

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU**
[Through Physical hearing/VC Mode (Hybrid)]

**C.P. (CAA) No.17/BB/2023
(Second Motion)**

U/ss.230-232 and other applicable provisions
of the Companies Act, 2013
R/w. the Companies (Compromises,
Arrangements and Amalgamations) Rules, 2016

IN THE MATTER OF:

M/s. Mitel Cloud Communications Pvt. Ltd.

R/o. at 7th Floor, NXT Tower-1,
Embassy Manyata Business Park,
Outer Ring Road, Nagawara,
Bengaluru – 560 045.

... Petitioner Company No.1/
Transferor Company

AND

M/s. Mitel Communications Pvt. Ltd.

R/o. at 9th Floor, Block M2,
Madhuvan North Avenue
Manyata Embassy Business Park,
Nagawara,
Bengaluru – 560 045.

... Petitioner Company No. 2/
Transferee Company

Order delivered on: 30th April, 2024

CORAM: 1. Hon'ble Shri K. Biswal, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner Companies : Ms. Lavanya B. Ananth
For the ROC & RD : Ms. Anuparna Bordoloi
For the IT Department : Shri Ganesh R. Ghale

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. This is a second motion Petition filed on 02.11.2022 by **M/s. Mitel Cloud Communications Pvt. Ltd.** (for brevity, the "Petitioner Company No.1/ Transferor Company") and **M/s. Mitel Communications Pvt. Ltd.** (for brevity, the "Petitioner Company No.2/Transferee Company"), under

Sections 230 to 232 of the Companies Act, 2013 (for short to be referred hereinafter as the "Act") and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (for brevity, 'Rules'), *inter alia*, seeking for the sanction of Scheme of Amalgamation between the Petitioner Companies w.e.f. 31.03.2020.

2. The Petitioner Companies filed First Motion Application bearing C.A. (CAA) No.52/BB/2021 before this Tribunal under Sections 230 to 232 of the Companies Act, 2013. Based on the said Application *vide* Order dated 25.08.2022 of this Tribunal, the meetings of Equity Shareholders and Unsecured Creditors of the Applicant Companies were dispensed. Since there were NIL Secured Creditors in the Applicant Companies there was nothing to convene their meeting.
3. *Vide* Order dated 11.04.2023 of this Tribunal, the following directions were issued:-

*"...3. The Petition be listed for hearing on **14.06.2023**. At least ten days before the date fixed for final hearing, the Petitioner Company shall publish the notice of final hearing of the Company Petition in two local newspapers viz. "Indian Express" in English edition and translation thereof in "Udayavani" in Kannada edition, both having circulation in Bangalore as per Rule 16 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.*

5. Notice be also served upon the Objector(s) or their representative as contemplated under sub-section (4) of Section 230 of the Act, 2013 who may have made representation and who have desired to be heard in their representation at least 30 days before the date fixed for hearing. It is to be specified in the notices that the objections, if any, to the Scheme may be filed within thirty days from the date of the receipt of the notice, failing which, it will be considered that there is no objection to the approval of the Scheme on the part of the objector(s).

6. In addition to the above public notice, the Petitioner Companies shall the Notice of the Petition on the following Authorities, namely (a) Regional Director (South East Region), Hyderabad (b) Registrar of Companies, Karnataka, Bengaluru (c) office of the Official Liquidator (d) Principal Chief Commissioner of Income Tax, Karnataka & Goa being the Designated Nodal Officer (e) Secretary, Competition Commission of India, New Delhi along with the copy of this Petition and the Annexures filed therewith by Speed Post immediately and to such other Sectoral Regulator(s) who may govern the working of the Petitioner Companies involved in the Scheme as per Rule 8 of the Companies (CAA) Rules, 2016, with a direction that they may submit

their representation, if any, within thirty days from the date of receipt of such notice, failing which, it will be presumed that the said Authority has no representation to make to the Scheme.”

4. In pursuant to the Order dated 11.04.2023, the learned Counsel for the Petitioner Companies has filed copies of proof of service of notices, paper clippings of Paper Publication and the no objectors' Affidavit *vide* Diary No.3100 dated 13.06.2023.
5. The main objects, dates of Incorporation, authorized, issued and paid-up share capital, rationale of the scheme and interest of employees have been discussed in detail in first Motion Order dated 11.04.2023.
6. The Board Resolution of the Petitioner Companies approving the Scheme is annexed as Annexures-F and Q to the Petition.
7. It is submitted that the Certificate of Statutory Auditors of the Transferee Company i.e., M/s. Rao & Emmar, Chartered Accountants *vide* Certificate dated 29.09.2020, have *inter alia*, certified that the Accounting Treatment contained in Clause 12 of the Scheme is in compliance with the applicable Accounting Standards notified under Section 133 of the Companies Act, 2013, read with the rules made there under and Other Generally Accepted Accounting Principles in India. The aforesaid Certificate is attached as **Annexure-Z** to the Petition.
8. It is further submitted that the Certificate of Statutory Auditors of the Transferor Company i.e., M/s. Singhvi Dev & Unni LLP., Chartered Accountants *vide* Certificate dated 30.09.2020, have *inter alia*, certified that the Accounting Treatment contained in Clause 12 of the Scheme is in compliance with the applicable Accounting Standards notified under Section 133 of the Companies Act, 2013, read with the rules made there under and Other Generally Accepted Accounting Principles in India. The aforesaid Certificate is attached as **Annexure-AA** to the Petition.
9. Ld. Counsel for the Petitioner Companies have filed affidavits with regard to the Sectoral Regulators, no Corporate Debt Restructuring and no investigations or proceedings are pending against the Petitioner Companies.

The aforesaid Affidavits are attached as Annexures-Y, AB & AG to the Petition.

- 10.** The Audited Financial Statement of Petitioner Companies as on 31.03.2020 and 31.03.2022 and Unaudited Financial Statement of the Petitioner Companies as on 30.11.2022 are attached as Annexures – D, E, O, P and Document No.1 to the Petition.
- 11.** As per the Scheme, the “Appointed Date” means 31.03.2020 or such other date as the NCLT may direct.
- 12.** In pursuant to the notice, the Regional Director (RD) and the Registrar of Companies (ROC) have filed a Common Report *vide* Diary No.4840 dated 18.09.2023. Both RD and ROC have raised the following observation *vide* para II:
 - (1) As per Para 3.3 of Part-I of the proposed scheme the appointed date has been stated as 31.03.2020 which is reasonably ante-dated and it is also found that the both the Petitioner Companies have already filed the latest Balance Sheets as on 31.03.2022. The Tribunal may be pleased to direct the Petitioner Companies to change the appointed date from 01.04.2020 to 01.04.2023 and also to amend the Scheme changing the appointed date in the proposed scheme, wherever applicable and to furnish the amended copy to all the statutory authorities.
 - (2) The Tribunal may be pleased to direct the Transferor Company to direct to file the due Annual Return and Balance Sheet for the financial year 2022-23 before the scheme is allowed.
 - (3) Both the Petitioner Companies have furnished the list of shareholders as on 31.03.2020 and there is no mention whether there are any changes in the shareholding pattern with respect to both the companies after 31.03.2020 to till date. The Tribunal may be pleased to direct the Petitioner Companies to furnish an affidavit to the effect that whether there are any changes in the shareholding pattern from 31.03.2020 to till date, if so to furnish the said details and consents/NOC of the present shareholders, before the scheme is allowed.

- (4) As per the latest shareholders list attached to the last Annual Return filed as on 31.03.2022 of the Petitioner Companies:
 - (a) ShoreTel International Inc., a USA based foreign Company, is holding the entire shareholding of the Transferor Company.
 - (b) Mitel Europe Limited, a UK based foreign Company, is holding the entire shareholding of the Transferee Company.
- (5) Transferor Company has changed its name from Shoretel Communications Private Limited to its current name Mitel Cloud Communications Private Limited w.e.f. 27.08.2019.
- (6) The Transferor Company and Transferee Company have Foreign Exchange Transactions. Hon'ble Tribunal may be pleased to direct the Petitioner Companies to submit the relevant approvals and compliances made under FEMA/RBI regulations before the scheme is allowed.
- (7) The Petitioner Companies have not filed scheme of the amalgamation in form GNL-1 with the Registrar of the Companies as required under Rule 12 of Companies (Registration Offices and Fees) Rules, 2014 read with Section 230-232 of the Companies Act, 2013. Hon'ble Tribunal may be pleased to direct the Petitioner Companies to comply with the same by filing relevant e-form.
- (8) As per clause 11 of the scheme, the Transferee Company shall issue and allot 310 Equity Shares of Rs.10/- each for every 1 Equity Share of Rs.10/- each held in the Transferor Company. Justification for such a skewed swap ratio is to be provided along with a proper valuation report. Since shares would be issued to foreign entities, the companies may be asked to comply with relevant RBI/FEMA guidelines and submit the compliance to the Hon'ble Tribunal.
- (9) The Authorized Share Capital of the Transferee Company may not be adequate to issue shares to the shareholders of the Transferor Company post sanction of the scheme. Hence, in this regard, the Transferee Company needs to furnish an undertaking to the Hon'ble Tribunal to the effect that the company will increase Its Authorized Share Capital adequately by complying with the applicable provisions of Companies Act, 2013 and by filing relevant e-forms.

- (10) As per note no.7 and 8 of the Financial Statements for the Financial Year ending 31.03.2022, Transferor and Transferee Companies have undisputed statutory dues to the tune of Rs.1.57 crores and Rs.2.83 crores respectively. The Petitioner Companies may be directed to furnish an undertaking to Hon'ble NCLT to the effect that it will settle the statutory dues immediately, if not settled so far.
- (11) As per note no. 6 of the Financial Statements for the year ending 31.03.2022 of the Transferor Company, outstanding dues to Micro and Small Enterprises to the tune of Rs.13,600 exist. The Company may be asked to show as to how it has complied with Micro, Small and Medium Enterprises Development Act, 2006 and may be directed to furnish an undertaking to the effect that it will settle the dues as per the said Act immediately, if not settled so far.
- (12) Clause 6.2 of the Scheme provides for Clubbing of Authorized Capital wherein it is stated that the authorized share capital of the Transferee Company shall automatically stand increased without any payment of stamp duty and fees. This term in the Scheme is not in line with the provisions of Section 232(3)(i) of the Companies Act, 2013. In this regard, the Transferee Company shall comply with the provisions of the Section and pay the difference of fee, after setting off the fee already paid by the Transferor Company on its respective capital. For this purpose, the Transferee Company needs to make a separate request letter to ROC for clubbing of Authorized capital within one month from the order.
- (13) As per Section 240 of the Companies Act, 2013, the liability in respect of offences committed under the Companies Act by the Officers in default, of the Transferor Company prior to merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.
- (14) Directorate *vide* letter dated 15.05.2023 had issued letters to Principal Commissioner of Income Tax, Bengaluru requesting to offer their comments/observations. However, till date no report in the matter has been received from Income Tax Department. Hon'ble Tribunal may be pleased to direct the Transferee Company to furnish an undertaking on

behalf of both the Transferor and Transferee Company that as and when any demand arises from the Income Tax Department, Transferee Company are ready to pay the said dues.

(15) Report of Official Liquidator, Karnataka dated 08.06.2023 filed before the Hon'ble NCLT (BB) and copy of the same has been furnished to this Directorate *vide* e-mail dated 08.06.2023 (copy enclosed) with respect to CP (CAA) 17/BB/2023. Official Liquidator in his report has pointed out certain observations. Hon'ble Tribunal may be pleased to direct the Petitioner Companies to comply with the observations pointed out by the Official Liquidator, before the Scheme is allowed.

II. There are no open complaints, prosecutions, technical scrutiny/ inquiry, inspections and investigations pending in this office against the petitioner companies.

13. Subsequently, reply affidavit to the Common Report of RD & ROC have been filed by the Petitioner Companies *vide* Diary No.5983 dated 28.11.2023, *inter alia* stating as under:-

i. Reply to para II (1) of the ROC & RD report:

(a.) It is submitted that the Appointed Date of 31st March, 2020 as set out in the Scheme has been approved by the Board of Directors of the Transferor Company and the Transferee Company at their meeting on 25th September, 2020 and Equity Shareholders of the Transferor Company and Transferee Company have given their consent to the Scheme by way of an affidavit Scheme and the same has been recorded in the Order passed by this Tribunal for the first motion Application 25th August, 2022.

(b.) Further, both the Petitioners have filed their respective financial statements under Section 137 of the Companies Act, 2013 for the Financial Year 31st March, 2022 on a standalone basis as the Scheme is pending approval by this Tribunal.

(c.) Upon this Tribunal approving the Scheme, the Transferee Company, i.e., the resultant amalgamated Company, will file a revised financial statement as practical, in accordance with the Companies Act, 2013. It is submitted that the Appointed Date of

31st March, 2020 has been decided with certain commercial considerations of the Petitioners, and shareholders have provided their consent by way of an affidavit.

- (d.) It is further submitted that the Appointed Date has been decided
- (i) on the basis of the latest financial statements of the Transferor Company as was available on the date of filing the Scheme before the NCLT in C.A. (CAA) No.52/BB/2021 (First Motion Petition); and
 - (ii) after carefully analysis of the commercial consideration by the Petitioners and their shareholders, intending to maximize value for the shareholders of the Petitioners.
- (e.) The Scheme and the Appointed Date has been consented to by the shareholders of both the Transferor Company and the Transferee Company; and their respective no objection/consent in the form of affidavits have been produced at Annexure H and U of the petition. Further, the Transferee Company and the Transferor Company have no secured creditors and the certificates from the Chartered Accountant certifying the same have been produced as Annexure K and Annexure V of the petition. Even certificates from the Chartered Accountant listing all the creditors of the Transferee Company and the Transferor Company are produced as Annexure L and Annexure W. Considering the aforesaid, this Tribunal had also passed an Order dated 25th August, 2022 read with Order dated 29th September, 2022 in the First Motion Petition and dispensed with convening, holding and conducting of the meeting of the shareholders and unsecured creditors of both the Transferee Company and the Transferor Company.
- (f.) Further to this, there have not been any objections raised against the Scheme or the Appointed Date by either the shareholders or unsecured creditors of the Petitioners.
- (g.) In addition to the above, the Ministry of Corporate Affairs *vide* Circular No.09/2019 dated 21st August, 2019 (MCA Circular) has issued a clarification in respect of the 'appointed date' in schemes of amalgamation and has, inter alia, clarified (relying on the decision of the Supreme Court of India in *Marshall Sons & Co. India*

v. ITO (223 ITR 809), that Section 232(6) of the Companies Act, 2013 enables companies to choose and state an appointed date which may precede the date of filing the application for sanction of the scheme before the National Company Law Tribunal. The Circular clarifies that where the appointed date significantly predates the date of filing (i.e., where the gap between the appointed and the date of filing is more than 1 (one) year), the applicants are required to provide a justification for the same and demonstrate that the same is not against public interest. In the present case, the Appointed Date under the Scheme is 31st March, 2020 and the Petitioners had filed the First Motion Petition before this Tribunal through physical filing (during Covid-19 lockdown) by registered post acknowledgement due on 6th November, 2020, well within the time period set out in the MCA Circular. A copy of the MCA Circular is attached herewith as Annexure-1.

- (h.) This Hon'ble Tribunal has previously sanctioned Schemes with an Appointed Date that predates the date of filing the Application, such as:
- (i.) In the scheme of arrangement between Prestige Exora Business Park Limited and Pluto Cessna Business Park Private Limited (C.P. (CAA) No.06/BB/2022) wherein the appointed date was 1st April, 2021 and the Application for approving the scheme was filed before this Tribunal on 7th August, 2021, the Bench of this Tribunal passed an Order approving the Scheme on 22nd April, 2022.
 - (ii.) In the scheme of arrangement between Balaji Malts Private Limited and Sumangal Dealers Private Limited (C.P. (CAA) No.19/BB/2019) wherein the appointed date was 1st April, 2013 and the Application for approving the scheme was filed before this Tribunal in the year 2018, and this Bench passed an Order approving the scheme on 29th May, 2020.
 - (iii.) In the scheme of amalgamation and arrangement between Mars Hotels and Resorts Private Limited, Vrihis Properties Private Limited, Kairos Property Managers Private Limited,

Striton Properties Private Limited, Aerobode One Private Limited and Parthos Properties Private Limited and (Mumbai Bench, C.P. (CAA) No.196/MB/C-I/2022) wherein the appointed date was 1st October, 2021 and the Application for approving the scheme was filed before this Tribunal on 22nd December, 2021, and the Mumbai Bench of this Tribunal passed an order approving the scheme on 24th April, 2023.

(iv.) It is accordingly submitted that the Appointed Date need not be changed or extended to any other date as same will adversely impact the scheme and the interests of the stakeholders upon the amalgamation.

- ii. **Reply to para II (2) of the ROC & RD report:** The Transferee Company and Transferor Company have filed the Annual Return and Balance Sheet filings for the Financial Year 2022-23 within the timelines prescribed under the Companies Act, 2013 and the same are as follows:

Company	AOC 4 Date and SRN	MGT-7 Date and SRN
Transferor Company	17/10/2023-F68814094	17/10/2023-F68915107
Transferee Company	17/10/2023- F68809383	17/10/2023- F68821230

Copies of the Annual Return and Balance Sheet for the Transferee Company and the Transferor Company for the Financial Year 2022-23 along with challans for filing the same are produced herewith as Annexure 2.

- iii. **Reply to para II (3) of the ROC & RD report:** It is submitted that there is no change in shareholding pattern of the Transferor Company and the Transferee Company from 31st March, 2020 till date. An affidavit stating that there is no change in the shareholding pattern is produced herewith Annexure A-3.
- iv. **Reply to para II (4) of the ROC & RD report:** No response is merited since this is just a statement without any conclusion.
- v. **Reply to para II (5) of the ROC & RD report:** No response is merited since this is just a statement without any conclusion.
- vi. **Reply to para II (6) of the ROC & RD report:** It is submitted that the Transferor Company and the Transferee Company are in compliance with the applicable laws under Foreign Exchange Management Laws and will adhere to the applicable Laws post completion of Scheme. The

particulars of the filings made with Reserve Bank of India are produced herewith as Annexure-4.

- vii. **Reply to para II (7) of the ROC & RD report:** It is submitted that the Transferor Company has filed the scheme of Amalgamation in e-form GNL-1 on 13th July, 2023 *vide* SRN F62461306. The copy of the payment of challan is attached as Annexure-5.
- viii. **Reply to para II (8) of the ROC & RD report:** It is submitted that the share exchange ratio has been provided on the basis of Valuation Report issued by Prakash Adiga B, Registered Valuer (IBBI) having Registration No. IBBI/RV/03/2019/11780. The Valuation Report has been produced along with the petition as Annexure-X. The same may be read as part and parcel of the instant Affidavit. Further, the Company will undertake to comply with applicable provisions under Foreign Exchange Management Act, toward allotment of such shares.
- ix. **Reply to para II (9) of the ROC & RD report:** It is submitted that Clause 6.2 of the Scheme provides the “Post-Scheme Capital Structure” of the Transferee Company’s post sanction of the Scheme. It is submitted that as per the aforesaid Clause the Memorandum of Association shall, without any further act, instrument or deed stands altered upon the sanction of the Scheme by this Tribunal by deleting the existing clause and replacing it with the following:
- “The Authorized Share Capital of the Company is INR.8,02,00,000/- (Rupees Eight Crores Two Lakhs only) divided into 80,20,000 (Eighty Lakh Twenty Thousand) equity shares having face value of INR. 10 (Rupees Ten only) each.”*
- It is accordingly submitted that no action is required to be taken by the Transferee Company prior to the sanction of the Scheme by this Tribunal in this regard and e-form INC-28 will be filed with the jurisdictional Register of Companies for clubbing of the authorised share capital.
- x. **Reply to para II (10) of the ROC & RD report:** The Transferor Company and the Transferee Company have settled the above-mentioned statutory dues in the month of April 2022. The Auditors Reports for the Transferee Company and the Transferor Company for the Financial Year 2022-23 demonstrate that these statutory dues have

been paid. The same have been produced as a part of Annexure-2 along with this Affidavit.

- xi. **Reply to para II (11) of the ROC & RD report:** The above-mentioned amount of INR 13,600 has been paid by the Transferor Company on 6th April, 2022. A copy of the details of the transaction for this payment is produced herewith as Annexure-6.
 - xii. **Reply to para II (12) of the ROC & RD report:** It is submitted that pursuant to the sanction of the Scheme by this Tribunal, the Transferee shall, at the time of undertaking the actions for the clubbing of the authorized share capital, pay any differential fee as may be applicable in this regard.
 - xiii. **Reply to para II (13) of the ROC & RD report:** It is submitted that the Transferor Company shall adhere to the provisions of the Companies Act, 2013.
 - xiv. **Reply to para II (14) of the ROC & RD report:** It is submitted that in accordance with Clause 7.5 of the Scheme, all taxes payable by the Transferor Company shall be on account of the Transferee Company pursuant to the sanction of the Scheme by this Tribunal. Further, Clause 7.1 of the Scheme, it has been provided that all debts, liabilities, duties and obligations of the Transferor Company shall stand transferred to the Transferee Company so as to become the debts, liabilities, duties and obligations of the Transferee Company pursuant to the sanction of the Scheme. Accordingly, it is hereby submitted that the Transferee Company will discharge the pending tax liability in accordance with applicable laws.
 - xv. **Reply to para II (15) of the ROC & RD report:** Transferor Company has filed its response to the report of the Official Liquidator's report and the same is produced as herewith as Annexure A7.
- 14.** The Official Liquidator (OL) has filed its report, *vide* Diary No.3010 dated 08.06.2023, *inter-alia* stating as under:
1. That both Transferor Company and Transferee Company are registered in the state of Karnataka. The Report of Official Liquidator is restricted to Transferor Company only.

2. The Authorized and paid-up capital of Transferor Company is Rs.2,00,000/- and Rs.1,10,930/- respectively.
3. The appointed date proposed is 31.03.2020. Being an old and outdated, the scheme may be allowed from 01.04.2023. It may be noted that the Transferor Company has already filed balance sheet as at 31.03.2022.
4. As per the proposed Share Exchange Ratio, Transferee Company will be issuing 310 equity shares of Rs.10/- each for every one equity share of Rs.10/- each to the shareholder of Transferor Company.
5. As per the financial statements and disclosure, there are large number of related party transactions for the last few years. The compliance of section 188 of Companies Act, 2013 needs to be shown to the jurisdictional Registrar of Companies. The petitioners needs to file an affidavit for the same.
6. Board of the Transferor Company has approved the scheme on 25.09.2020. No meeting of shareholders has been convened for the scheme proposed. Likewise, no meeting of unsecured creditors also been held. Since the scheme has been proposed in the year 2020 and also consent if any of the unsecured creditors for more than 2 and half year back taken, the meeting of the unsecured creditors may be directed to convene and obtain approval for the scheme or at least direct to provide list of creditors duly certified by a Chartered Accountant.
7. 100% shares of the Transferor Company is held by ShoreTel International Inc., a foreign entity. The FEMA compliances is to be made before allotting fresh shares to the entity arising out of merger.
8. The Transferor Company had extended loan of Rs.9,00,00,000/- (Rupees Nine Crore) to the Transferee Company. In this connection, the Petitioner has to submit an undertaking that, the Transferor Company has complied with the provisions of Section 185 and Section 186 of the Companies Act, 2013 including of passing Special Resolution, filing of MGT-14 and charging rate of interest as prescribed in the Act.
9. There are no IBC matters which are pending against Transferor Company & Transferee Company or u/s. 240-241 of Companies Act, 1956.

- 10.No Employees/workmen of Transferor Company to be retrenched/ terminated in the terms of amalgamation of Transferor Company with Transferee Company. The Tribunal may kindly see that the Transferee Company is complying with the same in letter and spirit and not retrenching the staff or employee of Transferor Company in the guise of surplus staff on account of merger. Need to give a separate undertaking by the Transferee Company in this regard.
- 11.That the Official Liquidator for scrutiny of the books of accounts and records of Transferor Company has engaged Ms. Geetha Chandrakanth & Co., Chartered Accountants, from the panel approved by the Hon'ble High Court of Karnataka having office at No.#36/36, 1st floor, 59th Cross, Bhashyam Circle, 5th Block, Rajajinagar, Bengaluru. The said Chartered Accountants, has submitted her report on Transferor Company on 03.03.2023 after examining the affairs of the Transferor Company. The said report is enclosed herewith in this report. The Chartered Accountant's report regarding Transferor Company may be treated as part and parcel of this report.
- 15.** The reply to the report of the Official Liquidator has been filed by the Petitioner Companies *vide* Diary No.4403 dated 25.08.2023, *inter alia*, stating as follows:
- i. **Reply to para 1 of the OL report:** Noted.
 - ii. **Reply to para 2 of the OL report:** Noted.
 - iii. **Reply to para 3 of the OL report:**
 - (a.)The Appointed Date has been decided (i) on the basis of the latest financial statements of the Transferor Company as was available on the date of filing the Scheme before the NCLT, and (ii) after careful analysis of the commercial consideration by the Petitioners and their shareholders, intending to maximize value for the shareholders of the Petitioners;
 - (b.)The Scheme, and Appointed Date has been approved by the shareholders of both the Petitioners.
 - (c.)The Ministry of Corporate Affairs *vide* Circular No.09/2019 dated 21.08.2019 (MCA Circular) has issued a clarification in respect of

the 'appointed date' in scheme of amalgamation and has, *inter alia*, clarified (relying on the decision of the Supreme Court of India in *Marshall Sons & Co. India Ltd v. ITO (223 ITR 809)*), that Section 232 (6) of the Companies Act, 2013 enables companies to choose and state an appointed date which may precede the date of filing the application for sanction of the scheme before the National Company Law Tribunal. The Circular clarifies that where the appointed date significantly predates the date of filing (i.e., where the gap between the appointed and the date of filing is more than 1 (one year), the applicants are required to provide a justification for the same and demonstrate that the same is not against public interest. In the present case, the appointed date under the Scheme is 31st March, 2020 and the Petitioners had filed the Application before this Hon'ble Tribunal on 6th November, 2020, well within the time period set out in the MCA Circular. A copy of the MCA Circular is attached herewith as Document No.1.

- iv. **Reply to para 4 of the OL report:** Noted.
- v. **Reply to para 5 of the OL report:** The Petitioners hereby undertake to provide all details of compliance with the provisions of Section 188 of Companies Act, 2013 to the RoC upon the sanction of the Scheme.
- vi. **Reply to para 6 of the OL report:** It is submitted that list of creditors duly certified by a Chartered Accountant has been attached as Annexures K, L, V and W to the present second motion Petition. It is further submitted that the Hon'ble Bench *vide* Order dated 25th August, 2022 dispensed conducting the meeting of the unsecured creditors based on the documents submitted by the Petitioners. Therefore, the recommendation to conduct the unsecured creditors meeting once again may waived off by this Tribunal.
- vii. **Reply to para 7 of the OL report:** Noted. The Company has completed, with the compliance requirement under the FEMA and shall undertake to comply with the requirements of FEMA.
- viii. **Reply to para 8 of the OL report:** The Company has extended the loan to Mitel Communications Private Limited (i.e. the Transferee Company) in its ordinary course of business amounting up to INR 21,00,00,000/-

(Indian Rupees Twenty-One Crore Only). The Board of Directors at their meeting held on 13th December, 2018 approved granting of the aforementioned loan. Subsequently, the shareholders also approved the loan on 14th December, 2018. The Company has complied with the requirements of Sections 185 and 186 in this regard and filed the MGT-14 e-form for filing the special resolutions with Registrar of Companies on 17th December, 2018. A copy of the MGT-14 and the special resolutions (along with its challan) filed on 17th December, 2018 is attached herewith as Document No.2. The Company undertakes to submit an undertaking to this effect if necessary before this Tribunal.

- ix. **Reply to para 9 of the OL report:** Noted.
- x. **Reply to para 10 of the OL report:** The Transferee Company undertakes that it shall not carry out any retrenchment exercise on account of amalgamation of the Transferor Company into the Transferee Company with respect to its employees upon the sanction of the Scheme by the NCLT; the treatment of both its existing employees as well as those joining from the Transferor Company will continue as per the normal course of business. It is further clarified that retrenchment, if any, will be in the ordinary course of business in accordance with the applicable laws and shall not prejudice the sanction of the Scheme.
- xi. **Reply to para 11 of the OL report:** Noted. It is further submitted that the Chartered Accountant's Report contains no adverse comments and states that the affairs of the Petitioners are not prejudicial to the interest of its members, creditors and the public. Accordingly, the Petitioners seeks an order from this Tribunal sanctioning the Scheme.

16. On 16.02.2024, the following Order was passed:

- “...2. The Petitioner Counsel has filed an affidavit vide Dy.No.1033 dated 15.02.2024 with regard to the memo filed by the ROC on 12.02.2024.*
- 3. The Counsel for the ROC/RD stated that there are no further observations in respect of the reply filed by the Petitioner.*
- 4. It is noticed that in spite of giving sufficient opportunities to the IT Department from 11.04.2023, the report is not filed by the IT Department.”*

17. It is observed that the notice to all the statutory authorities in the present petition was ordered on 11.04.2023. However, even after granting multiple opportunities to the I.T Department till 16.02.2024, no report has been filed by the Income Tax Department. Therefore, it is presumed that the Income Tax Department has no representation or objection with regard to the Approval of the Scheme. Accordingly, relying on Rule 8 (3) of Companies (Compromise, Arrangements and Amalgamations) Rules, 2016, we are inclined to dispose of this petition without the representation from the Income Tax Department.
18. The Competition Commission of India (CCI) has filed its report *vide* Letter No.N-20(19)/NF/1091-1093/(09)/2023/CD dated 12.05.2023, stating that undertaking from the Companies involved may be sought stating that approval of commission is not required for the said matters.
19. Heard the Ld. Counsel appearing for the Petitioner Companies, Ld. Counsel for the ROC/RD and I.T. Department. We have carefully perused the pleadings of the Parties and the Law and fact on the issue.
20. The reports of the ROC, RD, OL and CCI for the Petitioner Companies are taken on record. Similarly, reply filed by the Petitioner Companies to the above mentioned reports are also taken on record. In view of the above discussion, we conclude that the objections/observations to the Scheme received from RD/ROC and OL Department have been adequately replied by the Petitioner Companies and hence there is no impediment in approval of the Scheme.
21. The Scheme in question as annexed at **Annexure-A is approved with the Appointed Date being 31.03.2020** and thus we hereby direct that the same is binding on all the Shareholders and Creditors of the Transferor as well as Transferee Companies. While approving the Scheme, it is clarified that this Order should not be construed as an order in anyway granting exemption from payment of any stamp duty, taxes, or any other charges, if any, and payment in accordance with law or in respect of any permission/

compliance with any other requirement which may be specifically required under any law.

AND THIS TRIBUNAL DOES FURTHER ORDER:

- (i) That the Petitioner Company do, within 30 days after the date of receipt of this Order, cause a certified copy of this Order to be delivered to the Registrar of Companies, Karnataka for registration. The concerned Registrar of Companies shall place all documents relating to the Transferor Company registered with him on the file relating to the said Transferee Company and the files relating to Transferor and Transferee Companies shall be consolidated accordingly, as the case may be; and
- (ii) That the Petitioner Company shall deposit an amount of **Rs.75,000/-** with the *“Pay & Accounts Officer, Chennai in respect of the Regional Director, South East Region, Ministry of Corporate Affairs, Hyderabad”* and **Rs.25,000/-** in favour of *“The Prime Minister’s National Relief Fund”*, within a period of four weeks from the date of receipt of certified copy of this Order;
- (iii) That the Petitioner Company are directed to make compliance to the provisions of Section 170A of the Income Tax Act, 1961 within the stipulated period of time;
- (iv) That any person interested shall be at liberty to apply this Tribunal in the above matter for any directions that may be necessary;
- (v) That the approval/sanctioning of the Scheme shall not be construed as an exemption from any of the provisions under the Income Tax Act, 1961 or the Companies Act, 2013 and that the authorities under both the Acts, are at liberty to take appropriate action, in accordance with law, if so advised;
- (vi) That the Petitioner Companies have given various undertaking in response to observations made in the reports of the ROC/RD and the OL. They are directed to ensure compliance of the same.

22. As per the directions, Form No.CAA-7 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, formal orders be issued on the Petitioner Company on filing of the Schedule Property i.e., (i) freehold

property of the Transferor Company and (ii) leasehold property of the Transferor Company by way of Affidavit of the Transferor Company respectively.

- 23.** Accordingly, **C.P. (CAA) No.17/BB/2023** is disposed of.
- 24.** Copy of this Order be communicated to the Ld. Counsel for the Petitioner Companies.

Sd/-

MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

Sd/-

K. BISWAL
MEMBER (JUDICIAL)