

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)
IN
COMPANY APPLICATION NO. – C.A.(CAA)-78/ND/2022

IN THE MATTER OF SCHEME OF AMALGAMATION OF:

1. Aayushi Credit and Capital Services Limited

Applicant/Transferor Company No.1

AND

2. Amazing General Traders Private Limited

Applicant/Transferor Company No.2

AND

3. Angel Cement Private Limited

Applicant/Transferor Company No.3

AND

4. BBN Transportation Private Limited

Applicant/Transferor Company No.4

AND

5. Bhisham Energy Private Limited

Applicant/Transferor Company No.5

AND

6. Bhushan Buildwell Private Limited

Applicant/Transferor Company No.6

AND

7. Bhushan Consumer Electronics Private Limited

Applicant/Transferor Company No.7

AND

8. Bhushan Energy Trading Private Limited

Applicant/Transferor Company No.8

- 9. Bhushan Exports Private Limited**
Applicant/Transferor Company No.9
AND
- 10. Bhushan Finance Private Limited**
Applicant/Transferor Company No.10
AND
- 11. Bhushan General Traders Private Limited**
Applicant/Transferor Company No.11
AND
- 12. Bhushan Natural Resources Private Limited**
Applicant/Transferor Company No.12
AND
- 13. Bhushan Placement Services Private Limited**
Applicant/Transferor Company No.13
AND
- 14. Bhushan Steel Bengal Limited**
Applicant/Transferor Company No.14
AND
- 15. BNR Consultancy Services Private Limited**
Applicant/Transferor Company No.15
AND
- 16. BNS Placement Services Private Limited**
Applicant/Transferor Company No.16
AND
- 17. BNS Steel Trading Private Limited**
Applicant/Transferor Company No.17
AND

- 18. BNS Tour & Travel Private Limited**
Applicant/Transferor Company No.18
AND
- 19. Boost Minerals & Mining Private Limited**
Applicant/Transferor Company No.19
AND
- 20. Cantabile Minerals & Mining Private Limited**
Applicant/Transferor Company No.20
AND
- 21. Classic Transportation Private Limited**
Applicant/Transferor Company No.21
AND
- 22. Clemency Tour & Travel Private Limited**
Applicant/Transferor Company No.22
AND
- 23. Cohesive Management Consultants Private Limited**
Applicant/Transferor Company No.23
AND
- 24. Concise Exim Private Limited**
Applicant/Transferor Company No.24
AND
- 25. Dhenkanal Finvest Limited**
Applicant/Transferor Company No.25
AND
- 26. Excellent Placement Services Private Limited**
Applicant/Transferor Company No.26
AND

- 27. Frozen Iron & Steel Private Limited**
Applicant/Transferor Company No.27
AND
- 28. Genious Infrastructure Private Limited**
Applicant/Transferor Company No.28
AND
- 29. Highclass Iron & Steel Private Limited**
Applicant/Transferor Company No.29
AND
- 30. Houston Buildwell Private Limited**
Applicant/Transferor Company No.30
AND
- 31. Immense Minerals & Mining Private Limited**
Applicant/Transferor Company No.31
AND
- 32. Imperative Buildwell Private Limited**
Applicant/Transferor Company No.32
AND
- 33. Jagriti Job Finder Private Limited**
Applicant/Transferor Company No.33
AND
- 34. Janitor Infrastructure Private Limited**
Applicant/Transferor Company No.34
AND
- 35. Jinglebell Aluminum Private Limited**
Applicant/Transferor Company No.35
AND

- 36. Asper Information Technology Private Limited**
Applicant/Transferor Company No.36
AND
- 37. Landsky Real Estate Private Limited**
Applicant/Transferor Company No.37
AND
- 38. Exis Power Private Limited**
Applicant/Transferor Company No.38
AND
- 39. Marvelous Cement Private Limited –**
Applicant/Transferor Company No.39
AND
- 40. Matchless Infrastructure Private Limited**
Applicant/Transferor Company No.40
AND
- 41. Meramandali Finvest Limited**
Applicant/Transferor Company No.41
AND
- 42. Moostar Construction Private Limited**
Applicant/Transferor Company No.42
AND
- 43. Multistar Construction Private Limited**
Applicant/Transferor Company No.43
AND
- 44. Navjyoti Farming Private Limited**
Applicant/Transferor Company No.44
AND

45. Nifan Finvest Limited

Applicant/Transferor Company No.45

AND

46. Novelty Buildwell Private Limited

Applicant/Transferor Company No.46

AND

47. NRA Cement Private Limited

Applicant/Transferor Company No.47

AND

48. NRA Iron & Steel Private Limited

Applicant/Transferor Company No.48

AND

49. Oracle Machines & Tools Private Limited

Applicant/Transferor Company No.49

AND

50. Orchid Recruiter Private Limited

Applicant/Transferor Company No.50

AND

51. Pace Iron & Steel Private Limited

Applicant/Transferor Company No.51

AND

52. Prime Recruiter Private Limited

Applicant/Transferor Company No.52

AND

53. Prominent Hospital Private Limited

Applicant/Transferor Company No.53

AND

- 54. Quadrel Infrastructure Private Limited**
Applicant/Transferor Company No.54
AND
- 55. Reinforce Recruiter Private Limited**
Applicant/Transferor Company No.55
AND
- 56. Remarkable Consumer Electronics Private Limited**
Applicant/Transferor Company No.56
AND
- 57. Robust Transportation Private Limited**
Applicant/Transferor Company No.57
AND
- 58. Shriraj Investment and Finance Limited**
Applicant/Transferor Company No.58
AND
- 59. Sintex Consumer Electronics Private Limited**
Applicant/Transferor Company No.59
AND
- 60. SRN Mineral & Mining Private Limited**
Applicant/Transferor Company No.60
AND
- 61. Stance Consumer Electronics Private Limited**
Applicant/Transferor Company No.61
AND
- 62. Sukhna Steel Private Limited**
Applicant/Transferor Company No.62
AND

- 63. Superb Natural Resources Private Limited**
Applicant/Transferor Company No.63
AND
- 64. Titanic Developers & Builders Private Limited**
Applicant/Transferor Company No.64
AND
- 65. Tremendous Mining & Minerals Private Limited**
Applicant/Transferor Company No.65
AND
- 66. Tribute Information Technology Private Limited**
Applicant/Transferor Company No.66
AND
- 67. Trustworthy Security Services Private Limited**
Applicant/Transferor Company No.67
AND
- 68. Ultra Modern Developers & Builders Private Limited**
Applicant/Transferor Company No.68
AND
- 69. Una Steel Private Limited**
Applicant/Transferor Company No.69
AND
- 70. Vertical Power Private Limited**
Applicant/Transferor Company No.70
AND
- 71. Winfields Iron & Steel Private Limited**
Applicant/Transferor Company No.71
AND

72. Xtended Power Private Limited

Applicant/Transferor Company No.72

WITH

73. KBN Infrastructure Private Limited

Applicant/Transferee Company No.73

AND

THEIR RESPECTIVE SHAREHOLDERS AND CREDITORS

Order delivered on 18.04.2024

Under Section: 230 to 232 of the Companies Act, 2013

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Transferor Company : Adv. Arun Saxena and Adv. Sanu Pastore

For the Transferee Company : Adv. Ranjana Roy Gawai, Vasudha Sen, Vineet Wadhwa

For the RD : Adv. Shankari Mishra

ORDER

The present petition has been preferred jointly by **Aayushi Credit and Capital Services Limited and 72 other Transferor Companies** (hereinafter referred to as “Applicant Company/ Transferor Companies 1 to 72”) and M/s KBN Infrastructure Private Limited (“Applicant/Transferee Company”) seeking the following reliefs:-

- a. *To dispense with the requirement for convening the meetings of the equity shareholders of the Applicant Companies No. 1 to 73 and also to dispense with the requirement of issue and publication of notices for the same;*
- b. *To dispense with the requirement for convening the meetings of the secured creditors and unsecured creditors of the Applicant Companies No. 1 to 73 and also to dispense with the requirement of issue and publication of notices for the same;*
- c. *Direct service of notice to Central Government through Regional Director (Northern Region), New Delhi, Registrar of Companies New Delhi and Income Tax Authorities or such authorities as the Tribunal may deem fit, to make their respective representations, if any, to this Hon'ble Tribunal, under provisions of Section 230 (5) Companies Act, 2013 and further direct them to serve a copy of their representation on the Applicant Companies' Advocate”*
- d. *To pass any other order or directions, as may be deemed fit in the facts and circumstances of the case, may also be granted.”*

2. The present Application has been jointly preferred by the ‘Transferor Companies 1 to 72 and ‘Transferee Company’ (hereinafter referred to as the **‘Applicant Companies’**. The Hon’ble President of this Tribunal vide order C.A.(CAA)-78/ND/2022
Aayushi Credit and Capital Services Limited

dated 22.04.2022 has permitted the Applicant Companies to file the First Motion Application before NCLT, New Delhi Bench. The relevant excerpts of the order reads thus:

ORDER

The prayer in this Transfer Petition are as follows: -

- a. *To Permit the Applicant Companies herein to file a joint First Motion and Second Motion applications under section 230-232 of the Companies Act, 2013 for sanctioning the Scheme of Amalgamation as approved by the Board of Directors of the respective applicant companies and conducting all proceedings related to the sanctioning of the Scheme of Amalgamation of Applicant Companies before the Hon'ble National Company Law Tribunal, New Delhi Bench.*
- b. *To pass such other and further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."*

For the purpose of implementing the Scheme of Amalgamation as approved by the Board of Directors, the permission is sought to file all the petitions before the Principal Bench on the premise that eighteen (18) Transferor Companies and one (1) Transferee Company are having their registered office in Mumbai, one (1) Transferor Company is having the

registered office in Ghaziabad (UP) and fifty three (53) Transferor Companies are having the registered office in New Delhi.

In order to effectively implement the Scheme of Amalgamation, the present Transfer Petition is filed for permitting all the Transferor and Transferee Companies to file a common petition before this Tribunal.

In view of the fact that more than 53 Transferor Companies are having the registered office in New Delhi and eighteen (18) Transferor Companies and one (1) Transferee Company are having their registered office in Mumbai and one Transferor Company is having its registered office in Ghaziabad (UP), in the best interest of all the companies and for effective implementation of the Scheme of Amalgamation, this Transfer Petition (Co Act)- 03(PB)/2022, stands **allowed.**

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3. The Appointed Date of the Scheme is 01.04.2021 as per separate Affidavits filed by the Applicant Companies

4. The rationale of the proposed amalgamation Scheme, as espoused by the Applicants read thus:

“(i). The Transferor Companies belong to multiple common groups and therefore, consolidation of all the companies under one entity will help to consolidate the assets and liabilities as also to achieve administrative and operational convenience.

“(ii) Such restructuring will lead to simplification of multiple groups structure by eliminating multiple companies, thus enabling focus on core competencies and reduction in operational and administrative costs and facilitate unified control.

(iii) To achieve greater integration and greater financial strength and flexibility, to maximise overall shareholder value.

(iv) To achieve cost savings from more focused operational efforts, rationalization, standardization and simplification of business processes and rationalization of administrative expenses.

(v) Some facilities such as manpower, office space and other infrastructure could be better utilized by the Transferee Company and duplication of facilities could be avoided resulting in economic, efficient and optimum use of facilities to the advantage of the Transferee Company and achieve cost savings from more focussed operational efforts, rationalisation, standardisation and simplification of business processes.

(vi) The merger will result in significant reduction in the multiplicity of legal and regulatory compliances required at present to be carried on by the Transferor Companies! to 72 and the Transferee Company.as well as cost saving on account of reduction of regulatory and legal compliances.

5. The Valuation Report dated 30.09.2021 has been submitted by Mr. Sandeep Kothari (ACS), Registered Valuer, IBBI Registration No. (IBBI/RV/03/2020/13609) attached as part of the Application.

6. The Applicant Companies have further disclosed the following:

“338. That investigation or proceedings under Section 206 to 229 of the Companies Act, 2013 are completed against the Transferor Companies No. 1 to 72 and Transferee Company involved in the present Scheme of Amalgamation and the matter is now pending before the Hon'ble Special Judge (Companies Act) Dwarka Courts, New Delhi. The present

said criminal proceedings of the Transferor Companies No. 1 to 72 shall not abate, or discontinued or be in any way prejudicially affected by reason of the transfer of the Business of the Transferor Companies No. 1 to 72 or because of anything contained in the Scheme, but the proceedings shall be continued, prosecuted and enforced by or against the Transferee Company in the same manner and to the same extent as it would or might have been continued, prosecuted and enforced by or against the Transferor Companies No 1 to 72 as if the Scheme had not been made. A separate affidavit is also attached with this petition confirming the same.”

7. In the course of the present proceedings, this Bench directed SFIO vide its Order dated 19.05.2023 and 21.07.2023 for comments/report qua the report of RD and in response SFIO filed its report, enclosing the voluminous Investigation Report of SFIO along with the annexures of Bhushan Steel Ltd. & 156 others, which run into thousands of pages. It is stated that the Ministry of Corporate Affairs assigned the Serious Fraud Investigation Office (hereinafter referred to as "SFIO") to probe the activities of Bhushan Steel Limited (hereinafter referred to as "BSL") and 156 other companies associated with BSL under Section 212(1)(c) in the public interest.

8. The reports indicate that the conduct of the affairs of the Applicant companies was in such a manner as to perpetrate fraud in massive proportions in order to avail loan facilities from banks including public sector banks, creation of assets etc. to benefit the ex-promoters of BSL.

Moreover, the investments in various Applicant companies were done from

the siphoned off money in order to increase their share capital and also to inflate their net worth and were done in a complex web-like manner by circulating the same money amongst the Applicant companies and infusing it back into BSL as promoter's equity.

9. During the course of investigation, some common features were observed among the companies under investigation including Applicant Companies and were accordingly categorized under four categories. Out of total 157 companies including BSL which were under investigation, total 62 companies were categorized as Category "B" companies and 85 companies were categorized as Category "C" companies. The Applicant Companies No. 1, 4, 6, 8 to 17, 21, 25, 41, 45, 48, 57, 58, 60, 62, 65, 69 and 73 in the present matter herein fall under the said Category "B" as per the Investigation Report dated 27.06.2019. Further, with regard to the above stated Category companies viz. Category B companies, investigation established the following-

- (i) The Companies had no significant business activity, other than for receipt of funds from BSL and Bhushan Energy Ltd. (hereinafter referred to as "BEL") or for layering of funds;
- (ii) The funds received in the said companies were either diverted to purchase the property in the name of the company or invested as promoter's equity in the form of Preference shares in BSL.
- (iii) The Companies had invested in preference shares of BSL using the money siphoned from BSL.

(iv) The Companies had received funds from BSL and BEL as capital advances, which were either invested or given as loans and advances in other companies belonging to Category B for the purpose of layering of funds. Even after the "capital advances" were taken to the head "CWIP" by BSL, these companies continued to show these as liabilities;

(v) Companies were holding investments in the foreign companies incorporated by the ex- promoters of BSL;

(vi) Companies were holding movable or immovable property, acquired from funds transferred from BSL or BEL.

(vii) Through rotation of funds, the companies artificially increased their net worth by way of investing in shares issued at high premium despite not having any worth either in terms of holding property.

(viii) Audit of the said Applicant companies was conducted at either the registered office of BSL (Bhushan Centre) or at Som Dutt Building, Bikaji Cama Place, New Delhi even though the registered offices were at different places.

10. The investigations further established that the corporate structure of BSL was repeatedly abused for various fraudulent purposes. The books of accounts of BSL and all the Applicant companies herein were manipulated and financials were falsely presented. Various term loan facilities were extended from the year 2008-09 onwards to BSL and BEL by a consortium of banks for its steel plant project at Orissa. One of the terms and conditions for the loan was the maintenance of the Debt Equity Ratio for the project with the specified limit at all stages. Subsequent loans also had similar

terms and conditions invariably requiring the promoters/company to bring in fresh equity in case of insufficient internal accruals of the company. Hence, the ex- promoters of "BSL" needed to infuse capital into the company in order to avail credit facilities from lender banks for its steel plant. In order to meet this requirement, BSL issued preference shares and also brought out rights issue for equity shares during the FY 2009-10 to FY 2016-17, from the funds siphoned off from CUIs including Applicant companies.

11. Investigations further established that in order to infuse the capital and maintain the required level of debt equity, the ex-promoters of BSL, assisted by their employees and close associates, through a series of concerted actions, using a complex web of companies (including the Applicant companies) and financial transactions, siphoned off funds from "BSL" and BEL starting from the year 2009-10 onwards to invest in the preference shares/equity shares of BSL. Such siphoned funds were also used for creating assets for ex- promoters of BSL. The various modus operandi used for siphoning of funds from BSL and BEL through the Category B and C companies viz. the Applicant companies herein are described in the succeeding paras.

12. The following modus operandi was detected through the investigations during the years 2009-10 and 2010-11 for siphoning of funds from BSL and BEL through various Category B and C companies (which includes the Applicant companies herein as stated above) controlled by ex-promoters of BSL-

(i) BSL and BEL extended "capital advances" to various Category B and C companies (which includes the Applicant companies herein). The funds were transferred from various accounts of BSL and BEL.

(ii) These companies further transferred the funds to other Category B or Category C companies after dividing these into smaller amounts as loans and advances or as investments;

(iii) These companies further layered the funds received, in single or multiple layers of another set of Category B or Category C companies, before these were consolidated into the bank accounts of certain Category B companies. The funds which the Promoter's had to bring in as promoter's equity in BSL as a condition of the lenders (as own contribution) was in fact the siphoned money from BSL and BEL. Investigation established that in another modus operandi used during the year 2011-12 by 3 Category B companies viz. Applicant companies no. 10, 47 and 57 herein and during the year 2009-10 by the ex-promoters of BSL, they took loans from financial institutions pledging the shares held by them. An amount of Rs. 375 crore by the said companies and Rs. 200 crore by the ex- promoters were raised in this manner and invested against preference shares of BSL. The interest payments for these loans were made through funds siphoned from BSL after layering through various companies as explained in above stated first modus operandi.

13. It is stated that the purpose of the creation of such entries was to prop up the share capital of BSL to avail further finance of more than Rs. 6,000 crores. The financial statements of the Applicant companies herein (both transferor and transferee companies) showed a rosy picture with the

intention to deceive the lenders and in the beneficial interest of the promoters of the BSL. If the scheme of amalgamation is allowed by this Tribunal, it will give legal sanction to the past illegal/bogus transactions which commenced from the year 2008 onwards, as stated above and were done with the motive to deceive the financial institutions to take undue benefit of the public money.

14. On a perusal of the records submitted before us, we noticed the fact that almost all the companies are structured on the similar lines, having cross holding of shares of each other and are not having any independent business, except for financing intergroup entities and holding assets of the group. These companies are identical to each other. For the sake of discussion, the structure of Ayushi Credit and Capital Services Limited, which is identical to all the group companies before us in this scheme of amalgamation, is outlined as under:

Name	Ayushi Credit and capital Services Limited
Registered Address / Contact Details	23/4, Sahibabad Industrial Area, Sahibabad, Ghaziabad, UP-201010
Promoters / Directors / Management	Directors: 1 - Mr. Shankar Batra 2 - Mr. Neeraj Singal
Nature of Business / Size and Scale of Business	As per the information provided by the company, the company is engaged in Providing financial services, advisory and counseling services.
Share Capital of the company as on 31.03.2017	- The Company has issued 43,95,000 equity shares of Rs. 10 each. - Besides, the company has issued Preference Shares of following classes: o 75,75,000 10% Non-Cumulative Redeemable Preference Shares of Rs. 10 each fully paid up. - The holder of 10% Non-Cumulative Redeemable Preference Shares has option of redeeming the shares at Rs. 90 premium at any time within ten years from the date of allotment.
Equity Shareholders of the Company / Percentage of Shareholding as on 31.03.2017	Equity Shareholders: 1 - Shriraj Investment And finance Limited - 16.04% 2 - Meramandali Finvest Private Limited - 19.68% 3 - Dhenkanal Finvest Private Limited - 19.34% 4 - Nifan Finvest Limited - 18.20% 5 - Savroli Finvest Limited - 18.20%
Preference Shareholders of the Company / Percentage of Shareholding as on 31.03.2017	Preference Shareholders (more than 5%): 1 - Adamine Construction Private Limited - 11.88% 2 - Super star Agency Private Limited - 11.22% 3 - Vistrat Real Estate Private Limited - 10.69% 4 - Globus Realinfra Private Limited (Previously SUR Buildcon Private Limited) - 10.69% 5 - Goldstar Cement Private Limited - 12.54% 6 - Meramandali Finvest Private Limited - 10.95%

Net Worth of the Company as on 31.03.2017	<p>The company has a net worth of INR 93.51 crore as on 31 March 2017. The details of assets and liabilities is given as under:</p> <ul style="list-style-type: none"> o The company does not own any fixed assets. o The company has no trade receivables. o The company has cash and bank balances of INR 0.02 Crore. o The company has made investments in unquoted equity shares and unquoted preference shares aggregating to INR 15.24 Crore and INR 77.53 Crore respectively. Further, Company has also made investments in quoted equity shares aggregating to INR 0.002 Crore.(Refer Annexure 01) o The company has given short term loans and advances aggregating INR 0.75 Crore during the year. (Refer Annexure 02) o The company has not taken any loans during the year nor any loan outstanding for the previous year but there is Amount of 0.04 crore showing under Amount payable in current liabilities. (Refer Annexure 03) o There are trade payables to the tune of INR 0.88 lakhs.
Nature and Type of Assets	<ul style="list-style-type: none"> - The company has no fixed assets and trade receivables which indicates that the company does not indulge in trade. - The company has assets in the nature of investments and loans and advances.
Nature and Type of Liabilities	<ul style="list-style-type: none"> - The company has liabilities in the nature of other current liabilities and Trade Payables.
Revenue from operations	<ul style="list-style-type: none"> - The company does not generate revenue from operations which indicates that the company is not undertaking any business activity. - The company generate other income in terms of dividend, Misc income Amounting 0.01 lakhs.

Expenses incurred by the company and its nature	<ul style="list-style-type: none"> - The company has incurred expenses in the nature of salaries and other expenses to the tune of INR 3.85 Lakhs. - Other expenses include legal and professional charges, auditor's remuneration, Rates and taxes etc.
Number of employees/Salary expenses incurred	<ul style="list-style-type: none"> - The company has paid INR 3.40 lakhs salary to employees during the year. Further, Company has started paying salaries from financial year 2015-16 only. Before that, Company had mentioned in financial statements that company is not having any employee.

We further note the distinctive features of this company:

1. The company does not undertake any business activity. It does not generate any revenue from operations, and the nature of assets indicate that the company is used only for financial transaction.
2. The associate companies which are before us in this present application are also similarly structured and have no independent business, except for giving intra group loans and advances

15. We further notice that the flagship Company, i.e. Bhushan Steel Ltd for which the present applicants are functioning as a conduit companies, has been investigated by the SFIO in pursuance to orders from MCA under different Sections of the Companies Act. A detailed forensic audit of the books of the flagship company and its associates, including the present applicants, has as been carried out by the reputed Accountant Firm, Deloitte Haskins & Sells LLP (“DHS”) . After corroborating the findings of the forensic audit with volume statements recorded from associates of these groups, including personnel from the lending banks, and the following charges have been framed:

“Charge No.1: Fraud punishable under Section 447 of Companies Act, 2013 and Section 120B read with 409, 417, 418, 420, 467,468,471 of IPC,1860 for fraudulent availing of credit facilities, using false documents through the instrument of inland letter of credits and other fraudulent activities.

Charge No. 2: Liability under Section 36(C) punishable under Section 447 of Companies Act, 2013 for inducting lending banks to give credit facilities to “BSL”.

Charge No. 3: Liability under Sections 128, 129 and 448 of the Companies Act, 2013 for falsifying Books of Accounts and Financial Statements and under Section 177 punishable under Section 178 of Companies Act, 2013 for non discharge of duties by audit committee.

Charge No. 4 : Liability under Section 143 of Companies Act, 2013 punishable under Section 147, 448 r/w 447 of Companies Act, 2013 for failure in discharging statutory duties as auditors of "BSL"

Charge No. 5: Liability under Sections 128, 129 and 448 r/w 447 and Section 143, 147, 448 r/w 447 of Companies Act, 2013 Sections 209, 211 r/w Section 628, 227, 233 r/w 628 of Companies Act, 1956 for manipulation of accounts of and as financial statements do give true and fair view of affairs of "BEL", 18 Category "B" and 14 Category "C" Companies.

Charge No. 6: Liability under Section 209 r/w 211 r/w Section 628 and under Section 227/223 r/w 628 as financial statements do not give true and fair view of affairs of category "C" and "B" Companies."

It is pertinent to mention here that all the Companies in the present Application before us have been categorized as "B" Companies and, thus, most of these above charges lie against the present Applicants.

16. Thus, the SFIO investigation has prima facie established that the funds were siphoned off from BSL and Bhushan Energy Ltd. (hereinafter referred to as "BEL") and that the Applicant Companies were used as conduits for siphoning and layering of funds and ultimately for re-routing the money back to BSL in the form of the promoter's contribution for an infusion of equity to avail loan facilities from various banks. The layering and rotation of funds led to inflated bogus equity based on which the loan

facilities were availed. Since such an infusion of funds into BSL was bogus, it resulted in a default of dues to the banks amounting to approximately Rs. 56,000 Crores. This led to insolvency proceedings of BSL which was a listed company causing huge losses to not just banks but also public shareholders.

17. During the course of the present hearing on 16.02.2024, the Ld. Counsel appearing for the Applicant companies submitted that there is no requirement of hearing SFIO at the stage of 1st motion. The objections pertaining to SFIO can be dealt at the stage of 2nd motion. The Ld. Counsel was directed to submit a note in this regard along with supporting judicial decisions. In compliance with the aforesaid directions, the Ld. Counsel for the Applicants have filed Written Submissions and has relied upon the following Judgements, the relevant parts of which read thus:

- a) Hon'ble Supreme Court in Rainbow Denim Limited V. Rama Petrochemicals Limited, (2002) 10 Supreme Court Cases 498

“5. The appropriate time for the Company Judge to consider the scheme is subsequent to approval thereof by the shareholders and creditors of the appellant Company. Therefore, the order of the learned Company Judge and the order under appeal must be set aside and liberty given to the appellant Company to move the High Court for directions for calling meetings of its shareholders and creditors for the purposes of considering and approving the scheme. Once that has been done, a further application will be required to be made before the learned Company Judge. That would be the appropriate time for the learned Company Judge to consider the scheme.”

b) Hon'ble NCLAT in MEL Windmills Pvt. Ltd. Vs . Mineral Enterprises Limited And ANR, Company Appeal (AT) No. 04 of 2019

“6. As noticed elsewhere in this judgment, the Tribunal declined to sanction the proposed scheme of demerger, albeit on account of several issues pending finalization, without either considering prayer for dispensation of meeting of creditors and members of the three Appellant Companies or in the alternative directing convening of a meeting of the creditors and members of these companies for considering the proposed scheme of demerger. The mandate of law engrafted under Section 230(1) of the Act requiring the Tribunal to order calling of meeting of the creditors/ members of the concerned companies not being complied with and the mandatory provisions being observed in breach, the impugned order cannot be supported. The Tribunal, at the very threshold stage, was not required to venture into the merits of the proposed scheme of demerger which had to be examined only, after, obtaining the consent of creditors/members with requisite majority. For proper exercise of jurisdiction vested in the Tribunal it was imperative either to call the meeting of creditors/ members for consideration of the proposed scheme of demerger or to dispense with such meeting by invoking Sub-section (9) of Section 230 as 100% of shareholders of each company, 100% of creditors of Resulting Companies and 97.18% of creditors of the Demerged Company had filed consent affidavits. The Tribunal failed to adhere to the mandate of law which was mandatory and imperative in nature. This goes to the root of the impugned order which cannot be sustained.

7. Apart from what has been stated hereinabove, the pending issues could not be construed as an impediment in sanctioning the proposed scheme of demerger. It is so for more than one reason. First being the case of Appellants - Petitioners before the Tribunal, that the demerger scheme proposed by the Appellants

*was not with regard to business of Mining which would continue with the Demerged company, and the pending investigation would continue unhindered against the Director of the Demerged Company without having any impact on the proposed scheme of demerger. Second, because the pendency of investigation would not stand as a legal impediment in sanctioning the proposed scheme of demerger for any civil action or criminal proceedings in respect of past events/ transactions. In identical circumstances, the Hon'ble Gujarat High Court sanctioned the modified composite scheme of arrangement in terms of its judgment dated 1st March, 2007 rendered in **Company Petition Nos. 9 and 10 of 2006 titled "Core Health Care Limited Vs. Nirma Limited."** reported in 2007 SCC Online Guj 235. Relevant portion thereof reads as under:-*

"89. From this judgment, it would be clear that the scheme can always be sanctioned subject to and without prejudice to the liability, if any, in the civil and criminal proceedings in respect of the past transactions. The argument of objectors that the scheme is vague and incomprehensible should not detain this court unnecessarily because the scheme is clear, nobody either raised an objection in the meetings held for the purpose or at the time of the discussion that the scheme was vague and incomprehensible. The liability, if any, of the board, directors, management, etc., in civil and criminal proceedings would continue, and I accordingly so order."

c) Hon'ble NCLT in Fortis Emergency Services Ltd. and Others with Fortis Hospitals Ltd.

24. As could be seen from record Applicant Companies No. 1 to 4 filed their affidavits in reply to the representation/ affidavit of the

RD and have submitted the following:

I. The FIR in question was against erstwhile promoters who have no connection or relationship with the entities involved in this application. Further, Applicant Company No. 2 will not be adversely affected due to mere fact that the shareholding was historically held by the promoters. It further espoused that the FIR was filed by the parent company of the Applicant Companies against the erstwhile promoters in respect of certain transactions that caused wrongful loss to the parent company. In furtherance, it is a settled law that pending criminal proceedings cannot be constituted as a hinderance to a scheme of arrangement. As regards the interim order dated 17.10.2018 passed by SFIO, the order directed erstwhile promoters of the Fortis group to repay the funds siphoned away from the Fortis group and it attained finality vide SEBI's final order dated 19.04.2022.

II. As regards the violation of Sec. 186(1) of the Companies Act, 2013 , the Applicant Companies submitted that the IHH Healthcare Berhad is the ultimate holding company and that Integrated Healthcare Holdings Limited & . Parkway Pantai Limited (incorrectly recorded as Park Pantai Limited by RD) are intermediate holding companies of Fortis Healthcare Limited and the immediate holding company of Fortis Healthcare Limited is Northern TK Venture Limited. In view of the provided backdrop, there is no violation of Section 18 6(1) of the Act for reason that

the restriction on an entity not making investment through more than two 'layers' are applicable only to 'companies ' which are Indian companies as defined under the Act. It further espoused that the restriction is not applicable when such Indian company has investment subsidiaries outside India in a jurisdiction wherein more than two 'layers ' of investment are permitted and accordingly this restriction would not apply at level of any overseas entities that are holding investments in an Indian company. It also relied upon Rule 2 of the Companies (Restriction on Number of Layers) Rules, 2017.

III. As regards the SFIO investigation, the Applicant Companies submitted that the investigation by SFIO was into affairs of the ultimate holding company of the Applicant Companies i.e. FHL and not specifically against the Applicant Companies. The SFIO investigation sought to enquire into the fraudulent actions undertaken by the erstwhile promoters of the Fortis group who currently have no connection or relation whatsoever with the Fortis group or the Applicant Companies. The Applicant Companies further relied upon Clause 9 of the Scheme which envisages provisions for liabilities which may arise in future and comply with any findings and / or liability imposed. The Applicant Companies reiterated that the pending criminal proceedings will not constitute any hinderance to scheme of arrangement.

IV. As regards the consolidation of accounts, the Applicant Companies have refuted the submissions of RD and espoused it to be mere speculation. They further espoused that related party transactions occur frequently between group companies and mere existence of such transactions does not itself constitute any suspicious event so as to effect the Scheme of arrangement in any manner whatsoever. They have also submitted that no illegality has been alleged by the RD pertaining to these transactions and that the intra-group merger does not have adverse implications since consolidated assets and liabilities remain unchanged on account of the Scheme.

25. The Applicant Companies have further relied upon judgment of Hon'ble Supreme Court in the matter of Sesa Industries Limited vs. Krishna H. Bajaj & Ors. (Civil Appeal Nos. 1430-31 of 2011) decided on 07.02.2011 which reads thus:

"44 However, it is made clear that the scheme of amalgamation will not come in the way of any civil or criminal proceedings which may arise pursuant to the action initiated under Sections 209- A or 235 of the Act, or any criminal proceedings filed by Respondent 1"

Reliance was also placed on judgment by Hon'ble High Court of Gujarat IN **C.M. Smith and Sons Ltd., In re** (20 08 SCC OnLine Guj 249), wherein Hon'ble High Court held that any criminal prosecution/legal proceedings initiated against any of the

*transferee companies or the directors of any of the transferor companies, the order of sanctioning of scheme of amalgamation of these companies would not come in way of such proceedings. Similar view could be reiterated in the judgment by the Hon'ble High Court of Bombay in **Sesa Goa Limited vs. Shailesh Bajaj** (2013 SCC OnLine Born 538), wherein Hon'ble Court held that it is well settled position in law that any pending investigation or proceedings cannot come in the way of the Court considering the grant of sanction of Scheme. The relevant paras of the judgment reads thus:*

"16. So far as Company Application No. 3/ 20 1 3 is concerned, in the said application it is claimed that directions be given to the Central Government to produce the papers and other documents in respect of the actions taken or contemplated to be . taken by the Ministry of Corporate Affairs in terms of reimbursement of the amount of Rs. 1, 000 crores that has been siphoned away from the Petitioner Company as per the findings arrived at by the SFIO in its Report dated 29th April, 201 1 and seeking further direction to produce the necessary files, etc., in respect of the action taken by the Ministry of Corporate Affairs in terms of the supersession of the Board of Directors in view of the report. In my view, so far as these prayers are concerned, they have nothing to do with the grant of sanction of the scheme which is filed for amalgamation. It is a well settled position in law that any pending investigation or

proceedings cannot come in the way of the Court considering the grant of sanction under Section 391 of the Act.

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32. In my view, submissions made by the Objector cannot be accepted. It is a well settled position in law that pending investigation or pending cases cannot come in the way of the Court granting sanction to the Scheme of amalgamation filed by the Company under section 391. It is further held that even after the Scheme is sanctioned, prosecution, if any, initiated by the Central Government or any other Agency would continue against those Directors or persons responsible for committing the said illegalities and, as such, therefore, merely because Report has been tendered making allegations against the Company would not deter the Court from granting sanction on that ground alone, if it is satisfied that the provisions of section 391 have been complied with by the Company."

18. We have carefully considered the judicial decisions relied upon by the Applicants. The first decision in the case of Rainbow Denim Limited (Supra) by the Hon'ble Supreme Court was rendered in the context of the Companies Act, 1956 and the Rules made therein, which has subsequently been replaced by Companies Act, 2013. As discussed in the subsequent paragraphs, the provisions of the Companies Act, 1956 and Companies Act, 2013, though largely similar, still have certain subtle differences, particularly with respect to a Compromise or Arrangement. Thus the ratio of

the Rainbow Denim case is not applicable to the present case at hand. The second decision in the case of MEL Windmills Pvt. Ltd. (Supra) was a case of demerger, and in the said case, investigation was pending only against the Director of the demerged company. The Hon'ble NCLAT in this case was not considering a proposal of Amalgamation of a large number of Companies accused of massive irregularities, backed by voluminous evidence on record to prima facie indicate that companies amalgamating were designed to perpetrate a gigantic financial scam. Thus, the facts of the present case at hand are quite distinguishable from those considered in MEL Windmills Pvt. Ltd. (Supra).

19. The last case relied upon by the Applicants was the amalgamation of Fortis Emergency Services Limited and three other Companies with Fortis Private Limited (Applicant No. 4, the Transferee Company). This order was delivered by this Bench and it was observed that the FIR in question was against the erstwhile promoters, who had no connection or relationship with the Applicants at the time of the filing of the application. Even the SFIO order in the said case was directed against the erstwhile promoters of the Fortis Group, who failed to repay the fund sanctioned against the Fortis Group.

20. Per contra, in the present case, the allegations, based on voluminous evidence unearthed through the the investigation of the SFIO, is that the companies amalgamating under the present scheme are merely conduit companies of the Bhushan group, which were floated to carry out fraudulent financial transactions only to help the Bhushan Group perpetrate a massive

financial scam. It is further alleged that these are proposed to be amalgamated in this application with the intention of absolving these companies from the consequences of their fraudulent actions. Thus, after carefully considering the judicial decisions relied upon by the applicants, we are constrained to observe that the facts and circumstances of the present case are entirely distinguishable from the judicial decisions relied upon by the applicants in support of their prayer.

21. In this context, it is noted that the two-step process of filing first motion petitions for convening/dispensing meetings of members/creditors, and seeking sanction of schemes by way of filing second motion petitions, after due consideration of reports of chairpersons, and the relevant ROC/Regional Director/Official Liquidator, which was earlier adopted by the Courts under the Companies Act, 1956, has largely been retained under the new rules framed in 2016, but there are certain subtle differences in the Rules issued by the respective Acts relating to the First Motion application.

21.1 In this context, a reference is made to the relevant rules under the head Compromise or Arrangement under Sections 391-394 in the Companies (Court) Rules, 1959 wherein Rule-67 provides for summons for direction to convening a meeting followed by Rule-68, which provides service on companies and Rule-69, which lays down the directions at hearing on summons.

21.2 For the sake of clarity the provisions of Rule 67 to Rule 69 in the Companies (Court) Rules, 1959 are extracted as under: -

“Rule-67. Summons for directions to convene a meeting –

An application under section 391(1) for an order convening a meeting of creditors and/or members or any class of them shall be by a Judge's summons supported by an affidavit. A copy of the proposed compromise or arrangement shall be annexed to the affidavit as an exhibit thereto. Save as provided in rule 68 hereunder, the summons shall be moved ex parte. The summons shall be in Form No. 33, and the affidavit in support thereof in Form No. 34.

Rule-68. Service on company –

Where the company is not the applicant, a copy of the summons and of the affidavit shall be served on the company, or, where the company is being wound up on its liquidator, not less than 14 days before the date fixed for the hearing of the summons.

Rule-69 Directions at hearing of summons –

Upon the hearing of the summons or any adjourned hearing thereof, the Judge shall, unless he thinks fit for any reason to dismiss the summons, give such directions as he may think necessary in respect of the following matters:-

(1) determining the class or classes of creditors and/or of members whose meeting or meetings have to be held for considering the proposed compromise or arrangement;

(2) fixing the time and place of such meeting or meetings;

(3) appointing a chairman or chairmen for the meeting or meetings to be held, as the case may be;

(4) fixing the quorum and the procedure to be followed at the meeting or meetings, including voting by proxy;

(5) determining the values of the creditors and/or the members, or the creditors or members of any class, as the case may be, whose meetings have to be held;

(6) notice to be given of the meeting or meetings and the advertisement of such notice;

(7) the time within which the chairman of the meeting is to report to the Court the result of the meeting; and such other matters as the

Court may deem necessary.

The order made on the summons shall be in Form No. 35 with such variations as may be necessary.”

22 In contrast, the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, provides for the following:

“R.69 Directions at hearing of the application. - Upon hearing the application under sub-section (1) of section 230 of the Act, the Tribunal shall, unless it thinks fit for any reason to dismiss the application, give such directions as it may think necessary in respect of the following matters:-

(a) determining the class or classes of creditors or of members whose meeting or meetings have to be held for considering the proposed compromise or arrangement; or dispensing with the meeting or meetings for any class or classes of creditors in terms of sub-section (9) of section 230;

(b) fixing the time and place of the meeting or meetings;

(c) appointing a Chairperson and scrutinizer for the meeting or meetings to be held, as the case may be and fixing the terms of his appointment including remuneration;

(d) fixing the quorum and the procedure to be followed at the meeting or meetings, including voting in person or by proxy or by postal ballot or by voting through electronic means;

Explanation. For the purposes of these rules, "voting through electronic means" shall take place, mutatis mutandis, in accordance with the procedure as specified in rule 20 of Companies (Management and Administration) Rules, 2014.

(e) determining the values of the creditors or the members, or the creditors or members of any class, as the case may be, whose meetings

have to be held;

(f) notice to be given of the meeting or meetings and the advertisement of such notice;

(g) notice to be given to sectoral regulators or authorities as required under sub-section (5) of section 230;

(h) the time within which the chairperson of the meeting is required to report the result of the meeting to the Tribunal; and

(i) such other matters as the Tribunal may deem necessary.”

(Emphasis Supplied)

23. Comparing the two aforementioned set of rules under the Companies (Court) Rules, 1959 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, we note that the latter clearly provides that the Tribunal shall issue necessary directions “unless it thinks fit for any reason to dismiss the application”. Such a mandate was not clearly stated in the relevant rules in the Companies (Court) Rules, 1959 (extracted above). Thus, we are of the view that the rules under the Companies Act, 2013 provides that this Tribunal dismiss the application in the first motion stage, if a case backed by sufficient evidence is made out before the Tribunal to that effect.

24. In this background, after going through the detailed report of the SFIO as extracted in parts in para 8 to 14 clearly bringing out the critical role of the Applicant Companies in the massive financial scam perpetrated by the Bhushan Steel Group, we are of the considered view that this scheme deserves to be dismissed in the first motion stage itself.

25. As a result, the application is dismissed and disposed of accordingly.

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)