IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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Company Petition No. 209 of 2015 (O&M)
Connected with
Company Petition No.198 of 2015
Date of Decision:16.05.2017

IN THE MATTER OF:

SCHEME OF AMALGAMATION BETWEEN:

Keihin Automotive Systems India Private Limited

. . . . Transferor Company/Petitioner Company-I

AND

Keihin India Manufacturing Private Limited

. . . . Transferee Company/Petitioner Company-II

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CORAM: HON'BLE MR.JUSTICE RAKESH KUMAR JAIN.

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Present: - Mr.Atul V. Sood, Advocate,
for the petitioner-Companies.

Mr.Deepak Aggarwal, Advocate, with
Mr.D.K. Singh, Official Liquidator.

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RAKESH KUMAR JAIN, J.

This petition is filed under Section 391 to 394 of the Companies Act, 1956 [for short 'the Act'], duly supported by affidavits of the petitioner-Companies, seeking sanctioning of the Scheme of Amalgamation (Annexure P-1) [for short 'the Scheme'].

As per the Scheme, Keihin Automotive Systems India Private Limited (Transferor Company/Petitioner Company-I) shall amalgamate into Keihin India Manufacturing Private Limited (Transferee Company/Petitioner Company-II).

The registered office of the Transferor Company/Petitioner Company-I and Transferee Company/Petitioner Company-II are situated at Gurgaon, Haryana.

The main objects of the Transferor Company/Petitioner Company-I and Transferee Company/Petitioner Company-II are detailed in their respective Memorandum and Articles of Association annexed with the petition at Annexures P-2 and P-4, respectively.

The Board of Directors of the Transferor Company/Petitioner Company-I and Transferee Company/Petitioner Company-II have approved the said Scheme in their meetings held on 25.8.2015, Annexures P-6 & P-7, respectively.

Earlier the petitioner/Transferor & Transferee Companies had approached this Court by way of CP No.198 of 2015 in which vide order dated 06.11.2015 meetings of the Equity Shareholders and Unsecured Creditors of the Transferor Company/Petitioner Company-I and Transferee Company/Petitioner Company-II were dispensed with and since there were no Secured Creditors of the Transferor Company/Petitioner Company-I and Transferee Company/Petitioner Company-II, therefore, it was ordered that there was nothing to convene their meetings. Hence, the Ist motion petition was disposed of on 06.11.2015 with liberty to move the Second Motion Petition.

In the present Second motion petition, on 30.11.2015, notice was issued to the Regional Director, Ministry of Corporate Affairs, New Delhi and

Official Liquidator. It was also ordered to be published in the newspapers, namely, 'Indian Express' (English) and 'Jansatta' (Hindi) both Delhi/NCR Edition and in the Official Gazette of the Government of Haryana besides being uploaded on the official website of the Official Liquidator. The said order has been complied with and the affidavit of Publication dated 22.03.2016 has been placed on record.

The Official Liquidator has placed on record report by way of a representation/affidavit of A.K. Chaturvedi, Regional Director, Northern Region, Ministry of Corporate Affairs, New Delhi, dated 18.02.2016, in which the Regional Director has made observations in para Nos.7 to 11, which read as under: -

> *"7. That the Deponent states that in response to the Deponent's letter dated 08.01.2016 issued to the Income Tax Department requesting to offer their comments, letter dated 20.01.2016 has been received on 25.01.2016 from the Deputy Commissioner of Income Tax, Circle-2, Gurgaon stating that the company M/s Keihin Automotive Systems India Pvt. Ltd. is assessed with his Circle and that the assessee regularly filed the return of income for the A.Y. 2015-16. The said letter from the Income Tax Department is marked as Exhibit-C for kind perusal of the Hon'ble Court.*

8. *That the deponent states that the Petitioner Companies vide para 19 of their reply have furnished following replies to the Auditor Qualifications made in respect of the Transferee Company for the Financial Year 2013-14 and Financial year 2014-15:-*

(i) Given the uncertainty of the business plan, the auditors were unable to comment on the recoverability of Cenvat Credit. In relation to the said qualification, the management responded that the company has business plans which would reduce the incidence of input credit and considered that the balance available is good and recoverable.

It is seen from the qualification of Auditors on the accounts of the Transferee Company for the financial year ending on 31.03.2014 that the Company has huge amount of Rs.2316.15 lakhs Cenvat Credits on account of manufactured goods and capital purchases. Further, the statutory auditors have again qualified recoverability of Cenvat Credits amounting to Rs.2473.49 *lacks on account of manufactured goods and capital purchase. However, as explained by the Board of Directors in their report on the qualifications made by the statutory auditors in regard to company's business plans, no source of recoverability has been pointed out by the statutory auditors neither it is disclosed in the accounts of the company.*

(ii) The company has not provided and paid the provident fund on foreign component of salary paid to expatriate employees, as required in terms of the notification No.GSR 705 E and 706 E, dated 01.10.2008, issued by the Ministry of Labour and Employment, Govt. of India. In relation to the said qualification, the management responded that it is evaluating the implication of the aforementioned notification and awaiting the decision pending on similar matter at the Supreme Court level.

It is stated that no evaluation as stated by the Company and status of pendency of case at Court level has been submitted by the company to the office of Deponent.

8.1 That the Deponent states that the Petitioner Companies vie para 20 of their *reply have stated that there is no investigation/inspection pending against the petitioner companies under the provisions of various laws such as Companies Act, 1956, FEMA, IPC, SEBI Act, RBI Act etc.*

9. That the Deponent states that the Registrar of Companies, Delhi & Haryana vide his above referred report stated that he has complied factual report on the basis of record maintained and documents filed by the concerned petitioner companies and has not made any adverse comments to the Scheme of amalgamation under reference.

10. That the Deponent states that Hon'ble Court may direct the Petitioner Transferee Company to continue all the employees of the Transferor companies on existing or similar terms and conditions as to remuneration and other benefits, and without any breach or interruption of service as provided in Clause 13.1 of Part II of the Scheme of Amalgamation.

11. That the Deponent states the Hon'ble Court may direct the Petitioner Companies to comply with the provisions of the Accounting Standard 14 related to "the pooling of interests method" as prescribed *under Section 211 (3C) of the Companies Act, 1956 and under Section 133 of the Companies Act, 2013."*

In response to the aforesaid observations made by the Regional Director, Akihide Kato, Authorised Signatory of both the Petitioner Companies has filed reply by way of affidavit. The relevant averments made in the reply are reproduced as under: -

" 2. That the Regional Director in his Report in para 8(i) has referred to the qualification in Auditors Report of the financial years 2013-14 and 2014-15 regarding the recoverability of Cenvat Credit of the Transferee Company.

3. That the Transferee Company has business plans which would reduce the incidence of input credit and therefore it considers that the balance available is good and recoverable. Since past few years, domestic as well as export sales of Transferee Company have been growing gradually. In 2013-14, Export Sales were Rs.65,343,196/- in 2014-15 it rose to Rs.89,522,119/-. Given the same, Transferee Company would be able to utilize the available Cenvat

Credit and therefore the available balance is considered recoverable by the management.

4. *That further, with regard to the Regional Director's observation in para 8(ii) of the Report, the Regional Director has mentioned that the transferee Company has not provided and paid the provident fund on foreign component of salary paid to expatriate employees, as required in terms of notification No.GSR 705 E and 706 E, dated 01.10.2008, issued by the Ministry of Labour and Employment, Government of India. It is submitted that a petiton bearing No.W.P. (C) 2941/2012 challenging the demand of deposit of provident fund on foreign component of salary paid to expatriate employees is pending before Hon'ble Delhi High Court, in case titled Spice Jet Ltd. Versus Union of India and ANR, the Transferee Company, is evaluating the implications of the aforesaid notification of the Ministry of Labour and also the outcome of the said*

petition. A copy of order of Delhi High Court granting interim relief of in favour of the company, dated 11.09.2012 (ref. C.M. No.6321/2012 (stay)) is annexed hereto as Annexure A-1.

5. *That it is undertaken that in the event of the Courts not agreeing with the contention, the Transferee Company undertakes to duly deposit the Provident Fund for the relevant period with the concerned authorities.*
6. *That without prejudice to the above, the said observations pertain to the Transferee Company only which is not being dissolved under the Scheme.*
7. *That further, as observed in para 10 of the Report of Regional Director, the Transferee Company shall continue all the employees of the Transferor Company on existing or similar terms and conditions as to remuneration and other benefits, and without any breach or interruption of service as provided in Clause 13.1 of the Scheme.*

> 8. *That further in response to para 11 of the Report, it is undertaken that the Petitioner Companies shall comply with the provisions of Accounting Standard 14 related to "the pooling of interests method" as prescribed under Section 211(3C) of the Companies Act, 1956 and under Section 133 of the Companies Act, 2013.*
>
> 9. *That in the light of the above submissions, not of the observations of the Regional Directors survive."*

The above stated explanation submitted by the authorised signatory of the Petitioner-Transferor & Transferee Companies meets with the observations made by the Regional Director.

The Official Liquidator has filed his report dated 18.03.2016, who on the basis of the report of M/s K.D. & Associates, Chartered Accountant, has submitted in para No.6 of his report that the affairs of the Transferor Company have not been conducted in a manner prejudicial to the interest of its members, Creditors or to the Public Interest except than the qualifications mentioned in the report of M/s K.D. & Associates, Chartered Accountant and has further submitted that the matter may kindly be decided on merits keeping in view the submissions made in para No.4 of his report, which read as under: -

"4. That M/s K.D. & Associates, Chartered Accountant, has verified the Accounts of Transferor Company and submitted his report to this office on 16.3.2016. The copy of report is enclosed and annexed as Annexure R-2. The learned Chartered Accountant has made following observations: -

(a) That the Company has maintained proper records showing full particulars including quantitative details and situation of fixed assets.

(b) That there are some accumulated losses in the Company for past 4 years, can be briefed as under: -

Sr. No.	Company	Loss brought forward	FY 2010-11	FY 2011-12	FY 2012-13	FY 2013-14	FY 2014-15	Loss Carry Forward
1	Keihin Automotive Systems India Private Limited	Not applicable	Not applicable	Loss Rs.7,43,00,129	Loss Rs.9,41,94,573	Loss Rs.2,16,00,3464	Profit Rs.1,58,61,130	Nil Due to take over by Transferee Company

(c) That Company has made a provision for doubtful debts/advances. During the Financial year 2012-13 & 2013-14 Company has made a provision for doubtful debts to the tune of Rs.7,758,872/- and Rs.4,239,000/-. Out of this an amount of

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Rs.3,519,873/- had been written back in FY 2013-14. It should also be noticed that such transactions have been undertaken with the group Companies itself.

(d) That after carefully perusal of audit reports of the Company, we found that at some instance the audit report read with Companies (Auditor's report) Order, 2003 was qualified by auditors (shown in ITALICS as per guidelines of the ICAI), but not any explanation(s) was offered by Company in its BOD's report. The complete year wise elements can be discussed as under: -

Financial year	*Qualification*	*Company's Explanation*
2012-13	*Para (v)(b) of Companies (Auditor's report) Order, 2003: "In respect of transactions made in pursuance of such contracts or arrangements and exceeding the value of Rupees five lakhs entered into during the financial year, comparative quotes for those items are not available to us. Hence, we are unable to comment whether the transactions were made at prevailing market price at the relevant time."*	*No explanation was offered by Company, in its BOD's report.*

	Para (vi) of Companies (Auditor's report) Order, 2003: *"During the year no internal audit was carried out and accordingly, we are unable to comment on the internal audit system."*	*No explanation was offered by Company, in its BOD's report.* *However, when confront the replies of the Company is very contradictory. Firstly vide reply dated 19th January 2016, the Company states that :* *"We wish to submit that there has been no internal audit conducted past years, since there was no statutory requirement for the same in terms of Section 138 of the Companies Act, 2013 read with Rule 13 of the Companies (Accounts) Rules 2014."* *But vide reply dated February 16, 2016 the Company states that :* *"We hereby submit that Company has internal audit system commensurate with the size and nature of business. Further please note that statutory auditor has also confirmed the above in its report.* *Our earlier reply in this matter was inadvertently mentioned as "not applicable"* *However, no documentary proof is submitted in this regard till date.*
	Para (xvii) of Companies (Auditor's report) Order, 2003: *"According to information and explanation given to us*	*No explanation was offered by Company, in its BOD's Report.*

	and on an overall examination of the balance sheet of the Company, we report that funds amounting to Rs.5,27,87,751/- have been used for long term investment representing acquisition of fixed assets and funding of losses."	
2013-14	*Para (vii) of Companies (Auditor's report) Order, 2003: "During the year no internal audit was carried out and accordingly, we are unable to comment on the internal audit system."*	*No explanation was offered by Company, in its BOD's Report. However, when confront the replies of the Company is very contradictory. <u>Firstly vide reply dated 19th January, 2016, the Company states that</u>: "We wish to submit that there has no internal audit conducted past years, since there was no statutory requirement for the same in terms of section 138 of the Companies Act 2013 read with Rule 13 of the Companies (Accounts) Rules 2014." <u>But vide reply dated February 16, 2016 the Company states that :</u> "We hereby submit that Company has internal audit system commensurate with the size and nature of business. Further please note that statutory auditor has also confirmed the above in its report. Our earlier reply in this matter was inadvertently*

		mentioned as "Not applicable." *However, no documentary proof is submitted in this regard till date.*

(e) During the Financial Year 2014-15 the Company had estimated the different useful life of the assets rather than that suggested in Schedule-II of Indian Company Act, 2013.

Further the residual value was also estimated to NIL. This fact was confronted to the Company and asked to support the estimated life with technical advice as mentioned in Application Guide on the provisions of Schedule II of the Companies Act, 2013 issued by ICAI read with Accounting Standard-6 and Schedule II of Indian Company Act, 2013.

But vide reply dated February, 16th 2016 the Company had submitted management paper based on internal technical expert's review. But no such advice was submitted with us.

In the absence of such technical advice, it appears that the Company is not following the Schedule-II of the Indian Company Act, 2013.

> *(f) During the Financial year 2011-12, the Company had taken a Working Capital Loan of Rs.80 million from Bank of Tokyo-Mitsubishi UFJ Ltd., Parliament Street, New Delhi for 102 days towards the working capital requirements. On perusal of the financial statements of the Company it was found that the total working capital of the Company works out to Rs.36,596,540/-. This proves that the Company had utilized an amount of Rs.43,403,460/- (80,000,000 – 36,596,540) for long term investments representing acquisition of fixed assets and funding of losses. Therefore, there had been misapplication of the loan taken by the Company.*

It is further observed by the Official Liquidator in para 4(f) of his report that *"this issue was confronted to the Company by our questionnaire dated 8th February 2016 to which the Company submitted its reply on 18/02/2016 in which it has been stated that the Company is relying upon the audit report of their statutory auditors and hence, no proper justification had been provided.*

The Official Liquidator in para 4(g) of his report has also made the following observations: -

> *"(g) Further in spite of these finding while verification of financial documents,*

> *accounts, books and records of the transferor Company, certain discrepancies & irregularities, are found which are as follows: -*
>
> - *Not complying to certain Accounting Standards issued by Institute of Chartered Accounts of India : While verification of financial statements of the Company, we found that Company is not adherence to certain applicable accounting standards under provisions of the Indian Company Act (1956 and 2013) read with Companies (Accounting Standards) Rules, 2006. The year wise detail can be summarized as below: -*
>
> 1. *F.Y. 2011-12 : Accounting standard - 15: Employee Benefits & Accounting Standard – 26: Intangible assets.*
> 2. *F.Y. 2014-2015: Accounting Standard – 17 : Segment Reporting."*

In response to the aforesaid observations made by the Official Liquidator, Akihide Kato, Authorised Signatory of both the Petitioner Companies has filed reply by way of affidavit. The relevant averments made in the reply are reproduced as under: -

" 3. That the Transferor Company had already made its submissions to auditors which have not been duly considered in some of the observations raised. For instance in point (F) the auditors have qualified that during the financial year 2011-12, the Transferor Company had taken a working capital long of Rs.8,00,00,000/- from Bank of Tokyo-Mitsubishi UFJ Ltd., Parliament Street, New Delhi towards the working capital requirements which was partially used for long term investments and funding of losses. In this relation, the Transferor Company would like to submit that it has a closing cash balance of Rs.9,06,20,048.71/- in FY 2011-12 as highlighted in the auditor's report itself. This would clearly justify the fact that such working capital loan has not been used for long term investments purposes. The Transferor Company has used equity funding of Rs.20,00,00,000/- in that financial year primarily for acquisition of long

term and non-current assets and short term borrowings have been primarily used for working capital purposes. Further, no qualification is raised by statutory auditors in its report for that financial year.

4. *That it is submitted, that none of the observations per se have any impact on the amalgamation being proposed by the Petitioners and are balance sheet related observations.*

5. *That further para 11 of the Scheme provides as under: -*

"11 Legal proceedings

All legal proceedings of whatsoever nature by or against the Transferor Company pending and/or arising at the Appointing Date and relating to Transferor Company or its properties, assets, debts, liabilities, duties and obligations, shall be continued and/or enforced until be Effective as desired by the Transferor Company and as and from the Effective Date shall be continue and enforced by or against the Transferee Company in the same manner and to the same extent as *would or might have been continued and enforced by or against the Transferor Company. On and from the Effective Date, the Transferee Company shall and may, if required, initiate legal proceedings in its name in relation to the Transferor Company in the same manner and to the same extent as would or might have been initiated by the Transferor Company."*

6. *That the Scheme, therefore, sufficiently takes care of the observations of the Official Liquidator, if the observations are taken at their face value.*

7. *That further, given that the Scheme of Amalgamation provides for transfer of all the liabilities /proceedings of the Transferor Company to the Transferee Company (i.e. the surviving entity post approval of the Scheme of Amalgamation), the Transferee Company shall remain liable and responsible with the relevant authority with respect to the observations highlighted in the*

> *auditor's report by the Official Liquidator.*
>
> *8. That the Transferee Company further undertakes that upon sanction of the Scheme of Amalgamation, the Transferee Company shall be liable for any action/liability that could have been for may be brought against the Transferor Company towards the observations in the Official Liquidator's Report.*
>
> *9. That consequently, it is submitted that the observations made by the Official Liquidator are not detrimental to creditors, shareholders or public interest upon approval of the Scheme of Amalgamation.*
>
> *10. That in the light of the above submissions, none of the observations of the Official Liquidator survive."*

The above stated explanation submitted by the authorised signatory of the Petitioner-Transferor & Transferee Companies meets with the observations made by the Official Liquidator.

During the course of hearing, learned counsel for the petitioner-Companies in response to the observation made by the Official Liquidator at para 4(b) of his report that the Transferor Company suffered losses from

2010-11 to 2013-14 has submitted that it is not a ground under law for denying a merger/amalgamation rather a loss making company can be merged/amalgamated with a profit making company and further submitted that in the year 2014-15 onwards, the Transferor Company is in profits.

In response to the observation made at para 4(c) by the Official Liquidator in his report that the Transferor Company has a provision for doubtful debts during 2012-13 and 2013-14, learned counsel for the petitioner-Companies has submitted that there are no doubtful debts as all debts have been recovered as per the balance sheet of 2014-15 attached at page 107 of the petition.

In response to the observation made at para 4(d) by the Official Liquidator in his report that for the Financial Year 2012-13 and 2013-14, the auditor has observed comparative quotes for contracts above ₹5 lacs are not available and no explanation was offered by the petitioner-Transferor Company in auditors report, learned counsel for the petitioner-Companies has submitted that it is not a ground to deny the merger/amalgamation and it is further submitted that as per para 8 of reply to the report of the Official Liquidator, the Transferee Company has undertaken that it shall be liable for any action/liability that could have been or may be brought against Transferor Company

In response to the further observation made at para 4(d) by the Official Liquidator in his report that for the Financial Year 2012-13 and 2013-14, the auditor has observed that no internal audit was carried out and accordingly, Official Liquidator is unable to comment on the internal audit system. Learned counsel for the petitioner-Companies has submitted that the company has already replied that no internal audit has been conducted in the past years since there was no statutory requirement for the same in terms of Section 138 of the Act read with Rule 13 of the Companies (Account) Rules, 2014 [for short 'the Rules'] and it is further submitted without prejudice to the above, as per para 8 of the reply to the report of the Official Liquidator, the petitioner-Companies have undertaken that the Transferee Company shall be liable for any action/liability that could have been or may be brought against Transferor Company.

In response to the observation made at para 4(e) by the Official Liquidator in his report, learned counsel for the petitioner-Companies has submitted that in the audit report at page 100 of the petition, it has been averred that the company has made necessary changes in compliance with Schedule 11 of the Companies Act, 2013. The impact of the same on the financial statements is not material. The reasons for considering different life and rates and value with regard to items under Schedule II of Companies Act, 2013 are on the basis of technical evaluation done by technical people estimating the life and the realizable value.

In response to the observation made at para 4(g) by the Official Liquidator in his report, learned counsel for the petitioner-Companies has submitted that the company is a small and medium sized company (SMC) as defined in the General Instructions in respect of Accounting Standards notified under the Act. Accordingly, the company has complied with the Accounting Standards applicable to a Small and Medium Sized Company.

During the course of hearing, the learned counsel for the Official Liquidator has raised some objections to which learned counsel for the petitioner-Companies has replied to. Parawise objections raised by the counsel for the Official Liquidator and reply thereto by the counsel for the petitioner-Companies are as follows:-

Sr. No.	Objections raised by the counsel for the Official Liquidator	Reply by counsel for the petitioner-Companies to the objections
1.	The foreign exchange outflow is more than inflow.	As per the averments made in para 4 to 6 of the additional affidavit dated 17.11.2016, the company is trading automobile components and it imports the trade goods for which foreign exchange is required for sale in domestic market where sales are in Indian rupees.
2.	Salary paid to Directors is ₹1,79,08,880/-	The directors are expatriates and salary is in account with Companies Act. Even the statutory auditor has not made any adverse observation on this.
3.	The carry forward losses of the Transferor Company will be set off against the profits of Transferee	There are no carry forward losses of Transferor Company.

	Company	Even the report of the OL also states that the losses carry forward are 'Nil'.
4.	Latest Audited Accounts of the petitioner-Companies not produced.	Audited Balance Sheets for the Financial Year 2015-16 were filed along with CA No.525 of 2016 which was taken on record by this Court on 04.11.2016.

I have heard both the learned counsel for the parties and after considering all the relevant facts, the procedural requirements contemplated under Sections 391 to 394 of the Act, the relevant Rules and on due consideration of the reports of the Regional Director, Northern Region, Ministry of Corporate Affairs, New Delhi and the Official Liquidator and the separate reply(s) thereto by way of affidavits of the Authorised Signatory of the Petitioner-Companies, the Scheme of Amalgamation is hereby sanctioned and as a result thereof, the assets and liabilities relating to the Transferor Company/Petitioner Company-I shall stand vested in the Transferee Company/Petitioner Company-II and the Transferor Company/Petitioner Company-I shall be dissolved without being wound up. The Petitioner-Companies shall comply with all the applicable Accounting Standards upon sanctioning of the Scheme or any other undertaking made by the Petitioner-Companies.

The Scheme shall be binding on the Petitioner-Transferor and Transferee Companies, their respective shareholders, creditors and all concerned.

Let formal order of sanction of the Scheme be drawn in accordance with law and its certified copy be filed with the Registrar of Companies within 30 days from the date of receipt of the same.

A notice of the order be published in the newspapers, namely, “Indian Express” (English), “Jansatta” (Hindi) both Delhi/NCR Edition and in the Official Gazette of Government of Haryana.

Any person interested shall be at liberty to apply to the Court for any direction(s) as per law.

Learned counsel for the Petitioner-Companies states that the petitioner-Companies would voluntarily deposit a sum of ₹1,00,000/- in the Common Pool Fund Account of the Official Liquidator within four weeks. The statement is accepted.

Disposed of accordingly.

(RAKESH KUMAR JAIN)
16.05.2017 **JUDGE**
Vivek

Whether speaking/reasoned Yes/No

Whether reportable Yes/No