NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.352 of 2018
(Arising out of impugned order dated 11.6.2018 passed by National Company Law Tribunal, Chennai in CP/123/CAA/2018 (TCS/157/CAA/2017)

IN THE MATTER OF:

1. **Regional Director, Southern Region, MCA]**
   Shastri Bhavan, 5th Floor,
   26 Haddows Road,
   Chennai 600006

2. **Registrar of Companies,**
   Shastri Bhawan, 2nd Foor,
   26, Haddows Road,
   Chennai 600006 **...Appellants**

Vs

1. **Real Image LLP**
   No. 42, Dr. Ranga Road,
   Mylapore, Chennai.

2. **M/s Qube Cinema Technologies Pvt Ltd**
   No.42, Dr. Ranga Road,
   Mylapore, Chennai, **...Respondents**

Present: **Mr. Ripu Daman Bhardwaj, DGSC and Mr. T.P. Singh, Advocate for appellant.**
Mr. Goutham Shivshankar, Advocate for Respondent.

JUDGEMENT
(4th December, 2019)

JUSTICE JARAT KUMAR JAIN, MEMBER (JUDICIAL)

National Company Law Tribunal, Chennai vide impugned order dated 11.06.2018 allowed the company petition filed by respondents and permitted amalgamation of the Limited Liability Partnership firm into Private Limited company. Hence the appellant Regional Director Southern Region and Registrar of Companies have preferred this appeal under Section 421 of the Companies Act, 2013.

2. M/s Real Image LLP (hereinafter referred to as Transferor LLP) with M/s Qube Cinema Technologies Pvt Ltd (hereinafter referred to as transferee company) and their respective partners, shareholders and creditors moved joint company petition CP No.123/CAA/2018 under Section 230 to 232 of the Companies Act, 2013 read with Companies (Compromises, Arrangements and Amalgamation) Rules 2016 and National Company Law Tribunal Rules, 2016 before NCLT, Chennai. Transferor LLP is proposed to be amalgamated and vested with transferee company. Transferor LLP is incorporated on 4.1.2016 under the provisions of Limited Liability Partnership Act, 2008 having its registered office at 42, Dr. Ranga Road, Mylapore, Chennai. The transferee company is a private limited company incorporated on 12.1.2017 under the Companies Act, 2013 and having its registered office at 42. Dr. Ranga Road, Mylapore, Chennai. Both the incorporated bodies are engaged in the business of establishing and or acquiring Audio and Video Laboratories for Recording, Re-recording, Mixing, Editing, Computer Graphics and special effects for Film, Television Video and Radio Productions etc.

3. NCLT after considering the scheme found that all the statutory compliances have been made under Section 230 to 232 of the Companies Act, 2013 (in brief Act 2013). NCLT further found that as per Section 394(4)(b) of companies Act, 1956 (in brief Act 1956) LLP can be merged into company but there is no such provision in the Act, 2013. However, explanation of sub section (2) of Section 234 Act 2013 permits a foreign LLP to merge with an Indian company, then it would be wrong to presume that the Act, 2013 prohibits of a merger of an Indian LLP with an Indian company. Thus there does not appear any express legal bar to allow merger of an Indian LLP with

an Indian company. Therefore, NCLT applying the principal of *Casus Omissus*, by the impugned order allowed the amalgamation of Transferor LLP with transferee company.

4. Being aggrieved the appellants have filed the present appeal.

5. Issue for consideration before us that by applying the principal of *casus omissus* a Indian LLP incorporated under the LLP Act 2008 can be allowed to merge into a Indian Company incorporated under the Act, 2013.

6. Learned counsel for the appellants submits that as per Section 232(i)(a) of Act, 2013 a company can be merged with another company. Company is defined under Section 2(20) means "company" incorporated under this Act or under any previous Company Law. It is further submitted that Section 366 of Act, 2013 provides that for the purpose of Part I Chapter XXI the word company includes any partnership firm, limited liability partnership, cooperative society, society of any other business entity firm under any law for the time being in force and such company can apply for registration. It means that if Indian LLP is proposed to merge in an Indian company then firstly the LLP has to apply for registration under Section 366 of Act, 2013 and when LLP registered as a company then that company can be merged in to another Indian company. It is also submitted that Section 55 and 57 of Chapter X of LLP Act, 2008 provides for conversion from firm, private company and unlisted public company to limited liability partnership. Thus it is not correct that there is no provision for merger of Indian LLP into Indian Company in the Act, 2013.

7. On the other hand, Ld. Counsel for the respondents supports the impugned order and submitted that NCLT rightly held that when a foreign

body incorporated such a LLP can be amalgamated in Indian company then why Indian LLP cannot be permitted to merge in Indian company. To read the Act, 2013 as prohibiting amalgamation of an Indian LLP with an Indian company would be absurd and discriminatory, thus the principal *casus omissus* is applicable.

8. It is also submitted that in LLP Act and Act, 2013 the amalgamation scheme has to be sanctioned by the same authority i.e. NCLT. Hence there is no utility that LLP first convert into company then apply for merger. It is further submitted that the right to re-structure a business or corporate structure is implicit in the fundamental right to trade. Any restriction on a such right must be expressly provided by legislation. It cannot be read into statute by implication. On the contrary, statute must be liberally interpreted to facilitate the constitutional scheme of freedom trade.

9. Having heard the learned counsel for the parties we have considered the submissions.

10. It is undisputed that transferor LLP is incorporated on 04.01.2016 under the provisions of LLP Act, 2008 and the transferee company is incorporated on 12.01.2017 under the Act, 2013. Thus these corporate bodies were governed by the respective Acts and not by earlier Act, 1956.

Section 232 of Companies Act, 2013 reads as under:

> *232. Merger and amalgamation of companies.— (1) Where an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—*
>
> *(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the*

reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

(b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies,

the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply mutatis mutandis.

(2) Where an order has been made by the Tribunal under sub-section (1), merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:—
(a) the draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;
(b) confirmation that a copy of the draft scheme has been filed with the Registrar;
(c) a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;
(d) the report of the expert with regard to valuation, if any;
(e) a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.
(3) xxxx
(4) xxxx
(5) xxxx
(6) xxxx
(7) xxxx
(8) xxxx.

Chapter XXI Part I

Section 366 of the Companies Act 2013 reads as under:

***366. Companies capable of being registered**.— (1) For the purposes of this Part, the word "company" includes any partnership firm,*

limited liability partnership, cooperative society, society or any other business entity formed under any other law for the time being in force which applies for registration under this Part.

(2) With the exceptions and subject to the provisions contained in this section, any company formed, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act or of any other law for the time being in force or being otherwise duly constituted according to law, and consisting of two or more members, may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee, in such manner as may be prescribed and the registration shall not be invalid by reason only that it has taken place with a view to the company's being wound up:

Provided that—

xxxxx

11. It is apparent that as per Section 232 of Act, 2013 a company or companies can be merged or amalgamated into another company or companies. The Act, 2013 has taken care of merger of LLP into company. In this regard Section 366 of the Act, 2013 provides that for the purpose of Part I of Chapter XXI the word company includes any partnership firm, limited liability partnership, cooperative society, society or any other business entity which can apply for registration under this part. It means that under this part LLP will be treated as company and it can apply for registration and once the LLP is registered as company then the company can be merged in another company as per Section 232 of the Act, 2013.

12. Section 55 to Section 57 of Chapter X of Limited Liability Partnership Act,2008 provides conversion from firms, private company and unlisted public company into limited liability partnership

13. In such a situation it is implicitly clear that the legislature has enacted provisions in Act, 2013 for conversion from the Indian LLP into Indian

company and LLP Act 2008 provides conversion from Firm, Private company and unlisted public company into LLP.

14. Sub Section (4)(b) of Section 394 Act 1956 read as under:-

"*transferee company" does not include any company other than a company within the meaning of this Act, but transferor company includes any body corporate, whether a company within the meaning of this Act or not.*

Sub Section (2) of Section 234 of Act 2013 reads as under:-

"(2) Subject to the provisions of any other law for the time being in force, a foreign company may with the prior approval of the Reserve Bank of India, merge into a company registered under the Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may, as per the scheme to be drawn up for the purpose.

Explanation-For the purposes of sub-section (2), the expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

15. NCLT rightly held that Act 1956 provides that any body corporate can merge into a company. However Act 2013 provides that foreign company or body corporate incorporated outside India can be merged into a Indian company.

16 Now we have considered when the principal of *casius omissus* can be applied. Hon'ble Supreme Court in the case of ***Union of India Vs Rajiv Kumar (2003) 6 Supreme Court Cases 516*** held that subsidiary rules of interpretation-Casus Omissus when can be supplied by the Court. Para 23 and para 24 of the judgement is as under:-

"23. Two principles of construction-relating to casus omissus and the other in regard to reading the statute/statutory provision as a whole-appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. But, at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J. in Artemiou V. Procopiou *(All ER p. 544 I), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve hat obvious intention and produce a rational construction. (Per Lord Reid in Luke V. IRC where AC at p.577 (All ER p. 664 I) he also observed: "This is not a new problem, though our standard of drafting is such that it rarely emerges.")*

24.It is then true that,

"when the words, of a law extend not to an inconvenience rarely happening, but do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is cause omissus, and that the law intended quae frequentius accident".

"But", on the other hand,

"it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as it happened more frequently, because it happens but seldom"

A casus omissus ought not to be created by interpretation, save in some case of strong necessity. Where, however, a casus omissus does really

occur, either through the inadvertence of the legislature, or on the principle of quod enim semel aut bis existit practereunt legislatores, the rule is that the particular case, thus left unprovided for, must be disposed of according to the law as it existed before such statute-casus omissus er oblivion datus disposition juris communis relinquitur; "a casus omissus", observed Buller, J. in Jones V. Smart (ER p.967), "can in no case be supplied by a court of law, for that would be to make laws".

17. We found on reading of the provisions of Act 2013 as a whole in reference of conversion of Indian LLP into Indian company there is no ambiguity or absurdity or anomalous results which could not have been intended by the legislature. The principal of casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. As we have discussed above there is no such occasion to apply the principal of casus omissus.

18. Thus we are unable to convince with the interpretation of NCLT.

19. The legislature has enacted provision in the Companies Act, 2013 for conversion of Indian LLP into Indian Company and vice versa in the Limited Liability Partnership Act, 2008. Thus there is no question infringement of any constitutional right of the Respondent. Hence we find no substance in the arguments of Learned counsel for the respondent.

20. The impugned order is not sustainable in law hence set aside. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

New Delhi
Bm