IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH
COURT-IV.

COMPANY SCHEME PETITION NO. 2199 OF 2019

In the matter of Companies Act, 2013;

AND

In the matter of Sections 230 to 232 and other applicable provisions of the Companies Act, 2013;

AND

In the matter of Scheme of Amalgamation of RHI India Private Limited, RHI Clasil Private Limited and Orient Refractories Limited and their respective shareholders.

RHI India Private Limited, a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Neelkanth Business Park, Room Number 604C, Opposite Railway Station, Vidhyavihar (West), Mumbai – 400 086.

First Petitioner Company/ Transferor Company 1

AND

RHI Clasil Private Limited, a company incorporated under the provisions of the Companies Act, 1956 having its registered office at 301-302, Orbit Plaza, New Prabhadevi Road, Prabhadevi, Mumbai – 400 025.

Second Petitioner Company/ Transferor Company 2

AND

Orient Refractories Limited, a company incorporated under the provisions of the Companies Act, 1956 having its registered office at C-604, Neelkanth Business Park, Opp. Railway Station, Vidhyavihar (West), Mumbai – 400 086.

Third Petitioner Company/ Transferee Company

For Petitioner Companies : Mr. Robert Pavrey, Practising Company Secretary,

CORAM: Hon'ble Member (Judicial) : Mr. Rajasekhar V.K.,
Hon'ble Member (Technical) : Mr. Ravikumar Duraisamy.

DATED: 02.03.2020

Per: Ravikumar Duraisamy, Member (T).

ORDER

1. Heard the learned counsel for the Petitioner Companies in the matter of Scheme of Amalgamation of RHI India Private Limited, RHI Clasil Private Limited and Orient Refractories Limited and their respective

shareholders (the "**Scheme**"). No objector has come before this Hon'ble Tribunal to oppose the Scheme nor has any party controverted any averments made in the Petition.

2. The sanction of the Tribunal is sought under section 230 to 232 of the Companies Act, 2013, to the proposed Scheme.

3. The learned counsel for Petitioner Companies states that the First Petitioner Company is primarily engaged in business of purchase, sale, import, export and marketing of refractories, refractory products, chemicals, formulations and related equipment required in industries such as steel plants, furnaces, power house and cement plants. The Second Petitioner Company is engaged in the business of manufacturing and marketing of refractories and allied products. The Third Petitioner Company is engaged in the business of manufacture and marketing of refractory products, systems and services and has various global partners for its international quality products.

4. The rationale for the Scheme is that the proposed amalgamation will lead to / enable: simplification of the corporate structure and consolidation of the India businesses of the RHIM group; establishing a comprehensive refractory product portfolio; realising business efficiencies, *inter alia*, through optimum utilisation of resources due to pooling of management, expertise, technologies and other resources of the Petitioner Companies; improved allocation of capital and optimisation of cash flows contributing to the overall growth

prospects of the combined company; creation of a larger asset base and facilitation of access to better financial resources; and enhanced shareholder value pursuant to economies of scale and business efficiencies. The proposed Scheme is in the interest of all Petitioner Companies and their respective shareholders, employees, and creditors and there is no likelihood that the interests of any stakeholders in any of the Petitioner Companies would be prejudiced as a result of the Scheme. The proposed Scheme will not impose any additional burden on the members of the Transferor Companies or the Transferee Company.

5. The Petitioner Companies have approved the said Scheme by passing the board resolutions, each dated 31 July 2018, which are annexed to the joint company scheme petition.

6. The learned counsel for the Petitioner Companies further states that the Petitioner Companies have complied with all the directions passed in the Company order for Directions and that the joint company scheme petition has been filed in consonance with the orders passed in the Company order for Directions.

7. The learned counsel for the Petitioner Companies further states that the Petitioner Companies have complied with all requirements as per the directions of this Tribunal and they have filed necessary affidavits of compliance with the Tribunal. Moreover, the Petitioner Companies through their learned counsel undertake to comply with all applicable

statutory requirements, as required under the Companies Act, 2013 and the rules made thereunder. The said undertaking is accepted.

8. The Regional Director has filed his report dated 24 June 2019 stating therein that the Tribunal may consider the observations and pass such order or orders as deemed fit and proper in the facts and circumstances of the case post considering the observations made at Sr. No. IV (a) to (f) mentioned in his report.

   In paragraphs IV (a) to (f) it is stated that:

   (a) The Petitioners under provisions of section 230(5) of the Companies Act, 2013 have to serve notices to concerned authorities which are likely to be affected by Amalgamation. Further, the approval of the scheme by this Hon'ble Tribunal may not deter such authorities to deal with any of the issues arising after giving effect to the scheme. The decision of such Authorities is binding on the Petitioner Company(s).

   (b) It is observed that the Petitioner companies have not submitted a Chairman's Report, admitted copy of the Petition, and Minutes of Order for admission of the Petition. In this regard, the Petitioner has to submit the same for the record of Regional Director.

   (c) The Hon'ble NCLT may kindly direct to the Petitioners to file an undertaking to the extent that the Scheme enclosed to the Company Application and the scheme enclosed to the

Company Petition are one & same and there is no discrepancy or deviation.

(d) *In addition to compliance of AS-14 (IND AS-103), the Petitioner Companies shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5 (IND AS-8) etc.*

(e) *Petitioner Company have to undertake to comply with section 232(3)(i) of Companies Act, 2013, where the transferor company is dissolved,, the fee, if any, paid by the transferor company on its authorised share capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation and therefore, petitioners to affirm that they comply the provisions of the section.*

(f) *As per Definition of the scheme, "Appointed Date" means 1st day of January, 2019 or such other date as may be approved by the NCLT or such competent authority as may be applicable. In this regard, it is submitted that Section 232(6) of the Companies Act, 2013 states that the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed effective from such date and not at a date subsequent to the appointed date.*

However, this aspect may be decided by the Hon'ble Tribunal taking into account its inherent powers.

9. In so far as observations made in paragraph IV(a) of the Report of the Regional Director are concerned, the Petitioner Companies have served notices to all the regulatory authorities concerned, as required under section 230(5) of the Companies Act, 2013 such as the Income Tax Authority concerned, the Regional Director, Ministry of Corporate Affairs, Western Region, Mumbai, the Registrar of Companies, Maharashtra, Mumbai, the Reserve Bank of India, the Competition Commission of India, the Official Liquidator, High Court of Bombay, BSE Limited, the National Stock Exchange of India Limited, and the Securities and Exchange Board of India. Further, the approval of the Scheme by this Tribunal will not deter such authorities to deal with any of the issues arising after giving effect to the Scheme. All issues arising out of the Scheme will be met and answered in accordance with law.

10. In so far as observations made in paragraph IV(b) of the Report of the Regional Director are concerned, the Petitioner Companies have through their learned counsel submitted a copy of the Chairman's Report together with an admitted copy of the petition and Order for admission of the petition.

11. In so far as observations made in paragraph IV(c) of the Report of the Regional Director are concerned, the Petitioner Companies

through their learned counsel have filed an undertaking stating that the Scheme enclosed to the Company Application and the Scheme enclosed to the Company Petition are one and the same and there is no discrepancy or deviation.

12. In so far as observations made in paragraph IV(d) of the Report of the Regional Director are concerned, the Transferee Company undertakes that in addition to compliance of AS–14 (IND AS–103), the Transferee Company shall pass such accounting entries which are necessary in connection with the Scheme to comply with other applicable Accounting Standards such as AS-5 (IND AS-8).

13. In so far as observations made in paragraphs IV(e) of the Report of Regional Director are concerned, the Petitioner Companies undertake to comply with provisions of Section 232(3)(i) of the Companies Act, 2013.

14. In so far as observations made in paragraph IV(f) of the Report of the Regional Director are concerned the Petitioner Companies confirm and undertake that the Appointed Date has been fixed as the 1st day of January, 2019 which is in compliance with section 232(6) of the Companies Act, 2013 and the Scheme shall be effective from such Appointed Date but shall be operative from the Effective Date.

15. The observations made by the Regional Director have been explained by the Petitioner Companies in paragraphs 9 to 14 above. The

clarifications and undertakings given by the Petitioner Companies are hereby accepted.

16. The Official Liquidator has filed his report, *inter alia*, stating therein that the affairs of the Transferor Companies have been conducted in a proper manner and that the Transferor Companies may be ordered to be dissolved.

Upon perusal of the documents, the Bench has made the following observations:-

17. Valuation Report is dated 31.07.2018 and the valuation was done by "Jain Jindal & Co.", Chartered Accountants.

18. Fairness Opinion is also dated 31.07.2018 and was given by "Key Note Corporate Services Limited", a Category-I Merchant Banker, registered with Securities and Exchange Board of India (SEBI).

19. The Valuation Report and the Fairness Opinion, both the reports are addressed to the Board of Directors of Orient Refractories Limited, the Transferee Company to its New Delhi address whereas the Registered Office of the Company is situated in Mumbai.

20. As per the Valuation Report, and in compliance of the SEBI guidelines on pricing, the average weekly high and low of the share price of the transferee Company in NSE during the two weeks preceding the relevant date was Rs.182.58 whereas the average weekly high and low price during the last twenty six weeks was Rs.169.59.

Accordingly, the highest price of Rs.182.58 was considered for share exchange ratio.

21. It is also worthwhile to quote the Order of NCLT, Mumbai Bench dated 05.09.2018 in the matter of Scheme of Arrangement (Demerger) between East West Pipeline Ltd. and Pipeline Infrastructure Pvt. Ltd. in CSA No.719/2018, wherein the Bench has dealt with the issue of "Appointed Date" and the relevant portion from the Order is reproduced/ discussed below:-

> "24. The logic behind asking appointed date at the time scheme presented before Tribunal is that, appointed date has to be conceived as date from which demerged company undertaking is deemed as transferred to resulting company with all financial implications. And it will come into effect if scheme is approved by NCLT as well as approved by all regulatory and Sectoral Authorities, or else, that undertaking will continue as part of the demerged company as before.
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> 25. To know the financials of this arrangement, the assets proposed to be transferred to the Resulting company shall be valued, so that the consideration payable for transfer of the assets can be fixed, then if any share swapping, then to decide swap ratio, like wise to decide transferability of assets or liabilities; stamp duty liability, tax (direct and indirect) liability and loss or gain of Tax benefits by valuation of. So this cut off date taken into consideration for valuation shall be the appointed date, because all the financial implications are dependent upon the cut off date and valuation thereof.

26. …….Appointed date shall be the date determining the value of the transfer of Assets and its implications, so that shareholders, creditors and all other stakeholders will be in a position to know the permutations and combinations of that arrangement, therefore, basing on which they will make up their mind how to go about the Scheme. Likewise, the Tax Authorities as well as Stamp Duty Authorities will be in a position to assess the Tax Liability as well as Stamp Duty payable over such transfer.

27. Let us assume a converse situation that valuation of the asset has been fixed on March 31, 2017, appointed date has been fixed as September 30, 2017, in the meanwhile if any material change has come in between to the asset of the company varying financials of it, what valuation will become relevant for levying stamp duty for transfer, for assessing tax implications, will it be the valuation date or appointed date opted by the company subsequent to valuation? If this is correct, what for appointed date has come into existence? Can it be conceived that appointed date has been mentioned in the statute without any purpose and reason?

28. It is simple common sense, for any financial transaction, price fixation is the determinative for going ahead with transaction. Since appointed date is the effective date for such transfer, **the valuation date shall be the appointed date, not otherwise**."

"29. As per accounting standards, acquisition date is taken into consideration for accounting treatment, in scheme that acquisition date becomes appointed date, because

> scheme will be effective from appointed date on filing NCLT approval to the scheme before RoC. ...."
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> "30. .... In view thereof, there won't be any appointed date in future, because scheme always dependent upon the valuation and for valuation of the assets having to be done before presenting scheme, it is inconceivable to visualise appointed date in future."

22. The Bench has also considered the Circular No.09/2019 dated August 21, 2019 issued by the Ministry of Corporate Affairs on the issue of appointed date wherein it is clarified that the provision of section 232(6) of the Act enables the companies in question to choose and state in the scheme an 'appointed date'. This date may be a specific calendar date or may be tied to the occurrence of an event such as grant of license by a competent authority or fulfilment of any preconditions agreed upon by the parties, or meeting any other requirement as greed upon between the parties, etc., which are relevant to the scheme. In the current Scheme of Amalgamation, a specific date, i.e. 01.01.2019 has been fixed as Appointed Date whereas as discussed above, valuation report, fairness opinion, Board Resolution of all the Petitioner Companies were dated 31.07.2018. Therefore, we are of the considered view that as clarified by the Ministry of Corporate Affairs, the Scheme is not tied to the occurrence of an event or fulfilment of any pre-conditions agreed upon by the parties, hence the appointed date should be the valuation date as discussed above.

23. In this case the Appointed Date is fixed as 01.01.2019 and the closing market price per share was Rs.239.10 and the average market price per share was Rs.234.50 on that date.

24. Valuation Report is dated 31.07.2018, the Fairness Opinion is also dated 31.07.2018 and the Board Resolution was passed by all the three Companies also on 31.07.2018 which implies that the valuation, fairness opinion, Board Resolution, all are dated 31.07.2018, i.e. all the important events have taken place on the same date, (appears to be within a gap of few hours) which raises concern.

25. Further, upon scrutiny of the shareholding and other details of both the transferor Companies, the Bench observed that both the transferor Companies are ultimately owned by RHI Magnesita N.V., Netherlands (through various Layers) and this parent Company is listed on London Stock Exchange. From the Share Exchange Ratio it is observed that a total of 4,08,57,131 shares would be issued to the Shareholders of both the Transferor Companies-I and II and the further break-up is 2,41,49,931 shares would be allotted to the shareholders of Transferor Company-I and 1,67,07,200 shares would be allotted to the shareholders of the Transferor Company-II.

26. The shares of Transferee Company is listed on both BSE and NSE. Accordingly, the value of shares to be allotted to both the Transferor Companies would be approximately Rs.745.96 crore and the further break-up for the Transferor Company-I is approximately Rs.440 crore

and balance amount of Rs.305 crore is for the shareholders of the Transferor Company-II.

27. Further, as per shareholding pattern of both the transferor Companies, it is observed that the Transferor Company-I is having only two Shareholders viz. Dutch U.S. Holding B.V. and VRD Americas B.V., Netherlands. Further, as per the shareholding pattern for Transferor No.II, VRD Americas BV, Netherlands is holding 53.72% and Individuals of Indian Promoter Family is holding 46.28%. From the Balance Sheet of the Transferor Company-II it is observed that the following four shareholders are holding more than 5% shares of the Company viz. VRD Americas BV, Netherlands holding 53.72%, Ms. R. Udaya Rekha holding 22.37%, Mr. R. Venkata Suryanarayana Raju (Director) holding 6.79%, Mr. A.V. Narsimha Raju holding 9.78%, totalling to 92.66%.

28. Both the Transferor Companies are ultimately owned by RHI Magnesita N.V. Therefore, we are of the view that the ultimate beneficiary of the Scheme is RHI Magnesita NV/ Shareholders of RHI Magnesita. From the shareholding pattern it is further observed that VRD Americas BV, Netherlands is the common shareholder of both the Transferor companies and holding significant/ majority shareholding of 14.6% and 53.72% in Transferor Company-I & II respectively. Out of the proposed allotment of 1,67,07,200 shares to the shareholders of Transfer Company-II, the VRD Americas BV,

Netherlands would get around 89,75,107 shares, Ms. R. Udaya Rekha would get around 37,37,400 shares, Mr. Venkata Suryanarayana Raju would get around 11,34,419 shares and Mr. AV Narsimha Raju would get around 16,33,964 equity shares of the Transferee Company.

29. Upon analysis of the Balance Sheet of RHI India Pvt. Ltd., the Transferor Company No.1, it is noticed that the profit for the year ended 31.03.2017 was approximately Rs.10.25 crore and Rs.40.90 crore for the year ended 31.03.2018 and Earning Per Share (EPS) is Rs.299 and Rs.1193 respectively for the same financial years.

30. In the case of RHI Clasil Pvt. Ltd., Transferor Company No. II profit for the year 31.03.2017 was Rs.10.12 crore and Rs.13.84 crore for the year ended 31.03.2018 and Earnings Per Share was Rs.5.50 and Rs.7.52 for the respective years.

31. As on the appointed date i.e. 01.01.2019 the share price of the Transferor Company on Bombay Stock Exchange, was Rs.235.45, touched a high of Rs.237.80 and a low of 231.25 and closed at Rs.231.90. If we take average of High and Low as on 01.01.2019, the share price works out to Rs.234.50 and if we consider that amount and multiply with the number of shares to be allotted by the Transferee Company the same would amount to approximately Rs.958 crore. In case of shareholders of Transferor Company-I would get shares worth approximately Rs.566.31 crore and shareholders of

Transferor Company-II would get shares worth approximately Rs.391.78 crore of Transferee Company.

32. Further, the Bench has observed that upon the share capital of Rs. 34.28 Lakhs, (Securities Premium amounting to Rs.64.93 crore) on a profit of Rs.40.90 crore as on 31.03.2018, in case of Transferor Company No.I, the allotment of shares of Transferee Company would be approximately of Rs.440 crore as on 31.07.2018 and would be approximately of Rs.566.31 crore as on the appointed date i.e. 01.01.2019 and on the share capital of Rs.18.40 crore, on a profit of Rs.13.84 crore of Transferor Company No.II the shareholders would be allotted shares worth Rs.305 crore as on 31.07.2018 and Rs.391.78 crore as on the appointed date.

33. All the three companies are ultimately held by RHI Magnesita, N.V. Netherlands.

34. In the matter of de-merger of East West Pipelines (demerged Company) and Pipeline Infrastructure Pvt. Ltd. (the resultant Company), Court-I, NCLT, Mumbai had ordered the Petitioner Company to amend the Scheme of amalgamation by deciding the appointed date as on the date on which the demerged Undertaking has been valued. As decided in the case discussed *supra*, the Bench is of the considered view that the appointed date can be the date on which the Valuation Report was prepared and the Fairness Opinion was given by the Merchant Banker i.e. 31.07.2018. Since the

Transferee Company will be allotting the shares which are listed and being regularly traded on the Stock Exchanges, on consideration, the share exchange ratio would undergo change significantly in view of the market price on which the cut-off date i.e. appointed date is considered. In the instant case, if we consider 31.07.2018 as the appointed date, the average of two weeks market price per share was Rs.182.58 as stated above. However, if we consider the market price per share as on the appointed date proposed in the Scheme i.e. 01.01.2019 the average market price is 234.50.

35. Further analysis reveals that the Transferor Company-I the shareholders who invested Rs.1000 (100 equity shares, face value of Rs.10) would be allotted shares worth Rs.12,86,093 of the Transferee Company.

36. In the case of Transferor Company-II, the shareholder who made an investment of Rs.10,000 (for 1000 equity shares of Rs.10 each) would be allotted shares worth Rs.1,65,782 of the Transferee Company.

37. Total paid-up share capital of Orient Refractories as on 31.07.2018 is 12,01,39,200 equity shares of Re.1 each, total paid-up share capital of RHI India as on 31.07.2018 is Rs.34,28,440 (3,42,844 equity shares of Rs.10 each) and in the case of RHI Clasil, the total paid-up capital is Rs.18,40,00,000 (1,84,00,000 shares of Rs.10 each).

38. Further, it is also observed that the Transferee Company would allot a maximum of 4,08,57,131 shares as per the Valuation Report which works out to 34% of the current paid-up share capital of the Transferee Company. Once the Scheme is approved and the Scheme coming into effect the total capital of the Transferee Company would increase to 16,09,96,331 shares and allotment of 4,08,57,131 shares as proposed in the Scheme would amount to 25.38% of the post allotment percentage of the shareholding by the shareholders of these two Transferor Companies.

39. Considering the above factual details, the profit earning capacity and other financials of the Transferor-I and Transferor-II Companies, the share exchange ratio as per the valuation given by the Auditor and the Fairness Opinion given by the Merchant Banker appears to be too high which results in undue advantage/ enrichment to the shareholders of both the Transferor Companies and to the shareholders of the ultimate holding Company RHI Magnesita. Therefore, we are of the considered view that the Scheme is devised/ designed majorly to benefit the Two shareholders of Transferor Company-I and few shareholders of Transferor Company-II which in turn the undue advantage ultimately flows to the shareholders/ holding Company, i.e. RHI Magnesita. In view of the above analysis, we are of the considered view that the Scheme appears to benefit only a few shareholders of Transferor Company to be unfair and unreasonable and contrary to the public policy, public shareholders of

the listed Company therefore, we deem it fit not to sanction/ approve the proposed Scheme of Amalgamation. Therefore, we do not sanction/ approve the Scheme as prayed for.

40. Petitioner Companies are directed to file a copy of this Order with the Registrar of Companies.

Sd/-	Sd/-
RAVIKUMAR DURAISAMY	**RAJASEKHAR V.K.**
Member (Technical)	**Member (Judicial)**

02.03.2020
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