IN THE NATIONAL COMPANY LAW TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

(CAA)-63/PB/2020
In
CA(CAA)-55/PB/2020

Under Sections 230 to 232 of the Companies Act, 2013 r/w the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

In the matter of Scheme of Arrangement

of

SPIRITED AUTO CARS (I) LIMITED
...Demerged/Petitioner Company 1

And

SPIRITED MOTOR VEHICLES LIMITED
...Resulting/Petitioner Company 2

And

THEIR RESPECTIVE SHAREHOLDERS AND CREDITORS

Order Delivered on: 16.02.2021

CORAM

B.S.V. PRAKASH KUMAR,
HON'BLE ACTG. PRESIDENT

HEMANT KUMAR SARANGI,
HON'BLE MEMBER (TECHNICAL)

For the Petitioners : *Mr. Sanjeev Puri, Sr. Advocate*
Ms. Vatsala Rai, Mr. Bharat Apte
& Mr. Tanmay Sharma, Advocates

For the RD & OL : *Ms. Shankari Mishra, Advocate*
Ms. Apoorva Chowdhury, Proxy Counsel
for Ms. Tania Sharma, Advocates

For the I.T. Dept. : *Ms. Easha Kadian, Jr. Standing Counsel*
with Ankit Singh, Advocate

ORDER

PER- B.S.V PRAKASH KUMAR, ACTNG. PRESIDENT

Order Pronounced on: 16.02.2021

Under consideration is Company Petition **CAA-63/PB/2020** filed under Sections 230 to 232 of the Companies Act, 2013 read with the Companies (Compromises, Arrangements & Amalgamations) Rules, 2016. The purpose of the Company Petition is to obtain sanction of the Scheme of Arrangement (in short, "**Scheme**") which provides for the demerger of ***the business of dealership, trading and servicing of trucks under "Bharat Benz" and "Mercedes Benz" (herein after referred to as Demerged Undertaking as defined in clause 1.14 of Part A of the Scheme)*** of **Spirited Auto Cars (I) Limited** (herein after referred to as ***"Demerged/Petitioner Company-1"***) into **Spirited Motor Vehicles Limited** (herein after referred to as ***"Resulting/Petitioner Company-2"***).

2. The Demerged/Petitioner Company-1 is an unlisted Public Company and was incorporated on 21.05.2009, under the Companies Act, 1956 as M/s. Spirited Motors Limited, further changed to its present name i.e. "Spirited Auto Cars (I) Limited" on 25.06.2009 and engaged in the business of

dealership and servicing of cars under the "Toyota" brand and trucks under the "Bharat Benz" and "Mercedes Benz" brands as well as conducting retail sale of vehicle accessories and parts and arranging finance and insurance for vehicles. The Resulting/Petitioner Company-2 is an Unlisted Public Limited Company and was incorporated under the Companies Act, 2013 on 25.04.2019 as M/s. Spirited Motor Vehicles Limited and was incorporated to undertake the business of dealership, trading and servicing of vehicles including trucks under the "Bharat Benz" and "Mercedes Benz" brands. Both the Petitioner Companies are having its registered office at 2nd Floor, F-7, Block B-1, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi – 110044. The Board of Directors of the Demerged and Resulting Company vide Board Resolutions dated 06/08/2019, approved and subsequently at their respective meetings held on 20.03.2020, reaffirmed the said Scheme of Arrangement.

3. This Tribunal vide its order dated 26/06/2020 in CA(CAA)-55/PB/2020 directed to dispensed with holding and conducting the respective meetings of Secured and Unsecured

Creditors and further directed to hold and convene the respective meetings of the Equity Shareholders of the Petitioner Companies and the same were held on 01.08.2020. This Tribunal had further directed the Petitioner Companies to issue notices to the statutory authorities and the notices were issued. Further, the Petitioner Company was directed on 01.10.2020 to effect paper publication in "Business Standard" (English and Hindi, Delhi Editions). The same were effected on 10/10/2020 and proof of the same was filed with the Tribunal vide Affidavit. The Petitioner Companies have complied with all the directions passed in the above orders of this Tribunal.

4. The Counsel appearing on behalf of the Petitioner Companies submitted the rationale for, and the benefits of the demerger, as follows:

a) *Creation of a separate and distinct entity housing the demerged undertaking.*
b) *Dedicated and specialized management focus on the specific needs of the Demerged Undertaking in order to enable further growth of the Demerged Undertaking;*
c) *Optimal exploitation, monetization and development focus on the specific needs of the Demerged Undertaking;*
d) *Standardization and simplification of business processes;*

e) Maximizing the value and return to the shareholders; and

f) Achieving operational efficiencies through the effective and efficient utilization of financial resources, managerial talents, technical skills, marketing resources and services delivery capabilities.

5. The Regional Director, MCA has filed his report/affidavit, along with the report of the Registrar of Companies, New Delhi and stated that the Demerged Company has filed the Annual Return and Balance Sheet up to 31/03/2019. No prosecution has been filed & no inspection or investigation has been conducted in respect of the Petitioner Companies. As per Clause 6 of Part-B of the proposed Scheme of the Petitioner Companies provides for the protection of the interest of the employees and employee benefits of the Petitioner Companies. The office of Registrar of Companies (RoC) has not received any complaint/objection from any shareholder, creditor or other stakeholders of the captioned companies with regard to the proposed Scheme of Arrangement.

6. It is submitted in the report that, as per clause 11 and 12 of Part-B of the Scheme and Share Valuation Report submitted by Madhvi Takiar Sehgal, a registered valuer, the share exchange ratio is as follows:

As per Clause 11 of the Scheme, upon the Scheme being effective, the Resulting Company shall issue the equity & Preference shares to the shareholders of Demerged company in the following ratio: -

i. *The resulting Company shall issue and allot the Demerger Equity Shares in the ratio of 4:10, i.e. 4(four) fully paid up equity shares of Rs. 10 for every 10 (Ten) fully paid up Equity Shares of RS. 10/- each of the Demerged Company held by the Equity Shareholder of the Demerged Company as on the record date;*

ii. *The Resulting Company shall issue and allot the Demerger 8% Preference Shares in the ratio of 4:10 i.e. 4 (four) fully paid up 8% optionally convertible cumulative redeemable preference shares of Rs. 10/- for every 10 (Ten) fully paid up 8% optionally convertible cumulative redeemable Preference shares of Rs. 10/- each of the Demerged Company held by the 8% optionally convertible cumulative redeemable Preference shareholder(s) of the Demerged Company as on the record date; and*

iii. *The Resulting Company shall issue and allot the Demerger 2% Preference Shares in the ratio of 4:10 i.e. 4(Four) fully paid up 2% optionally convertible non-cumulative redeemable preference shares of Rs. 10/- for every 10 (ten) fully paid up 2% optionally convertible non-cumulative redeemable preference shares of Rs. 10/- each of the Demerged company held by the 2% optionally convertible non-cumulative preference shareholder(s) of the Demerged Company as on the record date;*

Provided however that, the number of Demerger shares will be equitably adjusted to reflect appropriately the effect of any shares split, reverse shares split, dividend, including any extra ordinary cash

dividend, reorganisation, recapitalisation, reclassification, combination, exchange of shares or other like change with respect to the Resulting Company's shares on the book of the Resulting Company as on the record date.

As per Clause 12 of the Scheme, upon this Scheme becoming effective, and as an integral part hereof, the existence issued, subscribed and paid up share capital of the Demerged Company shall be reduced by means of Reduction of paid up value (with no payment of cash or any other consideration to the Shareholders) as follows:

i. *Paid up value of 20,50,000 Equity Shares currently issued by the Demerged Company shall be reduced from Rs. 10 /- to Rs. 6/-. Pursuant to such reduction, the aggregate paid up equity shares capital of the Demerged Company shall reduce from the current Rs. 2,05,00,000/- (Comprising of 20,50,000 Equity Shares of rs. 10/- each which are fully paid up) to Rs. 1,23,00,000/- (comprising of 20,50,000 Equity Shares of Rs. 6/- each which are deemed to be fully paid up);*

ii. *Paid up value of 50,00,000 8% optionally convertible cumulative redeemable preference shares currently issued by the Demerged Company shall be reduced from Rs. 10/- to Rs. 6/-. Pursuant to such reduction, the aggregate paid up 8% Preference Shares of the Demerged Company shall reduce from the current Rs. 5,00,00,000/- (Comprising of 50,00,000 shares of Rs. 10/- each which are fully paid up) to Rs. 3,00,00,000/- (Comprising of 50,00,000 shares of Rs, 6/- each which are deemed to be fully paid up); and*

iii. *Paid up value of 1,50,00,000 2% optionally convertible non-cumulative redeemable preference shares currently issued by the Demerged Company shall be reduced from Rs. 10/- to Rs. 6/-. Pursuant to such reduction, the aggregate paid up 2% preference shares of the Demerged Company shall reduce from the current Rs. 15,00,00,000/- (Comprising of 1,50,00,000 shares of Rs. 10/- each which are fully paid up) to Rs, 9,00,00,000/- (Comprising of 1,50,00,000 shares of Rs. 6/- each which are deemed to be fully paid up).*

Immediately after the reduction in face value of existing shares of Demerged Company in terms of clause 12.1 of Part -B of this Scheme becoming effective and as integral part thereof, the paid-up share capital of the Demerged Company shall be reorganised by way of split /subdivision of shares as follows:

i. *Each Equity Share having paid up value of Rs. 6/- shall be subdivided into 6 (Six) equity shares of Re. 1/- each (with each share being considered fully paid up);*

ii. *Each 8% optionally convertible cumulative redeemable preference shares having paid up value of Rs. 6/- shall be sub divided into 6 (Six) Preference shares of Re. 1/- each (with each share being considered fully paid up); and*

iii. *Each 2% optionally convertible non-cumulative redeemable Preference share having paid up value of Rs. 6/- shall be subdivided into 6 (Six) Preference shares of Re.1/- each (with each share being considered fully paid up).*

6. As per Para 31 of the RoC Report dated 10.12.2020, certain observations have been made and further

explained by the Petitioner Companies in the joint reply filed to the Report dated 11.12.2020 ("**Reply**"), wherein the following clarification has been provided to the responses:

" ***Observation 1)***

1) The petitioner companies have not attached schedule of assets and liabilities to be transferred from Demerged Company to Resulting Company, hence, this office is unable to comment on fairness/justification of the said scheme.

1.1. With respect to the observation at Paragraph 1 of S. No. 31 of the ROC Report (and reiterated in Paragraph i of S. No. 11 of the RD Report), the Demerged Company has annexed it as **Annexure 2**, i.e. the provisional balance sheet (expected) as at 01.05.2019 (Appointed Date) which takes into account the assets and liabilities which shall be transferred from the Demerged Company to the Resulting Company upon the effectiveness of the Scheme. Therefore, in view of the above, it is respectfully submitted that the above observation maybe deemed to be satisfied.

Observation 2)

2) The petitioner companies have attached a valuation report dated 31.07.2019 prepared by Sh. Madhvi Takiar Sehgal, Registered Valuer in regard to share exchange ratio, however, method which is used to calculate the share consideration is not furnished in the said report. The petitioner companies may kindly be directed to clarify the same.

1.2. With respect to the observation at Paragraph 2 of S. No. 31 of the ROC Report (and reiterated in Paragraph ii of S. No. 11 of the RD Report), the Demerged Company submits that in the present case, the demerger is intended between two group companies. It is further submitted that shareholders of both companies have given their consents to the proposed Scheme and the share exchange ratio proposed therein. In support of its submission, In support of its submission, the Demerged Companies place reliance upon the judgment of the Hon'ble Bombay High Court in the matter of *Larsen And Toubro Limited; 2004 121 CompCas 523 Bom* wherein it has been held that valuation of the shares which is mandatory in a scheme of amalgamation may not be necessary in cases of demerger. The relevant extract of the judgment is as below:

> "75. *It may be noted here that the valuation of the shares which is mandatory in a scheme of amalgamation may not be necessary in cases of demerger like this since the shareholders continue to hold shares in the transferor company and the shareholders of the transferor companies are also issued shares in the transferee company.*"

1.3. The Demerged Company also places reliance upon the judgment of the Hon'ble Bombay High Court in *Advance Plastics (P) Ltd & Dynamic Plastics (P) Ltd.;138 Com Cas 1006* wherein it has been held as under:

> " *4. The Regional Director has filed an affidavit and in paragraph 6 thereof raised an objection stating that as per clause 12.1 of the scheme shares will be issued by the transferee company to the members of the transferor company. But no valuation report is submitted by the petitioner-company in respect of exchange ratio of 1:1 arrived at for such issue of shares by the transferee company to the members of the transferor company. Mr. Shah, learned counsel for the*

petitioner, submitted that except one shareholder, who holds hardly 50 shares of the transferor company, all the shareholders in both these companies are the same.

5. ....The shares are the properties of the shareholders and they are the ultimate and the best judge of the value they would put on their charges. There is no requirement in the Companies Act, 1956 that in such a case the ratio of exchange has to be determined on a valuation made by the chartered accountant and the auditor. In the present case, no shareholder has challenged the amalgamation. In the circumstances, valuation report is not necessary."

1.4. It is submitted that consequent to this demerger, the economic cum beneficial ownership of the shareholders of the Demerged Company and the Resulting Company shall remain the same and the proposed demerger will be value-neutral to current shareholders of the Demerged Company and the Resulting Company, hence the fair valuation of equity shares of the Petitioner Companies has no relevance. As stated in the Share Entitlement Report, there will be no impact on the economic interest of the equity and preference shareholders of the demerged company, since the proposed demerger is intended to result in shareholding pattern in resulting company which is an exact mirror image of the demerged company. In light of this, it is not necessary to conduct a fair equity valuation exercise for any of the Companies. In the light of above a fair valuation of equity shares or Transferor companies or Transferee Company have not been carried out.

1.5. It is further submitted that based on the Scheme and considering that all the shareholders of the Demerged Company are and will, upon demerger be ultimate beneficial shareholders of the Resulting Company and that upon allotment of equity shares in the Proposed Share Entitlement ratio, the beneficial

economic interest of the shareholders of the Demerged Company will be same as the Resulting Company The Petitioner Company thus submits that the share entitlement-ratio is fair in respect of proposed merger.

<u>Observation 3)</u>

3) As per Auditor report filed with Financial Statements as at 31.03.2019, the Demerged Company has made preferential allotment or private placement of shares during the year and amount of Rs. 15,00,00,000/- received in respect of issued preference shares has been used before filling return of allotment in e-form PAS-3 which is in contravention of section 42(4) and 42(6) of the Companies Act, 2013. The Demerged Company may kindly be directed to compound the same.

1.6. With respect to the observation at Paragraph 3 of S. No. 31 of the ROC Report (and reiterated in Paragraph iii of S. No. 11 of the RD Report), the Demerged Company submits that the Demerged Company had filed one company application being RD(NR)/570/DL/COMP/42/R07390487/16077 seeking compounding for violation of Section 42 before the Regional Director (Northern Division). In the hearing held on 12.02.2020, the Regional Director (Northern Division) allowed compounding subject to the payment of compounding fee of Rs. 50,000 each by Company and its KMP. It is submitted that the Demerged Company) and its KPM paid this fee and therefore by its order dated 09.03.2020, the Regional Director (Northern Division) was pleased to compound the offense. Copy of the order dated 09.03.2020 passed by the Regional Director (Northern Division) is annexed herewith as **Annexure 3**. Therefore, in view of the above, it is respectfully submitted that the above observation maybe deemed to be satisfied.

Observation 4)

4) Refer to clause 16 of the scheme wherein it is stated that the authorized share capital of Demerged company (Which will remain active) shall be reduced from Rs. 8,00,00,000/ and will be added in the authorized share capital of the Resulting Company. In this regard, it is stated that there are no provisions in the Companies Act for reduction of authorized share capital of any company. Hence, petitioner companies may kindly be directed to amend the scheme accordingly.

1.7. With respect to the observation at Paragraph 4 of S. No. 31 of the ROC Report (and reiterated in Paragraph iv of S. No. 11 of the RD Report), in view of Section 233(11) and 233(12) of the Act, such combining of the authorized share capital is allowed and acceptable. In support of its submission, the Demerged Company places reliance upon the judgment of this Hon'ble Tribunal passed in the matter of *Interglobe Enterprises Limited (judgment and order dated 24.11.2017 in Company Petition 26 of 2016)* wherein by similar clauses relating to combination of authorised share capital of demerged company into the Transferee Company were permitted. Without prejudice to the above, it is submitted that various provisions of Chapter XV of the Act, which deals with compromises, arrangements and amalgamations have come into force with effect from 15.12.2016 including Section 232 and Section 233. Section 233 (11) of the Act provides that a transferee company would be entitled, in law, to claim credit of the fee paid by the transfer company on its authorised share capital against the fee payable by the transferee company on the enhanced authorised share capital pursuant to the merger/amalgamation. Section 233 (12) further provides that the above benefit would be equally available to a case of demerger.

<u>Observation 5)</u>

5) As per financial statements as at 31.03.2019 of the Demerged company, it is observed that the company has eroded it's all net worth. The net worth of the company is (39,81,09,837/-). 'The liabilities of the company is excess in compare of the assets. Hence, the business of the company is not running on going concern basis and prima facie, it appears that the only purpose of the scheme is to transfer the liabilities the Company to Resulting Company"

1.8. With respect to the observation at Paragraph 5 of S. No. 31 of the ROC Report (and reiterated in Paragraph v of S. No. 11 of the RD Report), the Demerged Company relies upon the definition of 'Demerger' as provided in Section 2(19AA) of the Income Tax Act, 1961 ("**IT Act**"). which is extract below for each of reference:

"*(19AA) "demerger", in relation to companies, means the transfer, pursuant to a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956 (1 of 1956), by a demerged company of its one or more undertakings to any resulting company in such a manner that—*
(i) all the property of the undertaking, being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of the demerger;
(ii) all the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger;
(iii) the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger:
*[4][**Provided** that the provisions of this sub-clause shall not apply where the resulting company records the*

value of the property and the liabilities of the undertaking or undertakings at a value different from the value appearing in the books of account of the demerged company, immediately before the demerger, in compliance to the Indian Accounting Standards specified in Annexure to the Companies (Indian Accounting Standards) Rules, 2015;]
(iv) the resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis except where the resulting company itself is a shareholder of the demerged company;
(v) the shareholders holding not less than three-fourths in value of the shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger,
otherwise than as a result of the acquisition of the property or assets of the demerged company or any undertaking thereof by the resulting company;
(vi) the transfer of the undertaking is on a going concern basis;
(vii) the demerger is in accordance with the conditions, if any, notified under sub-section (5) of section 72A by the Central Government in this behalf.

1.9. It is further submitted that as held in the case of *Indo Rama Textile Ltd., [2012] 23 taxmann.com 390 (Delhi)*, the going concern test applies to the transfer and not to the demerged undertaking. By an undertaking being on a going concern basis what is essential is the that there is an intent to be profit making and the undertaking need not be actually profit making. Going concern always means to say 'alive', whether profit-making or not, what is essential is that it constituted a business activity capable of being run independently for the foreseeable future. It is submitted that the definition of demerger under section 2(19AA) of the IT Act would be satisfied if the

undertaking being demerged was hived off 'as a going concern', i.e., it should constitute a business activity capable of being run independently. The above criteria stands satisfied with the combined reading of the 'Rationale and Benefits of the Scheme' as well as the provision for transfer of assets and liabilities of the Demerger Undertaking to the Resulting Undertaking.

Reference is also placed to Clause 1, Clause 2 and Clause 3 of Part B of the Scheme which inter-alia provides for transferring of Demerged Undertaking (as defined in the Scheme) on a *'going concern basis'* as well as Transfer of Assets and Liabilities which show that the Resulting Company will be capable of functioning and carrying on its business together. The relevant clauses of Transfer of Assets and Liabilities as provided in the Scheme are not been reiterated in order to maintain brevity. In view of the above, it can be concluded that being a profitable entity at the time of a demerger is not a pre-requisite. Therefore, in our respectful submission, the observations contained in the RoC Report stand satisfactorily answered."

9. The clarifications submitted by the Petitioner Companies in the reply have been accepted by the RoC and the RD. therefore, the objections do not survive and the petition stands to be allowed.

10. The Income Tax Department has also filed its report in respect of the Demerged Company on 11.11.2020, wherein it has provided its "No Objection" to the sanction of the Scheme.

11. We have gone through the reports of the Ld. Regional Director (Northern Region), Ministry of Corporate Affairs, New

Delhi and Ld. RoC concerned and after perusing the same, we are of the view that the sanction of the present Scheme is not in violation of any provision of Companies Act as well as not against public policy, nor it would be prejudicial to the public interest at large.

12. A certificate of Statutory Auditor of the Petitioner Companies have been placed on record to the effect that Accounting Treatment proposed in the Scheme of Arrangement is in conformity with the Accounting Standard notified by the Central Government as specified under the provisions of Section 133 of the Companies Act, 2013. The Appointed date of the said Scheme is 01.05.2019.

13. There is no requirement for any modification and the said Scheme of Arrangement appears to be fair and reasonable and is not contrary to public policy and not violative of any provisions of law. All the statutory requirements of sections 230 to 232 of the Companies Act, 2013 are complied with. Taking into consideration the above facts, the Company Petition is allowed and the Scheme of Arrangement annexed with the Petition is hereby sanctioned which shall be binding

on the members, creditors and shareholders of the Petitioner Companies.

14. While approving the scheme as above, we further clarify that this order will not be construed as an order granting exemption from payment of stamp duty or taxes or any other charges, if payable, as per the relevant provisions of law or from any applicable permissions that may have to be obtained or, even compliances that may have to be made as per the mandate of law. The Companies to the said Scheme or other person interested shall be at liberty to apply to this Bench for any direction that may be necessary with regard to the working of the said Scheme.

15. The Petitioner Companies are directed to file the certified copy of this order along with a copy of the Scheme of Arrangement with the concerned Registrar of Companies, electronically along with E-Form INC-28, in addition to physical copy, as per the relevant provisions of the Companies Act, 2013 within 30 days of receipt of the order.

16. The Order of sanction to this Scheme shall be prepared by the Registry as per the format provided under the

Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 notified on 14th December, 2016.

17. Accordingly, the Scheme **stands sanctioned** and **CAA-63/PB/2020** stands disposed of.

Sd/-

(B.S.V PRAKASH KUMAR)

ACTG. PRESIDENT

Sd/-

(HEMANT KUMAR SARANGI)

MEMBER (TECHNICAL)

16.02.2021

Arpan LRA