

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Through Physical Hearing/ VC Mode (Hybrid))

C.P. (CAA) No.01/BB/2023
U/ss 230 & 232 of the Companies Act, 2013
& other applicable provisions of the Companies Act, 2013
R/w the Companies (Compromises, Arrangements
and Amalgamations) Rules, 2016

In The Matter Of

Simpler Consulting India Private Limited

No.12, Subramanya Arcade,
Bannerghatta Road,
Bengaluru – 560 029.

... **Petitioner Company No. 1/
Transferor Company No.1**

Truven Health Analytics India Private Limited

No.12, Subramanya Arcade,
Bannerghatta Road,
Bengaluru – 560 029.

... **Petitioner Company No.2/
Transferor Company No.2**

Fiberlink Software Private Limited,

No.12, Subramanya Arcade,
Bannerghatta Road,
Bengaluru – 560 029.

... **Petitioner Company No.3/
Transferor Company No.3**

Sanovi Technologies Private Limited,

No.12, Subramanya Arcade,
Bannerghatta Road,
Bengaluru – 560 029.

... **Petitioner Company No.4/
Transferor Company No.4**

Sterling Commerce Solutions India Private Limited

No.12, Subramanya Arcade,
Bannerghatta Main Road
Bangalore - 560 029.

... **Petitioner Company No.5/
Transferee Company**

Order delivered on: 24.04.2024

CORAM: Hon'ble Shri K. Biswal Member (Judicial)

Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

For the Petitioner: Shri Saji P. John

ORDER

Per: K. Biswal, Member (Judicial)

1. This is a Second Motion Petition filed by Simpler Consulting India Private Limited (for brevity, the "Petitioner Company No.1/ Transferor Company No.1"), Truven Health Analytics India Private Limited (for brevity, the "Petitioner Company No.2/Transferor Company No.2"), Fiberlink Software Private Limited (for brevity, the "Petitioner Company No.3/Transferor Company No.3"), Sanovi Technologies Private Limited (for brevity, the "Petitioner Company No.4/ Transferor Company No.4") and Sterling Commerce Solutions India Private Limited (for brevity, the "Petitioner Company No.5/ Transferee Company") on 22.12.2022 under Sections 230 & 232 of the Companies Act, 2013 (hereinafter referred to as the said Act) and other applicable provisions of the Companies Act, 2013, r/w the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, *inter alia*, seeking for the sanction of Scheme of Amalgamation of Simpler Consulting India Private Limited, Truven Health Analytics India Private Limited, Fiberlink Software Private Limited, Sanovi Technologies Private Limited with Sterling Commerce Solutions India Private Limited and their respective Shareholders.
2. The Petitioner Companies filed first motion Application under sections 230-232 of the said Act, 2013 bearing C.A. (CAA)No.47/BB/2022 before this Tribunal. This Tribunal vide order

dated 17.10.2022, dispensed with the meetings of the Shareholders, and Creditors of the Petitioner Companies.

3. When the petition was listed on 23.01.2023, through physical hearing, the following directions were issued:-

"...4 The Petition be listed for hearing on 06.03.2023. At least 10 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. "The Hindu" in English Edition and translation thereof in "Udayavani" in Kannada Edition, both having Bangalore as per Rule 16 of the Companies 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 who may have made representation and who have desired to be heard in their representation along with a copy of the Petition and the annexures filed therewith at least 15 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 objectors.

6. In addition to the above public notice, each of the Petitioner Company shall serve the notice of the Petition on the following Authorities namely, (a) Regional Director (South East Region), Hyderabad (b) Registrar of Companies, Karnataka, Bengaluru, (c) The Designated Nodal Officer, Jurisdictional Income Tax Authority (d) the office of the Official Liquidator (e) The Joint Director, Directorate of Enforcement (f) The Assessing Officer, (PAN-AAQCS9140L), Ward 23(3), Delhi (g) The Assessing Officer, (PAN-AAECT3770H), Corporate Ward 3(1), Chennai (h) The Assessing Officer, (PAN-AAACF8942P), Circle 3(1)(1), Koramangala (i) The Assessing Officer, (PAN-AAACY1364L), DC/ ACIT Circle 6(1)(1), Koramangala along with the copy of this Petition by speed post immediately and to such other Sectoral Regulator(s) who may govern the working of the respective Companies involved in the Scheme as per Rule 8 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, with a direction that they may submit their representation, if any, within 30 (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.

7. The Petitioner Companies shall host Notice of final hearing along with the copy of the Scheme on its website, if any.

8. The Petitioner Companies shall at least seven days before the date of hearing of the Petition file an Affidavit of Service regarding paper publication as well as service of notices on the Authorities specified above including the Sectoral Regulator as well as the Objector(s), if any. The Petitioner Companies shall file compliance report with this Tribunal at least ten days before the date fixed for final hearing and report to this Tribunal that the

directions regarding the service of notices upon regulatory authorities & publication of advertisement of the notice of hearing in the newspapers have been duly complied with.”

4. Pursuant to the aforesaid direction, the authorized signatory of the Petitioner Companies have filed copies of proof of service of notice vide diary no.1279 dated 06.03.2023, along with original copies of newspaper publication in “*The Hindu*” (English), and “*Udayavani*” (Kannada) dated 02.02.2023. Further, the Authorized Signatories of the Petitioner Companies has filed another Affidavit, vide diary no.3621 dated 07.07.2023, wherein it is stated that the Petitioner Companies have not received any objections from any persons/stakeholders/creditors as on the date of this Affidavit.
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 17.10.2022.
6. The Board Resolution of the Petitioner Companies approving the Scheme is annexed as Annexure-M to the Petition.
7. It is submitted that the Certificate of Statutory Auditors of the Transferee Company, stating that the accounting treatment contained in Clause 10 of Part C of Scheme is in compliance with the applicable accounting standards specified under Section 133 of the Act and other generally accepted accounting principles. The aforesaid certificate is attached as Annexure - T to the Petition.
8. The Audited Financial Statement as on 31.03.2022 of the Petitioner Companies and the Unaudited Financial Statements as on 31.10.2022 of the Petitioner Companies are attached as Annexures –C, C1, E, E1, G, G1, J, J1, L & L1 to the Petition. As per the amended Scheme, the “Appointed Date” means April, 1st 2023.

9. In pursuant to the direction dated 23.01.2023, the Regional Director (RD) and the Registrar of Companies (ROC) have filed their Common report vide Dairy No.5659 dated 09.11.2023 by *inter alia* observing as under, vide para 2:

- (i) As per Para 1.2 of Part-A of the proposed scheme the appointed date has been stated as 01.04.2022. The Tribunal may be pleased to direct the Petitioner Companies to change the appointed date from 01.04.2022 to 01.04.2023, and 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. However, the scheme does not define about effective date to be the date on which the order of (after approval of the scheme) the NCLT to be filed by the Transferee Company to give effect of the scheme. The Tribunal may direct the Transferee Company and Transferor Companies to clarify the same.
- (ii) As per the latest shareholders list attached to the last Annual Return filed as on 31.03.2022 are as under:
 - (a) Simpler Consulting LLC is holding 99.03% of equity shares in Simpler Consulting India Private Limited (Transferor Company No.1)
 - (b) Truven Health Analytics India Private Limited (Transferor Company No.2) and Sanovi Technologies Private Limited (Transferor Company No.4) are wholly-owned subsidiary of Sterling Commerce Solutions India Private Limited (Transferee Company).
 - (c) Fiberlink Software Private Limited (Transferor Company No.3) is the wholly owned subsidiary of Fiberlink Communication LLC, USA.
 - (d) The Transferee Company is the wholly owned subsidiary of IBM India Private Limited.
 - (e) International Business Machines Corporation, USA is the ultimate holding company of all the Petitioner Companies.

- (f) Since shares would be issued to a foreign entity, the Tribunal may be pleased to direct the Petitioner Companies to comply with relevant RBI/FEMA guidelines, before the scheme is allowed.
- (iii) The Authorized Share Capital of Transferee Company as provided in Clause 2.10 of the Scheme does not match with the MCA Records and this needs to be clarified by the Company.
- (iv) Transferor Company No.1 has shifted its Registered Office from the State of Delhi to the State of Karnataka w.e.f. 07.12.2020 and Transferor Company No.2 has shifted its Registered Office from the State of Tamil Nadu to the State of Karnataka w.e.f. 04.12.2020, hence falls under the jurisdiction of the Tribunal.
- (v) Transferor Company No.1 is to provide lean and quality education and training in both the public and private domain to wide range of industries and organization. Transferor Company No.2 is to carry on the business of providing market intelligence, benchmark databases, decision support solutions, clinical analytic methodologies, data management services, financial planning, health plan management etc. Transferor Company No.3 is to carry on the business of designing, developing, marketing, and exporting software, software tools and techniques that are generally required in the field of networking, remote access, VPN technology etc. Transferor Company No.4 is to carry on business of design, manufacture and dealing of computer, computer peripherals, computer systems etc.

Whereas, the main objects of the Transferee Company is to plan, design, develop, improve, market, distribute, sell, license all kinds of software, software proprietary software replication, computers, micro-processor based systems etc.

The Tribunal may be pleased to direct the Transferee Company to suitably altered the objects carried out by the Transferor Companies, so as to enable to comply with the applicable provisions of the Companies Act, 2013 and also by filing relevant e-forms,

before the scheme is allowed.

- (vi) Except Transferor Company No.4, all other Petitioner Companies viz. Transferor Company No.1, Transferor Company No.2, Transferor Company No.3 and Transferee Company are loss-making entities. The auditor has also raised material uncertainty regarding the respective Company's ability to continue as a going concern. Hence, the rationale behind merging of loss-making entities needs to be explained by the respective companies, before the scheme is allowed by the Hon'ble Tribunal.
- (vii) As per the Independent Auditor's Report of Transferee Company for the Financial Year ending 31.03.2022, the company has outstanding disputed Income Tax dues to the tune of Rs.11.57 crores. The Tribunal may be direct the Transferee Company to furnish an undertaking to the NCLT to the effect that it will settle the dues as and when the claim is crystallized.
- (viii) As per note nos. 6 and 8 of the Financial Statement for the Financial Year ending 31.03.2022 of Transferor Company 3 and Transferee Company, the Companies have undisputed statutory dues to the tune of Rs.30,000/- and Rs.2.03 lakhs respectively. The Tribunal may be pleased to direct the Petitioner Companies to furnish an undertaking to the NCLT to the effect that it will settle the statutory dues immediately, if not settled so far.
- (ix) Clause 12.1 of Part C 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 Companies 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.

- (x) 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.
- (xi) With reference to the Directorate's letter dated 27.02.2023 issued to the Principal Commissioner of Income Tax, Karnataka, till date no report/comments in the matter have been received from the Income Tax Office. The Tribunal may be pleased to direct the Petitioner Companies to furnish an undertaking that as and when the demand arises from the concerned Petitioner Companies, Transferee Company is ready to pay the said dues on behalf of the Transferor Companies and Transferee Company as per rules.
- (xii) With reference to this Directorate's letter dated 27.02.2023 and reminders dated 08.05.2023, 08.06.2023 & 05.07.2023 issued to Official Liquidator, advising to furnish his report/comments in the matter, till date no report in the matter has been received from Official Liquidator, Karnataka. If the report/affidavit was filed by Official Liquidator, before the Tribunal, Registrar of Companies is advised to inform the Tribunal to direct the Petitioner Companies to comply with the observations pointed out by the Official Liquidator, before the Scheme is allowed else, the Tribunal may be pleased to direct the Official Liquidator to submit his report immediately before the Tribunal and Companies may be directed to furnish their reply on the observations of the Official Liquidator, if any for consideration of the Tribunal.

10. The reply to the common report of RD & ROC have been filed by the petitioner company vide diary No. 5669 dated 09.11.2023, *inter alia* stating as under: -

- (i) **Reply to Point 2(i) of the Common Report of RD & ROC:** it is submitted that the Appointed Date is changed to 01.04.2023 and

Effective Date is modified as directed in the Common Report. Original executed copy of the Amended Scheme and Board Resolution of Petitioner Companies approving the said Amended Scheme is produced as Annexure-1.

- (ii) **Reply to Point 2(ii) of the Common Report of RD & ROC:** the Transferee Company undertakes to comply with the applicable FEMA/ RBI guidelines upon sanction of the Scheme by this Tribunal. The Transferee Company further submitted that, as on the date of this affidavit, the 100% shares of all the Transferor Companies are held by the Transferee Company itself.
- (iii) **Reply to Point 2(iii) of the Common Report of RD & ROC:** it is submitted that the Authorized Share Capital as provided in Clause 2.10 of the Scheme is correct and the Transferee Company has undertaken necessary filings with the Registrar of Companies. However, the same is yet to be updated in the MCA Records. It is further submitted that the Transferee Company undertakes to file necessary documents with the Registrar of Companies to update the records upon sanction of the Scheme by this Tribunal.
- (iv) **Reply to Point 2(iv) of the Common Report of RD & ROC:** it is submitted that the said observation is true and is not required to be traversed.
- (v) **Reply to Point 2(v) of the Common Report of RD & ROC:** it is submitted that the Transferor Companies are currently not carrying out any business operations. The Transferee Company undertakes to comply with applicable provisions of the Companies Act 2013 with respect to the alteration of the Objects Clause in its Memorandum of Association, if so required upon sanction of the Scheme by this Tribunal.
- (vi) **Reply to Point 2(vi) of the Common Report of RD & ROC:** it is submitted that neither the provisions of the Companies Act, 2013 nor the provisions of the Income Tax Act, 1961 prohibit the merger of a loss-making entities. The merger of companies is based on operational and commercial rationales as provided at Para II of the

General Section of the Scheme. The Shareholder and Board of Directors in their commercial wisdom approved to merge the Transferor Companies into the Transferee Company and focus on the business operations of one single entity.

Lastly, it is submitted that the Transferor Companies and Transferee Company undertake to satisfy all conditions prescribed under the provisions of the Income-tax Act, 1961 with regard to the merger.

- (vii) **Reply to Point 2(vii) of the Common Report of RD & ROC:** it is submitted that Transferee Company undertakes to clear its disputed Tax Liabilities as and when the claims are crystalized.
- (viii) **Reply to Point 2(viii) of the Common Report of RD & ROC:** it is submitted that Transferor Company No.3 and Transferee Company undertake to clear undisputed Tax Liabilities, if any, upon sanction of the Scheme by this Tribunal.
- (ix) **Reply to Point 2(ix) of the Common Report of RD & ROC:** it is submitted that the Transferee Company undertakes to file a separate request letter with the Registrar of Companies to increase/club the Authorized Share Capital of Transferor Companies by complying the applicable provisions of the Companies Act, 2013 by paying the differential fee, if any after setting of the fee paid by Transferor Companies and filing relevant e-forms with Registrar of Companies.
- (x) **Reply to Point 2(x) of the Common Report of RD & ROC:** it is submitted that the said observation is correct and is not required to be traversed.
- (xi) **Reply to Point 2(xi) of the Common Report of RD & ROC:** it is submitted that the Transferee Company undertakes to pay the Income Tax dues on behalf of the Transferor Companies as per the provisions of Income Tax Act, 1961 as and when the same becomes due.
- (xii) **Reply to Point 2(xii) of the Common Report of RD & ROC:** it is submitted that the Office of the Official Liquidator has not filed its

Report till date, hence the observation is correct and is not required to be traversed.

11. The Official Liquidator (OL) has filed his report vide diary no.02 dated 01.01.2024 wherein it has been pointed out as under:

- (i) Para 5 of the report of the Official Liquidator: The authorized and paid capital of Transferor Companies are:
 - TR 1- Rs.30,00,000 and Rs.29,93,180
 - TR 2- Rs.1,00,00,000 and Rs.96,60,130
 - TR 3- Rs.10,00,000 and Rs.1,00,000
 - TR 4- Rs.3,00,00,000 and Rs.2,67,05,683
- (ii) Para 6 of the report of the Official Liquidator: The appointed date proposed is 01.04.2022, and the Transferor Companies have filed the Balance Sheets as at 31.03.2022. Being old and outdated the scheme may be allowed from 01.04.023. The petitioners may be asked to file pending statutory documents as on 31.3.2023.
- (iii) Para 7 of the report of the Official Liquidator: In Transferor Companies, there are no charge pending as per charge register /master data maintained by MCA/ROC.
- (iv) Para 8 of the report of the Official Liquidator: This Tribunal vide order dated 17.10.22 dispensed with the meeting of equity shareholders and unsecured creditors of the applicant companies 1, 2, 3 & 4.
- (v) Para 9 of the report of the Official Liquidator: Swap ratio proposed :-
 - (a) Transferor Company No.1; "21 fully paid up equity shares of Rs.10/- of the Transferee Company shall be issued and allotted for every 1000 fully paid up shares of Rs.10/- each held in Transferor Company No.1.
 - (b) Transferor Company No.2; Transferor Company No.2 is a wholly owned subsidiary of Transferee Company. No shares shall be issued by Transferee Company to Transferor Company No.2

directly or indirectly.

- (c) Transferor Company No.3; 9900 fully paid up equity shares of Rs.10/- each of the Transferee Company shall be issued and allotted for every 1000 fully paid up equity shares of Rs.10 each held in Transferor Company No.3. Have also being a 100% subsidiary of Transferee Company no shall shares be issued directly or indirectly.
- (d) Transferor Company No.4; Transferor Company No.4 is a wholly owned subsidiary of Transferee Company with 100% equity shareholding since 25.02.2021. No shares shall be issued by Transferee Company to Transferor Company directly or indirectly.
- (vi) Para 10 of the report of the Official Liquidator: Transferor Company Nos.2, 3, 4 are wholly owned subsidiaries of Transferee Company.
- (vii) Para 11 of the report of the Official Liquidator: There are related party transactions by all the Transferor Companies. Need, to show the compliance of Section 188 of the Companies Act, 2013 also have been the transactions are treated as arm's length basis.
- (viii) Para 12 of the report of the Official Liquidator: It is noticed that the petitioner companies have filed scheme U/s 230-232 of the Companies Act, 2013 earlier which was dismissed in the year 2019. These aspects may please be looked into by the Tribunal and reasons for dismissal.
- (ix) Para 13 of the report of the Official Liquidator: There are changes in the status of many Transferor Companies after the Scheme has been filed. The Transferor Company Nos.2, 3 & 4 became the wholly owned subsidiary of Transferee Company after the Scheme is filed. Accordingly, Scheme needs to be amended to the extent and also no shares shall be issued by Transferee Company to Transferor Company No.2, Transferor Company No.3 and Transferor Company No.4 though it is proposed in the Scheme.
- (x) Para 14 of the report of the Official Liquidator: Transferor Company No.1 is a subsidiary of Simpler Consulting LLC, USA and Simpler

Consulting Ltd., UK held 2897 shares. Any shares issued to these entities shall be strictly in compliance with FEMA.

- (xi) Para 15 of the report of the Official Liquidator: An undertaking may be obtained from all the applicants stating that whatever stamp duty payable arising out of merger shall be paid to the State Govt. with an outer limit of 6 months.
- (xii) Para 16 of the report of the Official Liquidator:

Approval of	Board	Shareholder	Unsecured Creditor
Transfer Co.1	04.08.2021	Meeting Dispensed	Meeting Dispensed
Transfer Co.2	04.08.2021	Meeting Dispensed	Meeting Dispensed
Transfer Co.3	30.09.2021	Meeting Dispensed	Meeting Dispensed
Transfer Co.4	23.08.2021	Meeting Dispensed	Meeting Dispensed

- (xiii) Para 17 of the report of the Official Liquidator: The reasons for convening AGM/EGM was considerably delay after passing Board Resolution needs, clarification/explanation.
- (xiv) Para 18 of the report of the Official Liquidator: The Net profit of the Transferor Company No.2 for the year ended 31.03.2021 was Rs.29.86 lakhs. Previous year it was 115.45 lakhs. At note 13(b) of Transferor Company No.2, it was stated that gross amount required to be spent towards CSR was 12.77 lakhs and also spent the same amount on CSR. It is not known how the company has calculated CSR expenses to be spent. Same issues were also noticed in few TR companies. Need clarification.
- (xv) Para 19 of the report of the Official Liquidator: Transferor Company No.3 is a continuous loss making or meagre Profit making company. However, it was noted that the company has paid dividend to its foreign shareholders (IBM Group) for an amount of Rs.2.20 crores in foreign exchange. The Petitioner has to explain the source of declaring dividend and payment to a foreign entity. This is the case with Transferor Company No.4 too.
- (xvi) Para 20 of the report of the Official Liquidator: No Employees/workmen of Transferor companies to be retrenched/terminated in the terms of amalgamation of Transferor

companies with Transferee Company. This Tribunal may kindly see that Transferor or Transferee companies will not retrench Swap the staff or employee of Transferor Companies in the guise of surplus staff on account of merger. Needs to give a separate undertaking by the Transferee Company in this regard.

12. The reply to the OL has been filed by the Petitioner Companies vide diary no.45 dated 03.01.2024, *inter alia* stating as under:

- (i) **Reply to Para 5 of the OL Report:** it is submitted that the said observation a matter on record and is not required to be traversed.
- (ii) **Reply to Para 6 of the OL Report:** it is submitted that the Appointed Date is changed to 01.04.2023 and the Amended Scheme to this effect was filed as Annexure-1 of the Reply Affidavit to Common Report by RD & ROC.
- (iii) **Reply to Para 7 of the OL Report:** it is submitted that the same is true and is not required to be traversed.
- (iv) **Reply to Para 8 of the OL Report:** it is submitted that the same is true and is not required to be traversed.
- (v) **Reply to Para 9 of the OL Report:** it is submitted that Transferor Company No.1 is also a 100% subsidiary of Transferee Company as on the date of this affidavit. It is further submitted that no shares shall be issued by the Transferee Company to Transferor Companies as consideration.
- (vi) **Reply to Para 10 of the OL Report:** it is submitted that all the Transferor Companies are wholly owned subsidiaries of the Transferee Company.
- (vii) **Reply to Para 11 of the OL Report:** it is submitted that the Related Party Transactions are in the ordinary course of business and at arm's length. It is further submitted that the Related Party Transactions have been disclosed in the Financial Statements.
- (viii) **Reply to Para 12 of the OL Report:** it is submitted that Transferor Company No.1, Transferor Company No.2 and Transferor Company

No.3 have been not a part of any scheme of arrangement under Section 230-232 of the Companies Act, 2013. It is further submitted that Transferor Company No.4 was proposed to be amalgamated with Transferee Company vide CA(CAA) No.29/BB/2019, however an application was filed to withdraw Transferor Company No.4 from the said scheme which was subsequently approved by the Tribunal with the other Transferor Companies.

- (ix) **Reply to Para 13 of the OL Report:** it is submitted that Transferor Company Nos.1 and 3 have become wholly owned subsidiaries of the Transferee Company after the amended appointed date being 1st April 2023. It is further submitted that no shares would be issued by the Transferee Company as all the Transferor Companies are wholly owned subsidiaries of the Transferee Company cannot allot its own shares to itself. Hence there is no requirement to amend the Scheme to this effect.
- (x) **Reply to Para 14 of the OL Report:** it is submitted that the Transferee Company undertakes to comply with the applicable FEMA guidelines/Rules. The Transferee Company further submits that, as on the date of this affidavit, 100% shares of the Transferor Company No.1 are held by the Transferee Company itself.
- (xi) **Reply to Para 15 of the OL Report:** it is submitted that the Petitioner Companies undertake to pay the Stamp Duty as applicable as soon the concerned District Registrars issues the Adjudication Order.
- (xii) **Reply to Para 16 of the OL Report:** it is submitted that the same is true and is not required to be traversed.
- (xiii) **Reply to Para 17 of the OL Report:** it is submitted that there is no requirement under Section 230 or 232 of the Companies Act, 2013 to conduct AGM/EGM for approval of amalgamation by Shareholders and there are no timelines prescribed for this.
- (xiv) **Reply to Para 18 of the OL Report:** it is submitted that the manner of computation of gross amount required to be spent towards CSR expenses for the Financial Year 2020-21 in the case of

Transferor Company No.2 and Transferor Company No.4 are provided in the Annual Report for CSR Activities which is attached herewith as Annexure-2 and 3, respectively.

- (xv) **Reply to Para 19 of the OL Report:** it is submitted that Transferor Company No.3 declared dividends of INR 22.00 crores In FY 2020-21 out of the profits of the earlier years, i.e., INR 26.64 crores as at 31 March 2020. It is further submitted that the Transferor Company No.4 declared a dividend of INR 164.77 crores out of the profits of the earlier years, i.e., INR 164.80 crores as 31 March 2020.
- (xvi) **Reply to Para 20 of the OL Report:** it is submitted that the Transferee Company undertakes to not retrench employees of Transferor Company post-merger.

13. The Official Liquidator (OL) has filed its Supplementary Report vide Diary No.641 dated 30.01.2024, wherein it has been pointed out as under:

- (i) That the Petitioner has attached 5 e-stamps with certificate No. IN-KA88536383559132W, IN-KA88536944183682W, IN-KA88535536054519W, IN-KA88537968307851W, IN-KA88534673254434W without giving description about what for the affidavit, attached and about which company? This concerns need to be addressed by the Petitioners.
- (ii) With reference to Sl. No.6 of the Official Liquidator Report No. 121/2023, it is submitted that the Petitioner has filed reply affidavit amending the Scheme for shifting appointed date from 01.04.2022 to 01.04.2023 as suggested by the Official Liquidator. However, the copy is required to be submitted to this office. Also did not state whether the Balance sheet for the year 2022-2023 has been filed with ROC U/s 137 of the Companies Act, 2013 or not.
- (iii) In respect to Sl.No.11 of Official Liquidator report, there are Related Party Transactions in Transferor Companies. Simply stating that it was all done in arm's length basis and disclosed the same in the Financial Statement without supporting documents/showing compliances is not acceptable. The Tribunal may ask to how the

Transferor Companies have complied with Sec. 188 of the Companies Act, 2013 r/w AS 18.

- (iv) In respect of point No.13 of the Official Liquidator report, it is submitted that the scheme has been filed containing substantial issue of shares to the Transferor Companies upon merger. Whereas subsequently it was mentioned that no shares will be issued considering the status of subsidiary companies. To that extent, relevant clause of the scheme is to be amended
- (v) In respect of point No.15 of the Official Liquidator Report, the Transferee Company has not furnished the necessary undertaking. The same needs to be furnished in a separate affidavit.
- (vi) In respect of point No.17 of the Official Liquidator Report, it is replied that there is no requirement of conducting AGM/EGM for amalgamation of companies. The reply is wrong and against the provision of Sec. 230-232 of the Companies Act, 2013. Further, no reply has been given for the considerable delay in conducting shareholders meeting after the Board approval for amalgamation. Need clarifications on both issues.
- (vii) In respect of point No.18 of the Official Liquidator Report, the Petitioner did not provide clarification to the query raised. The question is how the companies have calculated the amount spent on CSR when the PBT of these companies were very much less than the threshold limit for spending CSR U/s 135 of the Companies Act, 2013. The Petitioner Companies may be directed to submit specific reply to the query instead of inviting Balance Sheet disclosure etc. The Official Liquidator is aware of the said disclosures.
- (viii) In respect of point No.19 of the Official Liquidator Report No. 121/2023, the reasoning given by the petitioner is unacceptable since the Transferor Company Nos.3 and 4 have made meagre profits in the year 2020-2021. It is replied that for payment of dividends, the company used its general reserves/profit made in earlier years. If that is the case, both the companies have to explain as to how they have complied with Sec. 123 r/w rule 3 of Declaration

and payment of Dividend Rules, 2014 in detail to the Official Liquidator to take further necessary action.

14. The reply to the Supplementary Report of Official Liquidator has been filed by the Petitioner Companies vide diary No.679 dated 31.01.2024 *inter alia* stating as under:

- (i) **Reply to Para No.(i) of the Supplementary Report of Official Liquidator:** it is submitted that the description is mentioned in the Stamp Paper itself. Description is "AFFIDAVIT" under Article 20 (4) of the Karnataka Stamp Act. Two Authorized Signatories namely Subhashree Sridharan (representing Petitioner Nos.1, 2 & 4) and Raghavendra M. Pai (representing Petitioner Nos. 3 & 5) have sworn to the Affidavit on behalf of the Petitioner Companies. Since there are 5 Companies swearing to the Reply Affidavit, there are 5 Stamp Papers.
- (ii) **Reply to Para No.(ii) of the Supplementary Report of Official Liquidator:** it is submitted that the Petitioner Company Nos. 1, 2, 3, 4 and 5 have filed the Financial Statements for 2022-2023 with ROC vide SRN No.F71937791, F65394033, F69402113, F65502106 and F67221846 (resubmitted on 18.01.2024 vide SRN No.F90563594) respectively. Copies of the Audited Financial Statements produced with the Reply Affidavit to OL Report. Further it is submitted that the Appointed Date is changed to 01.04.2023 and the Amended Scheme to this effect was filed as Annexure-1 of the Reply Affidavit to Common Report by RD & ROC. A copy of the Amended Scheme is produced herewith as Annexure-1.
- (iii) **Reply to Para No.(iii) of the Supplementary Report of Official Liquidator:** it is submitted that the Transferor Companies are currently not carrying on any business and hence there are no transactions pertaining to sale/ purchase of goods and services. The nature of related party transactions are limited to only loans, advances and reimbursement of expenses. It is further submitted

that these transactions have been undertaken at arm's length and the same have been disclosed in Financial Statements which have been signed by the statutory auditors.

- (iv) **Reply to Para No.(iv) of the Supplementary Report of Official Liquidator:** it is submitted that the Clause 5.1 of the Scheme of Amalgamation provides for issuance of equity shares of Transferee Company subject to the extent of shares held by Transferee Company. In other words, Shares of Transferee Company will be issued to the Shareholders of Transferor Companies to the extent of those Shares not held by Transferee Company in Transferor Companies. Currently, the Transferor Companies are wholly-owned Subsidiaries of Transferee Company.

Relevant portion of Clause 5.1 is reproduced below;

“5.1 Upon the amalgamation of the Transferor Companies with the Transferee Company in terms of this Scheme, the Transferee Company shall, without any application or deed, issue and allot equity shares, credited as fully paid up, to the extent indicated below, to the shareholders of Simpler India and Fiberlink India holding fully paid-up equity shares in Simpler India and Fiberlink India respectively, to the extent the shares are not held by the Transferee Company or its nominees, on the Record Date or to such of their respective heirs, executors, administrators or other legal representatives or other successors in title as may be recognized by the Board of Directors of Simpler India and Fiberlink India in the following proportion.

Further Clause 5.7 of the Scheme provides that the Shares held by Transferee Company in the Transferor Companies, as on the Record Date shall stand cancelled or shall be deemed to have been cancelled without any further act or deed. Hence there is no requirement to amend the Scheme as such as the Scheme itself covers for the wholly-owned subsidiary relationship.

- (v) **Reply to Para No.(v) of the Supplementary Report of Official Liquidator:** it is submitted that the Petitioner Companies which

includes the Transferee Company have already undertaken for the same in the Reply Affidavit to the First Report of Official Liquidator. The Transferee Company hereby undertakes to pay the Stamp Duty for merger as applicable as soon the concerned District Registrars issue the Adjudication Order.

- (vi) **Reply to Para No.(vi) of the Supplementary Report of Official Liquidator:** it is submitted that the Board Meetings approving the Scheme was held by Petitioner Company Nos. 1, 2, 3, 4 & 5 on 24.08.2021, 04.08.2021, 30.09.2021, 23.08.2021 and 02.08.2021 respectively. The Company Application was filed on 13.07.2022 which is well within time. Further, based on the Consent Affidavits given by the Shareholders, this Tribunal dispensed the meetings of Shareholders and Creditors vide Order dated 17.10.2022. Hence there the question of AGM or EGM for approval or merger does not arise.
- (vii) **Reply to Para No.(vii) of the Supplementary Report of Official Liquidator:** it is submitted that the provision u/s 135 are not applicable to the Transferor Company No.2 for the Financial Year 2020-21 as the net-worth/ turnover/ net- profit thresholds for the preceding Financial Year 2019-20 was not breached. However on a voluntary basis, the Transferor Company No.2 has complied with the obligation of discharging the CSR contribution at the rate of 2% of the average net profits of the immediately preceding 3 Financial Years. It is further submitted that the provisions u/s 135 are applicable to the Transferor Company No.4 for the Financial Year 2020-21 as the net profit threshold for the preceding Financial Year 2019-20 was breached. The CSR contribution was computed at the rate of 2% of the average net profits of the immediately preceding 3 Financial Years.
- (viii) **Reply to Para No.(viii) of the Supplementary Report of Official Liquidator:** it is submitted that the third proviso to sub-section 1 of section 123 r/w rule 3 shall not be applicable for distribution of dividend by Transferor Company Nos.3 and 4 as the same is

declared and paid out of the profits of the previous Financial Years [in accordance with section 123(1)(a)] which has not been transferred to free reserves.

15. The Official Liquidator (OL) has filed its Second Supplementary Report vide Diary No.1095 dated 19.02.2024, wherein it has been pointed out as under:

- (i) In respect to Point No.3 of the Supplementary Report, neither the compliance of Section 188 of the Companies Act, 2013 r/w AS 18 as per the Official Liquidator Report has submitted nor any undertaking has been submitted to show the compliance before Registrar of Companies, Karnataka. To that the reply of the Petitioner is incomplete.
- (ii) In respect of Point No.8 of the Supplementary Report, it is submitted that second proviso of subsection (1)(b) of Section of 123 of the Companies Act, 2013 stipulates that”

“Out of money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government:

Provided that a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company:

Provided further that where, owing to inadequacy or absence of profits in nay financial year, any company proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves, such declaration of dividend shall not be made except in accordance with such rules as may be prescribed in this behalf:

Provided also that no dividend shall be declared or paid by a company from its reserves other than free reserves:

Provided also that no company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company for the current year:.

Further, the third proviso to the said provision

stipulates that no dividend shall be declared or paid by company from its reserves other than free reserves. Thus, the reply of the company that they paid dividend out of profits of previous Financial Years and not to comply with Rule 3 is against the provision of the law.

The question here is whether the dividend has been paid due to inadequate profit by using earlier profit or not. The answer is yes. The above provisions are further made it clear by defining the term Free Reserves as per Section 2(43) to mean such reserve which is as per latest audited Balance Sheet of Company are available for distribution as dividend. Hence, the Petitioner has to explain as to how they have complied with Section 123 r/w Rules mentioned therein to the Registrar of Companies to his satisfaction by way of an undertaking.

16. The Income Tax Department has filed its report with respect to Transferor Company No.4 & Transferee Company vide diary no.2849 dated 01.06.2023 by *inter alia* observing as under:

Regarding Transferor Company No.4

- (i) As per the ITBA recovery module in this office, it is seen that company Sanovi Technologies Private Limited (Transferor Company No.4) has no carry forward losses as per return of income filed for the A.Y. 2022-23 and has no demand outstanding as on date.
- (ii) As seen on system there is no proceeding pending in respect of Sanovi Technologies Private Ltd (Transferor Company) as on date.
- (iii) It appears that there is no unlawful tax planning or tax avoidance.
- (iv) The date of last return of income filed by the assessee Sanovi Technologies Private Ltd (Transferor Company) for the A.Y. 2022-23 is 25.10.2022.
- (v) As per the latest return of income filed by assessee company the present directors of the Sanovi Technologies Private Ltd (Transferor

Company) are Shri Ajay Mittal and Shri Ravi Prakash Kakubal.

Regarding Transferee Company

- (i) On perusal of the record from recovery module of ITBA, it is seen that there is outstanding demand in respect of Sterling Commerce Solutions India Private Limited (Transferee/Resulting Company). The details are as under:

A.Y.	Section	Demand outstanding (Rs.)
2007-08	144 r.w.s. 144(13)	50,79,915
2011-12	143(3)	1,92,82,530
2014-15	143(3)	8,75,738

- (ii) As seen on system there is no proceeding pending in respect of Sterling Commerce Solutions India Private Limited (Transferee/Resulting Company) as on date.
- (iii) The carry forward of business losses in respect of Sterling Commerce Solutions India Private Limited (Transferee/Resulting company) as per return of income filed for the A.Y.2022-23 is Rs. NIL/-
- (iv) It appears that there is no unlawful tax planning or tax avoidance.
- (v) The date of last return of income filed by the assessee Sterling Commerce Solutions India Private Limited (Transferee/Resulting Company) for the A.Y. 2022-23 is 28.10.2022.

17. The reply to the Income Tax Department Report has been filed by the Transferor Company No. 4 & Transferee Company vide diary No.4051 dated 02.08.2023 by, *inter alia*, observing as under:

- (i) **With respect to the outstanding demand of INR 50,79,915 for Assessment Year (“AY”) 2007-08:** it is submitted that the Petitioner Company No.5 had filed the return of income for A.Y. 2007-08 declaring a total income of INR 18,85,499 (Rupees Eighteen Lakh Eighty Five

Thousand Four Hundred Ninety – nine only) on October 23, 2007. In this regard, notice u/s 143(2) of the Income-tax Act, 1961 (‘IT Act’) dated September 09, 2008 and February 04, 2009 was received by the Petitioner Company No.5. Subsequently Notice u/s 142(1) of the IT Act dated February 04, 2009, June 05, 2009 and December 10, 2010, were also received by the Petitioner Company No.5. In response to the said notices, necessary information/ documentation and representations were provided to the Income-Tax Authorities. Pursuant to the scrutiny assessment, the assessment order u/s 143(3) dated December 23, 2010 was passed with a tax demand of INR 21,49,523. It is submitted that the said tax demand for A.Y. 2007-08 has been duly discharged by the Petitioner Company No.5 vide challan no.10369 dated January 27, 2011. Thus the outstanding demand of INR 50,79,915 is inadvertently reflecting in the income-tax portal. The Petitioner Company No.5 undertakes to coordinate with the authorities and rectify the outstanding demand appearing in the Income- Tax Portal.

- (ii) **With respect to the demand of INR 1,92,82,530 for AY 2011-12:** it is submitted that the Petitioner Company No.5 had filed appeal before Income Tax Appellate Tribunal (ITAT) against the assessment order received u/s 143(3) dated December 17, 2015. The ITAT in its order dated October 31, 2017 has restored the matter to Dispute Resolution Panel (DRP) and currently pending for re-adjudication. In relation to the outstanding tax demand, the Petitioner Company No.5 has paid INR 2,00,12,940 as demand under protest. The Petitioner Company No.5 undertakes to pay the balance demand, if any, once the matter attains finality.

- (iii) **With respect to the demand of INR 8,75,738 for AY 2014-15:** it is submitted that the Petitioner Company No.5 had filed appeal before Commissioner of Income Tax (Appeals) [CIT Appeals] on January 11, 2017 against the assessment order received u/s 143(3) of the IT Act, dated November 30, 2016. The matter was adjudicated by CIT Appeals partly in favour of the Petitioner Company No.5. However, the order giving effect to the same is pending with Assessing Officer. Upon giving effect to the order passed by CIT Appeals, the outstanding tax payable by Petitioner Company No.5 will be determined. The resultant tax payable shall be adjusted against the refund receivable in the hands of the Petitioner Company No.5. Accordingly, outstanding tax demand, if any, shall be nil for A.Y. 2014-15. The Petitioner Company No.5 undertakes to coordinate with the Assessing Office to give effect to the order passed by the CIT Appeals.
- (iv) The Petitioner Company No.5 being the amalgamated company shall continue to exist and all the pending proceedings shall continue in the hands of the Petitioner Company No.5. The Transferee Company undertakes to clear the tax liabilities, if any, once the matters attain finality.

18. Intimation of the Scheme of Amalgamation was sent to all relevant statutory authorities/regulators. Wherever no response has been received from the said authorities/regulators, it is deemed that they have no objection to the proposed Scheme.

19. It is submitted that the Affidavits of the Authorized Signatories of the Petitioner Companies has been filed on 21.12.2022 stating that there are no investigation proceedings pending against the Petitioner Companies or its Directors under the Companies Act, 1956 or under any other statutes.

- 20.** It is submitted that the Affidavits of the Authorized Signatories of the Petitioner Companies have been filed on 21.12.2022 stating that the Scheme does not envisage for Corporate Debt Restructuring and the Scheme does not provide for any kind of arrangement with the Creditors of Petitioner Companies and thereby Corporate Debt Restructuring is not applicable to the Scheme.
- 21.** It is also submitted that the Affidavits of the Authorized Signatories of the Petitioner Companies have been filed on 21.12.2022 stating that Petitioner Companies are not regulated by any Sectorial Regulators to whom the Petition and Scheme needs to be intimated/filed before or after filing of the Company Application under Section 230 of the Companies Act, 2013 with this Tribunal.
- 22.** Heard the learned Counsels for the parties. We have carefully perused the pleadings of the parties and entire materials on record.
- 23.** On 01.02.2024 the learned Counsel for the ROC stated that there were no further observations after considering the reply filed by the Petitioner Companies. However, in respect of the issue raised by the Official Liquidator vide para 19 of its report, a Supplementary Report was filed by the Official Liquidator on 30.01.2024, after considering the reply of the Petitioner Companies. In this regard, the Petitioner Companies are directed to file compliance before the ROC, and thereafter the ROC is directed to take appropriate action if required in accordance with provisions of Companies Act, 2013 after examining of the same.
- 24.** The reports of the ROC, RD, Income Tax Department and OL are taken on record. The reply filed by the Petitioner Companies to the above mentioned reports are also taken on record.
- 25.** The Scheme of Amalgamation in question annexed as **Annexure-1 of the Reply Affidavit to the Common RD & ROC Report** filed vide Diary no.5669 dated 09.11.2023 is approved and we hereby direct that the same is to be binding on all the shareholders and creditors of the Transferor Companies as well as the Transferee Company. 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 Companies 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 and on such certified copies being so delivered the Transferor Companies shall be dissolved without undertaking the process of winding up. The concerned Registrar of Companies shall place all documents relating to the Transferor Companies 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;
- (ii) That the Transferee Company shall deposit an amount of Rs.75,000/- in favour of "Pay and 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 Companies are directed to comply with all the undertakings given by them in their reply filed to the ROC/RD, OL & IT report;
- (iv) That the Petitioner Companies are directed to make compliance to the provisions of Section 170A of the Income Tax Act, 1961 within the stipulated period of time;
- (v) That any person interested shall be at liberty to apply to this Tribunal in the above matter for any directions that may be necessary;
- (vi) 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.

- 26.** 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 Companies and (ii) leasehold property of the Transferor Companies by way of affidavit.
- 27.** The learned Counsel for the Petitioner Companies is directed to serve a copy of this Order to all the Statutory Authorities within ten days from the date of receipt of copy of this order.
- 28.** Accordingly, **C.P. (CAA)No.01/BB/2023 is disposed of.** Copy of this Order be communicated to the Counsel for the Petitioner Companies.

Sd/-
(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

Sd/-
(K. BISWAL)
MEMBER (JUDICIAL)