IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.04.2016

DELIVERED ON : 06.06.2016

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

C.P.Nos.119 to 121 of 2016

Equitas Finance Limited
having its Registered Office at
4th Floor, Phase II, Spencer Plaza,
No.769, Mount Road, Anna Salai,
Chennai – 600 002
represented by its Chief Financial Officer
Mr.Vasudevan S

.. Petitioner in C.P.No.119 of 2016/ Transferee Company

Equitas Housing Finance Limited
having its Registered Office at
410 A, 4th Floor, Spencer Plaza,
Phase II, No.769, Mount Road, Anna Salai,
Chennai – 600 002
represented by its Company Secretary
Ms.Swarna Rekha S

.. Petitioner in C.P.No.120 of 2016 / Transferor Company No.2

Equitas Micro Finance Limited
having its Registered Office at
4th Floor, Phase II, Spencer Plaza,
769, Mount Road, Anna Salai,
Chennai – 600 002
represented by its Company Secretary
Mr.Sampathkumar K R

.. Petitioner in C.P.No.121 of 2016 / Transferor Company No.1

Petitions filed under sections 391 to 394 of the Companies Act, 1956 to sanction the Scheme of Amalgamation.

For Petitioners : Mr.P.H.Arvind Pandian
For Mr.Harishankar Mani

Mr.G.Venkatesan
Central Government Standing Counsel
for Regional Director
Ministry of Company Affairs,Chennai

Mr.Achutha Ramaiah
Official Liquidator

COMMON ORDER

1. These are three petitions, filed, to seek sanction of a Scheme of Amalgamation (in short the Scheme), placed before this court by the petitioners herein. CP No. 119/2016 has been filed by Equitas Micro Finance Limited (hereafter referred to as transferor no.1 company), while CP No. 120/2016 has been filed by Equitas Housing Finance Ltd. (hereafter referred to as transferor no.2 company). CP No. 121/2016 has been filed by Equitas Finance Ltd. (hereafter referred to as the transferee company). For the sake of convenience, transferor company no. 1 and 2, and transferee company will be collectively referred to as petitioner companies.

1.1. The scheme envisages the merger of transferor company no. 1 and 2 with the transferee company. In this context, it is noticed that the first prayer in the three petitions is identical. Insofar as company petition No.191/2016 and 120/2016 are concerned, since these are the petitions filed by the transferor companies, quite obviously, they have made prayers with regard to the aspect pertaining to their delayed dissolution, *albeit,* without winding up as provided in clause (15) of the Scheme. Since, the prayers made are somewhat typical, therefore, for the sake of convenience, they are extracted hereafter:

> "Company Petition Nos.119/2016 and 120/2016
>
> a) That Scheme of Amalgamation of Equitas Micro Finance Limited and Equitas Housing Finance Limited with Equitas Finance Limited, enclosed as **Annexure 5** hereto, be sanctioned by the Hon'ble Court with effect from the Appointed Date (as defined under clause 1.2 of the Scheme of Amalgamation) so as to be binding on all the shareholders and creditors of the Petitioner Company namely, Equitas Micro Finance Limited and the said Petitioner Company;
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> b) The Petitioner Company be dissolved without the process of winding up in the manner provided under clause 15 of the Scheme of Amalgamation (i.e.) the

Petitioner Company shall be dissolved on the thirtieth day from the Effective Date (as defined under clause 1.7 of the Scheme) and not on the date of sanction of the Scheme by this Hon'ble Court."

"Company Petition No.121/2016

a) That Scheme of Amalgamation of Equitas Micro Finance Limited and Equitas Housing Finance Limited with Equitas Finance Limited, as **Annexure 5** hereto under clause 1.2 of the Scheme of Amalgamation) so as to be binding on all the shareholders and creditors of the Petitioner Company namely, Equitas Finance Limited and the said Petitioner Company.

2. In the context of the above, before I deal with the concerns and the objections of the Regional Director (in short the RD), I would like to note the following broad facts:

2.1. The petitioners are subsidiaries of a company, going by the name Equitas Holdings Limited (hereafter referred to as the Holding company). The holding company, it appears, had applied to the Reserve Bank of India (in short the RBI) for grant of, in-principle, approval to establish a Small Finance Bank (in short 'SFB'), *albeit,* in the private sector. This application was made by the Holding company, evidently, on 30.01.2015 in consonance with Section 22 of the Banking Regulations Act, 1949 (in short the 1949 Act) and the guidelines dated 27.11.2014 read with clarifications issued, in that behalf, on 01.01.2015.

2.2. The RBI, vide its communication dated 07.10.2015 granted an in-principle approval subject to certain conditions which, inter alia, required the proposed merger of the transferor company no. 1 and 2 with the transferee company, to be effected, prior to the commencement of business of the SFB. Pertinently, the RBI fixed an eighteen (18) months validity period for completion of relevant formalities by the Holding company including the conditions referred to above before it would consider issuing a banking license in favour of the proposed SFB, under Section 22 of the 1949 Act.

2.3. It is in this context that the petitioners took steps for bringing about the amalgamation/ merger of the transferor company no. 1 and 2 with the transferee company.

3. A perusal of the three petitions would show that the transferor company no.1 is, inter alia, engaged in the business of micro finance lending and, in extending finance to weaker sections of the society, as

also, in financing developmental activities. It is averred that transferor company no.1 has been classified by the RBI as a Non-Banking Financial Company – Micro Finance Institution (NBFC-MFI). It is further averred that transferor company No.1 is a systemically important Non-Deposit taking NBFC.

4. Similarly, transferor company no.2 is, apparently, also engaged in the business of providing finance, inter alia, for the purposes of housing and, construction of residential and commercial complexes involving societies, companies, bodies, office, association of persons etc. It is averred that transferor company no.2, in this behalf, has been issued a certificate of registration by the National Housing Bank, exemplifying the fact that it is a Non-deposit accepting Housing Finance Company.

5. In so far as the transferee company is concerned, it is also in the business of providing finance, albeit, for purchase of vehicles including cars, commercial vehicles. In addition, the transferee company also provides funds for purchase of capital equipment, accessories, land and building and plant and machinery etc. It is averred that the transferee company has been classified by the RBI as

an "NBFC Asset Finance Company-Non Deposit Taking (NBFC-AFC) (NBFC-NDSI)".

6. To be noted, while transferor company no. 1 and 2 were incorporated on 15.09.2015 and 18.09.2015 respectively, while the transferee company was incorporated on 29.09.2015. The scheme, it appears, was placed and, thus, approved by the respective Board of Directors (BODs) of the petitioner companies on even date i.e. 26.11.2015.

6.1. The record would show that the petitioner companies had moved this court by way of requisite company applications. The applications filed by the transferor company no. 1 and 2, as also, the transferee company were registered and numbered as : CA Nos.81/2016, 83/2016 and 85/2016 respectively.

6.2. These company applications came up for hearing before this court, on 29.01.2016, when, orders were passed, dispensing with the meeting of equity shareholders of the petitioner companies. In view of the fact that equity shareholders of the concerned companies, had given their consent in the form of affidavits, the scheme was placed before this court.

6.3. The record further shows that each of the petitioner companies have in number seven (7) equity shareholders, all of whom, as indicated above, gave their consent to the scheme, which led to this court dispensing with their meeting.

6.4. However, in so far as the secured creditors were concerned, as requested by the petitioner companies, meetings were convened. The transferor company no.1 had demonstrated at the relevant point in time that it had thirty eight (38) secured creditors, while transferor company no.2 had ten (10) secured creditors. In so far as transferee company was concerned, it had ninety six (96) secured creditors.

6.5. Upon directions of this court meetings of the respective secured creditors of the each of the petitioner companies was convened. The report filed by the chairperson appointed by this court demonstrates that the secured creditors of petitioner companies at their respective meetings held on even date i.e. 07.03.2016 approved the scheme placed before them. The reports of even date, i.e., 08.03.2016 of the chairperson of each of the meetings of the secured creditors qua the petitioner companies bears out this fact.

6.6. Therefore, as would be evident upon perusal of the facts delineated above, that the shareholders and the secured creditors of each of the petitioner companies have given their consent to the scheme, which is being considered for grant of sanction by this court.

7. Upon notice being issued in the captioned petitions, the RD, Ministry of Corporate Affairs, Chennai, on behalf of the Central Government has filed his affidavit. The affidavit filed is dated 26.04.2016. A perusal of the affidavit would show that while the RD projects that the petitioner companies are regular in filing their statutory returns and that no prosecution or complaints and/or investigation are pending against them, he has raised certain concerns, which are articulated in paragraph 8 to 11 of his affidavit.

7.1. The first concern of the RD, is that, the scheme does not fix the "appointed date", and that, its definition under clause 1.2 of the scheme is tied-in with the definition of the "effective date". In this context, the RD avers that the effective date as defined in clause 1.7 provides that it would be the working day immediately preceding the date of commencement of business of bank by the proposed SFB. The RD raises a concern that there is no clear date fixed in the scheme, which would work as the effective date.

7.2. The second concern expressed by the RD is also linked with the effective date, in as much as, while the scheme immediately does not articulate as to what would be the share-exchange ratio, it goes on to state that it would be arrived at based on the book value of the shares of the petitioner companies, as on the effective date.

7.3. The third and the last concern of the RD, which, in a sense, is also inextricably connected to the effective date, pertains to the provision in the scheme which envisages dissolution of the transferor companies no.1 and 2 on the 30th day of the effective date. In this behalf, it is required to be noticed that both, the scheme, as well as, the prayer made in the petitions, *albeit,* in the alternative, states that the transferor company no.1 and 2 would make separate applications to this court for dissolution without winding up within a period of 30 days from the effective date.

7.4. Thus, in effect, the RD has raised concerns with regard to the provisons incoporated in the scheme with respect to the "appointed date", the "effective date", the "share-exchange ratio" and, qua dissolution of transferor company no. 1 and 2. In sum, the RD expresses a concern with regard to the aforementioned aspects, for the reason that they are to be considered, prospectively, that is, post the sanction of the scheme.

8. Mr.P.H. Arvind Pandian, learned Senior Counsel, who argued, in support of the case, pithily, submitted that the scheme is so crafted, that is in the manner, in which, it appears, keeping in mind the in-principle approval granted by RBI vide its communication dated 07.10.2015.

9. Having regard to the facts adverted to above and the submissions advanced on behalf of the petitioner companies and the RD, what is required to be analyzed is : as to whether the scheme, as proposed, can be sanctioned with or without modification. Though, several judgments were cited by Mr.Arvind Pandian in support of the submissions advanced on behalf of the petitioner, none of them appear to be directly on the point.

9.1. According to me, what has to be examined is the relevant provision, as appearing in the Companies Act, 1956 (in short 1956 Act). Section 394 of the 1956 Act, to my mind, gives the relevant leeway in that behalf which, in the context of facts and circumstances obtaining in the present case, remind one of, in a manner of speech, a typical chicken and egg situation.

9.2. The reason that I liken the present circumstances to a chicken and egg situation is on account of the fact that the RBI has given an in-principle approval for commencing SFB business based on an assurance that amalgamation/merger of transferor company No.1 and 2 with the transferee company, will take place prior to the matter being taken up for grant of a banking license. This requirement is complicated by the fact that the in-principle approval, which, as granted by the RBI, on 07.10.2015, has a validity period of eighteen (18) months and, therefore, would ordinarily exhaust itself on 07.04.2017.

9.3. Furtheremore, the manner in which the in-principle approval is framed, there is no guarantee that a banking licence would follow if, for any reason, the RBI, comes to the conclusion that all formalities and conditions stipulated by it, do not, stand fulfilled.

9.4. Quite clearly, in these circumstances, the scheme can neither provide a clear appointed date nor can it fix the share exchange ratio. What adds a further twist to the situation is that the scheme by itself cannot provide for dissolution of the transferor company No.1 and 2, albeit, without winding up (as is usually the case in such like schemes), perhaps, for the same reason, which is, that there is a possibility, (howsoever, unlikely it may seem, at this juncture), that the RBI may not issue a licence to the amalgamated company / the merged entity.

9.5. Therefore, to my mind, one would have to take recourse to the provisions of the Act, which according to me, provide the necessary width to deal with such like situations. For this purpose, I deem it necessary to extract the relevant parts of Section 394:

> **"394. Provisions for facilitating reconstruction and amalgamation of companies.**
>
> (1) Where an application is made to the [1][Tribunal] under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in

that section, and it is shown to the [Tribunal] -

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a" transferor company") is to be transferred to another company (in this section referred to as". the transferee company");

the [Tribunal] may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:-

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

[Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the [Tribunal] unless the Court has received a report from [***]the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest:

Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the [Tribunal] unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the [Tribunal] that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.]

9.6. A perusal of the aforementioned provisions would show that the court either, while sanctioning the compromise or arrangement or, by a subsequent order is entitled to make provisions for all or any of the matters, including allotment of shares by the transferee company, dissolution without winding of the transferor company and such incidental and consequential matters, as may be necessary to secure that amalgamation is fully and effectively carried out.

9.7. It is, however, pertinent to note that the exercise of power by the court in sanctioning a scheme is hemmed-in by two provisos referred to in sub section (1) of Section 394.

9.8. The first proviso, requires the court to receive a report from the Registrar of Companies (in short ROC) that the affairs of the company, which is being wound up are not conducted in a manner prejudicial to the interests of its members or to public interest.

9.9. The second proviso, mandates that no order of dissolution of a transferor company under clause (iv) of sub section (1) of Section 394 can be ordered unless the Official Liquidator (OL), upon scrutiny of books and papers of the transferor company, has submitted a report that the affairs of such company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

10. Therefore, having regard to the aforesaid, what is required to be noticed are, the relevant provisions in the scheme. It is noticed that clause 1.2 of the scheme defines "appointed date" as the "effective date". The scheme goes on to define in clause 1.7 "effective date" as that working day which immediately precedes the date of commencement of business of the bank by the proposed SFB.

10.1. Quite clearly, the commencement of the business of the proposed SFB is dependent on a banking licence being issued by the RBI under the 1949 Act, which, in turn, is dependent on the scheme being sanctioned.

10.2. As alluded to hereinabove by me, the RD, in its affidavit, has clearly recorded that no prosecution, complaint(s) or investigation(s) are pending either against transferor company No.1 and 2 or, the transferee company. It is also stated in the very same affidavit by the RD that the ROC has submitted a report that the petitioner companies have been regular in filing their statutory returns. The RD's report does not point to any misdemeanor or infraction of any of the provisions of law by the petitioner companies.

11. Having regard to the aforesaid, I am inclined to agree with the submissions advanced on behalf of the petitioner companies, by Mr.P.H.Arvind Pandian, that I could sanction the scheme having regard to the peculiar situation arising in the present case, by placing reliance on the subsisting provisions of the 1956 Act, *qua* "appointed date" and "effective date" .

12. To my mind, if this submission is accepted, which I have, then the other concern of the RD with regard to the share-exchange ratio will also have to be dealt with in the same manner. Quite correctly and logically, the determination of the share-exchange ratio can only be worked out based on the methodology articulated therein i.e. book value method, albeit, on the effective date. Since, the effective date is discernable, which is a date linked to the date of commencement of business by SFB, the determination of the share-exchange ratio on that date, in my opinion, should not present any difficulty.

13. I must note that it has not been shown on behalf of the RD that there is any impediment in law in accepting the tenability of provisions incorporated, in the scheme, which relate to, as indicated above, the "appointed date", the "effective date" and the share exchange ratio.

14. This brings me to the other aspect, which is, whether the dissolution without winding of transferor company No.1 and 2 in terms of clause 15.1 of the scheme can be deferred to the 30th day from the "effective date" or, in the alternative, leave be granted to the transferor company No.1 and 2 to file a separate application for the same purpose within a period of 30 days of the "effective date".

14.1. As is well settled, that, with the amalgamation of the transferor company with the transferee company, in law, the transferor company ceases to exist. (See ***Saraswati Industrial Syndicate Limited V. C.I.T., Haryana, Himachal Pradesh, Delhi, AIR 1991 SC 70)***. Having said so, can it be said that while a scheme for amalgamation may be sanctioned, the actual date of amalgamation/merger be delayed till such time the necessary prerequisites are fulfilled. In my opinion, a perusal of Section 394(1) gives such leeway to the court. Sanctioning of a compromise or arrangement does not necessarily fetter the court from delaying the date of actual amalgamation/merger of entities. In this case, the amalgamation of the transferor company No.1 and 2 with transferee company is dependent on issuance of a banking licence by the RBI and, in turn, the issuance of licence is dependent on this court sanctioning the scheme.

14.2. Therefore, in my view, since the affidavit of the RD and the report of the OL indicate that the affairs of the transferor company No.1 and 2 are not carried out in a manner prejudicial to its member or the public, the scheme can be sanctioned, with a caveat, that the transferor companies will move applications for their dissolution, albeit, without winding up within 30 days of the "effective date". In this behalf, I intend to append an additional condition, which is, that an advance notice of the applications will be served on both, the RD and the OL. The OL, in particular, upon receipt of the application will file a fresh report with this Court indicating therein as to whether the affairs of the transferor companies continue to be conducted in a manner which is neither prejudicial to the interest of its members or, the public.

15. Having regard to the aforesaid discussion and given the fact, as indicated above, the equity share holders and the secured creditors of the petitioners have approved the scheme, I am inclined to grant prayers (a) and (b) as set out in paragraph 30 (a) and (b) of Company Petitions No.119 of 2016 and 120 of 2016 and, the prayer made in paragraph 30 (a) of the Company Petition No.121/2016. The OL will adhere to the condition stipulated in paragraph 14.2 above in the form of an application, whereupon the matter will be listed in Court to establish due compliance.

16. Needless to say, the petitioners will abide by the terms of the scheme, as sanctioned, and that, this order, shall not be construed as exemption from any approval, permission, or consent with regard to payment of any tax, charge, duty or cess or the like that may have to be paid by the petitioners.

Index: Yes / No
Internet: Yes 06.06.2016

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RAJIV SHAKDHER,J.

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Pre-Delivery Order in
C.P.Nos.119 to 121 of 2016

06.06.2016