NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI
COMPANY APPEAL(AT) NO.60 OF 2018

(Arising out of order dated 05.01.2018 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad in CP No.(CAA) No.98/230/HDB/2017).

	BEFORE NCLT	BEFORE NCLAT
IN THE MATTER OF:		
1. Ritemed Pharma Retail Private Limited, H.No.11-6-56, survey No.257 & 258/1, Opposite to IDPL Railway Siding Road, Moosapet, Kukatpally, Hyderabad-500037 Telengana	Petitioner	Appellant No.1
2. Optival Health Solutions Private Ltd H.No.11-6-56, Survey No.257 & 258/1, Opposite to IDPL Railway Siding Road, Moosapet, Kukatpally, Hyderabad-500037. Telengana.	Petitioner	Appellant No.2
Vs		
1. The Official Liquidator, Corporate Bhawan, 1st Floor, Bandlaguda, Nagole, Tattiannaram village, Hayat Nagar Mandal, Ranga Reddy District, Hyderabad-500068.	Respondent	Respondent
2. The Regional Director (SER) Ministry of Corporate Affairs, Corporate Bhawan, 3rd Floor, Bandlaguda, Nagole, Tattiannaram Village, Hayat Nagar Mandal, Ranga Reddy district, Hyderabad.	Respondent	Respondent

Present: For Appellant:-Mr Praveen K. Mittal, Advocate.

For Respondents: - None.

JUDGMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

01. The present appeal has been preferred under Section 421 of the Companies Act, 2013 by the appellants against the impugned order dated 05.01.2018 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad (hereinafter referred to as the 'Tribunal') in C.P.(CAA) No.98/230/HDB/2017 wherein the Scheme of Amalgamation between Appellant No.1 (Ritemed Pharma Retail Private Limited) and Appellant No.2 (Optival Health Solutions Private Limited) and their respective shareholders and Creditors was not sanctioned by the Tribunal.

02. The brief facts of the case are that the appellant No.1 (transferor company) is a company incorporated under the Companies Act, 1956. The transferor company is a private limited company. Appellant No.2 (transferee company) is a company incorporated under the Companies Act, 1956 and is also a private limited company. Both the companies are subsidiaries of Mediplus Health Services Private Limited. Both the companies are having their registered office at H.No.11-6-56, Survey No.257 & 258/1, Opposite to IDPL railway Siding Road, Moosapet, Kukatpally, Hyderabad-500037. The main business of both the companies is to establish, run, take on hire or lease, maintain, organize and promote retail pharmacy stores. To buy, sell, import, export or deal in any manner in Medical and Pharmaceuticals Products like intravenous sets, intravenous solutions, all kinds of drugs, disinfectants, tinctures, colloidal products, injectables and all the

pharmaceuticals and medicinal preparations, veterinary products including setting up contract manufacturing facility etc. The Board of Directors of the appellant companies vide their respective resolutions dated 6th March, 2017 approved the Scheme of Merger/Amalgamation of Transferor company with Transferee company. Thereafter, the appellants filed Company Application No.CA(CAA) No.29/230/HDB/2017 before the Tribunal under Section 232 read with Section 230 of the Companies Act, 2013 praying for dispensing the meetings of equity shareholders and secured creditors of transferor company and the meetings of the equity shareholders, secured creditors and unsecured creditors of transferee company. The said company application was allowed by the Tribunal vide order dated 8th May, 2017. As per directions of the Tribunal, the appellants filed an affidavit stating that they got published Newspaper advertisement of the "Notice of Petition" in English Daily and Telugu Daily and filed the proof of the same.

03. The appellants filed a joint petition for sanction of the Scheme of amalgamation between them and their respective shareholders. The Scheme of Amalgamation provides that the transferee company shall, without any further act or deed, issue and allot to each member of the transferor company whose name is recorded in the register of members of the Transferor Company on the Record Date, equity shares in the Transferee Company in the ratio of 136 equity shares in the Transferee Company of the face value of Rs.10/- at a premium of Rs.26/- each credited as fully paid up for every 100 equity shares of Rs.10/- each

fully paid up held by such member in the transferor company. Notice was issued to the Regional Director (South East Region), Ministry of corporate Affairs, ROC concerned, Official Liquidator and jurisdictional Income Tax Authorities. The Official Liquidator submitted his report dated 10.7.2017 stating that the transferor company has not submitted consent of Trade Payables and other creditors for the proposed Scheme of amalgamation and except that the affairs of the Company appears to have not been conducted in a manner prejudicial to the interest of the members or to public interest.

04. The Regional Director, South East Region, Ministry of Corporate Affairs, Hyderabad filed an affidavit dated 13.7.2017 stating that the appellants are regular in filing the statutory returns and no complaints, no investigation and no inspection are pending against them and to dispose the petition on merit.

05. No reply was filed by the Income Tax Department.

06. After hearing the parties and perusing the record, the Tribunal passed the impugned order dated 05.01.2018 thereby recording disinclination to sanction the Scheme of Amalgamation, as proposed. Relevant portion of the impugned order is as under:

> *"13. Upon perusal of the provisions of Section 230 and 232 of the Companies Act, 2013, in the case of merger and amalgamation of Companies, the Act does not provide for allotment of shares at a premium. When the issue was raised, the learned PCS for the Petitioner Companies, submitted a copy of the Order of Hon'ble High Court of Bombay in the matter of Scheme of Amalgamation sanctioned between Rishiroop Rubber International Limited and Puneet Resins Limited under Section 391/394 of the Companies Act, 1956. However, upon perusal of the scheme submitted to the Hon'ble High Court of Bombay, it is observed that shares of both the transferor and transferee companies are listed on Bombay*

Stock Exchange Limited. Therefore, the Bench is of the considered view that the order relied upon by the Petitioners are not of much useful/not in favour of the Petitioners since the facts in hand and of the scheme approved by the Hon'ble High Court are totally different to the extent that the scheme of amalgamation which was earlier sanctioned, both the Transferor and Transferee Companies shares listed/traded on BSE Limited, whereas in the instant scheme of Amalgamation proposed between Ritemed Pharma Private Limited and Optival Health Solutions, both are unlisted/private limited companies. Therefore, in the absence of explicit provision available in the Companies Act, 2013 to issue shares at a premium, the Bench is of the considered view that the scheme is not in compliance with Section 232 of the Companies Act, 2013, therefore, the Bench is not inclined to sanction the scheme of Amalgamation as proposed.

14. The Petitioner Companies are directed to issue newspaper publication with respect to status of Scheme of Amalgamation in the same newspapers in which previous publications were issued in order to ensure transparency/dissemination of complete information to all concerned parties about the same of the Scheme filed with the Tribunal.

15. The Petitioner Companies are directed to serve a copy of this order on the Registrar of Companies within 30 days from the date of receipt of copy of this order.

16. The Petitioner Companies are further directed o strictly adhere to the above directions and liberty is granted to the Petitioner Companies to approach the Tribunal after complying with all the applicable provisions of the Companies Act, 2013."

07. Being aggrieved by the said impugned order the appellants have filed the present appeal. The appellants have sought the following relief:

a) Set aside the impugned order dated 05.01.2018 passed by the learned Tribunal in CP (CAA) No.98/230/HDB/2017.

b) To hold that the appellant companies shall not be required to issue newspaper publications with respect to the status of Scheme of Amalgamation as required under the impugned order;

c) To hold that the Transferee Company, which is a private limited company, is entitled to issue equity shares at premium to the shareholders of the Transferor Company while sanctioning the Scheme of amalgamation;

d) To declare that the provisions of Scheme of Amalgamation enabling the Transferee Company to issue shares at a premium of Rs.26/- per share is in due accordance with the applicable laws including but not limited to Section 52 of the Companies Act, 2013.

08. On filing the appeal, notices were issued to the Respondents. Respondents were served property but they did not appear before the Appellate Tribunal. Therefore, arguments on behalf of the appellants were heard.

09. The learned counsel for the appellants argued that the Tribunal has recorded incorrect findings in observing that the 2nd appellant has not authority or power to issue shares at a premium to the members of the 1st appellant as part of discharging the consideration for the proposed amalgamation. Learned counsel further argued that there is no legal embargo or prohibition for issue of shares at a premium for discharge of purchase consideration in pursuance of a scheme of amalgamation either by a private company or by a public company under the provisions of Companies Act, 2013.

10. Learned counsel further argued that the approval from the relevant stakeholders such as the Board of Directors and creditors of the appellant for scheme of amalgamation have been taken and the same

were filed before the Tribunal. Learned counsel also argued that Section 52 of the Companies Act, 2013 specifically provides issuance of shares at a premium, whether for cash or otherwise.

11. Learned counsel for the appellant argued that the following judgements pronounced by various Courts permitted to issue shares at a premium as part of Scheme of Amalgamation or arrangement but the Tribunal has not accepted these judgements on the plea that the companies in these judgements are all listed companies and the appellants are private limited company.

a) ***Tieto Software Technologies Limited and Tieto ITServices India Pvt Ltd.***

b) ***Sterlite Technologies Limited and Sterlite Power Technologies Ltd.***

c) ***Simbhaoli Sugars Ltd and Simbhaoli Spirits Ltd.***

d) ***Moschip Semiconductor Technology L:td and Verasity Technologies Inc.***

e) ***OCL India Pvt Ltd and or***

f) ***Heritage Foods Retail Ltd and Future Retail Ltd***

g) ***Trident Corporation Ltd and Trident Ltd***

12. Learned counsel for the appellants further argued that the Companies Act, 2013 does not make any distinction between the listed company and the private company. The Act is applicable to all the companies whether public or private which are registered under the Companies Act, 1956/Companies Act, 2013. Therefore, the findings of the

Tribunal that these judgements are not applicable in the case of private companies is not acceptable.

13. Lastly the learned counsel of the appellants drew our attention towards the judgement pronounced by the Hon'ble Supreme Court in the case of ***Miheer H. Mafatlal Vs Mafatlal Industries Ltd (AIR 1997 SC 506)*** and argued that the appellants have followed the procedure for the purposes of the Scheme and have complied with all requirements as laid down by the Hon'ble Supreme Court in the above judgement and argued that the Tribunal did not have any further jurisdiction to sit in appeal over the commercial wisdom of the proposed Scheme and rejected the sanction of Scheme merely upon unfounded belief that there are not specific provisions providing for issuance of shares at premium in case of any scheme of amalgamation or arrangements.

14. We have heard the arguments of the learned counsel for the appellants and perused the record.

15. On careful reading of the impugned order, we have observed that the Tribunal has recorded disinclination to sanction the Scheme of Amalgamation as has been proposed on the ground that both the companies are unlisted/private limited companies, therefore, in the absence of explicit provision available in the Companies Act, 2013 to issue shares at a premium, the NCLT Bench is of the considered view that the scheme is not in compliance with Section 232 of the Companies Act, 2013, therefore, the Bench is not inclined to sanction the scheme of amalgamation as proposed.

16. Section 232(3)(i) also deals with incidental, consequential and supplemental matters, which is as follows:

"Xxxxx

(i) Such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under Section 133."

17. The above section is applicable to all the companies and does not make a distinction whether the company is a private or public company or whether it is listed company or non-listed company. The company where issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of premium received on those shares shall be transferred to a "securities premium account". Thus there is no bar that the issues of shares at a premium or otherwise than cash also be resorted to by the company.

18. It is the prerogative of the company to issue shares at a premium or otherwise depending upon the facts and circumstances of the situation. In the present case the shares are being issued by the transferee company to the transferor company for acquiring the assets of the company. If the fair value of the assets being acquired by the transferee company is more than the face value of the shares issued for the same,

the company has no other alternative but to allot the shares at premium and the difference being carried to a "securities premium account". This is what precisely the company has proposed to do.

19. The certificate as required under Section 232(3)(i) of the Companies Act, 2013 from the company's auditor is annexed at Page No.292 of the Appeal Paper Book filed by the appellants. The Chartered Accountant in his report dated 17th March, 2017 has observed as under:

> ***"Based on procedures performed by us, and the information and explanations given to us, in our opinion the accounting treatment contained in Clause 12 of the Draft Scheme is in conformity with the applicable Accounting Standards as mentioned above."***

Thus the compliance of Section 232(3)(i) has been made.

20. Further Section 133 of Companies Act, 2013 prescribes that the Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under Section 3 of Chartered Accountants Act, 1949 (38 of 1949) in consultation with and after examination of the recommendations made by the National Financial Reporting Authority (NFRA). The Auditor has certified that the Scheme has complied with Section 133 of the Companies Act, 2016 read with Rule 7 of the Companies (Accounts) Rules, 2014 and 2016. Rules 7 of the Companies (Accounts) Rules, 2014 and 2016 provides as under:-

"(1) The standards of accounting as specified under the Companies Act, 1956 (1 of 1956)shall be deemed to be the Accounting Standards until Accounting Standards are specified by the Central Government under Section 133."

Accounting Standard and the treatment prescribed under it as much as a part of the legal compliance in the amalgamation of the companies. Accounting Standard 14 deals with accounting for amalgamation. It deals with various situations of amalgamation etc. In the present case the Scheme has complied with the legal requirements on amalgamation.

21.We have noted that Section 52 of the Companies Act, 2013 deals with the issue of shares at premium which is as follows:-

"Section 52- Application of premiums received on issue of shares-(1) where a company issues shares at a premium whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be transferred to a "securities premium account" and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the share premium account were the paid-up share capital of the company.
(2)Notwithstanding anything contained in sub-section (1), the securities premium account may be applied by the company-
(a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;
(b) in writing off the preliminary expenses of the company;
(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or of any debentures of the company; or

(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or
(e) for the purchase of its own shares or other securities under section 68.
(3) The securities premium account may, notwithstanding anything contained in sub-section (1) and (2), be applied by such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133,-
(a) in paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; or
(b) in writing off the expenses of or the commission paid or discount allowed on any issue of equity shares of the company; or
(c) for the purchase of its own shares or other securities under section 68."

22. We are not in agreement that the accounting standard have not dealt with the issues specifically and it cannot be said that there is no legal provision specified.

23. The Hon'ble Supreme court in the case of ***Miheer H. Mafatlal Vs Mafatlal Industries Ltd (AIR 1997 SC 506)*** has already laid down the scope and ambit of jurisdiction of the Company Court whilst approving scheme under erstwhile provisions of Sections 391-394 of Companies Act, 1956 (Presently Section 230 of Companies Act, 2013). In view of the settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad conours of such jurisdiction have emerged:

a) *The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with*

and that the requisite meetings as contemplated by Section 391(1) (a) have been held.

b) *That the Scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).*

c) *That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.*

d) *That all necessary material indicated by Section 393(1) (a) is placed before the voters at the concerned meetings as contemplated by Section 391 sub-section (1).*

e) *That all the requisite material contemplated by the proviso of Sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.*

f) *That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.*

g) *That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.*

h) *That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.*

i) *Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.*

24. Therefore, in the light of the Hon'ble Supreme Judgement, we are not in agreement with the Tribunal's observations for not sanctioning the scheme.

25. Therefore, the Appeal is allowed. National Company Law Tribunal, Hyderabad Bench, Hyderabad is directed to sanction the scheme and may issue further consequential directions/orders so as to ensure/enable the Companies to make all other legal compliances as necessary.

26. No order as to costs.

(Justice A.I.S. Cheema)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

New Delhi

Dated: 03-05-2018

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