

IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH
KOLKATA

C.P.(CAA) No. 1526/KB/2020
connected with
C.A No. (CAA) No. 826/KB/2020

In the matter of:
The Companies Act, 2013

And

In the matter of:
Section 230 read with Section 232 of the Companies Act, 2013 and other applicable provisions of the Companies Act, 2013

And

In the matter of:

J. M. HOSIERY & CO. LIMITED, 39, Kali Krishna Tagore Street, Kolkata – 700 007

... **Transferor Company 1**

And

In the matter of:

EBELL FASHIONS PRIVATE LIMITED, PS Srijan Tech park, DN-52, 10th Floor, Salt Lake City, Sector V, Kolkata – 700 091

... **Transferor Company 2**

And

In the matter of:

LUX INDUSTRIES LIMITED, 39, Kali Krishna Tagore Street, Kolkata – 700 007

... **Transferee Company**

And

1. **J. M. HOSIERY & CO. LIMITED**
2. **EBELL FASHIONS PRIVATE LIMITED,**
3. **LUX INDUSTRIES LIMITED**

... **PETITIONERS**

Date of Hearing: 25/03/2021

Date of pronouncement of the order: 25/03/2021

Coram: Shri Rajasekhar V.K., Member (Judicial)
Shri Harish Chander Suri, Member (Technical)

Appearances (via video conferencing):

For the Petitioners

1. Mr. Ratnanko Banerji, Sr. Advocate
2. Ms. Shruti Swaika, Advocate
3. Ms. Iram Hassan, Advocate
4. Mr. Sanket Sarawgi, Advocate

For the Regional Director (ER) 1. Mr. Harihara Sahoo, Joint Director

Per: Harish Chander Suri, Member (Technical)

ORDER

1. Heard the Learned Senior Counsel for the Petitioner Companies as well as Mr. Harihara Sahoo, Joint Director from the Office of the Regional Director (ER) representing the Central Government. No objector has come before this Tribunal to oppose the Scheme nor has any party controverted any averments made in the Petitions to the Scheme of Amalgamation.
2. The instant second motion petition has been filed under Section 230 read with Section 232 of the Companies Act, 2013 for sanction of Scheme of Amalgamation between J.M. Hosiery & Co. Ltd, Ebell Fashions Private Limited and Lux Industries. Copy of the Scheme is annexed as Annexure A at pg. 38 of the petition.
3. The Ld. Senior Counsel for the Petitioners submits that the Transferee Company and the Transferor Companies are engaged inter alia in the business of hosiery.
4. The Ld. Senior Counsel submits that the circumstances and/or reasons and/or grounds that have necessitated and/or justified the arrangement are stated in the said Scheme of Amalgamation. They are inter alia, as follows:

- (a) The proposed merger will lead to the presence of the Transferee Company across various market segments leading to risk mitigation and higher growth;
- (b) The proposed merger will rationalize the management structure, enhance customer reach, reduce overhead costs and ultimately lead to increased top line and bottom line for the Transferee Company;
- (c) The merged entity will have greater financial strength and flexibility;
- (d) The merger will also result in value appreciation for the shareholders of the merged entity;
- (e) Under a liberalised, fast changing and highly competitive environment, this amalgamation shall strengthen the businesses of the Transferor Companies and the Transferee Company by pooling up resources for common purpose;
- (f) The amalgamation will enable the future business activities to be carried on more conveniently and advantageously with a larger asset base besides achievement of management efficiency, reduction in administrative cost, optimisation of resources, enhanced flexibility in funding of expansion plans, improving profitability and stronger balance sheet of the merged company.
- (g) Cost savings are expected to flow from more focused operational efforts, rationalisation, standardisation and simplification of business processes, and the elimination of duplication and rationalization of administrative expenses.

5. The Scheme was approved by the respective Board of Directors of the Companies at their meetings held on 26th June, 2018.
6. The statutory Auditor of the Transferee Company have by their certificate dated 26th June, 2018 confirmed that the accounting treatment in the Scheme is in conformity with the accounting standard prescribed under Section 133 of the Companies Act, 2013.
7. It is also stated by the Ld. Senior Counsel of the Petitioners that no proceedings are pending under Sections 210 to 227 of the Companies Act, 2013 against the Petitioner(s).
8. It is also stated that the exchange ratio of shares in consideration of the Amalgamation has been fixed on a fair and reasonable basis and on the basis of the Report thereon of the IBBI, Registered Valuer.
9. The Learned Senior Counsel for the petitioners submits that the joint company petition has been filed in consonance with the Order of this Tribunal dated 21st October, 2020 in CA(CAA) No. 826/KB/2020. In terms of the order meetings were held and the chairperson Mr. Patita Paban Bishwal has filed his report which is annexed to the petition at page no. 1040 being **Annexure N** to the petition. From the report it appears that the creditors and shareholders have approved the Scheme in their respective meetings.
10. Affidavit of service/compliance in terms of order dated 21st October, 2020 is filed and is also annexed to the petition at page 907 being **Annexure M** to the petition.
11. This second motion petition was admitted by order dated 6th January, 2021. Upon admission directions were given for publication of notice of hearing and service upon the sectoral authorities.

12. Learned Senior Counsel for the petitioners submit that in compliance of the order dated 6th January, 2021, the petitioners have published the notice of hearing and also served the sectoral authorities being Registrar of Companies, Central Government through the Office of Regional Director, Eastern Region, Income Tax, Official Liquidator, National Stock Exchange of India, BSE, SEBI and Competition Commission of India. It is further submitted that affidavit of compliance dated 28th January, 2021 has been filed before this Tribunal. It is submitted that both National Stock Exchange of India and BSE have given their “NoC” to the Scheme which has been filed in this Tribunal by way of Supplementary Affidavit dated 5th March, 2021.
13. Learned Sr. Counsel submitted that Official Liquidator has filed its report dated 4th March, 2021 and at para 10 of the said report it states that:

“10. That the Official Liquidator on the basis of information submitted by the Petitioner Companies is of the view that the affairs of the aforesaid Transferor Companies do not appear to have been conducted in a manner prejudicial to the interest of its members or to public interest as per the provisions of the Companies Act, 1956/the Companies Act, 2013 whichever is applicable.”

14. It is further submitted that the Central Government through the office of Regional Director has filed an affidavit dated 4th March, 2021 by which they have given their observations. Their observations and responses of the petitioners are given below:

Paragraph No. 2(a) of RD affidavit

“The Appointed Date is 1st April, 2018 which is much older. In terms of the Circular no.09/2019 dated 21.08.2019 of the Ministry of Corporate

Affairs, where the 'Appointed Date' is chosen as a specific calendar date, it may precede the date of filing of the application for scheme of merger/ amalgamation in NCLT. However, if the 'Appointed Date' is significantly ante-dated beyond a year from the date of filing, the justification for the same would have to be specifically brought out in the scheme and it should not be against public interest". It is not ascertainable from the documents provided by the Applicant whether the application for the scheme was filed before Hon'ble Tribunal within a year from 1st April 2018. If the application for the scheme was filed with Hon'ble Tribunal after more than one year from the Appointed Date, Hon'ble Tribunal may kindly direct the Applicant to bring out the justification for the Appointed Date being more than one year before date of filing of the application for the scheme, in the scheme according to the Circular.

Paragraph No. 3 and 4 of Rejoinder

The petitioners submit that on 26th June, 2018 the Board of Directors of the respective Companies had approved the proposed Scheme and accordingly the same was filed with BSE and National Stock Exchange for their No Objection. The Stock Exchanges thereafter asked the petitioners to comply with certain requisites which took some time for the petitioners to comply with due to unforeseen reasons. Upon compliance the Stock Exchanges gave their No Objection on 5th March, 2020. Immediately, thereafter on 17th March, 2020 the Scheme was filed before this Hon'ble Tribunal for its sanction. The delay was due to reasons beyond the control of the applicants. In any event the Scheme envisages in clause 3.1 that:

“This Scheme as set out herein in its present form or with any modification(s), as may be approved or imposed or directed by the

Tribunal or made as per Clause 16 of this Scheme, shall become effective from Appointed Date but shall be operative from the Effective Date”

Therefore, the petitioners submit that the Appointed Date may be allowed to be changed by this Hon'ble Tribunal from 1st April, 2018 to 1st April, 2020 and that the Board of Directors of the applicant companies have also approved such change in date vide Circular Resolution. A copy of the Circular Resolution is also annexed to the Rejoinder and marked “A”.

This will also not have any impact on the financials of the companies.

Paragraph No. 2(b) of RD affidavit

The promoters' stake in the Transferee Company shall increase pursuant to the merger, from 69.51 % to 74.39%. This is a material fact regarding beneficial effect of the Scheme on the Promoters which was needed to be disclosed under section 230(3) of the Companies Act, 2013. Non-disclosure of the fact impacts the application, as it appears. Hon'ble Tribunal is requested to take note of the fact and order as may deem fit and proper.

Paragraph 5 of Rejoinder

The petitioners submit that with regard to the effect of the Scheme on the shareholding pattern including in the Promoter's Stake both pre and post amalgamation in the Transferee Company has been disclosed and the same is available at the website of the Company as well as the same was filed with the Stock Exchanges where the shares of the Transferee Company are listed. A copy of the change in pre and post amalgamation change in the promotor's shareholding is also attached to the Rejoinder and marked as “B”.

Paragraph 2(c) of RD affidavit

It is submitted that in the financial statement of J M Hosiery & Co. Ltd (Transferor Company) as at 31.3.2020, following Car Loans were shown as secured borrowings:-

<i>Kotak Mahindra Prime Ltd</i>	<i>Repayable in 36 installments from July 2014</i>
<i>Kotak Mahindra Prime Ltd</i>	<i>Repayable in 36 installments from September 2014</i>
<i>Volkswagen Auto Fin Ltd</i>	<i>Repayable in 36 installments from Oct 2016</i>
<i>HDFC Bank Ltd</i>	<i>Repayable in 36 installments from July 2016</i>

However, no Form CHG-1 in compliance with the provision of section 77 of the Companies Act, 2013 was filed in this regard. Once merged, since the Transferor Company will no longer be able to rectify such defects as the status of the Transferor Company will no more be 'Active', the Transferor Company should be directed to file first the relevant Form in compliance with the provision of section 77 of the Companies Act, 2013.

Paragraph 6 of Rejoinder

The petitioners submit that with regard to the Car loans from Kotak Mahindra Prime Limited and Volkswagen Auto Fin Limited, the same

have been repaid and there is no outstanding. Copies of no dues certificates are also annexed to the rejoinder and marked as "C". It is further submitted that due to inadvertence the charge was not filed in form CHG-1 under Companies Act, 2013. It is also submitted that in any event the Transferee Company undertakes that whatever liabilities that arises due to such inadvertence, the Transferee Company shall bear the same in terms of the Scheme of Amalgamation.

Paragraph 2(d) of RD affidavit

That the Petitioner Transferee Company should comply with the provision of section 232(3)(i) of the Companies Act, 2013 in regard to adjustment of fees upon clubbing of Authorized Share Capital(s) of the Transferor Company (ies) with the Authorized Share Capital of the Transferee Company in post-amalgamation.

Paragraph 7 of Rejoinder

The petitioners submit that consequent upon the Sanction of the Scheme by this Tribunal the Transferee Company undertakes to pay requisite fees, if any, on the increase in the Authorised Share Capital, after adjustment of fees upon clubbing of Authorised Share Capital(s) of the Transferor Companies as required in compliance with the applicable provisions of the Companies Act 2013 read with relevant rules as applicable.

Paragraph 2(e) of RD affidavit

That the Transferee Company should be directed to pay applicable stamp duty on the transfer of the immovable properties from the Transferor Companies to it.

Paragraph 8 of Rejoinder

The petitioners submit that consequent upon sanctioning of the scheme applicable stamp duty on transfer of the immovable properties from the transferor Companies will be paid by the Transferee Company.

Paragraph 2(f) of RD affidavit

In compliance of Accounting Standard-14 or IND-AS 103, as may be applicable, the Transferee Company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5 or IND-AS-8 etc.

Paragraph 9 of Rejoinder

The petitioners submit that consequent upon the sanction of the Scheme, the Transferee Company, in compliance of IND-AS 103, shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable accounting standards such as AS-5 or IND-AS 8.

Paragraph 2(g) of RD affidavit

The Hon 'ble Tribunal may kindly direct the Petitioners to file an affidavit to the extent that the Scheme enclosed to the Company Application and Company Petition are one and same and there is no discrepancy or no change is made.

Paragraph 10 of Rejoinder

The petitioners submit that the copy of Scheme attached to the Company Application (first motion petition) and Company Petition i.e the present petition for Sanction of the Scheme is one and same and that there is no discrepancy and that no change has been made in the Scheme.

Paragraph 2(h) of RD affidavit

The Petitioners under provisions of section 230(5) of the Companies Act 2013 have to serve notices to concerned authorities which are likely to be affected by the Amalgamation or arrangement. Further, the approval of the scheme by the Hon'ble Tribunal may not deter such authorities to deal with any of the issues arising after giving effect to the scheme. The decision of such authorities shall be binding on the Petitioner Company (s) concerned.

Paragraph 11 of Rejoinder

The petitioners further submit that necessary notice as required under section 230(5) of the Companies Act, 2013 have been served by the Petitioner Companies to all concerned authorities and affidavit of service in this regard has also been filed before the Tribunal.

Paragraph 2(i) of RD affidavit

The Hon'ble Tribunal may kindly seek the undertaking that this scheme is approved by the requisite majority of members and creditors as per section 230(6) of the Companies Act 2013 in meeting duly held in terms of section 230(1) read with sub-sections (3) to (5) of section 230 of the said Act and the Minutes thereof are duly placed on record.

Paragraph 12 of Rejoinder

The petitioners submit that the Scheme has been approved by the requisite majority of members and creditors as per section 230(6) of the Companies Act, 2013. The Chairman's Report of the Meetings relating to approval of the Scheme is also on record of this Tribunal.

Paragraph 2(j) of RD affidavit

It is submitted that the Income Tax Department by a letter dated 09/02/2021 with a request to forward their comments/ observations/ objections, if any However, the said authority has not forwarded their report to this Directorate till date.

Paragraph 13 of Rejoinder

It is submitted that the petitioners have not received any objection from any other Sectoral Authority.

15. Mr. Harihara Sahoo, Joint Director appearing on behalf of the Regional Director, Eastern Region, Ministry of Corporate Affairs, representing the Central Government submits that in view of submissions made by the petitioners in paragraphs 3 and 4 of the rejoinder, Central Government has no objection to approval of the Scheme of Amalgamation.
16. From the material on record, the Scheme appears to be fair and reasonable and is not violative to any provisions of law, nor is contrary to public interest.
17. Since all requisite compliance has been fulfilled, the following orders in terms of prayers made in the petition, with modification by the Tribunal are passed:
 - (a) The Scheme of Amalgamation being Annexure “A” herein be sanctioned by this Hon’ble Tribunal to be binding with effect from the 1st April, 2020 instead of 1st April, 2018 being the Appointed Date as mentioned in the Scheme, on their respective shareholders and all concerned including those mentioned in the Scheme of Amalgamation;
 - (b) Pursuant to Section 230 to 232 of the Companies Act, 2013, all properties, rights, powers, interests, assets and undertakings of the Transferor Companies as on 1st April, 2020, being the Appointed Date, be

transferred without any act deed or thing to the Transferee Company;

(c) Pursuant to Section 230 to 232 of the Companies Act, 2013, all liabilities and duties of the Transferor Companies as on 1st April, 2020, being the Appointed Date, be transferred without any act deed or thing to the Transferee Company;

(d) All suits and/or appeals and/or any proceedings, of whatsoever nature now pending by or against the Transferor Companies, if any, be continued by or against the Transferee Company;

(e) The Transferee Company do within 30 days of the date of obtaining certified copy of the order to be made herein, cause certified copy of the said order to be delivered to the Registrar of Companies, West Bengal for registration;

(f) The Registrar of Companies, West Bengal upon receiving such certified copy, be directed to place all such documents, papers and records relating to all the applicant companies and the files relating to the applicant companies shall be consolidated in terms of the scheme of amalgamation;

(g) The Transferor Company 1 and the Transferor Company 2 be dissolved without winding up from the date of filing of the certified copy of this order upon the Registrar of Companies, West Bengal by them;

(h) Leave is given to file the Schedule of Assets of the Transferee Company within four weeks from date of this order;

(i) Any person interested shall be at liberty to apply to this Hon'ble Tribunal in the above matter for such directions as may be necessary;

(j) Sanction of the Scheme shall not come in the way of any action for

violation of any provisions of law committed by any of the Petitioner Companies and the same shall be met and answered by the Transferee Company. We leave it to the authorities concerned to see if there has been any violation of provisions of law and to take action as may be deemed appropriate under the law.

18. The Company Petition being CP (CAA) 1526/KB/2020 connected with CA (CAA) No.826/KB/2020 is disposed of.
19. There will be no orders as to costs.
20. Certified copy of the order may be issued upon compliance of all requisite formalities.

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

Signed on this, the 25th day of March, 2021

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