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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY SCHEME PETITION NO 469 OF 2015

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 383 OF 2015

Lotus Surgical Specialities Private Limited

……. Petitioner/ Transferor Company

COMPANY SCHEME PETITION NO 470 OF 2015

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 384 OF 2015

Lotus Surgicals Private Limited

…… Petitioner/Transferee Company

In the matter of the Companies Act, 1956 (1 of 1956);

AND

In the matter of Sections 391 to 394 read with Sections 100 to 103 of the Companies Act, 1956 and Section 52 of the Companies Act, 2013;

AND

In the matter of Scheme of Amalgamation and Arrangement between Lotus Surgical Specialities Private Limited ("LSSPL")and Lotus Surgicals Private Limited ("LSPL") and their respective shareholder and creditors

Called for Hearing

Ms. A. Ghone, a/w. Mr. Rajesh Shah, i/b, Rajesh Shah & Co., Advocates for the Petitioner Companies.

Mr. J.S. Saluja, i/b, Mr. A.A. Ansari, for the Regional Director.
Mr. S. Ramakantha, Official Liquidator present.

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CORAM: S. C. Gupte, J.

DATE: 28 September, 2015

<u>P.C.</u>:

. Not on board. Mentioned. taken on board.

2. Heard the learned Counsel for the Petitioner Companies. No objector has come before the Court to oppose the Scheme of Amalgamation and Arrangement and nor any party has controverted any averments made in the Company Scheme Petition.

3. The sanction of the Court is sought under Sections 391 to 394 read with Sections 100 to 103 of the Companies Act, 1956 and Section 52 of the Companies Act, 2013, to the Scheme of Amalgamation and Arrangement of Lotus Surgical Specialities Private Limited ('LSSPL') with Lotus Surgicals Private Limited ('LSPL') and their respective shareholder and creditors.

4. The Learned Counsel for the Petitioner Companies states that the Petitioner Companies are engaged in the business of manufacturing and/or supply of sutures and other surgical instruments.

5. The Learned Counsel for the Petitioner Companies states that the Petitioner Companies are part of same group. Further, the Transferee Company is wholly owned subsidiary of the Transferor Company and pursuant to the Scheme of Amalgamation and Arrangement will result into simplification of the structure, greater

integration, improve synergies, enable the achievement of economies of scale, reduce administrative costs, provide enhanced financial strength and flexibility and will also result in improvement in the future profitability of the Transferee Company and also optimise overall shareholder value and improve the competitive position of the combined entity.

6. The learned Counsel for the Petitioner Companies further states that the Board of Directors of the Petitioner Companies have approved the said Scheme of Amalgamation and Arrangement by passing the Board Resolutions which are annexed to the respective Company Scheme Petitions filed by the Petitioner Companies.

7. The learned Counsel appearing on behalf of the Petitioner Companies has stated that Petitioner Companies have complied with all directions passed in the respective Company Summons for Direction and that the Company Scheme Petition have been filed in consonance with the orders passed in respective Company Summons for Direction.

8. The Learned Counsel appearing on behalf of the Petitioners has stated that the Petitioner Companies have complied with all requirements as per directions of this Court and they have filed necessary Affidavit of compliance in the Court. Moreover, Petitioner Companies undertake to comply with all statutory requirements if any, as required under the Companies Act, 1956 / 2013 and the Rules made there under whichever is applicable. The said undertaking is accepted.

9. The Official Liquidator has filed his report on 19th August, 2015 stating that the affairs of the Transferor Company have been

conducted in a proper manner and that Transferor Company may be ordered to be dissolved without being wound up.

10. The Regional Director has filed an Affidavit on 23rd September, 2015, stating therein, save and except as stated in paragraph 6(a) to 6(d) of the said affidavit, it appears that the scheme is not prejudicial to the interest of shareholders and public. In paragraph 6(a) to 6(d) of the said affidavit, the Regional Director submits that:-

"6. That the Deponent further submits that,

a) The Shares of the Transferor company are held by Foreign Body Corporate. Hence, while giving effect to the Scheme, by issuing new shares by the Transferee Company to the shareholders of Transferor Company, the Transferee Company has to comply with the provisions of FEMA / RBI regulations as applicable in this regard.

b) Clause No. 5.1 of the Scheme provides for issue of Preference Shares to the shareholders of the Transferor Company, who are holding Compulsorily Convertible Preference Shares. It is observed that these Compulsorily Convertible Preference Shares of the Transferor Company are held by Foreign Body Corporate. As per the existing provisions / regulations of the Reserve Bank of India, for Foreign Investors, the Compulsorily Convertible Preference Shares alone can be issued to the Foreign Investors, whereas, the aforesaid clause of the Scheme provides for issue of ordinary Preference Shares to them. The Scheme is also silent with respect to the terms and conditions governing the proposed issue of Preference Shares. In this regard, the Petitioner Companies may be directed to amend the Scheme suitably by clarifying the above position in the Scheme.

c) The authorized share capital of the Transferee company may not be sufficient to issue further shares as provided in clause no. 5.1 of the Scheme, even after merging of Authorised Share Capital of Transferor Company with that of Transferee Company. In this regard, it is suggested that Transferee company may, if necessary and to the extent required, increase its Authorised Share Capital to facilitate issue and allotment of Shares under this Scheme. In this connection, the Transferee company may be directed to comply with provisions of section 61/64 of Companies Act, 2013 corresponding to section 94/97 of Companies Act, 1956, in respect of filing of necessary forms with the Registrar of Companies after payment of necessary filing fee and stamp duty as applicable on the said forms.

d) The Income Tax Department vide its letter dated 09/09/2015 (copy annexed hereto as Exhibit-'D') commented on this Scheme of Amalgamation by incorporating following points:-

i. 'Setting off and carrying forward of accumulated losses and unabsorbed depreciation by the Transferor Company, cannot be allowed in the hands of the Transferee Company, as the conditions required to be adhered as per the provision of section 72A of the Income Tax Act, have not been fulfilled'.

ii. 'M/s. Lotus Surgical Pvt. Ltd., the Transferee company transferred its fixed asset of Rs. 14,07,28,820/- out of the total fixed asset of Rs. 15,10,26,404/- to M/s. Lotus Surgical Specialities Pvt. Ltd. It is worthwhile to mention here that the Appointed Date of the proposed Amalgamation, as per the scheme has been fixed as 01/04/2014. The transfer of fixed assets of such quantum within two years of the proposed amalgamation is highly questionable and require to be thoroughly investigated'. It is also observed that the said fixed assets is returning back to the Transferee Company pursuant to this Scheme of Amalgamation."

In view of the above facts, the Income Tax Department has submitted that the right of the Income Tax Department may be kept reserved to ascertain/assess correct income in correct hands as per the provisions of the Income Tax Act. In this regard, it is respectfully submitted that the tax implication, if any, arising out of the Scheme is subject to final decision of Income Tax Authorities. The approval of the Scheme by this Hon'ble Court may not deter the Income Tax Authority to scrutinize the tax return filed by the Transferee Company after giving effect to the Scheme. The decision of the Income Tax Authority is binding on the Transferor Company and Transferee Company."

11. In so far as observations made in paragraph 6(a) of the Affidavit of the Regional Director is concerned, the Counsel for the Transferee Company agrees to comply with the provisions of FEMA/ RBI regulations as applicable.

12. In so far as observations made in paragraph 6(b) of the Affidavit of the Regional Director is concerned, the Counsel for the Petitioner Companies agrees to amend clause 1.4 of the Scheme dealing with the definition of CCPS, by deleting the figure *"613,285"* and amend clause 5.1 of the Scheme by substituting the words *"CCPS"* for the words *"Preference Shares"* in the 19th line of clause 5.1. Further, the Petitioner Companies seek leave to amend the Scheme of Amalgamation and Arrangement as aforesaid and accordingly clause

1.4 and clause 5.1 of the Scheme of Amalgamation and Arrangement shall read as under:

"1.4 "**CCPS"** means Compulsory Convertible Preference shares of Rs 10 each to be issued and allotted by the Transferee Company to the shareholders of the Transferor Company under this Scheme on same terms as in the Transferor Company

5.1 Upon this Scheme becoming effective and in consideration of the shareholders of the Transferor Company agreeing to the extinguishment of the shares of the Transferor Company, consequent to the amalgamation of the Transferor Company with the Transferee Company, and the dissolution without winding-up of the Transferor Company, in terms of this Scheme, the Transferee Company shall, without any further application, act, instrument or deed, issue and allot shares, credited as fully paid up, to the extent indicated below, to the members of the Transferor Company, holding fully paid-up shares in the Transferor Company and whose names appear in the Register of members of the Transferor Company, on the Effective Date in the following proportion viz.:

620 (Six Hundred and twenty) fully paid up Equity Share of Rs. 10 each of the Transferee Company at premium of Rs. 106 which has been determined by an independent valuer, to be issued and allotted for every 100 (One Hundred) Equity Share of Rs. 10 each held in the Transferor Company"

620 (Six Hundred and twenty) fully paid up CCPS of Rs. 10 each of the Transferee Company at premium of Rs 106 which has been determined by an independent valuer, to be issued and allotted for every 100 (One Hundred) Preference Share of Rs. 10 each held in the Transferor Company."

13. In so far as observations made in paragraph 6(c) of the Affidavit of the Regional Director is concerned, the Counsel for the Transferee Company agrees to increase its authorized share capital to the extent required and also to comply with the provisions of Companies Act, 1956 and Companies Act, 2013 in respect of filing of necessary forms with the Registrar of Companies and making payment of necessary filing fee and stamp duty as applicable on the said forms.

14. As far as observations made in paragraph 6(d) of Affidavit of the Regional Director is concerned, the Transferee Company submits that the Petitioner Companies are bound to comply with all the applicable provisions of the Income-tax Act, 1961 and all tax issues arising out of the Scheme shall be met and answered in accordance with law.

15. The Learned Counsel appearing for the Regional Director on instructions of Mr. M. Chandanamuthu, Joint Director (Legal) in the office of the Regional Director states that they are satisfied with the undertaking given by the Petitioner Companies. The said undertaking given by Petitioner Company is accepted.

16. Leave to amend Clause 1.4 and 5.1 of the Scheme of Amalgamation and Arrangement as mentioned in paragraph 11 (Eleven) herein above is granted. Amendment to be carried out within two weeks from date of the Order.

17. From the material on record, the Scheme appears to be fair

and reasonable and is not violative of any provisions of law and is not contrary to public policy.

18. Since all the requisite statutory compliances have been fulfilled, Company Scheme Petition Nos. 469 and 470 of 2015, filed by the Petitioner Companies are made absolute in terms of prayer clause (a), (c) and (d) of the respective Company Scheme Petitions.

19. The Petitioner Companies are directed to file a copy of this order along with a copy of the Scheme and Form of Minutes with the concerned Registrar of Companies, electronically, along with E-Form INC-28, in addition to the physical copy as per the relevant provisions of the Companies Act, 1956/2013 whichever is applicable.

20. The Petitioner Companies are directed to lodge a copy of this order and the Scheme along with the Form of Minutes, duly authenticated by the Company Registrar, High Court, Bombay, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, on the same within 60 days from the date of the Order.

21. The Petitioner Companies to pay costs of Rs.10,000/- each to the Regional Director, Western Region, Mumbai and the Petitioner Company in the Company Scheme Petition No. 469 of 2015 to pay cost of Rs. 10,000/- to the Official Liquidator, High Court, Bombay. Costs to be paid within four weeks from today.

22. Filing and issuance of the drawn up order is dispensed with.

23. All concerned regulatory authorities to act on a copy of this order along with the amended Scheme and Form of Minutes, duly authenticated by the Company Registrar, High Court, Bombay.

24. It is directed that the scheme shall take effect from the date of the filing of a signed copy of this order with the Registrar of Companies. Learned Counsel for the Petitioner undertakes to file a certified copy of the scheme along with this order with the Registrar of Companies within a period of one month from today.

(S. C. Gupte, J.)