THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION No.20654 OF 2017

O R D E R:

This Writ Petition is filed questioning the communication dated 19.06.2017 intimating the petitioner that the letter of acceptance issued in favour of M/s KVR Rail Infra Projects Private Limited (in short "KVR Rail Infra") does not enure to the benefit of the petitioner company, as the said KVR Rail Infra was a non-existing company as on the bid submission date and consequently, declared the Letter of Award of Contract (in short "LAC") as invalid and thus no contract can be entered with the petitioner company.

2) The facts, in brief, are that the 1st respondent company floated a tender enquiry for execution of "Railway Tracks (in-plant) (Package No.50)" for 3.0 MTPA Integrated Steel Plant at Nagarnar near Jagdalpur, Chhattisgarh State (hereinafter referred to as "Contract work"). KVR Rail Infra, which was technically qualified to bid for the same, has submitted its bid and the same came to be accepted by issuance of LAC on 02.07.2016. Thereafter, KVR Rail Infra also submitted a Letter of Acceptance dated 04.07.2016. The petitioner *vide* letter dated 14.07.2016 addressed to the 1st respondent, informed about the orders of the High Court, dated 30.10.2014 passed in C.P.Nos.142 and 143 of 2014, whereunder it is brought to the notice that KVR Rail Infra has merged into the petitioner company and thus, in terms of the said High Court order, the assets and liabilities of KVR Rail Infra are that of the petitioner's company and thus, sought amendment of work order and agreement in favour of petitioner company pursuant to the LAC dated 02.07.2016, issued in favour of KVR Rail Infra. The request of the petitioner was rejected

by the 1st respondent company. Questioning the said rejection, the present Writ Petition is filed.

3) At this stage, it may be necessary for this Court to set out the Corporation action by way of a merger and amalgamation between the petitioner company and their shareholders with KVR Rail Infra. Company Petitions bearing Nos.142 and 43 of 2014 came to be filed after following due procedure seeking merger and amalgamation of M/s. KVR Rail Infra Projects Private Limited into the then existing M/s. Axis Rail India Limited, by invoking the provisions under Sections 391 and 394 of the Companies Act, 1956. The said Company Petitions came to be ordered on 30.10.2014 by approving the scheme of amalgamation, as propounded by Axis Rail India Limited and KVR Rail Infra. KVR Rail Infra being dissolved without winding up and merger with Axis Rail India Limited, resulting in only the petitioner company.

4) The issue, which falls for consideration in the present writ petition is whether the stand taken by the respondent company that on account of KVR Rail Infra having been merged into the petitioner company, in terms of the Scheme sanctioned on 30.10.2014, the same is ceased to be existed and thus, the offer made by KVR Rail Infra in response to the tender notification dated 20.02.2015 of the respondent is invalid and non-responsive bid and thus, no rights would be accrued in favour of the petitioner company, notwithstanding the fact that KVR Rail Infra came to be merged with the petitioner company.

5) Sri O. Manohar Reddy, learned counsel for the petitioner submits that the High Court, while passing the final orders on 30.10.2014, approved the Scheme and categorically held that the Scheme would take effect from the appointed date and further had

imposed an obligation to comply with certain statutory requirements in relation to SEBI Circular and also the conditions imposed by BSE, and all these were completed only by 27.06.2016 and thus a proper appreciation of the High Court order, sanctioning the Scheme read with the conditions in the sanctioned Scheme, KVR Rail Infra ceased to be existing only with effect from 27.06.2016 and thus, the offer made by KVR Rail Infra was a valid offer and on Scheme being sanctioned by the High Court, the benefit of the LAC would enure to the benefit of petitioner company, which is the resultant company. Learned counsel would draw attention to the orders of the Court along with terms of the Scheme, particularly Para-1 of the order and the definitions of 'Appointed Date', 'Effective Date', Clause 2 in Part-I, Clause 4 in Part-IV and Clause 2 in Part-V and contends that the cumulative reading of all these clauses leave no manner of doubt that KVR Rail Infra continues to be in existence. In terms of the approved scheme, particularly, in terms of Part-III, all the benefits, assets and liabilities of KVR Rail Infra would be that of the petitioner company and thus the LAC granted in favour of KVR Rail Infra would endure to the benefit of the petitioner company and the cumulative effect of the order and the scheme is that, it is only on compliance of all the formalities, that are required to be complied with under Part-V of the scheme, the scheme would become effective and the said date is 27.06.2016. In those circumstances, for all practical purposes, KVR Rail Infra company shall be deemed to be in existence and thus offer made by KVR Rail Infra company and the LAC issued to them is valid and by operation of law, the same would enure to the benefit of the petitioner company. In those circumstances, learned counsel for the petitioner prays for allowing the Writ petition.

6) Learned counsel for the petitioner also placed reliance on the judgment of the Supreme Court in **Saraswati Industrial Syndicate Ltd., v C.I.T. Haryana, Himachal Pradesh, Delhi-III, New Delhi**[1], **Marshall Sons & Co. (India) Ltd., *v* Income Tax Officer**[2] and **Singer India Limited *v* Chander Mohan Chadha and Others**[3].

7) Sri K. Raghava Charyulu, learned counsel appearing for the respondent company contends that KVR Rail Infra had failed to disclose the true facts and the company not being in existence, as on the date of issuance of the tender notification, dated 20.02.2015, it is not entitled to submit its bid. The petitioner company suppressed the said fact and by misrepresentation obtained the LAC and as the LAC was issued to the non-existing company, accepting non-existing company's bid, it is of no consequence and void *ab inito* and that there is no privity of contract between the petitioner and the respondent company and the respondent company has rightly refused to recognise the petitioner company and thus, there is no question of amending the LAC in favour of the petitioner and consequently, the question of issuance of Work Order and entering into an agreement with the petitioner company does not arise. By placing specific reliance on the Doth Order of the High Court in C.P.Nos.142 and 143 of 2014, particularly Para-1 and para-8 of the Order, he would submit that KVR Rail Infra ceased to exist on filing of the Certified Copy of the said order dated 30.10.2014 along with Form No.INC-28, with Registrar of Companies, which, in fact, was done in the case on hand on 10.01.2015. Thus, for all purposes KVR Rail Infra did not exist after 10.01.2015. To support his contention, he would also place reliance on **M/s. General Radio and Appliances**

[1] AIR 1991 Supreme Court 70
[2] (1997) 2 Supreme Court Cases 302
[3] (2004) 7 SCC

Co. Ltd., and Others *v* M.A.Khader (dead) by LRs.,[4] and **Janata Dal vs H.S. Chowdhary And Ors.,**[5] to the effect that once the Scheme is sanctioned the amalgamated company ceased to exist.

8) It is not necessary for this court to deal with various contentions raised by the respective parties as the core issue revolves around the effect of the order of the Hon'ble High Court in Company Petition Nos.142 and 143 of 2014, sanctioning the companies' amalgamation.

9) In the above fact situation, the question, which falls for consideration is "Whether M/s KVR Rail Infra Pvt. Ltd., can be set to be in existence as on the date of the submission of the tender?"

10) The answer to this question would lie in the proper understanding of the effect of this Court's order dated 30.10.2017 in C.P.Nos.142 and 143 of 2014 approving the Scheme of amalgamation between KVR Rail Infra (transferor company) and Axis Rail India (the Transferee company). As can be seen from the order of the Court in the Company Petition Nos.142 and 143 of 2014, the process of seeking to amalgamate the transferor company into transferee company began with filing of C.A.No.621 of 2014 and C.A.No.622 of 2014, seeking to appoint Advocate Commissioner for convening the meeting of the shareholders and other stakeholders, like creditors of the respective companies to consider the scheme of amalgamation. Thereafter, the respective companies' shareholders meeting approving as propounded the respective company petitions were filed seeking approval of the Court, as required under the provisions of the Companies Act. The scheme finally was approved by the Court on 13.10.2014 allowing the Company Petitions No.142 and 143 of

[4] AIR 1986 Supreme Court 1218
[5] (1992) 4 SCC 305

2014. The Order of the Company Court so far as relevant reads as under: (so far as relevant Para Nos.1 and 8).

> "1. That the company petitions be and hereby are allowed, and that this Court doth hereby sanction the scheme of amalgamation, as consented and approved by the Shareholders and the creditors of the petitioner/transferor and the Transferee company a copy is filed along with the petitions as Annexure-A5, with effect from the appointed date i.e., 01.04.2012 but however, the transferee company shall comply with Circular of SEBI dt.21.05.2013 and also the conditions imposed by the BSE as its letter dt.19.12.2013 and doth hereby declare the same to be binding on all the members creditors and employees and all concerned of the transferor company and the transferee company, viz., M/s. K.V.R. Rail infra Projects Private Limited and M/s. Axis Rail India Limited.
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> …………
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> 8. That the, Transferee Company do within 30 days from the date of receipt of this order cause a certified copy of this order to be delivered to the Registrar of Companies for the State of Telangana and the State of Andhra Pradesh at Hyderabad and take all other consequential steps in pursuance of the approval of the scheme of amalgamation, and on such certified copy being so delivered the transferor company shall be dissolved, without, going through the process of winding up."

11) Further, the details of the scheme (so far as relevant, Clauses-1.3; 1.4 and 2 in Part-I: General Provisions and Definitions; Clause-4 in Part-IV: Issue of Shares & Accounting Treatment, likewise Clauses-2.2 and 2.6 in Part-V: Other Provisions,).

> "PART-I – General Provisions:
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> 1.3. "Appointed Date" means 1st April, 2012, being the date with effect from which the Scheme shall be applicable or such other date as may be approved by the Hon'ble High court.
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> 1.4. "Effective Date": means the date on which certified copy of the order of the Hon'ble Court(s) under Section 391 and 394 of the Act sanctioning the Scheme is filed with the

Registrar of Companies after obtaining the sanctions, orders or approvals referred to in Clause 2 of Part-V of this Scheme.

2. DATE OF EFFECT AND OEPRATIVE DATE:

The Scheme setout herein in its present form or with any modification(1), if any made as per Clause 3 of PART-V of this Scheme shall be effective from the Appointed Date but shall be operative from Effective Date.

PART-IV: ISSUE OF SHARES & ACCOUTNIGN TREATMENT

4. Dissolution of Transferor Company

On occurrence of the Effective date, Transferor company shall, without any further act or deed, shall stand dissolved without winding up.

PART-V: OTHER PROVISIONS

2. Conditionality of Scheme:

2.2. The Scheme being approved by the Hon'ble High Court;

2.6 This Scheme although to come into operation from the Appointed Date shall not become effective until the necessary certified copies of the order(s) under Sections 391 to 394 of the Act shall be duly filed with the Registrar of Companies of relevant jurisdiction."

12) At the outset, it may be noted that though the proposal to amalgamate KVR Rail Infra into Axis Rail India was conceived and the process initiated by filing Company Applications in the year 2014, in the scheme proposed the 'appointed date' has been specifically set out as '01.04.2012'. The fact that the 'appointed date' has been specified as a date, much prior to initiation of the amalgamation process by approaching the Courts, definitely indicate that both the transferor and transferee companies clearly intended the scheme to be operative with effect from the appointed date i.e., 01.04.2012. The order of the High Court in Para 1 also specifically refers to the same with a further rider that the transferee company shall comply with certain formalities with respect to SEBI circular and the conditions imposed by BSE. It may be noted that these formalities are required to be fulfilled by the transferee company as

the transferee company was a public listed company with its shares traded on Bombay Stock Exchange. There is no role that is required to play by the transferor company, as, in law, for all practical purposes, on the Scheme being approved and necessary filing as required by the Companies Act is made with the Registrar of Companies the scheme stands approved. The question that would arise is the meaning that is required to be given to the definition 'effective date'. It may be noted that the Scheme coming into operation and being effective is for the purpose of implementation of various terms of the Scheme, particularly, in relation to the obligations to the shareholders of the transferor company. It is now well-settled that a Scheme of arrangement / merger / demerger / amalgamation is nothing but a contract that is entered into between the shareholders of the transferor and transferee companies and would essentially govern the respective party rights. The proceedings before the Court only for the purpose of statutory approval and in the process the role played by the Company Court is supervisory in nature to ensure that the Scheme is not prejudicial to the various stakeholders' interest and the same is not contrary to the public interest. A reference may be made to the judgement of Calcutta High Court in **Gemini Silk Limited *v* Gemini Overseas Limited**[6]. Further, Para-8 of the Doth Order of this Court in C.P.Nos.142 and 143 of 2014 also makes it very clear that the transferee company stands dissolved without winding up on the day the Certified Copy of the order of the High Court, approving the scheme of amalgamation, is filed before the Registrar of Companies. In the case on hand, such application was filed on 10.01.2015 and as such the transferee company KVR Rail Infra ceased to exist on and after 10.01.2015.

[6] 2003 53 CLA 328 Cal.

There is a slight contradiction in Clause 4 in Part-IV with Clause 2.6 in Part-V. However, this contradiction would pale into insignificance, as stated supra. The intention of the parties is to make effective the Scheme of Amalgamation with effect from the 'appointed date', to be effective as and when necessary formalities are complied with.

13) A careful reading of the judgments cited by both the learned counsel would only go to declare that as and when the Scheme of Amalgamation is approved, the same would be effective with the date mentioned in the Scheme. As a matter of fact, in Para 9 of the judgment in **General Radio and Appliances case (4 supra)**, it was held that with amalgamation taking effect, the transferee company would cease to exist. To the same effect, Para 14 of the judgment of the Supreme Court in **Marshall Sons & Co., case (2 supra)**, wherein the effect of specifying the transfer date was considered. In the case on hand, in clear terms, the effect and the obligations of the respective transferee and transferor companies with reference to 'appointed date' and 'effective date' are categorically set out in Part-III of the Scheme, which leaves no manner of doubt that with effect from the appointed date and the scheme becoming effective, the transferee company assumes responsibility in all aspects, both in present and future. The judgment in **Singer India Limited case (3 supra)** would not support the case of the petitioner, as even in the said case, after reviewing the earlier cases cited before it, in Para 8, has held "However, their respective rights or liabilities are determined under the Scheme of Amalgamation, but the corporate identity of the transferor company ceases to exist with effect from the date of amalgamation is <u>made effective</u>". In the present case, the Scheme is made effective on the 'effective date' with effect from the 'appointed date'.

14) In the light of the above discussion, in the case on hand, as on the date of KVR Rail Infra submitting the bid i.e., on 05.04.2015, the said company cannot be said to be in existence, and thereby, the bid submitted by it cannot be said to be an effective bid and consequently, the refusal of the respondent company to recognize and enter into contract agreement with the petitioner company and refusal to issue Work Order, cannot be faulted and in the circumstances there being no merits in the Writ Petition, the same is dismissed. No costs.

15) Miscellaneous Petitions, if any, pending in the Writ Petition, shall also stand dismissed.

CHALLA KODANDA RAM, J

Date:22.09.2017,

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