In Re: Sequent Scientific Ltd.

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Court : Mumbai

Decided On : Jun-16-2009

Reported in : [2009]94SCL55(Bom)

Judge : A.M. Khanwilkar, J.

Acts : Companies Act, 1956 - Sections 21, 153, 153A, 153A(2) and 391 to 394; Delhi Rent Control Act - Sections 14(1); Income Tax Act, 1961 - Sections 269UA; Monopolies and Restrictive Trade Practices Act - Sections 23 and 24; Monopolies and Restrictive Trade Practices (Amendment) Act, 1991; Industrial Disputes Act, 1947; Code of Civil Procedure (CPC) , 1908 - Order 22, Rule 10 - Order 23, Rule 3; Companies Rules

Appeal No. : Company Petition Nos. 99 and 100 of 2009 in Company Application Nos. 1552 and 1553 of 2008

Appellant : In Re: Sequent Scientific Ltd.

Advocate for Pet/Ap. : Virag Tulzapurkar, ;Alpana Ghone, ;Chirag Mody, ;Janak Dwarkadas, ;M. Chandanamuthu, ;M.S. Bhardwaj and ;S.K. Mohapatra, Advs.

Judgement :

A.M. Khanwilkar, J.

1. These Petitions are filed by the Transferor and Transferee company to obtain sanction of this Hon'ble Court to the scheme of amalgamation whereby the entire undertaking of the Transferor company Sequent Scientific Ltd. shall stand transferred and vested in or deemed to be transferred and vested in Transferee company (P.I. Drags) and form part of the business of the Transferee company and to obtain order under Section 394 of the Companies Act interalia for vesting the said undertaking of the Transferor company in the Transferee company without any further act or deed and for dissolution of the Transferor company without winding up.

2. The Transferor company was originally incorporated on 16-8-2002 in the name and style of Strides Research and Specialty Chemicals Limited ('SRSCL'). However, after compliance of all necessary formalities under Section 21 of the Act, the name of the company was changed to Sequent Scientific Ltd. ('SSL') with effect from 18-9-2006. The Transferor Company carries on business in the human healthcare segment and has invested significantly into strong Research and Development Team and facilities. It is engaged in the business of Specialty and Fine chemicals, contract manufacturing, contract research and development, outsourced drug discovery services and custom synthesis and API's. As on 31-3-2008 the authorised share capital of the Transferor company was Rs. 50,00,000 equity shares of Rs. 10 each in the value of Rs. 5,00,00,000. The issued, subscribed and paid up capital of the Transferor company is 38,50,000 equity shares of Rs. 10 each valued at Rs. 3,85,00,000. However, as on the date of filing of the Petition, the share capital of the Transferor company is stated to be authorised share capital of 50,00,000 equity shares of Rs. 10 valued at Rs. 5,00,00,000 and issued, subscribed and paid up capital of 43,50,000 equity shares of Rs. 10 valued at Rs. 4,35,00,000. It is stated that the shareholders of the Transferor company as on the date of the filing of the Petition were Praxis Life Sciences Pvt. Ltd. including its nominees holding 38,50,000 shares and Primera Partners Pvt. Ltd. holding 5,00,000 shares.

3. It is stated that the Transferee company was originally incorporated on 28-6-1985 under the provisions of the Companies Act in the name and style of Visistha Traders and Finance Ltd. Pursuant to order dated 23-9-2003 passed by this Court,

an erstwhile unlisted company, PIDPL (Transferor company) was amalgamated with the said Visistha Traders and Finance Ltd. After following necessary procedure the name of the company was changed to P.I. Drugs and Pharmaceuticals Ltd. It is stated that the Transferee company is a manufacturer and exporter of specialized quality formulations and bulk drugs in the human and animal healthcare segment. As on 31-3-2008 the share capital of the Transferee company is mentioned as authorised capital 1,50,00,000 equity shares of Rs. 10 each valued at Rs. 15,00,00,000 and issued, subscribed and paid up capital of 1,10,85,191 equity shares of Rs. 10 each valued at Rs. 11,08,51,910. It is stated that as on the date of filing of the present Petition no change in the share capital of the Transferee company has been effected.

4. The Transferor company proposed to enter into a scheme of amalgamation with the Transferee company. It is stated that scheme has been approved by the Board of Directors of the Transferor company at its meeting held on 8-8-2008. Similarly, the scheme has been approved by the Board of Directors of the Transferee company at its meeting held on 8-8-2008. Thereafter, the Transferee company by letter dated 10-9-2008 submitted the proposed scheme for approval of the Bombay Stock Exchange Ltd. The Bombay Stock Exchange vide letter dated 1-10-2008 has given their no objection to the proposed scheme. The Petition also reproduces the circumstances to justify the proposed scheme. The Petitioners assert that the scheme shall be effective from the appointed date as contemplated in the scheme or such other date as this Hon'ble Court may direct. It is further stated that the Transferee company has also obtained valuation report in respect of the Share Exchange Ratio from Deloitee Touche, Tohmatsu India Pvt. Ltd. dated 6-8-2008. Further, as required by Clause 24 of the Listing Agreement of the Transferee company, both the Petitioner/Transferor company and the Transferee company appointed Chartered Capital and Investment Ltd. as merchant bankers for giving fairness opinion or the valuation report. It is stated that upon the scheme being sanctioned the Transferor company will be dissolved without winding up in accordance with provisions of Section 394 of the Act as stated in Clauses 12 and 13 of the Scheme.

5. The Petitioners took out summons for directions being Company Application Nos. 1552/2008 and 1553/2008 respectively. By order dated 21-11-2008, this Hon'ble Court dispensed with the meeting of the equity shareholders of the Transferor company since all the shareholders had given their consent. However, directed the Transferor company to hold meeting of secured creditors and unsecured creditors for the purposes of considering and if thought fit approving with or without modification the arrangement enrolled in the scheme of 3-1-2009 at the appointed time and place. Insofar as the Transferee company is concerned, this Hon'ble Court directed the Transferee company to hold meetings of its equity shareholders, secured creditors and unsecured creditors for the same purposes on 3-1-2009 at the appointed time and place.

6. Pursuant to the directions of the High Court the Transferor company gave individual notices to the secured and unsecured creditors to attend the scheduled meeting. It is stated that in the meeting of secured creditors, 3 secured creditors remained present and voted for the scheme. The secured creditors in value who voted for the scheme is stated to Rs. 33,07,81,650 who unanimously approved the scheme. Insofar as the meeting of unsecured creditors, in all 47 unsecured creditors attended the meeting. Out of them 36 unsecured creditors voted for the scheme in the value of Rs. 2,49,26,083. Two unsecured creditors voted against the scheme in the value of Rs. 54,22,000. Votes given by 9 unsecured creditors was declared invalid in value of Rs. 5,57,35,167. It is stated that the unsecured creditors in their meeting approved the scheme by requisite majority in number representing more than 3/4th in value of unsecured creditors of the Transferor company.

7. In so far as Transferee company is concerned, it is stated that meeting of equity shareholders was attended by 20 shareholders in person or proxy or by way of authorised representative. Out of them 18 voted for the scheme in value of Rs. 7,35,64,030. None of the shareholders voted against the scheme. Votes given by the two shareholders was declared invalid in the value of Rs. 12,270. It is stated that out of 20 shareholders, 13 equity shareholders had attended the meeting in person. Insofar as the meeting of secured creditors, it is stated that the same was attended by the 3 secured creditors and all the 3 unanimously voted in favour of

the scheme in the value of Rs. 8,26,28,592; whereas in the meeting of unsecured creditors, 22 unsecured creditors attended the meeting. Out of them, 15 voted for the scheme in the value of Rs. 1,48,17,402. None of the unsecured creditors voted against the scheme. However, votes of 7 unsecured creditors was declared invalid in the value of Rs. 26,21,29,306. It is stated that the scheme has been approved by the requisite majority in number representing more than 3 /4th share in value of the unsecured creditors of the Transferee company.

8. In this background, the Petitioners have approached this Court for the sanction of the arrangement embodied in the scheme by the members of the Transferor and Transferee company so as to be binding on all the members and shareholders of the respective companies. The Petitioner asserts that no one will be prejudiced if the scheme is sanctioned and the sanction of the scheme will be in the interest of Transferee company, Transferor company, the general public and all concerned for which reason it is just and equitable that the scheme is sanctioned as the same is bound to benefit both the companies.

9. The Regional Director, Western Region, Ministry of Corporate Affairs has stated on affidavit that the scheme is not prejudicial to the interest of shareholders and public and the Court may pass such orders as it deems fit and proper. Having noticed that all necessary compliances have been made by the respective companies with assurance to comply all consequential formalities, even the Official Liquidator has submitted report regarding consent for sanction of the proposed scheme of amalgamation. No other shareholder or creditor has come forward to oppose these Petitions. The only objection registered is by M/s. CIBA (India) Ltd. by filing affidavit of Jimeasow the Constituted Attorney of the Intervenor. In the reply affidavit the Intervenor has stoutly disputed the correctness of the stand taken by the Petitioners in Paragraph 37 of the Petition-that no one will be prejudiced if the scheme is sanctioned. According to the Intervenor, the said statement is false and/or irresponsible statement. In that, the Scheme proposes to transfer the undertaking of the Transferor company in favour of Transferee company and the word undertaking inter alia includes benefits of agreements, contracts and arrangements as defined in Clause 1.9 of the said scheme. It is then stated that CIBA (India) Ltd. then known as CIBA Specialty

Chemicals (I) Ltd. had entered into Supply Agreement dated 18-5-2006 with the Transferor company, then known as Strides Research and Specialty Chemicals Ltd. The affidavit then refers to some of the Clauses of the said Supply Agreement amongst other Clauses 1(a), 1(f), 1(j), 2-4(a) to (c), 8-11(a) to (c), 12(a) to (f), 17(a) to (d), 19 and 23. Relying on these provisions it is stated that the Supply Agreement is subsisting and will expire automatically on 31-12-2010. It is stated that the said agreement has not been terminated by either party. Further, Clause 23 of the agreement provides that the Transferor company is bound not to assign whole or in part, its rights and obligations under the said agreement without the prior written consent of the Intervenor CIBA (India) Ltd. It is stated that the Transferor company has not approached the Intervenor seeking such consent nor has the Intervenor has given its consent to the Transferor company to assign or transfer in whole or in part of its rights and its obligations under the said Supply Agreement to any third party including the Transferee company. It is then stated that the object of the present Petition filed by the Transferor company is to obtain sanction of this Court to the scheme of arrangement whereby the entire undertaking of the Transferor company on the appointed date by simultaneous transfer would vest in the Transferee company. This scheme would come into operation subject to the approval accorded by the Board of Directors of the two companies and more particularly on account of the Courts sanction order to be passed on these Petitions. It is stated that it is well established position in law that such transfer is not an involuntary transfer effected by an order of the Court. For that reason, having regard to Clauses 4(c) and 23 of the said Supply Agreement the technology whether provided by Intervenor CIBA (India) Ltd. or developed by Transferor company shall exclusively belong to Intervenor company CIBA (India) Ltd. and is non-transferable, in view of the prohibition on Transferor company from assigning in whole or in part, its rights and obligations under the Supply Agreement without the prior written consent of the Intervenor company. It is then stated that it has now com e to the notice of the Intervenor company that recently the Transferor company has already approached the only two upstream customers of CIBA in India and has offered to sell the said product PEPQ either directly or through a company called Qualichm Specialists Pvt. Ltd. As a result the Transferor company has or is likely to commit a breach of the Supply Agreement. It is stated that the Intervenor company has been advised to take recourse to appropriate proceedings in that behalf and is opposing the scheme proposed by the Transferor company without prejudice to its rights to take recourse to separate action against the Transferor company for committing breach of the said Supply Agreement. It is further stated that as per the Supply Agreement the Intervenor company has provided the technology for manufacture of PEPQ and to sell the same exclusively to the Intervenor CIBA. That the Supply Agreement clearly defines as to what technology means in Clause 1(j) thereof and that the Transferor company has confirmed in the Supply Agreement having received from Intervenor the technology necessary for manufacture of PEPQ and it is further agreed and recorded in the Supply Agreement that all right, title and interest and additions and improvement thereof whether provided by Intervenor CIBA to the Transferor company or developed by the Transferor company during this term of the said agreement shall belong solely to the Intervenor company CIBA and technology provided by Intervenor CIBA to the Transferor company is non-transferable by them. It is lastly asserted that if the proposed scheme is sanctioned, it could indirectly transfer the said technology belonging to Intervenor CIBA to the Transferee company which is prohibited under the said Supply Agreement. On these basis the prayer for sanction of scheme have been opposed.

10. The Transferor company has filed rejoinder affidavit contesting the stand taken by the Intervenor company. The Counsel appearing for the respective parties have advanced legal arguments more or less on the basis of the plea taken in the affidavits filed before this Court.

11. Having considered the rival submissions, the first question that needs to be addressed is: whether the Intervenor has locus to appear in the present proceedings and in any case to object to the proposed scheme. There is force in the stand taken by the Petitioner companies that Section 391 plainly recognizes that it is only the creditors and shareholders who are expected to participate in consideration of proposed scheme of amalgamation. The Intervenor is neither a shareholder nor the creditor of the Transferor company. Thus understood, the Intervenor cannot be heard to raise any objection with regard to the proposed scheme.

12. Assuming that the Intervenor has locus, having regard to the fact that it has executed Supply Agreement with the Transferor company under which the Transferor company is obliged to discharge its obligation specified therein. Even so, the question is whether the objection of the Intervenor can be addressed at this stage of the proceedings. The objection essentially is in the nature of grievance about breach of or likelihood of breach of conditions of Supply Agreement operating between the Intervenor and the Transferor company. The Counsel appearing for the Transferor company has rightly pressed into service decision of the Delhi High Court as well as of the Calcutta High Court to contend that the Intervenor company as of now has no cause of action to resist the proposed scheme. The fact that on account of the scheme coming into force, there is likelihood of breach of some contractual terms between the Intervenor company and the Transferor company cannot be the basis to consider the efficacy and the justification for introducing proposed scheme of amalgamation. In the case of Telesound India Ltd. In re [1983] 53 Comp. Cas. 926 (Delhi). In Paragraph 16 of the said decision, while considering similar grievance the Court observed thus:.This Court is, however, not concerned at this stage if the transfer by or consequent on amalgamation by the order of the Court would nevertheless be tantamount to the assignment of a tenancy and if without the consent of the landlord would render the company or the transferee-company liable to eviction under Section 14(1)(b) of the Rent Control Act or otherwise be actionable in a regular civil action against them. Such a matter has to be examined and decided in accordance with the special jurisdiction created by that Act or on a regular civil action, if maintainable. No cause of action accrues to the landlord before the amalgamation and consequential vesting. The cause of action, if any, follows the amalgamation and the vesting. Neither the amalgamation nor the vesting would deprive the landlord of any please based on alleged assignment which may be open in law to the landlord. If there is any assignment in law, which may attract the provisions of the Delhi Rent Control Act, the landlord would be free to take recourse to the proceedings under that Act or in a regular civil action and such proceedings would be dealt with and decided by the appropriate authority in accordance with law. (p. 947)

13. On similar lines, the Calcutta High Court in the case of Sailendra Kumar Roy v. Bank of Calcutta Ltd. : AIR 1948 Cal. 131 in Paragraphs 14 & 15 observed thus:

14. In order to find an answer to that question, it is not necessary to go beyond Section 153A, Companies Act. That Section pre-supposes that an application has been made to the Court under Section 153 for the sanctioning of a compromise or arrangement and enacts that the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for certain matters, provided two conditions are satisfied. The first condition is, to quote only the material part, that:

it is shown - that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for...the amalgamation of any two or more companies.

It is to be observed that uptill then, the compromise or arrangement has only been proposed. The second condition is that it is shown that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this Section referred to as the transferor-company) is to be transferred to another company (in this Section referred to as 'the transferee company'). It is again to be observed that uptill then the property is only to be transferred. There is yet no completed transfer. The Section goes on to say that if the conditions mentioned above arc satisfied, the Court may, by its order sanctioning the scheme or a further order, provide inter alia for:

(a) the transfer to the transferee-company of the whole or any part of the undertaking and of the property or liabilities of any transferor-company.

15. It is to be ordered that the Section does not merely say, as does Order 23, Rule 3 in the case of compromises of suits, that the Court 'Shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith' but directs the making of a further order by the Court on its own account for the transfer of assets in addition to sanctioning the scheme. Even then, it is not left to the order itself to effectuate the transfer by its own force as an order of the Court. It is provided further by Sub-section (2) of the Section that:

Where an order under this section, provides for the transfer of property....' that property shall, by virtue of the order, be 'transferred to and vest in...the transferee company.'

There, at last, the transfer is accomplished, and the clear statutory provision is that it takes place by virtue of the order passed by the Court. It does not take place by an assignment by the transferor company, for that company makes no assignment at all, either in substance or in form. It only makes a proposal and submits it to the Court. Nor does the transfer take place by the scheme as sanctioned by the Court, so that it may be said that what happens is only that to the scheme, the sanction of the Court is superadded as in the case of ordinary compromise decrees. The actual transfer is brought by the further order, operating with the force conferred on it by Sub-section (2) of Section 153A, Companies Act. In other words, it is a transfer otherwise than by assignment. (p. 133)

14. It necessarily follows that the issue raised by the Intervenor that if the scheme is sanctioned, it may indirectly facilitate transfer of the technology belonging to the Intervenor company to the Transferee-Company in spite of prohibition in the Supply Agreement, cannot be countenanced. If the sanction results in that situation, it is for the Intervenor company to consider the course of action either permitted by the written contract or such other remedy in common law, as may be advised. Those proceedings will have to be considered on its own merits. I refrain to express any opinion with regard to the correctness of the stand taken by the Intervenor one way or the other. All questions in respect of the said plea are left open and will have to be addressed at the appropriate stage.

15. From the affidavit as filed and the argument canvassed by the Intervenor, the thrust of the objection is that on according sanction to the proposed scheme it would inevitably result in transfer of the rights and obligations contained in the Supply Agreement by the Transferor company in favour of the Transferee company without the consent of the Intervenor. That transfer is not an involuntary transfer, but by choice. In that, the Board of Directors in the first place propounded the scheme of amalgamation which was then approved by the shareholders as well as the secured and unsecured creditors. It is only thereafter the company

instituted the present petition which was also a voluntary act. Merely because the Court has accorded sanction does not result in an involuntary transfer.

16. To buttress this submission, reliance was placed on decisions of the Apex Court in the case of General Radio & Appliances Co. Ltd. v. M.A. Khader : [1986] 2 SCC 656, Singer India Ltd. v. Chander Mohan Chadha : [2004] 7 SCC 1. These decisions deal with the question as to whether the transfer of tenancy emanating from the sanction of a scheme of amalgamation is in the nature of voluntary transfer or involuntary transfer. In these decisions the Apex Court, no doubt, has expounded that on account of the scheme of amalgamation the tenancy rights in respect of premises in question stood transferred in favour of the Transferee company; it then proceeded to observe that by no standard, such transfer can be said to be involuntary transfer. However, what is significant to note is that the Court was called upon to examine the core question as to whether such transfer is prohibited 'within the meaning of the concerned Rent Control Legislation'. The Apex Court proceeded to hold that even if it was an involuntary transfer, it would offend the provisions of the Rent Control Legislation and result in unlawful subletting. That opinion is rendered in the proceedings taken out by the landlord for possession of the suit premises on the ground that original tenant unlawfully transferred and sublet the suit premises to the Transferee company as a consequence of scheme of amalgamation. As aforesaid, the consequence of approving proposed scheme of amalgamation results in breach of Supply Agreement, is a matter which will have to be addressed in the appropriate proceedings. The cause of action for purported, breach would arise only after the scheme is approved by this Court and is to be acted upon by the Companies.

17. To get over this position, Counsel for the Intervenor company would contend that this Court while approving the scheme cannot turn blind eye to the possibility of breach of contractual obligation by the Transferor company and more so when the breach is in relation to an intellectual property-rights of the Intervenor company. According to him, this Court cannot be a party to the situation resulting in likelihood of breach and allow the illegality to be perpetrated. The argument though attractive will have to be stated to be rejected in view of the settled legal position that the possibility of breach of some contractual obligation as a

consequence of approving the scheme of amalgamation cannot be the basis to examine the request of the Transferor and Transferee company to accord sanction to the proposed scheme of amalgamation. If any authority is required, we can usefully refer to the decision of the Division Bench of our High Court in the case of Sadanand S. Varde v. State of Maharashtra [2001] (I) Bom CR 261 : 30 SCL 268. In this case, almost similar argument was canvassed. In that case the issue was whether it was imperative to seek prior permission as was required in terms of provisions of Chapter XX-C of the Income-tax Act. In that, on account of scheme of amalgamation, it would result in transfer of property within the meaning of Section 269UA, Clause (f) of the Income-tax Act, which would require prior permission of the appropriate authority. In absence of such permission, the transfer effected by scheme of amalgamation would be invalid. The Division Bench of our High Court on analyzing the relevant decisions on the point in issue proceeded to observe thus:

95. It is next contended that the provisions of Chapter XX-C would apply only to cases of 'transfer' as defined by Clause (f) of Section 269UA. A scrutiny of the definitions of 'apparent consideration' given in Clause (b) and 'transfer' given in Clause (f) would unmistakably indicate that the transfers to which the provisions of Chapter XX-C are intended to apply, are only transfers under agreements or contractual transfers and not statutory transfers or transfers effected by orders of the court or by operation of law. In a situation of amalgamation, the transfer is not by way of sale, exchange, lease or rent so as to fall within Section 269UA. Further, the process by which the land in question stood vested in the transferee-company by virtue of the amalgamation order, would not answer the description of 'immovable property' within the meaning of Clause (d)(ii), nor does it answer the description of 'transfer' as defined in Clause (f)(ii) of Section 269UA of the Income-tax Act. See in this connection Sailendra Kumar Ray v. Bank of Calcutta Ltd. [1948] 18 Comp. Cas. 1 (Cal.) and Suhti-Yanidhi (Virudhnagar) Ltd. v. A.R.S. Subrahmanya Nadar [1951] 20 Comp. Cas. 214 (Mad.) and Tele sound India Ltd. In re . In Sailendra Kumar Ray's case [1948] 18 Comp. Cas. 1, the Calcutta High Court held that in a situation of amalgamation even if it can be said that there was a transfer of asset, the transfer was not by way of an assignment but by the order of the court backed up by the force of a statutory provision and by operation of

law. In Sahayanidhi's case [1951] 20 Comp. Cas. 214 (Mad.), the Madras High Court reiterated this proposition. In Telesound's case , it is held that as amalgamation has its origin in a statute and is statutory in character, the transfer and vesting is by operation of law and not an act of the transferor-company, nor an assignment by it, but is the result of a statutory instrument. In J.K. (Bombay) (P.) Ltd. v. New Kaiser-I-Hind Spg. & Wvg. Co. Ltd. [1967] 2 Comp. L.J. 272, this Court cited with approval the decision of the English Court In Re Garner Motors Ltd. [1937] 1 All E.R. 671 (Ch. D.) and held that a scheme of amalgamation has statutory operation when sanctioned by the Company Court under the relevant provisions of the Companies Act and is distinct and different from a mere agreement signed by the necessary parties. Even if the scheme is approved by all concerned parties by consensus, merely because it is so agreed upon, the court is not obliged to put its imprimatur on it. The court has the discretion and power to reject a scheme even if all the shareholders and creditors have agreed to it. But, once the scheme is scrutinized by the Company Court and sanctioned by an order made by it under Section 391 of the Companies Act, it ceases to retain the character of contract and operates by force of the statute. This judgment was considered by the Supreme Court in appeal in J.K. (Bombay) Pvt. Ltd. v. New Kaiser-I-Hind Spinning and Weaving Co. Ltd. [1970] 40 Comp. Cas. 689, and the Supreme Court reiterated that once a scheme becomes sanctioned by the court, it ceases to operate as a mere agreement between the parties and becomes binding on the company, the creditors and the shareholders and has statutory operation by virtue of the provisions of Section 391 of the Companies Act. Such a scheme sanctioned by the Company Court is statutorily binding even on the creditors and shareholders who might have dissented from it or who might have opposed its being sanctioned. It, therefore, has the statutory sanction in that sense. The Supreme Court also approved the observations In Re Garner Motors Ltd. [1937] 1 All ER 671 (Ch D), while coming to this conclusion. The observations of the Calcutta High Court in House of Laourers Ltd. v. Comilia Banking Corporation Ltd. , are to similar effect.

There is overwhelming authority of precedents suggesting that when an amalgamation takes place, the transfer of assets takes place by the force of the Company Court's order and/or by operation of law; it ceases to be a contractual or a consensual transfer. The contention, therefore, is that Chapter XX-C is not attracted to such a transfer by operation of law. This con ten tion has substance and needs to be upheld.

18. It may be useful also to consider the following observations in the same Judgment which reads thus:

The contention urged by the petitioners as well as the fifth respondent, appropriate authority, that a no objection certificate under Chapter XX-C is a condition precedent to the Company Court considering the scheme for amalgamation also does not appear to be tenable for several reasons. First, whenever the Legislature wanted a sanction order to be subject to some condition precedent, the Legislature has so provided expressly. (See in this connection provisions of Sections 23 and 24 of the Monopolies and Restrictive Trade Practices Act prior to the deletion of these Sections from the Act by amendment of 1991). While interpreting a statute, the court has to consider the legislative habit. The legislative habit indicates that where the Legislature intended a sanction to an amalgamation scheme was subject to consent by another authority, it expressly provided so. There is no such provision either in Chapter XX-C or in any other provision of the Income-tax Act, 1961. This is a clear indicator of the negative intention. The sixth respondent has cited an unreported judgment of this Court (per Tipnis J.) dated 10-11-1994, in Judges Summons No. 346 of 1994 in Company Application No. 118 of 1994, connected with Company Petition No. 370 of 1994, where the contention urged in opposition to an amalgamation scheme was that the court should not consider an amalgamation scheme which was likely to result in an unlawful assignment of tenanted premises of the transferor-company to the transferee-company. This Court rejected the contention on the ground that whether the scheme of amalgamation in fact and in law results in an unlawful assignment, is a question which can only be determined after amalgamation before the appropriate forum in proper proceedings and docs not arise for consideration by the Company Court at the stage of giving sanction to the scheme for amalgamation. (This order of the learned Single 1 udge was virtually affirmed since an appeal there against was summarily dismissed on 24-11-1994, by the Division Bench of this Court). To similar effect are the observations of the Supreme Court in General Radio and

Appliances Co. Ltd. v. M.A. Khader [1986] 60 Comp. Cas. 1013. It is, therefore, contended that, by conjuring up consequences that may arise after amalgamation, it is not open to the Company Court, which is the forum constituted under a Special Act, namely, the Companies Act, to reject or refuse to sanction a scheme of amalgamation by reckoning factors which are non-germane and irrelevant for consideration under the provisions of Sections 391 - 394 of the Companies Act. Hence, it is contended that a no objection certificate by the appropriate authority under Chapter XX-C is not a prescribed condition, precedent under Section 391 of the Companies Act and, therefore, is a factor wholly irrelevant, immaterial and non-germane for consideration at the time of sanctioning of the amalgamation scheme. In these circumstances, we are of the view that the contention of the petitioner, that the Company Court was obliged to suo motu issue a notice to the appropriate authority and seek its no objection certificate under Chapter XX-C as a condition precedent to sanctioning the amalgamation scheme, has no statutory basis and cannot be accepted.

19. In the light of the exposition in this decision of the Division Bench of our High Court, the argument of the Intervenor that the transfer is not involuntary transfer and that it is likely to result in breach of conditions of Supply Agreement is of no avail. Assuming that it results in transfer and such transfer is in breach of contractual terms under the Supply Agreement, that is a matter which will have to be addressed at the appropriate stage. The Intervenor is free to invoke the terms of contract and terminate the agreement, as also claim relief of damages or any other civil or criminal action as may be permissible by law. Although it may not be necessary for this Court to answer the issues raised by both sides in the context of terms of Supply Agreement, I would briefly refer to the stand taken by the Transferor company which prima facie in my opinion appears to be a plausible argument. The Supply Agreement clearly provides that the other part of the agreement, namely, the Transferor company, shall unless it be repugnant to the context and meaning thereof, be deemed to mean and include its successors and permitted assigns. It is not necessary for us to deal with the expression 'permitted assigns' as it is nobody's case that the Transferee company would be a permitted assignee. The question is whether the Transferee company would be the successor of the Transferor company in the context of the Supply Agreement.

While giving the description of the Intervenor company in the recital, the same agreement mentions that the expression unless it be repugnant to the context or meaning thereof, be deemed to mean and include its successors and assigns. In other words, both parties clearly understood that insofar as the successors of any of the party would be bound by the terms and conditions of the Supply Agreement. In the entire agreement, nowhere it is provided that before allowing succession, the concerned party should take prior written consent of the other. Unlike, in the case of transfer or assignment it is expressly provided that prior written consent of the Intervenor company should be obtained. In the present case, the Transferee company would become successor in interest as a consequence of scheme of amalgamation as the Transferor company would stand dissolved without winding up. The Petitioners has justly relied on the decision of the Apex Court in the case of Bhagwan Dass Chopra v. United Bank of India : 1987 (Supp.) SCC 536 wherein the Court considered the argument about the effect of scheme of amalgamation and the status of the Transferee company as a result of such amalgamation. In Paragraph 5, the Apex Court observed thus:

It is, however, necessary to evolve a reasonable procedure to deal with cases where a devolution of interest takes place during the pendency of a proceeding arising under the Industrial Disputes Act, 1947. In the circumstances it is reasonable to hold that in every case of transfer, devolution, merger, takeover or a scheme of amalgamation under which the rights and liabilities of one company or corporation stand transferred to or devolve upon another company or corporation eitherunder a private treaty, or a judicial order or under a law the transferee-company or corporation as a successor-in-interest becomes subject to all the liabilities of the transferor company, or corporation and becomes entitled to all the rights of the transferor company or corporation subject to the terms and conditions of the contract of transfer or merger, the scheme of amalgamation and the legal provisions as the case may be under which such transfer, devolution, merger, takeover or amalgamation as the case may be may have taken place. It follows that subject to such terms it becomes liable to be impleaded or becomes entitled to be impleaded in the place of or in addition to the transferor company or corporation in any action, suit or proceeding filed against the transferor company or corporation by a third party or filed by the transferor company or corporation against a third party and that whatever steps have already taken place in those proceedings will continue to operate against and be binding on the transferee company or corporation in the same way in which they operate against a person on whom any interest has devolved in any of the ways mentioned in Rule 10 of Order 22 of the Code of Civil Procedure, 1908 subject of course to any terms in the contract of transfer or merger, scheme of amalgamation or other relevant legal provisions governing the transaction under which the transferee company or corporation has become the successor-in-interest of the transferor company or corporation. (p. 540)

[Emphasis supplied]

20. It may be useful to advert to the decision of the Full Bench of the Madras High Court in the case of Sahayanidhi Virudhunagar Ltd. v. A.S.R. Subrahmanya Nadar AIR 1951 Mad. 209. In Paragraph 4, the Court dealing with the effect of order of Court sanctioning the arrangement observed thus:

4. Before considering the terms and stipulations in the two deeds of transfer referred to as A-2 and A-3, we would like to refer to Section 153A, Companies Act, which has been enacted with a view to facilitate arrangements and compromises between a company and its creditors or shareholders which involve a transfer of its assets and liabilities to other companies as part of such arrangement. If any such scheme or arrangement is sanctioned by Court, the Court is empowered by the Section to make provision by its order sanctioning the arrangement or any subsequent order, for the transfer of the assets and liabilities of a company in liquidation to another company, styled in the Section as the transferee company. Where an order of Court made under the Section provides for the transfer of the assets and liabilities of a company in liquidation to another company, the assets are, by virtue of that order, without more, transferred to and vest in the transferee company and the liabilities of the former company are also cast upon the transferee-company.... (p. 210)

21. Similarly, the Apex Court in the case of J.K. (Bombay) (P.) Ltd. v. New Kaiser-I-HindSpg. & Wvg. Co. Ltd. : AIR 1970 SC 1041 in Paragraph 29 has observed that a scheme sanctioned by the Court does not operate as a mere agreement

between the parties; it becomes binding on the company, the creditors and the shareholders and has statutory force. It went on to observe that by virtue of Section 391 of the Act, a scheme is statutorily binding even on creditors and shareholders who dissented from or are opposed to its being sanctioned. It has statutory force and cannot be affected except with the sanction of the Court.

22. A priori, the Transferee company would step in the shoes of successor in interest of the Transferor company and would be bound by the terms and conditions of the Supply Agreement and is obliged to comply with the same in its letter and spirit in all respects. Suffice it to observe, that the Supply Agreement does not expressly exclude the succession of the concerned party whether in case of Intervenor company or the Transferor company. Once again it is clarified that this is only an incidental enquiry and not a final pronouncement on the issue as to whether the scheme of amalgamation results in transfer of the rights and liabilities under the Supply Agreement in favour of the Transferee company in violation of the said agreement. It is also not necessary for me to elaborate as to whether it would be a matter of transfer or assignment or neither of them, in the present proceedings. All those matters will have to be addressed at the appropriate stage in the event the Intervenor company decides to terminate the agreement or to proceed for breach of the terms and conditions of the Supply Agreement in the Court of law which claim will have to be decided on its own merits in accordance with law. All questions in that behalf are left open. However, at the same time I may place on record that the Counsel appearing for the Transferee company assured the Court that the Transferee company would abide by every singular condition of the Supply Agreement including the confidentiality Clause having stepped in the shoes of the Transferor company. Assurance so given on behalf of Transferor as well as Transferee company will have to be accepted.

23. For the aforesaid reasons, it is not possible to accept the grievance of the Intervenor that the Transferor company has made false and/or irresponsible statement as is contended. Accordingly, objection raised on behalf of the Intervenor company will have to be overruled.

24. Since the Petitioners have complied with all the requirements as per the directions given by this Court and they have filed necessary affidavits of compliance in Court and that they have undertaken to comply with all statutory requirements, if any, as required under the Companies Act, 1956 and rules made therein, coupled with the fact that the Regional Director as well as the Official Liquidator has opined that the scheme is not prejudicial to the interest of creditors, shareholders and public and that no objection from any other quarter much less from the shareholders and creditors is forthcoming, both the Petitions ought to succeed.

ORDER

1. Company Petition No. 99 of 2009 filed by the Transferor Company is made absolute in terms of prayer Clauses (a) to (h) and Company Petition No. 100/2009 filed by the Transferee Company is made absolute in terms of prayer Clauses (a) to (g).

2. The Petitioner Companies to lodge a copy of this order and the Scheme with the concerned Superintendent of Stamps for the purpose of adjudication of the stamp duty payable, if any on the same within 30 days on obtaining the certified copy and/or authenticated copy of the order.

3. The Petitioner Companies in respective petitions to pay cost of Rs. 7,500 each to the Regional Director. Cost to be paid within four weeks from today.

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

5. All concerned parties to act on a copy of this order along with Scheme duly authenticated by the Company Registrar, High Court, Bombay.