engaged or employed by the respective Transferor-Company, without any break in their services and on the basis of continuity of services.”

24. It is also stated in the Scheme that on and from the Appointed Date, all suits, actions and legal proceedings by or against the Transferor-Company shall be continued and/or enforced until the Effective Date as

desired by the Transferee-Company and on and from the Effective Date, shall be continued and/or enforced by or against the Transferee-Company as effectually and in the same manner and to the same extent as if the same has been and/or pending and/or arising by or against the Transferee-Company.

25. It is submitted that the certificate of the statutory auditor of the Transferee-Company states that the accounting treatment under the Scheme is in conformity with the provisions prescribed under Section 133 of the Companies Act, 2013 and the same is at Annexure P-23.

A. In relation to Transferor-Company:

- i. Meeting of the equity shareholders is dispensed with as there are only two equity shareholders and the consent of 100% in number and value of the shareholders on affidavits have been obtained and placed on record.
- ii. There is no requirement of meeting of the secured creditors in view of no secured creditors.
- iii. Meeting of the unsecured creditors be convened on 24.02.2018, Wednesday, at 12:00 O' Clock Noon at The Palms Towns & Country Club, B-Block, Sushant Lok, Phase-1, Gurgaon, Haryana-122001 as suggested by the Authorized Representative of the Applicant-Companies subject to notice of meeting being issued. The Quorum of the meeting of the unsecured creditors of the Transferor-Company shall be 50% in value of the total unsecured debt.

B. In relation to Transferee-Company:

- i. Meeting of the equity shareholders is dispensed with as there are only two equity shareholders and the consent of 100% in number and value of the shareholders on affidavits have been obtained and placed on record.
- ii. There is no requirement of meeting of the secured creditor in view of no secured creditors.
- iii. Meeting of the debenture holders is dispensed with as the consent of the sole debenture holder has been obtained by way of an affidavit.
- iv. Meeting of the unsecured creditors is dispensed with as 95.01% in value of the unsecured creditors including Trade Creditors have agreed and confirmed to the Scheme of Amalgamation by way of an affidavit and the consents have been obtained and placed on record.

- C.** In case the required quorum as noted above for the meeting of unsecured creditors of the Transferor Company is not present at the commencement of the meeting, then the meeting shall be adjourned by half an hour, and thereafter the persons present 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 Transferor Company at least 48 hours before the meeting. The Chairperson and Alternate Chairperson appointed herein

along with the Scrutinizer shall ensure that the proxy register is properly maintained.

- D.** It is further directed that where at a meeting majority of persons representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to the proposed Scheme.
- E.** Justice (Retd.) Sh. H.S. Bhalla, House No. 433, Sector 16, Panchkula, Mobile Number 9815709797 is appointed as the Chairperson for the aforesaid meeting. He shall be paid a fee of ₹ 1.50 lacs for his services as the Chairperson.
- F.** Mr. B.M. Bedi District & Sessions Judge (Retd.), Haryana, House No. 22, Sector 04, Panchkula, Mobile Number 8054381862 is appointed as the Alternate Chairperson for the aforesaid meeting. He shall be paid a fee of ₹75,000/- for his services as Alternate Chairperson.
- G.** The Scrutinizer for the meetings shall be Ms. Preeti Arora, as suggested by the Authorized Representative, Mobile Number 9871566665 who shall be paid a fee of ₹65,000/- for her services as the Scrutinizer.
- H.** The fee of the Chairperson, Alternate Chairperson and Scrutinizer shall be paid by the Transferee-Company. Travelling expenses, boarding and lodging, if any, for them shall also be borne by the Transferee-Company.
- I.** It is further directed that the individual notices of the aforesaid meeting shall be sent by the Transferor-Company to all the

unsecured creditors as on 30.11.2017 through e-mail, registered post or speed post, 30 days in advance before the schedule date of the meeting, indicating the day, date, place and time as aforesaid, together with a copy of Scheme of Amalgamation, a copy of Explanatory Statement, required to be sent under the Companies Act, 2013 and the 'Rules' along with the proxy form and any other documents as may be prescribed under the Act shall also be duly sent with the notice.

- J.** It is further directed that along with the notice, copy of valuation report relied upon by the Applicant-Companies shall also be sent to explain their effect on the creditors, key managerial personnel, promoters and non-promoter members etc. along with the effect of the arrangement for amalgamation on any material interests of the Directors of the Transferor-Company or the debenture-trustees, if any, as provided under sub-section (3) of Section 230 of the Act.
- K.** It is also directed that the supplementary accounting statement relating to the period ending 30.11.2017 be also circulated for the aforesaid meetings apart from other requirement of sub-section (2) of Section 230 of the Act.
- L.** The Transferor-Company shall publish advertisement with a gap of at least 30 days before the aforesaid meeting, indicating the day, date, place and time as aforesaid, to be published in the "**Business Standard**" (English, Delhi/NCR Edition) and "**Jansatta**" (Hindi, Delhi/NCR Edition). It be stated in the

advertisement that the copies of Scheme of Amalgamation, the Explanatory Statement required to be furnished pursuant to Section 230-232 of the Companies Act, 2013 and the form of proxy shall be provided free of charge at the registered office of the Applicant-Companies. The Applicant-Companies shall also upload the notice at their respective websites, if any.

- M.** It shall be the responsibility of the Transferor-Company to ensure that the notices are sent under the signature and supervision of the authorized representative of the company on the basis of Board Resolution for which they shall file affidavit in the Tribunal at least 10 (Ten) days before the date fixed for the meeting.
- N.** Voting on the Scheme shall be allowed in person or by proxy through postal ballot or through electronic means as may be applicable to the respective companies under the Act and rules framed thereunder.
- O.** Voting on the Scheme shall be allowed in person or by proxy through postal ballot or through electronic means as may be applicable to the respective companies under the Act and rules framed thereunder.
- P.** The Chairperson shall be responsible to report the result of the meeting to the Tribunal in Form No. CAA.4, as per Rule 14 of the Companies (Compromises, Arrangements and Amalgamation) Rules, 2016, within seven days of the conclusion of the meeting. He would be fully assisted by the Authorized Representative/Company Secretary and the

Scrutinizer who will assist the Hon'ble Chairperson and Alternate Chairperson in preparing and finalizing the report.

- Q.** The Applicant-Companies shall individually and in compliance of subsection (5) of Section 230 and Rule 8 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 send notices in Form No. CAA.3 along with a copy of the Scheme, the Explanatory Statement and the disclosures mentioned in Rule 6 of the 'Rule' to (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 & Haryana, New Delhi; (c) The Official Liquidator, Chandigarh; and (d) the Income-Tax Authorities; and other Sectoral Regulators, if any, stating that representations, if any, to be made by them shall be sent to the Tribunal within a period of 30 days from the date of receipt of such notice and copy of such representations shall be simultaneously sent to the concerned companies, failing which it shall be presumed that they have no objection to the proposed Scheme.
- R.** The Applicant-Companies shall further furnish copy of the 'Scheme' free of charge within 1 day of any requisition for the 'Scheme' made by any creditor or member/ shareholder entitled to attend the meeting as aforesaid.
- S.** The Authorized Representatives of the Applicant-Companies shall furnish affidavits of service of notice of meeting and publication of advertisement and compliance of all the

directions contained herein at least a week before the date of meeting.

- T.** All the aforesaid directions are to be complied with strictly in accordance with the applicable law including forms and formats contained in the “Rules” as well as the provisions of the Companies Act, 2013 by the Applicants.
- U.** With the aforesaid directions, the first motion petition stands disposed of. A copy of this order be supplied to the learned counsel for the applicant-companies who in turn shall supply copy of the same to the Chairperson, the Alternate Chairperson and the Scrutinizer.

Sd/-
(Justice R.P. Nagrath)
Member (Judicial)

January 12, 2018
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