



NCLAT directs NCLT to sanction Scheme of Amalgamation for issue of shares at premium, relies on Supreme Court judgment in Miheer H. Mafatlal Vs Mafatlal Industries Ltd.

Case Details:

1. Case Name: Ritemed Pharma Retail Pvt. Ltd. & Optival Health Solutions Pvt. Ltd. Vs Official Liquidator & Regional Director
2. Order passed by Justice A.I.S. Cheema (Member, Judicial) and Mr. Balvinder Singh, Member (Technical),
3. Order dated May 3, 2018.

Summary of facts and brief analysis:

1. Transferor Company and Transferee Company are private companies and both companies are incorporated under the Companies Act, 1956. Both the companies are subsidiaries of Mediplus Health Services Pvt. Ltd. The Board of Directors of transferor company and the transferee company approved the Scheme of Merger/Amalgamation and filed joint application and petition with the NCLT, Hyderabad;
2. Scheme of Amalgamation provided that Transferee Company shall, without any further act or deed, issue and allot to each member of the transferor company whose name is recorded in the register of members of the Transferor Company on the record date, equity shares in the Transferee Company in the ratio of 136 equity shares in the Transferee Company of the face value of Rs.10/- at a premium of Rs.26/- each credited as fully paid up for every 100 equity shares of Rs.10/- each fully paid up held by such member in the transferor company;
3. NCLT passed the impugned order recording disinclination to sanction the Scheme of Amalgamation, as proposed. NCLT stated that "In the absence of explicit provision available in the Companies Act, 2013 to issue shares at a premium, the Bench is of the considered view

that the scheme is not in compliance with Section 232 of the Companies Act, 2013, therefore, the Bench is not inclined to sanction the scheme of Amalgamation as proposed.";

4. On Appeal, NCLAT noted section 232(3)(i) of Companies Act, 2013. The provisions related to 'incidental, consequential and supplemental matters', which states that "Such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out: Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under Section 133.";
5. NCLT opined that the said section is applicable to all the companies and does not make a distinction whether the company is a private or public company or whether it is listed company or non-listed company. The Appellate Tribunal noted that the company which shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of premium received on those shares shall be transferred to a "securities premium account". The Appellate Tribunal observed that there is no bar that the issues of shares at a premium or otherwise than cash also be resorted to by the company;
6. NCLAT opined that "It is the prerogative of the company to issue shares at a premium or otherwise depending upon the facts and circumstances of the situation. In the present case the shares are being issued by the transferee company to the transferor company for acquiring the assets of the company. If the fair value of the assets being acquired by the transferee company is more than the face value of the shares issued for the same the company



it has no other alternative but to allot the shares at premium and the difference being carried to a 'securities premium account'. This is what precisely the company has proposed to do.”

7. NCLAT noted the Certificate as required under Section 232(3)(i) of the Companies Act, 2013 from the company's auditor and also noted the compliance of Section 133 of the Act. NCLAT perused section 52 of the Act and observed that Accounting standard have not dealt with the issues specifically and it cannot be said that there is no legal provision specified;
8. NCLAT relied on the Supreme Court judgment in Miheer H. Mafatlal Vs Mafatlal Industries Ltd

(AIR 1997 SC 506). NCLAT stated that Supreme Court has already laid down the scope and ambit of jurisdiction of the Company Court whilst approving scheme under erstwhile provisions of Sections 391-394 of Companies Act, 1956 (Presently Section 230 of Companies Act, 2013). NCLAT stated that “In view of the settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked”;

9. NCLAT allowed the appeal and directed NCLT (Hyderabad Bench) to sanction the scheme and issue further consequential directions/orders so as to ensure/enable the companies to make all other legal compliances as necessary.

