

(202) 07 NCLT CK 0013

National Company Law Tribunal, Chandigarh Bench

Case No: CP (CAA) No.18/Chd/Hry/2020 (2nd Motion)

SKAP Forging Private Limited

APPELLANT

Vs

Registrar of Companies

RESPONDENT

Date of Decision: July 27, 2022

Acts Referred:

- Companies Act, 2013 - Section 92, 133, 137, 230, 230(1), 232, 232(3)(i)
- Income Tax Act 1961 - Section 72A, 79, 143(3)

Hon'ble Judges: Harnam Singh Thakur, Member (J); Subrata Kumar Dash, Member (T)

Bench: Division Bench

Advocate: Dhritiman Bhattacharyya, Yogesh Putney, Harveet Singh Sehgal

Final Decision: Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

1. This is a joint second motion application filed by Petitioner Companies namely; SKAP Forging Private Limited (Transferor Company No.1/

Petitioner Company No.1), Sona Management Services Limited (Transferor Company No.2/ Petitioner Company No.2), Kiaan Sports &

Nutrition Private Limited (Transferor Company No.3/ Petitioner Company No.3), Sona Skill Development Centre Limited (Transferor

Company No.4/ Petitioner Company No.4), and Aureus Investment Private Limited (formerly Sona Autocomp Holding

Private Limited) (Transferee Company/Petitioner Company No.5) in relation to the Scheme of amalgamation and Arrangement between the

petitioner companies under Section 230-232 of Companies Act, 2013 (the Act) and other applicable provisions of the Act read with Companies

(Compromises, Arrangements and Amalgamations) Rules, 2016 (the Rules).

2. The Petitioner Companies have prayed for sanctioning of the Composite Scheme of Amalgamation and Arrangement between the respective

companies. The said Scheme is attached as Annexure-A of the petition. Thereafter, the Petitioner Companies filed Amended Scheme of

Amalgamation and Arrangement by Diary No.01415 dated 29.06.2022.

3. The Petitioner Companies have filed first motion application bearing CA (CAA) No.7/Chd/Hry/2020 before this Tribunal for seeking directions for

dispensing with the meetings of Equity Shareholders, Secured and Unsecured Creditors of the Applicant Companies. The first motion application was

disposed of by order dated 18.05.2020, with directions to dispense with the meetings of Equity Shareholders, Secured and Unsecured Creditors of the

Applicant Companies for the reasons mentioned in the aforesaid orders.

4. The main objects, date of incorporation, authorized and paid-up share capital, and the rationale of the Scheme had been discussed in detail in the

order dated 18.05.2020.

5. In the second motion proceedings, certain directions were issued by this Tribunal by order dated 05.11.2020 and the same were compiled by filing

an affidavit of compliance by diary No.01577/01, 01557/3 both dated 16.12.2020. The notice of hearing was published in "Business Standard"

(English), Delhi NCR Edition and "Business Standard" (Hindi) Delhi NCR Edition on 19.11.2020. The original copies of the newspapers are

attached as Annexure-B of the aforesaid affidavit. It has also stated in the affidavit that copies of notices were served upon the (a) Central

Government through Regional Director (Northern Region), Ministry of Corporate Affairs; (b) Registrar of Companies, NCT of Delhi and Haryana;

(c) the Official Liquidator; and (d) the jurisdictional Income Tax Department, by way of hand delivery/speed post. Original acknowledgement receipts

and postal receipts along with a tracking report evidencing the service of notice are attached as Annexure-A of the aforesaid affidavit.

6. It is deposed by the authorised signatories of the petitioner companies that pursuant to the publications in the newspaper, no objection has been

received from any person till date. The aforesaid affidavit is filed by Diary No.01578/7 dated 24.11.2021.

7. In response to the abovementioned notices, the statutory authorities have furnished their replies.

7.1 Registrar of Companies (RoC)/Regional Director (RD)

The Regional Director (RD) has filed its report along with the report of the Registrar of Companies (RoC) by Diary No.01578/1 dated 22.03.2021. The R.D. in its report has observed that at para 10 of the report of Registrar of Companies it is stated that:-

As per Clause 32 of the report of RoC, Delhi, following observations were pointed out:

i. Refer to Clause A Part C of the Scheme, the Transferee Company shall comply with section 232(3)(i) of the Companies Act, 2013 and pay the difference fee on

consolidated authorized share capital of Transferee Company, after setting off the fee already paid by the Transferor Companies on their respective capital.

ii. As per MCA record, the Transferor Company No.1 and Transferee Company have not filed its Annual Return and Financial Statements for the F.Y. 2019-20 in

accordance with Section 92 and 137 of the Companies Act, 2013.

7.2 In response to the Report of RD/RoC, the Petitioner Companies have filed a response by Diary No.01578/05 and 01578/06 dated 07.09.2021

wherein the Petitioner Companies have stated that as per Section 232(3) (i), Where the transferor companies are dissolved pursuant to a Scheme, 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.

With regard to the filing of Financials and Annual Returns by the Transferor Company No. 1 and Transferee Company, it is averred that the

Transferee Company has filed its financials and Annual Return for the FY 2019-20 after the statutory timeframe. Due to the delay in filing financials

and Annual Return, default has occurred which is compoundable in nature and the Transferee Company has already filed a compounding application

vide SRN: T32750978, dated 27.07.2021. Copy of the Challan and GNL-1 is attached as Annexure B of the affidavit. It is further mentioned that

Transferor Company No.1 has also filed a compounding application for delayed filing of financials and Annual Return for the FY 2019-20 and the

same has been compounded by order dated 08.11.2021 which is attached Annexure-A of Dairy No. 1557/8 Dated 17.11.2021.

It is further asserted that as per the Scheme, all legal proceedings of whatever nature pending by or against the respective Transferor Companies,

shall not be abated, be discontinued or be, in any way, prejudicially affected by reason of the sanction of the Scheme but the proceedings may be

continued, prosecuted and enforced by or against the Transferee Company, in the same manner, and to the same extent as it would or might have

been continued, prosecuted and enforced by or against the Transferor Companies as if the Scheme had not been made. Hence, if the compounding

applications are not decided on the date of sanctioning of the Scheme, all compounding proceedings shall be continued by the Transferee Company or

the officers in default shall pay all fees and penalties as determined in such proceedings.

On a perusal of this response, we feel that the issues raised by the RD/RoC have been adequately addressed and no adverse observation against the

petitioner companies is called for.

7.3 Official Liquidator

The Official Liquidator has filed his report by Dairy No.01578/4 dated 23.08.2021. The Official Liquidator in its report has stated in para 8 that the

Petitioner Company No. 1 has issued 12% redeemable preference shares amounting to Rs.161,70,10,404 which is mentioned in the Balance Sheet for

the year ending 31.03.2020 of the Transferor Company No.1 and as per Note 5 of the said Balance Sheet, the Company has made a non-current

investment in unlisted equity shares of Rs.168,85,50,826 without earning any income/interest. Hence, the company has incurred losses due to 12%%

interest on the non-cumulative redeemable preference shares and thus it is not in the interest of the shareholders of the company.

In response to the report of Official Liquidator, the petitioner companies have filed reply by Dairy No 1557/6 Dated 31.08.2021, it is replied that all the

preference shareholders of Petitioner Company No. 1 have consented to the Scheme, which is already attached with the first motion application

bearing No. C.A. (CAA) No.7/CHD/HRY/2020 and the same fact has been mentioned in para 21 of the Order dated 18.05.2020. It is further

submitted that The Transferor Company No.1 being the shareholder of the Transferee Company had also consented to the Scheme, in its capacity as a shareholder of the Transferee Company and the same fact has been discussed in the First Motion application.

It is further averred by the petitioner companies that since the Scheme has been approved by all the concerned shareholders of the Transferor Company No.1 and the Transferee Company, the observations of the Official Liquidator questioning the commercial wisdom of the parties is not tenable.

The petitioner has placed reliance on *“Miheer H. Mafatlal vs Mafatlal Industries Ltd. (1997 1 SCC 57)”*. The relevant portion is reproduced below:

It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it

by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the

informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The

Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have

ratified the Scheme by the requisite majority.”

Considering the fact that all the equity shareholders and preference shareholders have consented to the scheme and on the basis of the ratio

established in the *Miheer H. Mafatlal (Supra)*, we hold that no adverse conclusion needs to be drawn on the basis of the observations of the Official

Liquidator.

7.4 Income Tax Department

The Income Tax Department has filed its report by Diary no.01578/9 dated 14.12.2021 wherein, it has been stated that no demand or proceedings are

pending with respect to Petitioner Company Nos.1 to 4. However, there is a demand outstanding of Rs.6,97,320/- is pending for A.Y. 2018-19. The

Income-tax Department has also filed its report by Diary Nos.01578/2 dated 22.03.2021 wherein in para 3 it has observed that the present Scheme is prejudicial to the interest of the Revenue and that the Transferor Company No.3 is a loss-making company and the same are not eligible to be carried forward as per the provisions of Income Tax Act, 1961. Additionally, in para 7, the Income Tax Department has prayed that the interest of Revenue be protected while sanctioning the Scheme.

In response to the reports filed by the Income Tax Department, the Petitioner Companies have filed an affidavit by Diary No. 01578/11 dated 31.12.2021 wherein, it has been stated that the demand of Rs.6,97,320/- in terms of Section 143(3) of the Income Tax Act 1961 for AY 2018-19 is outstanding qua the Transferee Company and Subsequent to the filing of said report by the Income Tax Department, a rectification Order has been passed on 01.12.2021 by the Income Tax Department. A demand notice showing that a sum of ₹0 (Zero) is payable by the company. The rectification Order and Demand notice is attached as Annexure A & B of the affidavit.

The Petitioner Companies have filed reply affidavit by Diary No. 01578/5 dated 07.09.2021 wherein, it has been undertaken that the Petitioner Companies will not claim any carry forward of losses under the Income Tax Act 1961, except in accordance with law and shall comply with all applicable provisions of the Income Tax Act, 1961. It is further stated that the Scheme provides that the Transferee Company shall take over all the existing liabilities, including tax liabilities of all the Transferor Companies. it is further undertaken that the Transferee Company shall defray all tax liabilities of all the Transferor Companies in accordance with law irrespective of the sanction of the Scheme and the sanction of the Scheme shall not defeat the right of the Income Tax Department to take appropriate recourse for recovering the existing or previous liability of the Transferor Companies and the Transferee Company shall not raise any issue regarding maintainability of said proceeding on account of the sanctioning of the Scheme or in respect of the assets sought to be transferred under the Scheme and the same shall be binding on the Transferee Company.

Keeping in view the aforementioned response, it is held that the interests of the Income Tax Department are not adversely affected in the proposed scheme and the observations raised by the Income Tax Department in respect of the petitioner Companies stand satisfied.

8. The petitioner companies have filed an amended scheme of Amalgamation and Arrangement incorporating the change of name of the transferee company by CA No.153/2022. Moreover, the registered offices of Transferor Company No. 1, 2 and Transferee Company have been shifted. The amended scheme of Amalgamation and Arrangement has been passed in the respective board meetings of Transferor and Transferee Companies.

The board resolutions Dated 21.06.2022 passed by petitioner Companies are attached as Annexure F, G, H, I and J of Diary No.01415 dated

29.06.2022 and the amended scheme of Amalgamation and Arrangement is attached as Annexure A of Diary No.01415 dated 29.06.2022.

9. The certificate of the Statutory Auditors with respect to the Scheme between Petitioner Companies to the effect that the accounting treatment proposed in the Scheme is in compliance with applicable Indian Accounting Standards (Ind AS) as specified in Section 133 of the Act, read with rules thereunder and other Generally Accepted Accounting Principles was filed as Annexures-X, Y, Z, ZA and ZB of the petitioner companies.

10. We have heard the learned Counsel for petitioner companies, learned Senior Standing Counsel for the Income Tax Department and perused the record carefully.

11. In the context of the above discussion, the Scheme contemplated between the petitioner companies, appears to be prima facie in compliance with all the requirements stipulated under the relevant sections of the Companies Act, 2013. As the objections from the Statutory Authorities have been duly addressed by the Petitioner Companies and since all the requisite statutory compliance have been fulfilled, this Tribunal sanctions the Scheme of Amalgamation and Arrangement appended as Annexure 'A' of Diary No.01415 dated 29.06.2022.

12. Notwithstanding the submission that no investigation is pending against the petitioner companies, if there is any deficiency found or, the 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 the law, against the concerned persons, directors and officials of the petitioners.

13. While approving the scheme as above, it is clarified that this order should not be construed as an order in any way granting exemption from

payment of stamp duty, taxes or any other charges, if any, payment is due or required in accordance with law or in respect to any

permission/compliance with any other requirement which may be specifically required under any law.

THIS TRIBUNAL DO FURTHER ORDER:

(i) That all the property, rights and powers of the Transferor Companies 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 Companies but subject nevertheless to all charges now affecting the same;

(ii) That all the liabilities and duties of the Transferor Companies 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;

(iii) That the Appointed Date for the scheme shall be 01.04.2019 as specified in the scheme;

(iv) That the proceedings, if any, now pending by or against the Transferor Companies be continued by or against the Transferee Company;

(v) That the employees of the Transferor Companies shall be transferred to the Transferee Company in terms of the 'Scheme';

(vi) That the fee, if any, paid by the Transferor Companies 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';

(vii) That the carry forward and set off of accumulated losses and unabsorbed depreciation allowance in the Petitioner Companies, if any, shall be subject to

applicable provisions of Income Tax including Section 72A and Section 79 of the Income Tax Act, 1961.

(viii) That the Transferee Company shall file the revised memorandum and articles of association with the Registrar of Companies, Punjab and Chandigarh and further make the requisite payments of the differential fee (if any) for the enhancement of authorized capital of the Transferee Company; after setting off the fees paid by the Transferor Companies;

(ix) That the Petitioner Companies shall, within 30 days after the date of receipt of this order, 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 Companies shall be dissolved without undergoing the process of winding up. The concerned Registrar of Companies shall place all documents relating to the Transferor Companies registered with him on the file relating to the said Transferee Company, and the files relating to the Transferor Companies and Transferee Company shall be consolidated accordingly, as the case may be;

(x) That the Transferee Company shall deposit an amount of ₹1,00,000/- (Rupees One Lakh Only) to be paid in favour of "Pay and Accounts Officer, Ministry of Corporate Affairs, New Delhi" and ₹50,000/- (Rupees Fifty Thousand Only) in favour of "The Company Law Tribunal Bar Association" Chandigarh within a period of four weeks from the date of receipt of the certified copy of this order;

14. As per the aforesaid directions, Form No. CAA-7 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, formal orders be issued on the petitioners to the filing of the Schedule of Properties within three weeks from the date of receiving a certified copy of this order.

15. All the concerned Regulatory Authorities to act on a copy of this order annexed with the Scheme duly authenticated by the Registrar of this Bench.

16. The Company Petition CP (CAA) No.18/Chd/Hry/2020 is disposed of accordingly.