

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH**

CP NO. 179/2016
RT No. 116/Chd/Hry/2017

Date of Order: 04.05.2017

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

In the matter of scheme of amalgamation between:

Span Nihon Kohden Diagnostics Pvt. Ltd.
308, 3rd Floor, Tower A Spazedge, Sector 47,
Gurgaon-122002 (Haryana)

.....Applicant No.1/Transferor company.

AND

Nihon Kohden India Private Limited,
308, 3rd Floor, Tower A Spazedge, Sector 47,
Gurgaon-122002 (Haryana)

.....Applicant No.2/Transferee company.

**Application under Section 391-394 of the Companies Act,
1956 praying for sanctioning of the scheme of amalgamation.**

Present: Mr. Yash Pal Gupta, Advocate along with
Mr.Sanyam Goel, PCS / Authorised Representative
for Applicants.
Mr. D.K. Singh, Official Liquidator on behalf of
Regional Director.

ORDER

R.P.Nagrath J., Member (Judicial) (ORAL) :

This is a joint application filed by Transferor Company and Transferee Company (to be described as 'Applicant Companies') for the Scheme of Amalgamation (to be described as 'Scheme') between Transferor Company (A-1 company) into Transferee Company (A-2 company). It was noticed by the Hon'ble High Court in the order dated

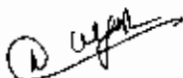
19.8.2016 in CP No.159/2016 (O&M), when the first motion petition was disposed of that the Registered Office of both the companies are presently located in Gurgaon (Haryana) and therefore, this Tribunal has the territorial jurisdiction to entertain and dispose of the instant petition.

2. It is stated that the main objects of the 'A-1 company' are to carry on the business of manufacturing, processing, manipulating, refining, treating, importing, exporting, buying, selling and otherwise dealing in Diagnostic Reagents calibrated to auto analysers such as Haematology Blood Cell counters and reagents and consumables required to run all kinds of manual, automatic and semi-automatic equipment, scientific and pathological instruments, apparatuses, contrivances, improvisations or other medical devices which may be found necessary or suitable in diagnosis, healthcare intervention and treatment of disease in human beings and animals.

3. The main objects of 'A-2 company' is also of similar nature viz. to carry on the business as wholesalers, distributors, manufacturers, importers and exporters of all medical, electronic equipment, patient monitors, electroencephalographs, evoked potential and electromyography systems, electrocardiographs, defibrillators, AEDs, hermatology analysers and haemostasis analysers.

4. The capital structure of both the applicant-companies was noticed in the order dated 19.09.2016 by the Hon'ble High Court (Annexure P-9) and there is no need to repeat those allegations.

5. The prayer made in the instant petition is for approval of the Scheme of Amalgamation of A-1 company into A-2 company.



6. The petition discloses that initially an application for seeking dispensation for the convening of meeting of equity shareholders and unsecured creditors of both the companies was filed before the Hon'ble High Court of Punjab and Haryana and it was stated in the first motion petition that there were no secured creditors of both the companies. The Hon'ble Punjab and Haryana High Court, by order dated 19.9.2016 (Annexure P-9) dispensed with the requirement of convening of the meetings of equity shareholders and unsecured creditors of both the companies.

7. It is represented that the 'Scheme' which was approved by the Board of Directors of both the companies is at Annexure P-1 (Page 19). It is further represented that the shares of both the companies are not listed on any Stock Exchange nor issued or agreed to issue any Debentures. The rationale behind the 'Scheme' as stated in the petition can be inter alia described as under:

i) That both the companies are subsidiary of common shareholders of Nihon Kohden Corporation, Japan and are closely held companies;

ii) That the proposed scheme of amalgamation would result in business synergy and consolidation of these companies into one larger company with a stronger assets base;

iii) That the 'Scheme' would enable the pulling of physical, financial and human resources of these companies for the most beneficial utilisation of these factors in the combined entity;

iv) That the proposed 'Scheme' would contribute in fulfilling and furthering the objects of the transferor and the transferee companies since both the companies are in similar lines of business activities etc.

8. It is further represented that the assets of both the companies are sufficient to meet their liabilities and in case it is approved, will not adversely affect the rights of any other parties dealing with or related with both the companies in any manner whatsoever.

9 The Applicant-Companies have also attached share valuation at (Annexure P-8) which is a report of KNM & Associates, Chartered Accountants. The Swap Ratio (Fair Equity Share Exchange Ratio) for the amalgamation of A-1 Company with A-2 Company is 20,311 equity shares of A-2 of ₹10/- each fully paid up for every 1000 equity shares of A-1 of the value of ₹100/- each fully paid up as on April 01,2016.

10. This petition for approval of 'Scheme' was filed before the Hon'ble Punjab and Haryana High Court. Notice was directed to be issue to the Regional Director, Ministry of Corporate Affairs, Noida and Official Liquidator. Simultaneously, notices were also directed to be published in the newspapers namely, 'Indian Express' (English) and 'Jansatta' (Hindi), both Delhi / NCR edition and in the Official Gazette of Govt. of Haryana and the same were also directed to be uploaded on the official website of the Official Liquidator.

11. Learned counsel for applicants filed his own affidavit stating compliance of publishing notices in the newspapers as well as sending notice to the Official Liquidator. Copies of the newspaper publications are also attached with the application. The publication in both the newspapers was made on 09.11.2016. The Official Liquidator submits that the notice was also uploaded on the official website as directed in the order dated 24.10.2016. Along with the affidavit of the learned counsel of applicants, copy of the gazette notification in the Haryana Government Notification dated 22 11.2016 with regard to date of hearing in the petition for amalgamation and calling for the objections, if any, to



the 'Scheme'. Learned counsel for applicants submits that no objections have been filed by any person against the 'Scheme'.

12. Since the provisions relating to Compromise, Arrangements and Amalgamation as contemplated under Sections 230-232 have been notified with effect from 15.12.2016 wherein the power to consider such schemes have now been vested with the National Company Law Tribunal, the Hon'ble High Court of Punjab and Haryana, pursuant to the notification bearing no.DL-33004/99 dated 07.12.2016 issued by the Ministry of Corporate Affairs has transferred / transmitted the records of the above petition to this Tribunal vide order dated 06.03.2017.

13. I have heard learned counsel for the Applicants, the Official Liquidator and perused the records with their assistance.

14. Pursuant to the directions issued by the Hon'ble High Court, Mr.Narender Kumar Bhola, the Regional Director, Northern Region, Ministry of Corporate Affairs filed his report by way of his affidavit. The report of the Regional Director would also suggest that in terms of circular letters dated 26.07.2011 and 15.01.2014 issued by the Ministry of Corporate Affairs, the Regional Director also issued notices to the Income Tax Department, Registrar of Companies, NCT of Delhi and Haryana, asking them to file their reports. The Income Tax Department did not send any specific comments to raise any objections to the 'Scheme'. The Regional Director had also called for report from the companies concerned and has made certain observations for the A-2 company to comply, in case the 'Scheme' is approved.



15. The learned Official Liquidator has made specific mention of the observations made by the Regional Director that the company has not complied with the provisions of Section 135(5) of the Companies Act, 2013 as CSR amount of ₹11,67,773/- was not spent in the year 2015-16. However, an undertaking was given to put in best endeavour to spend the entire sum of CSR contribution for the year 2015-16 in the next Financial Year 2016-17. Mr.Yash Pal Gupta, Advocate, on instructions from Mr.Sanyam Goel, Practicing Company Secretary submits that this amount seems to have been not fully utilised. This non-compliance cannot be taken lightly as it is the requirement of law to do so. The learned counsel undertakes that the CSR amount will be spent during the current financial year. The undertaking is taken on record. However, it needs to be observed that in case any penal consequences are provided in the Act and Rules framed thereunder regarding non-utilisation of the CSR timely, this direction will not be an obstacle in implementing those provisions.

16. Learned counsel for the Applicants, however, pointed out that there is a specific averment made by the applicant-companies that no proceedings are pending against these companies under Sections 235 to 251 of the Companies Act, 1956, now Sections 210-227 of the Companies Act, 2013. The Regional Director in his report also observed that applicant-companies represented before him that no prosecution proceedings against the Transferee Company and its Directors are pending for having violated the provisions of the Companies Act, 1956, FEMA, IPC, SEBI Act and RBI Act etc.

17. The 'Scheme' also takes care of the fate of the employees / workers of the Transferor Company. It provides that on the Scheme becoming effective, all employees of the Transferor Company in service on the Effective Date which has been defined in the 'Scheme' shall be deemed to have become employees of the Transferee Company with effect from the Appointed Date without any break, discontinuance or interruption in their service and on the basis of continuity of service and on the same terms and conditions of their employment with the Transferor Company on the Effective Date.

18. In view of the aforesaid discussion, while approving the 'Scheme', it is further clarified that this order shall not be construed as an order in any way granting exemption to the companies from the payment of the stamp duty, taxes or any other charges, if any, and payment in accordance with law or in respect of any permission / compliance with any other requirement which may be specifically required under any law.

19. The Tribunal further orders as under:

i) 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 vested 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,

ii) 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

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transferred to and become the liabilities and duties of the transferee company;

iii) That all proceedings now pending by or against the transferor company be continued by or against the transferee company;

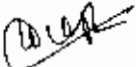
iv) That the transferor company shall within 30 days of the date of the receipt of this order cause a certified copy of this order to be delivered to the Registrar of Companies and on such certified copy being so delivered the transferor company shall be dissolved and the Registrar of Companies shall 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 two companies shall be consolidated accordingly;

v) That any person interested shall be at liberty to apply to the Tribunal in the above matter for any direction that may be necessary;

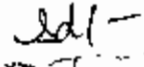
vi) That the applicant- companies would comply with the applicable provisions of FEMA / RBI Regulations; and

vii) That the Accounting Standard-14 issued by the Institute of Chartered Accountants of India shall be followed upon the 'Scheme' becoming effective;

20. It is further directed that the A-2 company shall remove the deficiencies found in the Auditor's Report for the year 2013-14 for which the required undertaking was also given by the company in its report to the Regional Director. A-2 company shall utilise the amount of CSR within the Financial Year 2017-18, if not already utilised, but such a concession would be without prejudice to any penal consequences, if any



for having not utilised the amount in the previous year under the provisions of the Act and Rules framed thereunder. Copy of this order be supplied to the applicants.


(Justice R.P. Nagrath)
Member (Judicial)

May 04, 2017.

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