

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment:07.11.2012*

+ **COMPANY PETITION NO. 250 OF 2012**

ABHINEET PESTICIDES PRIVATE LIMITED

..... Transferor Company No.1

AND

CRAFTSILVER JEWELS PRIVATE LIMITED

..... Transferor Company No.2

AND

FERN HEALTHCARE PRIVATE LIMITED

..... Transferee Company

Through Mr. Mukesh Sukhija, Advocate
for the Petitioners

Mr.K.S.Pradhan, Dy.ROC for the Regional
Director.

Mr.Rajiv Bahl, Advocate for the Official
Liquidator.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1. This joint Petition has been filed under sections 391(2) & 394 of the Companies Act, 1956 by the Petitioner Transferor Companies and Transferee Company seeking sanction of the Scheme of Amalgamation of M/s ABHINEET PESTICIDES PRIVATE LIMITED (Transferor Company No. 1); CRAFTSILVER

JEWELS PRIVATE LIMITED (Transferor Company No. 2);
with FERN HEALTHCARE PRIVATE LIMITED (Transferee
Company).

2. The registered offices of the Petitioner Transferor Companies and Transferee Company are situated at New Delhi, within the jurisdiction of this Court.
3. Details with regard to the date of incorporation of Transferor and Transferee Companies, their authorized, issued, subscribed and paid up capital have been given in the Petition.
4. Copies of the Memorandum and Articles of Association as well as the latest audited Accounts as at 31st March, 2011 of the Petitioner Transferor and Transferee Companies have also been enclosed with the Petition.
5. Copies of the Resolutions passed by the Board of Directors of the Petitioner Companies approving the Scheme of Amalgamation have also been placed on record.
6. It has been submitted that no proceedings under Sections 235 to 251 of the Companies Act, 1956 is pending against the Petitioner Companies.

7. So far as Share Exchange ratio is concerned, the Scheme provides that upon amalgamation of the 'Transferor Companies No. 1 to 2' into the 'Transferee Company' pursuant to the Scheme of Amalgamation, the following would be the share Exchange Ratio:

- a. Eleven (11) Equity Shares of Rs. 10/- each to be issued and allotted by the Transferee Company in lieu of every Seventeen (17) Equity Shares of Rs. 10/- each fully paid up to the shareholders of Abhineet Pesticides Private Limited.*
- b. Eighty Two (82) Equity Shares of Rs. 10/- each to be issued and allotted by the Transferee Company in lieu of every three (3) Equity Shares of Rs. 10/- each fully paid up to the share holders of Craftsilver Jewels Private Limited.*

8. The Petitioner Companies had earlier filed CA (M) No. 84 seeking directions of this Court for dispensation/convening of meetings. Vide order dated 10.5.2012, this Court allowed the Application and dispensed with the requirement of convening meetings of Shareholders of all the Companies and the Secured & Un-secured Creditors of the Transferee Company, while there

were no secured or un-secured creditor in the Transferor Company No. 1 and 2 accordingly there is no requirement of convening the meetings of the secured or un-secured creditor in the Transferor Company No. 1 and 2.

9. The Petitioner Transferor Companies and the Transferee Company have thereafter filed the present Petition seeking sanction of the Scheme of Amalgamation. Vide order dated May 21, 2012, notice in the Petition was directed to be issued to the Regional Director, Northern Region and the Official Liquidator. Citations were also directed to be published in the 'Business Standard' (English, Delhi Edition) and 'Nav Bharat Times' (Hindi, Delhi Edition). Affidavit of Service and Publication has been filed by the Petitioners showing compliance regarding service of the Petition on the Regional Director, Northern Region and the Official Liquidator, and also regarding publication of citations in the aforesaid newspaper on July 18, 2012. Copies of the newspaper cuttings, in original, containing the publications have been filed along with the Affidavit of Service.

10. Pursuant to the notices issued, the Official Liquidator sought information from the Petitioner Companies. Based on the information received, the Official Liquidator has filed his report dated 17.8.2012 wherein he has stated that he has not received any complaint against the proposed Scheme from any person/party interested in the Scheme in any manner and that the affairs of the Transferor Companies No, 1 to 2 do not appear to have been conducted in a manner prejudicial to the interest of its members, creditors or to public interest.
11. In response to the notices issued in the Petition, Mr. Rakesh Chandra, Learned Regional Director, Northern Region, Ministry of Corporate Affairs has filed his Affidavit dated August 24, 2012. Relying on Clause 5.4 of the Scheme of Amalgamation, he has stated that, upon sanction of the Scheme of Amalgamation, all the employees of the Transferor Companies No. 1 to 2 shall become the employees of the Transferee Company without any break or interruption in their services upon sanctioning of the Scheme of Amalgamation by the Hon'ble Court. Further the Ld. RD had raised the following observations:

5. *That the Deponent further craves leave to submit that Para 5.10 of Part-V of the Scheme of amalgamation provides that if the scheme can not be made effective on or before 31st March, 2012, the scheme shall become null & void and be of no effect.-*

6. *That the Deponent further craves leave to submit that the Registrar of Companies, Delhi has reported that it has been observed from the Balance Sheet as at 31.03.2010 of both the Transferor Companies, that the Transferor Company No. 1 viz. M/s Abhineet Pesticides Private Limited had outstanding unsecured loan of Rs. 176.50 Lacs and similarly the Transferor Company No. 2 viz. M/s Craftsilver Jewels Private Limited had outstanding unsecured loan of Rs. 119.70 Lacs. The unsecured loans received by both the Transferor Companies was invested in the shares of M/s Forties Financial Services Limited. In the next financial year ended 31.03.2011, both these companies received Share Application Money of Rs. 150 Lacs & Rs. 130 Lacs respectively and re-paid their entire outstanding unsecured loan. Therefore, these companies has to treat Share Application Money as a part of their Paid-up Share Capital for the purpose of calculating the Share Exchange Ratio for the proposed Scheme of Amalgamation.*

7. *That the Deponent further craves leave to submit that the Registrar of Companies, Delhi has reported that the Transferor Company No. 1 viz. M/s Abhineet Pesticides Private Limited has not filed its Balance Sheet as at 31.03.2008 & Annual Return thereto. Thus, there is prima-facie contravention of Provisions of Section 159/220 of the Companies Act, 1956.*

8. *That the Deponent further craves leave to submit that the Registrar of Companies, Delhi has reported that the Transferor Company No. 1 viz. M/s Abhineet Pesticides Private Limited has not filed e-Form 5 regarding*

conversion of CRPS into equity on 28.02.2008 so far in terms of Provisions of Section 94 read with Section 95 of the Companies Act, 1956.

9. *That the Deponent further craves leave to submit that the Registrar of Companies, Delhi has also reported that the Transferor Company No. 2 viz. M/s Craftsilver Jewels Private Limited has not filed e-Form 32 regarding change in designation of Shri Anuj Chowdhary and Shri Hiranand Jethani as director of the company as they were regularised in the AGM held on 29.09.2008.*

10. *That the Deponent further craves leave to submit that the Registrar of Companies, Delhi has further reported that the Transferee Company viz. M/s Fern Healthcare Private Limited has not appointed whole time Company Secretary with effect from 10.11.2008 to 31.03.2012. Thus there is a violation of the Provisions of Section 383-A of the Act.*

12. That Mr. Awanish K. Dwivedi & Mr. Ashutosh Kumar & Mr. Alok Kumar Tripathi, the respective Authorised Signatories of the Transferor Company No. 1, 2 & the Transferee Company had given their respective affidavits dated 26/09/2012, giving their reply to the above observations, raised by the Ld. Regional Director. The reply is as follows:

(i) *The Board of Directors of the Transferor Companies i.e. M/s Abhineet Pesticides Private Limited and M/s Craftsilver Jewels Private Limited as well as the Board of Directors of the Transferee Company i.e. Fern Healthcare Private Limited in their meeting held on 26th March, 2012 had passed a resolution extending the effective*

date of Scheme of Amalgamation between M/s Abhineet Pesticides Private Limited and M/s Craftsilver Jewels Private Limited with M/s Fern Healthcare Private Limited from 31.03.2012 to 31.03.2013. A copy of the extract of Board Resolution passed by the Petitioner Companies is being attached with the affidavit.

- (ii) The Transferor Company No. 1 and Transferor Company No. 2 had received a sum of Rs. 150 Lacs and Rs. 130 Lacs respectively as share application money from M/s Fern Healthcare Private Limited (i.e. the Transferee Company). The share application money was utilized by the Transferor Companies to pay off its unsecured loan standing in the Balance Sheet as at 31.03.2010. As the sum of Rs. 150 Lacs and 130 Lacs received by the Transferor Company No. 1 and Transferor Company No. 2 respectively as the share application money and no allotment has been made till March 31, 2011, accordingly, the same is reflected in the Balance Sheet of the Transferor Companies as Share Application Money.*
- (iii) It is pertinent to mention here that the aforesaid Share Application Money received by the Respective Transferor Companies have been received only from Transferee Company. It is however submitted that the Share Application Money pending allotment cannot be considered as capital of the Company and the same cannot be considered as capital for the purpose of calculation of Share Exchange ratio. Furthermore even if the contention of the Ld. RD is accepted and the share application money is converted into the Capital, the respective Transferor Companies will become subsidiaries of the Transferee Company and the inter Company holding needs to be cancelled for giving effect to the Scheme, meaning thereby the Transferee Company holding in the Transferor Companies will automatically get cancelled.*

- (iv) *In reply to para 7 it is submitted that due to inadvertence/oversight the Transferor Company No. 1 has not filed its Balance Sheet and Annual Return as at 31.03.2008. Subsequently the Transferor Company No. 1 has filed its Balance Sheet as at 31.03.2008 and Annual Return thereto on 04/09/2012.*
- (v) *In reply to para 8 it is respectfully submitted that the Transferor Company No. 1 has filed e-Form 5 regarding conversion of Cumulative Redeemable Preference Shares into Equity Shares of Rs. 10/- each on 20th September, 2012. Therefore, the provisions of section 94 read with section 95 of the Companies Act, 1956 has been duly complied with.*
- (vi) *In reply to para 9 it is submitted that the Transferor Company No. 2 was of the view that the Form 32 for change in designation of the Director is not required to be filed, since the said objection was raised by the Ld. RD, the Transferor Company no. 2 has vide SRN-B57738650 filed e-Form 32 regarding change in designation of Shri Anuj Chowdhary and Shri Hiranand Jethani on 17/09/2012, thereby, complying the provisions of Section 260 read with Section 303 of the Companies Act, 1956.*
- (vii) *In reply to para 10 it is submitted that the Transferee Company was not able to appoint the Company Secretary despite having the requisite capital. However, the Transferee Company has made all reasonable efforts to comply with the provisions of sub-section (1) of section 383A, however, the Transferee Company could not locate a suitable candidate for the said post. Further, the Transferee Company has appointed whole-time Company Secretary w.e.f. 01/04/2012, copy of the Form 32 filed with the ROC alongwith Challan were enclosed*

That further it was submitted that in terms of the para 5.2 of the Scheme, if any suit, appeal or other proceeding of whatever nature shall not abate or be discontinued with. The relevant para is reproduced hereunder for ready reference

If any suit, appeal or other proceeding of whatever nature by or against the Transferor Companies is pending, the same shall not abate or be discontinued or in any way be prejudicially affected by reason of or by anything contained in this Scheme, but the said suit, appeal or other legal proceedings may be continued, prosecuted and enforced by or against the Transferee Company, as the case may be, 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 this Scheme had not been made.

13. Moreover the counsel for the Petitioner Companies placed reliance on the judgment of this Hon'ble Court in the matter of Salil Industries Limited in CP No. 149/2010 ,para no. 17:

In support of the above submission, learned counsel relied on the judgment of Single Judge of the Gujarat High Court in the matter of Core Healthcare Limited Vs. Nirma Limited [(2007) 138 Comp Cas 204 (Gujarat)] wherein the court has held that “the Scheme can always be sanctioned subject to and without prejudice to the liability, if any, in the Civil and Criminal proceedings in respect of past transactions and the liability, if any, of the

Board, Directors, Management etc., in civil and criminal proceedings would continue.”

In view of the submissions made at the bar and the settled law on the subject, the objection raised by the Regional Director is rejected and the Scheme is sanctioned subject to and without prejudice to the liability, if any, in the civil and criminal proceedings in respect of past transactions. It is further clarified that the proceedings pending before the ACMM, Tis Hazari, Delhi against the transferor company and/or its Board, Directors and management etc. shall continue and the liability, if any, of the Board, Directors, Management etc., in the said proceedings would continue as if the Scheme has not been made.

14. That further Mr. Alok Kumar Tripathi, the Authorised Signatories of the Transferee Company had given an additional affidavit dated 2nd November 2012 giving the further reply to the observations, raised by the Ld. Regional Director. The reply is as follows:

- a. The Transferor Company No. 1 and Transferor Company No. 2 has received a sum of Rs. 150 Lacs and Rs. 130 Lacs respectively as share application money from M/s Fern Healthcare Private Limited (i.e. the Transferee Company). The share application money was utilized by the Transferor Companies to pay off its unsecured loan standing in the Balance Sheet as at 31.03.2010.*
- b. As the sum of Rs. 150 Lacs and 130 Lacs received by the Transferor Company No. 1 and Transferor Company No. 2 respectively as the share application money and no allotment has been made till March*

31, 2011, accordingly, the same is reflected in the Balance Sheet of the Transferor Companies as Share Application Money. The certified copy of the Balance Sheet of Transferor Company No. 1 & Transferor Company No. 2 are already on record at page no 98 to page no 111 of and page no 182 to page no 195 of Ist Motion Application.

- c. It is pertinent to mention here that the aforesaid Share Application Money received by the Respective Transferor Companies have been received only from Transferee Company. It is however submitted that the Share Application Money pending allotment cannot be considered as capital of the Company and the same cannot be considered as capital for the purpose of calculation of Share Exchange ratio. Furthermore even if the contention of the Ld. RD is accepted and the share application money is converted into the Capital, the respective Transferor Companies will become subsidiaries of the Transferee Company and the inter Company holding needs to be cancelled for giving effect to the Scheme, meaning thereby the Transferee Company holding in the Transferor Companies will automatically get cancelled.*

Further the reliance was placed on the decision of the Apex Court in Miheer H. Mafat Lal vs. Mafat Lal Industries Ltd. [1996] 87 Comp. Case. 792

Also the reliance was placed on the decision of the Apex Court in Hindustan Lever Employees' Union v. Hindustan Lever Limited. [1994] 1 Comp LJ 267; [1995J 83 Comp Case 30]

- d. In reply to para 7 it is submitted that due to inadvertence/oversight the Transferor Company No. 1 has not filed its Balance Sheet and Annual Return as at 31.03.2008. Subsequently after the knowing the fact in the process of Affidavit of Ld. Regional Director, The*

Transferor Company No. 1 has filed its Balance Sheet and Annual Return as on 04/09/2012 for making the Compliance of the Act .The Transferor Company No. 1 has also moved an application for composition of offence under section 159 and 220 of the Act.

- e. In reply to para 8, it is respectfully submitted that the Transferor Company No. 1 has filed e-Form 5 regarding conversion of Cumulative Redeemable Preference Shares into Equity Shares of Rs. 10/- each on 20th September, 2012. The Transferor Company No. 1 has also moved an application for composition of offence under section 95 of the Act.*
- f. In reply to para 9, the Transferor Company no. 2 has Filed Form 32 For regularization of Director vide SRN- B57738650 filed e-Form 32 regarding change in designation of Shri Anuj Chowdhary and Shri Hiranand Jethani on 17/09/2012, thereby, complying the provisions of Section 260 read with Section 303 of the Companies Act, 1956. The Transferor Company No. 2 has also moved an application for composition of offence under section 303 of the Act.*
- g. In reply to para 10 it is submitted that the Transferee Company was not able to appoint the Company Secretary despite having the requisite capital. However, the Transferee Company has made all reasonable efforts to comply with the provisions of sub-section (1) of section 383A, however, the Transferee Company was not able to find a suitable candidate for the said post. Further, the Transferee Company has appointed whole-time Company Secretary w.e.f. 01/04/2012. The Transferee Company has also moved an application for composition of offence under section 383A of the Act.*
- h. Further para 5.2 of the Scheme of Amalgamation provides as follows:*

LEGAL PROCEEDINGS

If any suit, appeal or other proceeding of whatever nature by or against the Transferor Companies is pending, the same shall not abate or be discontinued or in any way be prejudicially affected by reason of or by anything contained in this Scheme, but the said suit, appeal or other legal proceedings may be continued, prosecuted and enforced by or against the Transferee Company, as the case may be, 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 this Scheme had not been made.

15. No objection has been received to the Scheme of Amalgamation from any other party by either of the Petitioner Company or the counsel Mr. Awanish K. Dwivedi & Mr. Ashutosh Kumar & Mr. Alok Kumar Tripathi, the respective Authorised Signatories of the Transferor Company No. 1, 2 & the Transferee Company had given their respective affidavits dated 18-08-2012 confirming that neither the Petitioner Companies nor the counsel has received any objection pursuant to citations published in the newspapers.
16. In view of the approval accorded by the Shareholders and Creditors of the Petitioner Companies; representation/reports filed

by the Regional Director, Northern Region and the Official Liquidator, attached with this Court to the proposed Scheme of Amalgamation, there appears to be no impediment to the grant of sanction to the Scheme of Amalgamation. Consequently, sanction is hereby granted to the Scheme of Amalgamation under sections 391 and 394 of the Companies Act, 1956. The Petitioner Companies will comply with the statutory requirements in accordance with law. Certified copy of the order be filed with the Registrar of Companies within 30 days from the date of receipt of the same. In terms of the provisions of sections 391 and 394 of the Companies Act, 1956, and in terms of the Scheme, the whole or part of the undertaking, the property, rights and powers of the Transferor Company No. 1 to 2 be transferred to and vest in the Transferee Company without any further act or deed. Similarly, in terms of the Scheme, all the liabilities and duties of the Transferor Companies No. 1 to 2 be transferred to the Transferee Company without any further act or deed. Upon the Scheme coming into effect, the Transferor Companies shall stand dissolved without winding up. It is, however, clarified that this

order will not be construed as an order granting exemption from payment of stamp duty or taxes or any other charges, if payable in accordance with any law; or permission/compliance with any other requirement which may be specifically required under any law.

17. Learned Counsel for the Petitioners states that the Petitioner Companies would voluntarily deposit a sum of Rs. One lac in the Common Pool fund of the Official Liquidator within three weeks from today. The statement is accepted.

18. The Petition is allowed in the above terms.

INDERMEET KAUR, J

NOVEMBER 07, 2012

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