

(2021) 02 NCLT CK 0098

National Company Law Tribunal Mumbai Bench

Case No: Company Petition (CAA) No. 1008/MB-IV Of 2020, Company Application (CAA) No. 1015/MB-IV Of 2020

Drychem Solutions Pvt. Ltd.

APPELLANT

Vs

VIWA Drymix Pvt. Ltd.

RESPONDENT

Date of Decision: Feb. 16, 2021

Acts Referred:

- Companies (Incorporation) Rules, 2014 - Rule 8(2)(8)
- Companies Act, 2013 - Section 61, 230, 231, 232, 232(3)(i)
- Income Tax Act, 1961 - Section 2(IB)

Hon'ble Judges: Suchitra Kanuparthi, J; Chandra Bhan Singh, Member (Technical)

Bench: Division Bench

Advocate: Tripti Bihani, Ashish O. Lalpuria, Manish Ghia, Rupa Sutar

Final Decision: Allowed

Judgement

1. The Bench convened through videoconferencing today (16.02.2021).

2. We have heard the Learned Authorised Representative for the Petitioner Companies and the Deputy Director, WR, MCA. No objector has come before this Tribunal to oppose the Scheme and nor has any party controverted any averments made in the Petition.

3. The Learned Authorised Representative for the Petitioner Companies submits that the present Company Petition is filed in consonance with

Sections 230 to 232 of the Companies Act, 2013 along with the order passed in C.A.(CAA)/1015/MB-IV/ 2020 by this Tribunal.

4. The sanction of this Tribunal is sought under Sections 230to 232 of the Companies Act, 2013to a Scheme ofAmalgamation(herein after referred to

as the "Scheme" between Drychem Solutions Private Limited (Transferor Company) with Viwa Drymix Private Limited (Transferee Company) and their respective shareholders.

5. The Petitioner Companies have approved the said Scheme of Amalgamation by passing the Board Resolutions at their respective Board

Meeting held on 31st day of March 2020 and thereafter they have approached the Tribunal for sanction of the Scheme.

6. The Learned Counsel for the Petitioner Companies states that the Order in Company Scheme Application No. 1015/2020 was passed by this

Tribunal on 8th July 2020.

7. The Petitioner Companies further submits the rationale for the Scheme is as under:

a) The amalgamation would result in the creation of a Transferee Company with large asset base and net worth with strong financials enabling further

growth and development of Transferee Company and enable it to withstand with the growing competition in the market scenario;

b) The amalgamation will result into reduction in multiplicity of entities, thereby reducing compliance cost of multiple entities viz., statutory filings,

regulatory compliances, labour law/establishment related compliances;

c) Enable both the Companies to consolidate their business operations and provide significant impetus to their growth;

d) Reduction of overheads and other expenses facilitate administrative convenience and ensure optimum utilization of available services and resources

and eliminate duplication of work;

e) Both the Companies are in similar line of business and can use each other's facilities for the production purpose;

f) The Shareholding in both the Companies are under common control, post-merger the ownership will be consolidated in the single entity;

g) The Amalgamation will lead to the benefits of the economies of scale;

8. The Learned Authorised Representative for the Petitioner Companies further submits that the Transferor Company is engaged in the business of

trading, marketing, supplying, exporting & importing all kinds of building & construction materials and the Transferee Company is engaged in the

business of manufacturing whether manual or mechanized, marketing, supplying, trading, exporting and importing and application of all kinds of cement-based plaster products.

9. In terms of the Order dated 08.07.2020 passed in CA(CAA) No. 1015/2020 the convening and holding meeting of the Equity Shareholders of

the Transferor Company was dispensed with in view of the consent on affidavit given by all the Equity Shareholders of the Transferor Company.

10. In terms of the Order dated 08.07.2020 passed in CA(CAA) No. 1015/2020 the convening and holding meeting of the Equity Shareholders of the

Transferee Company was dispensed with in view of the consent affidavit given by all the Equity Shareholders of the Transferee Company.

11. In terms of the Order dated 08.07.2020 passed in CA(CAA) No. 1015/2020 the convening and holding meeting of the Secured Creditors of the

Transferor Company was dispensed with. Further, in compliance with the said Order, the Transferor Company had served notice along with the

Scheme to the said Secured Creditors via email dated 06th August 2020 for inviting representations/objections, if any.

12. The Learned Authorised Representative submits that there are no Secured Creditors in the Transferee Company.

13. The Learned Authorised Representative further submits that the Secured Creditors of Transferor Company have given their consents by way of

affidavit to the Scheme.

14. In terms of the Order dated 08.07.2020 passed in CA(CAA) No. 1015/2020 the convening and holding meeting of the Unsecured Creditors of the

Transferor Company was dispensed with. Further, in compliance with the said Order the Transferor Company had served individual notice along with

the Scheme via email to the said Unsecured creditor having outstanding balance of Rs.10,00,000/- and above [(Rupees Ten Lakhs only) and above]

constituting 97.35% in the value of Unsecured Creditors for inviting representations/objections, if any.

15. In terms of the Order dated 08.07.2020 passed in CA(CAA) No. 1015/2020 convening and holding meeting of the Unsecured Creditors of the

Transferee Company is dispensed with. Further, in compliance with the said Order the Transferee Company had served individual notice via email to

the respective Unsecured creditors having outstanding balance of Rs. 2,00,000/- and above [(Rupees Two Lakhs Only) and above] constituting

95.86% in the value of Unsecured Creditors for inviting representations/objections, if any.

16. The Learned Authorised Representative appearing on behalf of the Petitioner Companies further states that the Petitioner Companies have

complied with all requirements as per directions of the National Company Law Tribunal, Mumbai Bench, Mumbai and that they have filed the

Compliance Report with the National Company Law Tribunal, Mumbai Bench dated 14th August, 2020. Moreover, Petitioner Companies undertake to

comply with all the statutory requirements, if any, as required under the Companies Act, 2013 and the Rules made thereunder. The said undertaking is

accepted.

17. The Regional Director vide his Report dated 07th December, 2020 stated under paragraph no. IV the following observations: -

(a) In compliance of AS-14 (IND AS -103), the Petitioner Companies shall pass such accounting entries which are necessary in connection

with the Scheme to comply with other applicable Accounting Standards such as AS-5 (IND AS-8) etc.

(b) As per Definition of the Scheme,

“Appointed Date” means the 1st day of April 2019 or such other time and date, as the Tribunal may direct/fix or any other competent

authority may otherwise direct/fix.

“Effective Date” or “Upon the Scheme becoming effective” or “On the Scheme becoming effective”

means the last of the dates on which the certified true copies of the order of the Tribunal sanctioning the Scheme are filed with the Registrar

of Companies, Mumbai. The Scheme shall be effective from the Appointed Date.

Further, the Petitioners may be asked to comply with the requirements and clarified vide circular no. F. No.7/12/2019/CL- 1 dated

21.08.2019 issued by the Ministry of Corporate Affairs.

(c) Petitioner Company have to undertake to comply with section 232(3)(i) of the Companies Act, 2013, where the transferor company is

dissolved, the fee, if any, paid by the Transferor Company on its authorised capital shall be set-off against any fees payable by the

Transferee Company on its authorised capital subsequent to the amalgamation and therefore, the petitioners to affirm that they comply the provisions of the section.

(d) As per Clause 15.5 of the Scheme, "Any deficit arising out of amalgamation (including on account of cancellation of cross

holdings or any other inter-company balances) shall be adjusted against capital reserves, if any, in the books of the Transferee Company.

Whereas any surplus arising out of Amalgamation (including on account of cancelling of cross holdings or any other inter-company balances) shall be credited to capital reserve."

In this regards, Transferee Company proposes the Accounting Treatment for recording the assets at book value by pooling of interest method.

It is submitted that the surplus shall be credited with Capital Reserve Account arising out of Amalgamation and shortfall shall be debited to Goodwill Account and not to the Capital Reserve Account.

(e) As per Clause 18.1 of the Scheme, "On the coming into effect of this Scheme, the Transferee Company shall change its name from

ViwaDrymix Private Limited to Drychem Solutions Private Limited on account of the latter being the name used in operations by the

Transferor Company which is known by all the customers, suppliers and other parties interacting with the undertaking."

That the adoption of new name of Transferor Company by the Transferee Company shall create confusion in the minds of general public

and other stakeholders. Besides it will also create confusion with the regulators like Income Tax, GST, MCA, etc. which gives impression

that Transferor Company is still in existence however it is not in existence.

In this regards, as per Rule 8(2)(8) of the Companies (Incorporation) Rules, 2014, "The names released on change of name by any

Company shall remain in database and shall not be allowed to be taken by any other Company including the group company of

the Company who has changed the name for a period of three years from the date of change subject to specific direction from the

competent authority in the course of compromise, arrangement or amalgamation.

Hence, the Transferee Company i.e. ViwaDrymix Private Limited may not be allowed to change its name by the name of Transferor Company

i.e. Drychem Solutions Private Limited and the Petitioner Company have to amend the Scheme accordingly.

(f) ROC, Mumbai in their report dated 02.11.2020 has inter-alia mentioned that there are no prosecution, no technical security, no inquiry,

no inspection, no compliant are pending.

Further, mentioned that:-

1. Authorized Share Capital does not match with MCA Portal as stated in Para 7 of the Report.

2. Interest of the Creditors should be protected.

In this regards, Petitioner Companies has to clarify the same.

18. In response to the above observations of the Regional Director, the Petitioners have already filed its Rejoinder to Report of the Regional Director.

The Authorized Representative for the Petitioner Companies submits as under:

A. Apropos observation made in paragraph IV (a) of the report of Regional Director isconcerned, the Petitioner Company undertakes to comply with

AS-14 (IND AS-103) and pass such entries as per applicable accounting standards for Amalgamation and as per applicable provisions of Companies

Act, 2013 while passing necessary entries in connection with the Scheme.

B. Apropos observation of the Regional Director, Western Region, Mumbai, as stated in paragraph IV (b) of his report concerned, the Petitioner

Company 2 confirms that the definition "Appointed Date" means 1st April 2019. Further, Clause 3.2 of the Scheme specifies that the appointed

date shall be 1stApril 2019 or such other time and date as the tribunal may direct / fix. Further, the Petitioner Company No. 2 confirms that the

"Effective Date" means thelater of the date on which the certified copies of the order (s) sanctioning scheme by the Mumbai Bench of National

Company Law Tribunal is filed with the Registrar of Companies, Mumbai Maharashtra by the Transferor Company and the Transferee Company as

required under the provisions of the Companies Act, 2013. The petitioners further undertake to comply with the circular no. F. No.7/12/2019/CL-1

dated 21.08.2019 issued by the Ministry of Corporate Affairs. The Petitioner clarifies that the amalgamation as embodied in the Scheme shall take effect from the Appointed Date i.e. 1st April 2019.

C. Apropos the observation of the Regional Director stated in Paragraph IV (c) of his report is concerned, the Petitioner undertakes to comply with the provisions of Section 232(3)(i) of the Companies Act, 2013.

D. Apropos observation made in paragraph IV (d) of the report of Regional Director is concerned with regards to clause 15.6 of the scheme, the

Petitioner Company undertakes that Surplus shall be credited with capital reserve account arising out of Amalgamation and shortfall shall be debited to

Goodwill Account and not to the Capital Reserve Account in accordance with applicable accounting standard.

E. Apropos observation made in paragraph IV (e) of the report of Regional Director, Western Region, Mumbai on Clause 18.1 of the Scheme is

concerned, Petitioner Company 2 hereby undertakes that on the scheme coming into effect it will not change its name from Viwa Drymix Private

Limited (Transferee Company) to Drychem Solutions Private Limited (Transferor Company) and further undertake that the scheme shall stand

amended to that extent and Hon'ble NCLT may pass such direction in this regard. Apropos observation made in paragraph IV (f)(i) of the report

of Regional Director, Western Region, Mumbai is concerned the Petitioner Company No. 2 hereby undertakes and states on behalf of Transferor

Company / Petitioner Company No. 1 that the authorized share capital of Transferor Company/Petitioner Company No. 1 was increased on 30th

September, 2019 vide ordinary resolution passed by the shareholders of the Company under Section 61 of the Act, subsequent to the appointed date

i.e. 1st April, 2019 as mentioned in the Scheme hence, the authorized share capital reflecting on the MCA Portal and that mentioned in the Scheme as

on the appointed date differs. The details of the authorised capital of Petitioner Companies as follows:

i) Authorised share capital of Petitioner Company No. 1 / Transferor Company as on the appointed date i.e. 1st April 2019 as mentioned in the scheme

was Rs. 1,05,00,000/- divided into 1,05,000 equity shares of Rs. 100/- each.

ii) Subsequent to appointed date Petitioner Company No. 1/Transferor Company has increased its authorised share capital from Rs. 1,05,00,000/-

divided into 1,05,000 equity shares of Rs. 100/- each to Rs.1,50,00,000/- divided into 1,50,000/- Equity shares of Rs.100/- each on September 2019

pursuant to Section 61 of the Companies Act, 2013 by way of ordinary resolution passed by the shareholders of the Company which matches with the

MCA portal.

iii) The authorised share capital of the Transferee Company as on appointed date 1st April 2019 and as on date is Rs.50,00,000/- divided into 5,00,000

Equity Shares of Rs.10/-each.

iv) Upon scheme coming into effect aggregate authorised share capital of the Petitioner Company 2 / Transferee shall be Rs. 2,00,00,000/- divided into

20,00,000 Equity shares of Rs. 10/- each.

F. Apropos observation made in paragraph IV (f)(ii) of the report of Regional Director, Western Region, Mumbai is concerning the Petitioner

Company No. 2 hereby states that both the transferor and transferee Company are profitable Companies and having enough reserves/ resources to

meet the liabilities of its creditors and undertakes to protect the interest of the Creditors post amalgamation.

19. The Official Liquidator has filed his report dated 16th September 2020 stating therein that the affairs of the Transferor Company have been

conducted in proper manner and in public interest and have not been conducted in the manner prejudicial to the interest of its members or to the public

at large interest. Further, the matter may be decided on merits.

20. The Learned Representative presents on behalf of the Petitioner Companies that the authorized share capital of Petitioner Company No. 1 as on

appointed date was Rs.1,05,00,000 divided into 1,05,000 Equity Shares of Rs.100/- each and the authorized share capital of Petitioner Company 2 as

on appointed date was Rs. 50,00,000 divided into 5,00,000 Equity shares of Rs. 10/- each.

21. The Learned Representative on behalf of Petitioner Companies hereby states that the authorized share capital of the Petitioner Company No.

1/Transferor Company was increased on 30th September 2019 from Rs. 1,05,00,000 to Rs. 1,50,00,000 divided into 1,50,000 Equity Shares of Rs.

100/- each.

22. The Learned Representative on behalf of the Petitioner Companies hereby states that increase in authorized share capital of the Transferor

Company will result in increase in authorized share capital of the Transferee Company post merger from Rs. 50,00,000/- (Rupees Fifty Lacs Only) to

Rs. 2,00,00,000/- (Rupees Two Crores Only). The same fact is also stated in Para (f)(i) of the reply affidavit filed in consonance to the Regional

Director report. Further, the Capital Clause of the Memorandum of Association of the Transferee Company shall stand substituted by;

“The authorized share capital of the Company is Rs. 2,00,00,000/- (Rupees Two Crores Only) divided into 20,00,000 Equity Shares of Rs. 10/-

each.”

23. The Learned Representative on behalf of the Petitioner Companies hereby states that the Petitioner Company 2 have accepted the observation

made by the Regional Director in his report in Para No. IV (e) w.r.t. Clause 18.1 of the Scheme. Further, on the scheme coming into effect the

Petitioner Company 2 will not change its name from Viwa Drymix Private Limited to Drychem Solutions Private Limited.

24. The terms and conditions of the Scheme are set out in the proposed Scheme. The material provisions of the proposed Scheme are as under:

“TRANSFER AND VESTING OF UNDERTAKING

5.1 With effect from the opening of the business hours as on the Appointed Date (i.e. 1st April, 2019) and subject to the provisions of this

Scheme, the entire undertaking of the Transferor Company including the assets and liabilities as on the Appointed Date, shall pursuant to

Section 230 to 232 and other applicable provisions of the Act, without any further act, instrument or deed, be and shall stand transferred to

and vested in and/or deemed to have been transferred to and vested in the Transferee Company as a going concern subject, however, to all

charges, liens, mortgages, if any, then affecting the same or any part thereof.

COMPLIANCE WITH TAX LAWS:

6.1 Any tax liabilities under the Income Tax Act, 1961, Goods and service Tax or other applicable laws/regulations dealing with taxes/duties/levies (hereinafter in this clause referred to as "Tax Laws") of the Transferor Company to the extent not provided for or covered by tax provision in the accounts made as on the date immediately preceding the Appointed Date shall be transferred to the Transferee Company.

6.2 This Scheme has been drawn up to comply with the conditions relating to "Amalgamation" as specified under Section 2(IB) of the it Act, 1961, if any, terms or provisions of the scheme is/are inconsistent with the provision of Section 2(IB) of the IT Act, 1961, the provisions of Section 2(IB) of the IT Act shall prevail and the Scheme shall stand modified to the extent necessary without requiring the modification under Clause 20 of this scheme and such modification shall not affect other parts of the Scheme.

CONSIDERATION BY THE TRANSFEE COMPANY

13.1 Upon coming into effect of the Scheme, Transferee Company shall without any further application or deed, issue and allot its Equity Shares, credited as fully paid-up, to the extent indicated below, to every shareholder of Transferor Company or his/her heirs, executors, administrators or the successors-in-title, as the case may be, holding fully paid up equity shares of Transferor Company and whose names appear in the Register of Members of Transferor Company as on the Effective Date in the following proportion viz,:

"50 (Fifty) fully paid Equity Shares of Rs.10/- (Rupees Ten Only) each of VDPL shall be issued and allotted for every 100 (one

Hundered) Equity Shares of Rs.100/- (Rupees Hundred Only) each held in DSPL."

25. From the material on record, the Scheme of Amalgamation appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public interest.

26. Since all the statutory compliances have been fulfilled in C.P.(CAA)/1008/MB-IV/2020 Connected with C.A.(CAA)/1015/MB- IV/2020, this

bench hereby sanctions this Scheme in its absolute terms subject to para 23 of this Order.

27. The Scheme is hereby sanctioned, with the Appointed Date fixed as 01st April 2019. The Transferor Company be dissolved without winding up.

28. The Petitioner Companies is directed to file a copy of this Order along with a copy of the Scheme of Amalgamation with the concerned Registrar

of Companies, electronically in e-Form INC-28 within 30 days from the date of receipt of Order duly Certified by the Joint Registrar of this Tribunal.

29. The Petitioner Company 2 to lodge a copy of this Order duly Certified by the Joint Registrar of this Tribunal, along with a copy of the Scheme,

with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, within a period of 60 working days from

the date of receipt of the Order.

30. All concerned regulatory authorities shall act on a copy of this Order duly certified by the Joint Registrar of this Tribunal, along with the Scheme.

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