

**IN THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”**

CP (CAA) No.2/Chd/Hry/2019

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

In the matter of the Scheme of Amalgamation between:

Salter India Limited

having its registered office at
Plot No. 53, Sector-25, Ballabgarh,
Faridabad, Haryana-121004
CIN: U31909HR1998PLC055856

....Transferor Company/Petitioner Company-1

With

Avery India Limited

having its registered office at
Plot Nos. 50-59, Sector 25, Ballabgarh,
Faridabad, Haryana-121004
CIN: U29196HR1947PLC043478

....Transferee Company/Petitioner Company 2

Judgment delivered on: 18.12.2019

**Coram: HON'BLE MR. AJAY KUMAR VATSAVAYI, MEMBER (JUDICIAL)
HON'BLE MR. PRADEEP R. SETHI, MEMBER (TECHNICAL)**

For the petitioner-companies : Mr. Atul V. Sood, Advocate

For Income Tax Department : 1. Mr. Yogesh Putney, Advocate
2. Mr. H.S. Sehgal, Advocate

For Official Liquidator : Mr. Vibhor Sharma, Advocate

Per: Mr. Pradeep R. Sethi, Member (Technical)

JUDGMENT

This is a joint Second Motion Petition under Sections 230 to 232 of the Companies Act, 2013 (for short, the 'Act') filed by the Petitioner-Companies in terms of Rule 15 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (for brevity, 'Rules') for the sanction of Scheme of Amalgamation (for brevity 'Scheme') of Salter India Limited (Transferor Company) with Avery India Limited (Transferee Company). The joint petition is maintainable in terms of Rule 3(2) of the Rules.

2. The applicant-companies filed First Motion Application bearing CA (CAA) No.35/Chd/Hry/2018 before this Tribunal for seeking dispensation with the meetings of equity shareholders and unsecured creditors of Transferor Company and secured creditors of both the Applicant-Companies and for convening the meetings of equity shareholders and unsecured creditors of Transferee Company and to pass any such orders or directions as may be deemed fit in the facts and circumstances of the case.

3. The First Motion Application was disposed of vide order dated 13.11.2018 with a direction to hold meetings of equity shareholders and unsecured creditors of the Transferee Company. Meeting of equity shareholders and unsecured creditors of the Transferor Company was dispensed with. There was no secured creditor in any of the applicant company, therefore, there was nothing to convene their meeting. Certain necessary directions as mentioned in the order dated 13.11.2018 at Annexure P-10, were also issued.

4. The affidavit dated 22.12.2018 of Mr. Rohit Gupta, authorized representative of the Petitioner Companies with regard to compliance of all the directions given in the order dated 13.11.2018 was filed vide Diary No. 5123 dated

24.12.2018 along with newspaper publications in Indian Express (English), Delhi/NCR Edition and 'Business Standard (Hindi), Delhi NCR Edition both dated 04.12.2018 and notices are also stated to be sent to the Income Tax Department, Regional Director, RoC, Official Liquidator and Reserve Bank of India, Mumbai and Delhi. Certificate from National Securities Depository Limited (NSDL) certifying the successful transmission of email for service of the notice of the equity shareholders (2319 equity shareholders) of the Transferee Company is stated to be attached as Annexure-4 of the affidavit and proof of dispatch of notices to 6352 equity shareholders of the Transferee Company duly certified by the post office is stated to be attached as Annexure-5 of the affidavit. As regards the 159 Unsecured Creditors of the Transferee Company, 148 Unsecured Creditors are stated to be served by e-mail and the remaining 11 Unsecured Creditors by registered post. No objections are stated to be received by the Applicant Companies pursuant to the issue of the above notices.

5. Report dated 05.01.2019 of the Chairperson along with the report of the Scrutinizer in respect of the meetings of equity shareholders & unsecured creditors of the Transferee Company held on 05.01.2019 was received vide Diary No. 49 and 50 dated 07.01.2019.

6. The Chairperson has reported that the Scheme was approved by the 99.87% of the equity shareholders and 100% of the unsecured creditors of the Transferee Company. Thereupon the instant petition was filed for approval of the Scheme in terms of Rule 15 of the Rules.

7. The main objects, date of incorporation, authorized and paid-up share capital, interest of employees and rationale of the Scheme were already discussed in detail in the First Motion order dated 13.11.2018 passed by this Tribunal.

8. Annexure P-13 is the certificate dated 05.09.2018 of Deloitte Haskins & SeNS, Chartered Accountants, stating therein that the accounting treatment in the books of the applicant companies proposed in the Scheme is in compliance with the applicable Accounting Standards notified by the Central Government under Section 133 of the Companies Act, 2013 read with Companies (Accounting Standards) Rules, 2006 as amended and other generally accepted accounting principles in India as applicable.

9. The audited financials for the period ended 31.03.2018 and supplementary financial statements for the period ended 30.09.2018 of the applicant companies are attached as Annexure P-3, P-4, P-6 and P-7 respectively.

10. As per the Scheme, the Appointed Date is 01.04.2018 or such other date as may be approved by the Tribunal or another appropriate authority. The Share Exchange Ratio under the Scheme has been determined in accordance with the report dated 31.07.2018 issued by SSPA & Co., Chartered Accountants, attached as Annexure A-12. According to the Valuation Report, the fair value per equity share of Transferee Company works out to ₹276 as on the Valuation Date.

11. It is also submitted that the present 'Scheme' involves reduction of share capital of Transferee Company and the relevant paragraph is reproduced as under:-

17. REDUCTION OF SHARE CAPITAL OF THE TRANSFEREE COMPANY

17.1 As on 24th August 2018, the issued, subscribed and paid up share capital of the Transferee Company is Rs. 9,83,23,020 consisting of 98,32,302 equity shares of face value Rs. 10 each, fully paid up, of which, 8,63,857 equity shares are held by the Relevant Shareholders. The issued, subscribed and paid up share capital of the Transferee Company shall stand reduced with regard to the shares held by the Relevant Shareholders as on the Record Date,

by paying back the capital at a price as mentioned hereinafter.

17.2 Upon the Scheme becoming effective, the issued, subscribed and paid up share capital of the Transferee Company will be reduced from Rs. 9,83,23,020 (Rupees Nine Crores Eighty Three Lakh Twenty Three Thousand and Twenty) consisting of 98,32,302 (Ninety Eight Lakh Thirty Two Thousand Three Hundred and Two) equity shares of face value Rs. 10 each to Rs. 8,96,84,450 (Rupees Eight Crore Ninety Six Lakh Eighty Four Thousand Four Hundred and Fifty) consisting of 89,68,445 (Eighty Nine Lakh Sixty Eight Thousand Four Hundred and Forty Five) equity shares of face value Rs. 10 each, by cancelling and extinguishing 8,63,857 (Eight Lakh Sixty Three Thousand Eight Hundred and Fifty Seven) equity shares of face value Rs. 10 each, to the end and intent that all the equity shares held by the Relevant Shareholders as on the Record Date are cancelled and extinguished for payment of requisite consideration mentioned in clause 17.3 below.

It is hereby clarified that in the event there is a decrease in the number of equity shares held by the Relevant Shareholders between 24th August 2018 and the Record Date, the reduction of equity shares shall be deemed to have been effected for the number of equity shares held by the Relevant Shareholders as on the Record Date.

17.3 Upon the Scheme becoming effective and pursuant to clause 17.1 and clause 17.2 above, the Relevant Shareholders of the Transferee Company as on the Record Date, shall be paid, for the equity shares held by them and which are cancelled and extinguished, a sum of Rs. 276 per equity share of face value Rs. 10 each, so cancelled and extinguished, as per valuation carried out by independent valuers, SSPA & CO. (Chartered Accountants). Further, as per the provisions of section 115-O of the Income Tax Act, 1961, the Transferee Company shall additionally bear the dividend distribution tax @ 20.555% amounting to approximately Rs. 56.73 per equity share so cancelled and extinguished or as may be applicable as per the tax laws then in force.”

12. It is also stated that the Transferor Company is wholly owned subsidiary of the Transferee Company, therefore, there would be no issue and allotment of shares by the Transferee Company. It is further submitted that upon

sanctioning of the Scheme, the entire present issued, subscribed and paid-up capital of the Transferor Company shall stand automatically cancelled and extinguished and this company shall stand dissolved without undergoing the process of winding up. The present Scheme of Amalgamation provides for the following with respect to issue of shares:-

“12. ISSUE OF SHARES

Since the Transferor Company is a wholly owned subsidiary of the Transferee Company, and the Transferee Company holds 100% shares in the Transferor Company, no shares would be issued and allotted by the Transferee Company on the amalgamation of the Transferor Company with the Transferee Company. Upon the Scheme becoming effective, the entire share capital of the Transferor Company shall be cancelled and extinguished. The investments in the shares of the Transferor Company, appearing in the books of the Transferee Company, shall, without any further act or deed, stand cancelled.”

13. The Registry reported on 25.01.2019, 25.02.2019 and 29.04.2019 that objections were received from Sh. Dilip Kumar Surana (Diary No.136 dated 29.01.2019), Sh. PP Zibi Jose (Diary No.164 dated 30.01.2019 and Diary No.207 dated 05.02.2019) and Hanuman Share & Stock Brokers Ltd. (Diary No.217 dated 05.02.2019)

14. When the petition was listed on 26.02.2019, the following directions were issued by this Tribunal:-

“The petition be listed for hearing on 30.04.2019. Notice of hearing be advertised in the same newspapers as in the first motion petition i.e. “Indian Express (English)”, Delhi/NCR Edition and “Business Standard (Hindi)”, Delhi/NCR Edition not less than 10 days before the aforesaid date fixed for hearing.

Notice be also served upon the Objector(s) or their representatives who may have made representation and who have desired to be heard in their representation along with a copy of the petition and the annexures filed therewith at least 15 days before the date fixed for hearing. It be specified in the notices that the objections, if any, to the Scheme contemplated by the authorities to whom notice has been given on or before the date of hearing fixed herein may be filed within thirty days from the date of the receipt of

the notice, failing which it will be considered that there is no objection to the approval of the Scheme on the part of the authorities by this Tribunal and subject to other conditions being satisfied as may be applicable under the Companies Act, 2013 and relevant rules framed thereunder.

As per office report, objections have been filed by 3 shareholders i.e. three individual shareholders and one company viz., Mr. Dilip Kumar Surana, Address: Arihant Plaza, 1st floor 84-85 Wall Tax road Chennai-60003; Mr. PP Zibi Jose, PCS, Address: 61/2939, Tenrose SRM Road, Kochi 682018 and Hanuman Share & Stock Brokers Ltd., Address: 57 H.H. Trust Building Opp. Dhanlaxmi Market, Revdi Bazar, Kalupur, Ahmedabad-380002. It is, therefore, directed that individual notices be sent to the above mentioned shareholders.

The petitioner-companies have attached specific affidavits of Mr. Pawan Kumar Arora and Mr. Rohit Gupta, the authorized representatives of the Transferor & Transferee Company to the effect that there is no sectoral regulator(s) governing the business of the petitioner-companies and it is also stated that since the Company is a downstream investment of foreign owned and controlled company, Reserve Bank of India may be treated as Sectoral Regulator for that purpose.

In addition to the above public notice, each of the petitioner-companies shall serve the notice of the petition on the following Authorities namely, (a) Central Government through Regional Director (Northern Region), Ministry of Corporate Affairs (b) Registrar of Companies at Delhi and Haryana, Ministry of Corporate Affairs (c) Income Tax Department through the Nodal Officer - Principal Chief Commissioner of Income Tax, NWR, Aaykar Bhawan, Sector 17-E, Chandigarh by mentioning the PAN of the companies (d) Official Liquidator, Punjab, Haryana and Chandigarh (e) Reserve Bank of India (f) Mr. Dilip Kumar Surana, Shareholder (g) Mr. PP Zibi Jose, PCS, Shareholder and (h) Hanuman Share & Stock Brokers Ltd., Shareholder along with copy of this petition by speed post immediately and to such other Sectoral Regulator(s) who may govern the working of the respective companies involved in the Scheme.

The petitioner companies shall also file the affidavit at least two days before the date fixed to the effect that no objections to the Scheme have been received by the petitioner-companies.”

15. The learned counsel for the petitioner-companies filed compliance affidavits of the authorized signatory of the petitioner-companies dated 22.04.2019 (Diary No. 2120 & 2121 dated 25.04.2019) along with copies of newspaper publications in Business Standard (Hindi) Delhi NCR Edition and

Indian Express (English) Delhi NCR, both dated 13.03.2019 were annexed as Annexure A-1 of the affidavit.

16. It is also stated in the affidavits dated 22.04.2019 that individual notices were sent by the petitioner-companies to the (i) Regional Director, Northern Region, Ministry of Corporate Affairs; (ii) Registrar of Companies, Chandigarh; (iii) Principal Chief Commissioner of Income Tax, Chandigarh; (iv) Official Liquidator, Punjab, Haryana and Chandigarh; (v) RBI; (vi) Mr. Dilip Kumar Surana; (vii) Mr. PP Zibi Jose and (viii) Hanuman Share & Stock Brokers Ltd. It is further stated that the notice sent to RBI, Mumbai (head office) was returned on 11.03.2019 while notice sent to RBI, Regional Office (Delhi) was successfully delivered on 07.03.2019. The courier receipts along with tracking reports of the notices sent to the above authorities are stated to be attached as Annexures A-2 and A-3. It is stated in the affidavits dated 22.04.2019 that after filing of the Second Motion Petition, objections were received from two shareholders of the Transferee Company and that pursuant to the publication of advertisement, neither the advocate of the Applicant Companies nor the Applicant Companies have received any objection.

17. We have heard the learned counsel for the petitioner companies, the learned counsel for the Official Liquidator and learned counsel for the Income Tax Department and have perused the records carefully.

18. Mr. O.P. Sharma, the Official Liquidator has filed his report dated 08.05.2019 (Diary No.2400 dated 13.05.2019) wherein no specific objections to the Scheme have been raised and it is submitted that the matter may be decided on merits.

19. The Regional Director, Northern Region, Ministry of Corporate Affairs (RD) has filed its report by way of affidavit dated 02.05.2019 (Diary

No.2427 dated 14.05.2019). The Regional Director on the basis of the Registrar of Companies report dated 23.04.2019 has made few observations in Para 9 of his report which are as follows:-

- (a) With reference to clause 14 of the scheme, the RD in para 9(a) observed that the Transferee company may kindly be directed to comply with the provision of section 232 (3) (i) of the Companies Act, 2013 in regard to fee payable on its revised authorized share capital.
- (b) In para 9(b) of the report, the RD observed that the Transferor Company has mentioned that they have no secured creditors and the meeting of secured creditor was also dispensed by Hon'ble Tribunal on the basis of above submission of Transferor Company. However, it has been observed from MCA-21 records that the Transferor company has an active charge of Rs.15,00,000/-. The same may be clarified from the Transferor Company.
- (c) In para 9(c) of the report, the RD has observed that a letter dated 31.01.2019 has been received from Sh. P.P.ZIBI Jose, Practicing Company Secretary, Shareholder of the Transferee Company objecting the proposed reduction of share capital of Transferee Company.
- (d) In para 12 of the report, the RD has extracted the reply of the petitioner companies (para 26 of letter dated 11.04.2019 addressed to the RD) stating that capital reduction under the proposed Scheme of Arrangement is in no manner a buy-

back of shares under Section 68 of the Act. The buy-back provisions does not supplant any part of the pre-existing jurisdiction of the Court/NCLT to sanction a scheme for share reduction under Sections 230-232, 66 of the Act. Therefore, the conditions for buy-back under Section 77A cannot be applied to a scheme under Sections 100 to 104 and Section 391, since the two operate in independent fields. Reliance is placed on the judgment of Bombay High Court in case of SEBI vs Sterlite Industries (India) Ltd.

The RD has stated that the reply of the petitioner companies appears to be reasonable and the Tribunal may decide the case on merits.

20. The learned counsel for the petitioner companies filed their respective replies to the report of Regional Director by way of affidavits (Diary No.2770 & 2771 both dated 31.05.2019) of the authorized representatives which is as follows:-

- (i) In response to the observations contained in Para 9(a) of the report of Regional Director, the Transferee Company undertakes to comply with the provisions of Section 232(3)(i) of the Companies Act, 2013 and shall pay the applicable fee, if any, post the consolidation of the authorized share capital of the Transferor Company with the authorized share capital of the Transferee Company.
- (ii) In response to the observations contained in Para 9(b) of the affidavit, it has been submitted by the Transferor Company that it has no secured creditors and that the pending charge of

₹15,00,000/- currently being seen on the MCA-21 records, towards Bank of India have been duly satisfied through Form No. 17 filed with the Registrar of Companies on 31.12.2004 but the same still appears inadvertently on the MCA-21 records due to some technical lapse and needs to be rectified as satisfied. The relevant document pertaining to the charge satisfied is attached as Annexure A (Diary No. 2770).

- (iii) In response to the objections filed by Mr. P.P. Zibi Jose, PCS, it has been submitted by the Transferee Company that in terms of provision 230(4) of the Act, the shareholders holding a minimum of 10% of the total shareholding has the right to raise objections against the compromise and arrangements filed under Section 230 of the Companies Act, 2013. Mr. P.P. Zibi Jose holds 8,172 equity shares in the Transferee Company which constitute only 0.0831% of the total shareholding of the Transferee Company. Therefore, such percentage held by the Mr. P.P. Zibi Jose does not meet the minimum threshold prescribed under proviso to Section 230(4) of the Act and on this ground the letter dated 31.01.2019 filed by the Mr. P.P. Zibi Jose lacks the validity under the statutory provision.

21. Mr. Yashpal Chawla, Jt. Commissioner of Income Tax Circle-22(1), New Delhi, filed its report dated 15.01.2019 (Diary No.4359 dated 27.08.2019). It is stated in the report that a demand of ₹15,914/- for the Assessment Year 2006-07 is outstanding against the Transferor Company and there is no objection to the proposed amalgamation.

22. Mr. Debasish Biswas, Asst. Commissioner of Income Tax Circle-1(1), Kolkata, filed its report dated 19.06.2019 (Diary No.371 dated 24.06.2019) in the case of the Transferee Company giving its NOC to the proposed Scheme of Amalgamation.

23. In response to the objection raised by the Income Tax Department in its report dated 08.02.2019, the authorized signatory of Transferor Company filed reply by way of affidavit dated 24.04.2019 (Diary No.2158 dated 29.04.2019) stating therein that upon the Scheme coming into effect on the Effective Date and with effect from the Appointed Date, any tax liability of the Transferor Company shall stand transferred to the Transferee Company and shall become tax liabilities of the Transferee Company.

24. As discussed above, notice was sent to RBI, Mumbai (Head Office) which was returned on 11.03.2019. However, it is stated by the applicant-companies that notice sent to RBI, Regional office (Delhi) was successfully delivered on 07.03.2019. However, despite sufficient lapse of time no reply has been received and therefore, it is presumed that they have no representation to make on the proposal.

25. When the matter was listed on 27.08.2019, the learned counsel for the petitioner companies was directed to file the proof of service along with the table in respect of both the companies with regard to service to (i) Dilip Kumar Surana, (ii) PP Zibi Jose PCS and (iii) Hanuman Share and Stock Brokers Ltd.

26. The petitioner companies filed compliance affidavit dated 30.08.2019 and 31.08.2019 (Diary No.4525 & 4526 both dated 03.09.2019) of their authorized signatories. The Transferee Company in its affidavit has given the details of notices (in tabular format) dispatched to the shareholders who have filed objections to the Scheme along with copy of postal receipts and tracking report.

Further, both the Petitioner Companies in their respective affidavits have also stated in tabular form the details of notices dispatched to the statutory authorities along with postal receipts and tracking report.

27. In response to notice issued to Mr. P.P. Zibi Jose, PCS, vide order dated 26.02.2019, he has filed written submissions vide Diary No. 96 dated 28.04.2019 stating therein that one of the arrangements proposed in the Scheme is to compulsorily cancel the shares held by non-promoter shareholders which is highly prejudicial to the interest of the non-promoter shareholders by-passing Section 66 and/or Section 236 of the Companies Act. It is stated by the objector that he holds 0.0831% of the paid up share capital. The Scheme is outside the purview of Section 230-232 since the said provisions are primarily intended to restructure either a sick company or a potential sick company or companies which are not in a good financial position or are getting into possible business difficulties including winding up but possible to reorganize the same. Lastly, it is stated that the Scheme is only intended to remove all the non-promoter shareholders of the company at a throw away price with only zero cost to the promoters. There is no compromise or arrangement envisaged in the Scheme and the only compromise is compulsory cancellation of non-promoter shareholders at a throw away price.

28. The learned counsel for the petitioner companies has filed reply to the above mentioned objections vide Diary Nos. 2768 and 2769 dated 31.05.2019 by way of affidavits of the respective authorized representatives of the petitioner companies stating therein that since the objector holds 8,172 equity shares in the Transferee Company which constitute only 0.0831% of the total shareholding of the Transferee Company, he does not meet the minimum threshold of 10% prescribed under proviso to Section 230(4) of the Act and therefore, on this ground the letter filed by the objector lacks validity under the statutory provision.

It is also contended that the contents of “written submissions” are contrary to settled law. Lastly, it is submitted that there is no verification provided under the affidavit filed by the objector as required under Rule 34 of the NCLT Rules.

29. When the matter was listed on 01.10.2019, the learned counsel for the petitioner was directed to collect copies of the objections/letters from the Registry, sent by Mr. Dilip Kumar Surana, Shareholder; Mr. P.P. Zibi Jose, Practising Company Secretary and M/s Hanuman Share & Stock Brokers Ltd. and file in tabular form, the objections raised and the reply of the petitioners thereto.

30. The authorized signatories of the Petitioner Companies filed compliance affidavits dated 01.10.2019 (Diary No.5476 & 5495 both dated 11.10.2019) for submitting the response in tabular form to the representation/objections of shareholders of Transferee Company which is as follows:

S. No.	Submission of Shareholders	Response
1.	Dilip Kumar Surana, Hanuman Share and Stock Brokers P. Ltd. - Form of objections	A letter was sent to this Hon'ble Tribunal raising objections. This is contrary to NCLT Rules as objections can be filed only as per NCLT Rules. This Hon'ble Bench afforded an opportunity to these shareholders for representation and vide order dated 26.2.2019, directed issuance of notice to them. No representation was made before this Hon'ble Tribunal pursuant to notice and no representation has been received by the Petitioner Companies. Hence, there are no valid objections before this Hon'ble Tribunal.
2.	Common Response to objections raised by all the objectors	
	a. On maintainability on objections	Proviso to Section 230(4) specifically provides that only shareholders holding 10% share or more can file an objection. In the present case, admittedly, the shareholding of all the 3 shareholders put together is 0.15%.

		<p>Such percentage held by the Objectors does not meet the minimum threshold prescribed under Section 230 (4) and on this ground, the alleged objections are ineligible to be heard by this Hon'ble Tribunal.</p> <p>Further, on the recommendations of the Report of Expert Committee on Company Law, the Companies Act, 2013 introduced the threshold for objections.</p> <p>Hence, the objections cannot be considered, being ineligible u/s 230(4) of the Act.</p>
	b. Petitioners are by-passing Section 66 and 236 of the Act.	<p>Explanation to Section 230(12) of the Act clearly states that section 66 is not applicable and in a Scheme of Arrangement, capital reduction is permissible. This position has been upheld by Hon'ble NCLAT in <i>R Systems International Ltd, MANU/NL/0151/2018</i> and in the matter of <i>Ratnagiri Gas and Power Limited & Anr. in Company Appeal (AT) No. 294 of 2017</i>. This has also been held by this Hon'ble Tribunal in the matter of <i>Brooks Instruments India P. Ltd. in CP(CAA) No. 25/Chd/Hry/2018</i> vide judgment dated 17.5.2019.</p> <p>There is no acquisition of shares by virtue of amalgamation . By way of a separate Clause in the Scheme, capital is being reduced, which is permissible under Section 230. On the other hand, the proposed Scheme is at an entirely different footing, wherein the Transferee Company itself is reducing the capital of the non-promoter shareholders and discharging consideration and there is no acquisition of shares. Hence, section 236 has no application.</p>
	c. Variation of Class rights is being done in violation of Section 48 of the Act	<p>As per Article of Association, the company has only one class of shares, i.e., equity shares and the voting and other rights are the same for the entire class of equity shareholders. Hence, there is no occasion of variation of any rights of shareholders as per Section 48 of the Companies Act, 2013.</p> <p>Further, this aspect has already been upheld by this Hon'ble Tribunal in the matter of <i>Bharti Telecom Ltd. C.P. No.</i></p>

		<i>167/Chd/Hry/2018</i> vide judgment dated 27.9.2019 in par nos. 35-36 relying on <i>Reckitt Benckiser (India) Ltd. 2005 SCC OnLine Del 674</i> (para 31)
	d. Scheme is outside the view of Sections 230-232 as said provisions are meant for sick company or potentially sick company	There is no such bar that only a sick or potentially sick company can exercise its right u/s 230-232 of the Act. In fact, section 230-232 (akin to Section 391-394 of the Companies Act, 1956) has been interpreted in a wide manner, as being a complete code in itself.
	e. Reduction of share capital should benefit the Company and should not be mis-used for selective cancellation of non-promoter shareholding and the purpose and rational of the Scheme are all mis-leading statement	Reduction of share capital is a matter of domestic concern, i.e., the commercial decision of the majority prevails. <i>Reckitt Benckiser (India) Ltd. (supra)</i> (para 21). This principle of law has been followed by this Hon'ble Tribunal in the matter of <i>Bharti Telecom Ltd. (supra)</i> (Para 41) The Transferor Company and the Transferee Company are two separate companies, engaged in complementary businesses. The Transferor Company is independent in its operations, functionalities and management. Accordingly, the Scheme would result in consolidation of complementary businesses and related assets of the Transferor Company with the Transferee Company, leading to synergistic linkages and benefits.
	f. Scheme is intended to avoid payment of stamp duty on transfer of immovable properties and payment of income tax.	Clause 9 of the Scheme states that all tax dues will be paid by the Transferee Company. Further, the Income Tax department has given a no objection to the Scheme. Any stamp duty as applicable on transfer of immovable properties shall be paid by the Transferee Company.
	g. Valuation of shares in bad. Non-promoter shareholders are being removed at a throw away price.	Only a bald statement has been made and no explanation has been given to support this averment. It has been held by <i>Hon'ble Supreme Court in Hindustan Lever Employees Union V. Hindustan Lever Ltd. & Ors.</i> that an objector must first show that the valuation is ex-facie unreasonable, i.e., so unreasonable that it can't be accepted. It was also held that valuation is not an exact science and all valuations proceed on assumptions. No such averments have been made in the present case.

		<p>Further, the Court is not required to ascertain mathematical accuracy and is not required to interfere only because the figure arrived at by the valuer was not better as it would have been if another method was adopted.</p> <p>In the present case, we humbly submit that the independent valuer has undertaken exhaustive study of the business of the Transferee Company and has considered the industry trends and all other relevant financial and economic factors to determine the value per share of the Transferee Company. Further, Dividend Distribution Tax of INR 56.73 per equity share upon payment to shareholders will also be borne by the Transferee Company. Clause 17.3 of the Scheme (page 80 of paperbook).</p>
	<p>h. the independent directors are guilty of collusion with promoters in approving the scheme of arrangement</p>	<p>Bald allegations. The Scheme was duly approved by shareholders and creditors with requisite majority. The meetings of shareholders and unsecured creditors of the Transferee Company was also conducted by a Chairman/ Alternate Chairman appointed by this Hon'ble Tribunal who happens to be a retired judge of Hon'ble High Court.</p> <p>Transferor Company is not required to appoint Independent Director as per Rule 4 of The Companies (Appointment and qualification of Directors) Rules, 2014</p>
	<p>i. The Scheme is in violation of Articles 14, 19, 31, right to equality and right to property guaranteed under Constitution of India</p>	<p>Merger of a Wholly Owned Subsidiary ('WOS') with its parent is not restricted under any provision of the Act and there have been multiple instances of a WOS being merged with its parent company, with prior approval of the Hon'ble NCLT/ High Court.</p> <p>It has been duly held in the matter of <i>Reckitt Benckiser (India) Ltd. (supra)</i> that such decisions are a matter of domestic concern.</p> <p>Further, as per the principles of corporate democracy, the requisite majority of shareholders and creditors as contemplated under the law have approved the Scheme. The reports of Official Liquidator, Regional Director, Registrar of Companies and Income</p>

		Tax department have also not objected to the Scheme.
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31. When the matter was heard on 14.10.2019, the order was reserved. Subsequently, during the course of examination, certain issues came to notice and the matter was listed on 23.10.2019, when the following order was passed:-

“During the course of examination, it is noticed that for the purpose of determining whether the proposed reduction of capital is fair and equitable and it is also just and reasonable, the details of the shareholding position of the Transferee Company before and after reduction are not available and the voting position of the relevant Shareholders is also not available.

Similarly, for the purpose of determining whether the valuation of the shares is ex facie unreasonable i.e. so unreasonable that it cannot be accepted, the working for computation of the DCF by the Valuer is not available.

For the purpose of obtaining the above details, the case is fixed for re-hearing on 29.10.2019.”

32. In compliance, the Transferee Company filed affidavit (Diary No.6224 dated 08.11.2019) of Mr. Rohit Gupta, authorized signatory of Transferee Company stating the *“Pre and Post Capital Reduction Shareholding Pattern of the Transferee Company is as under:-*

S. No.	Category of Shareholders	Total No. of Shares held	Shareholding as % of total No. of shares
Pre Capital-Reduction Shareholding:			
1.	Promoter Group	89,68,445	91.2%
2.	Relevant Shareholders	8,63,857	8.8%
	Total	98,32,302	100.00%
Post Capital-Reduction Shareholding:			
1.	Promoter Group	89,68,445	100.00%
	Total	89,68,445	100.00%

Further the voting details by the Shareholders through Remote e-voting and voting through ballot papers of the meeting of equity shareholders of the Transferee Company on 05.01.2019 are as follows:-

Final Voting Status – All shareholders (as per Section 230 and directions of this Hon’ble Tribunal dated 13.11.2018 in First Motion Petition):

Particulars	Mode	Yes	No	Total
No. of Shareholders	Remote e-voting + Ballot Papers	98	16	114
Percentage		85.96%	14.04%	100%
Value of Shares		8,96,98,850	1,17,660	8,98,16,510
Percentage		99.87%	0.13%	100%

Voting Status – Relevant Shareholders:

Particulars	Mode	Yes	No	Total
No. of Shareholders	Remote e-voting + Ballot Papers	96	16	112
Percentage		85.71%	14.29%	100%
Value of Shares		14,400	1,17,660	1,32,060
Percentage		10.90%	89.10%	100%

33. It is also stated in the aforesaid affidavit that the valuation report along with the detailed workings supporting the valuation of the Transferee Company computed in accordance with Discounted Cash Flow (DCF) method is annexed as Annexure-A. It is further submitted that as per Articles of Association, the company has only one class of shares, i.e., equity shares and the voting and other rights are the same for the entire class of equity shareholders and only one meeting of shareholders was directed and convened.

The matter was accordingly reserved for orders on 14.11.2019.

34. We have already extracted above the response of the petitioner companies in tabular form to the representation/objections of the shareholders of

the Transferee Company. We consider it reasonable in this case to decide on the objections raised on merits vide Sr. No.2b onwards. We find that the objections from 2b to 2i have been adequately replied too by the Petitioner Companies. We may add that in **Reckitt Benckiser (India) Ltd. 2005 SCC OnLine Del 674**, the Hon'ble Delhi High Court in para No.21 held as under:-

“21. The principles, which can be distilled from the aforesaid judicial dicta, are summarised as under:

(i) The question of reduction of share capital is treated as matter of domestic concern, i.e. it is the decision of the majority which prevails.

(ii) If majority by special resolution decides to reduce share capital of the company, it has also right to decide as to how this reduction should be carried into effect.

(iii) While reducing the share capital company can decide to extinguish some of its shares without dealing in the same manner as with all other shares of the same class. Consequently, it is purely a domestic matter and is to be decided as to whether each member shall have his share proportionately reduced, or whether some members shall retain their shares unreduced, the shares of others being extinguished totally, receiving a just equivalent.

(iv) The company limited by shares is permitted to reduce its share capital in any manner, meaning thereby a selective reduction is permissible within the framework of law (see Re. Denver Hotel Co., 1893 (1) Chancery Division 495).

(v) When the matter comes to the Court, before confirming the proposed reduction the Court has to be satisfied that (i) there is no unfair or inequitable transaction and (ii) all the creditors entitled to object to the reduction have either consented or been paid or secured.”

35. The Hon'ble Delhi High Court has therefore, held that the question of reduction of share capital is treated as a matter of domestic concern and while

reducing the share capital, the company can decide to extinguish some of its shares without dealing in the same manner as with all other shares of the same class.

36. A similar decision is rendered by the Hon'ble Delhi High Court in **R.S. Live Media Pvt. Ltd. CO.PET.572/2013** and it was held in para No.37 of the judgment as follows:-

“37. In view of the above discussion, the questions viz.: Whether it is permissible for a company to reduce its share capital in a disproportionate manner and whether it is permissible that consideration payable to different shareholders on account of reduction of share capital is calculated at different rates, must be answered in the affirmative. The mode, manner and incidence of reduction has been regarded as a matter of domestic concern and there is no restriction under the Act which curtails the discretion of a company in adopting the manner in which the company chooses to reduce its capital.”

37. Therefore, the Hon'ble Delhi High Court has held that it is permissible for a company to reduce its share capital in a disproportionate manner. However, in both the decisions, the Hon'ble Delhi High Court has held that before the proposed reduction is confirmed by the court, the court has to be satisfied that i) there is no unfair or inequitable transaction and ii) all the creditors entitled to object to the reduction either consented or be paid or secured. It has been held in **R.S. Live Media Pvt. Ltd.** supra (para No.38) that the court has to view whether the reduction in capital is fair, just and reasonable keeping in mind that the shareholders are in the best position to ascertain the necessities and interests of the company.

38. The voting status of the relevant shareholders has been discussed above. Out of 112 relevant shareholders, 96 shareholders (85.71%) have voted in

favour of the Scheme and even though as per value of shares, their percentage is only 10.9%, the views of the relevant shareholders voting is in favour of the Scheme. Therefore, the proposed reduction of share capital by payment to the relevant shareholders has been found to be fair and equitable by the majority number of relevant shareholders and also by 85.96% of the total shareholders holding 99.37% value of shares attending the meeting.

39. As regard the valuation of the shares, we refer to the decision of Hon'ble Bombay High Court in **Cadbury India Ltd. Manu/MH/2681/2014** and Hon'ble Supreme Court in **Hindustan Lever Employees Union Vs. Hindustan Lever Ltd. & Ors.1995Supp(1)Supreme Court Cases 499**. We find that in **Cadbury India Ltd.** supra (Section 7) : General Principles the Bombay High Court has held that before a court can decline sanction to a scheme on account of valuation, an objector to the scheme must first show that the valuation is ex-facie unreasonable i.e. so unreasonable that it cannot be accepted. It was also held that plausible rationale provided by a valuer is not be readily discarded merely because an objector has a different view. It was held that valuation is not an exact science and all valuations proceed on assumptions and to dislodge a valuation, it must be shown that those assumptions as such as could never have been made, and that they are so patently erroneous that the end result itself could not but be wrong unfair and unreasonable. In **Hindustan Lever Employees Union Vs. Hindustan Lever Ltd.** supra (para No.3) the Hon'ble Supreme Court held that the jurisdiction of the court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test and the court is not required to interfere only because the figure arrived at by the valuer was not as better as it would have been if another method would have been adopted. It was held that what is imperative is that such determination should not

have been contrary to law and that it was not unfair to the shareholders of the company which was being merged.

40. On an examination of the facts of the present case with reference to the above judgments, we find that the valuation of the shares is supported by the report dated 31.07.2018 issued by SSPA & Company, Chartered Accountants attached as Annexure A-12. According to this valuation report the fair value per equity share of the Transferee Company works out to ₹276/- as on the valuation date. We may add here that the dividend distribution tax is to be paid by the Transferee Company as per clause 17.3 of the Scheme. No specific objections to the valuation of the shares has been raised in the representations/objections received from the three shareholders.

41. The representations/objections of the three shareholders are not accepted.

42. In view of the above discussion, we conclude that the objections/observations to the Scheme have been received only from Official Liquidator, Regional Director, Registrar of Companies and the shareholder P.P. Jibi Jose, Dlip Kumar Surana & Hanuman Share and Stock Brokers P. Ltd. and their objections/observations are adequately replied to by the Petitioner Companies and hence there is no impediment in the sanction of the Scheme. Therefore, the Scheme (Annexure P-1) is approved. While approving the Scheme, it is clarified that this order should not be construed as an order in any way granting exemption from payment of any stamp duty, taxes or any other charges, if any, and payment in accordance with law or granting permission. In respect of any permission/compliance with any other requirement which may be specifically required under any law. It is directed that the Petitioner Companies shall comply

with the provisions of FEMA/RBI Act. With the sanction of the Scheme, the Transferor Company shall stand dissolved without undergoing the process of winding up resulting in increase in the share capital of the Transferee Company as per the terms of Scheme. Notwithstanding the above, if there is any deficiency found, or violation committed qua any enactment, statutory rule or regulation, the sanction granted by this Tribunal 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 as well as the petitioners.

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 sections 230 to 232 of the Companies Act, 2013, be transferred to and vested in the Transferee Company for all the estate and interest of the Transferor Company 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 sections 230 to 232 of the Companies Act, 2013, be transferred to and become the liabilities and duties of the Transferee Company; and
3. That all the proceedings now pending by or against the Transferor Company be continued by or against the Transferee Company; and

4. That all the employees of the Transferor Company shall be transferred to the Transferee Company in terms of the 'Scheme'; and
5. The authorized share capital of the Transferee Company shall stand increased and that of Transferor Companies shall stand cancelled and extinguished as provided in the Scheme; and
6. That the fee, if any, paid by the Transferor Company on its authorized capital shall be set off against any fees payable by the Transferee Company on its authorized capital subsequent to the sanction of the 'Scheme'; and
7. That the Petitioner Companies do, within 30 days after the date of receipt of the order of this Tribunal, 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 without undergoing the process of winding up and the concerned Registrar of Companies shall place all documents relating to the Transferor Company and registered with him on the file kept in relation to the Transferee Company and the files relating to the said Transferor and Transferee Companies shall be consolidated accordingly, as the case may be; and
8. That the Transferee Company shall deposit an amount of ₹1,00,000/- (Rupees One Lakh only) with the Pay & Accounts Officer in respect of the Regional Director, Northern Region, Ministry of Corporate Affairs within a period of three weeks from the receipt of the certified copy of this order; and

9. That any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary.

43. As per the above directions and Form No. CAA.7 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, formal orders be issued on the petitioners filing the schedule of properties i.e. (i) freehold property of the Transferor Company and (ii) leasehold property of the Transferor Company by way of affidavit.

Pronounced in the open Court.

Sd/-
(Ajay Kumar Vatsavayi)
Member (Judicial)

Sd/-
(Pradeep R. Sethi)
Member (Technical)

Dec. 18, 2019
Anchal