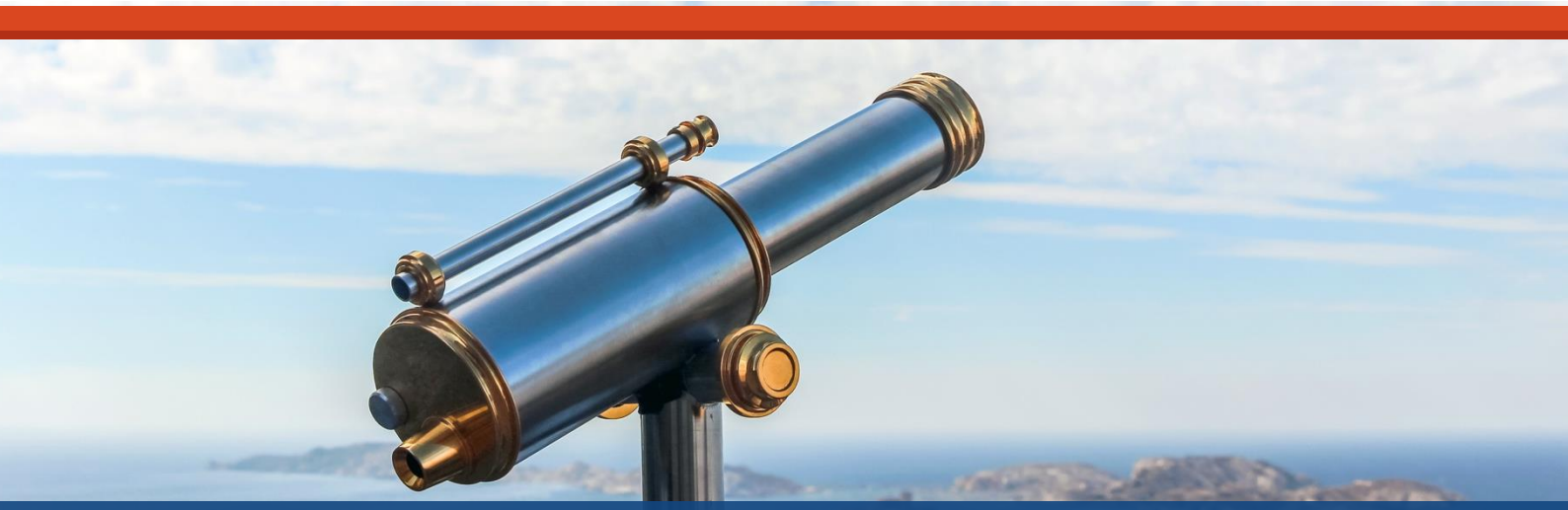

NCLAT sets aside NCLT Order allowing amalgamation of an Indian Limited Liability Partnership ('LLP') into Indian Company

The Hon'ble National Company Law Appellate Tribunal ('NCLAT'), in its recent decision[1] set aside the Order dated June 11, 2018[2] passed by the National Company Law Tribunal, Chennai Bench ('Tribunal') thereby rejecting the proposed scheme of amalgamation of an Indian LLP into an Indian Company. NCLAT allowed the appeal filed by the Regional Director, Southern Region ('RD') and the Registrar of Companies at Chennai ('ROC') against the said order of the Tribunal.

The NCLAT also ruled that on a reading of the provisions of the Companies Act, 2013, as a whole, the case of an LLP merging into a Company cannot be referred to as a clear case of '*Casus Omissus'* meaning *'omission from the law'*.

Background and Facts

- The company petition before the Tribunal pertained to a proposed Scheme of Amalgamation between Transferor LLP and Transferee Company on a going concern basis pursuant to section 230 to 232 of the Companies Act, 2013. The parties to the scheme were as follows: -
  - Real Image LLP ('Transferor LLP');
  - M/s Qube Cinema Technologies Private Limited ('Transferee Company').

- All the statutory compliances were made under section 230 to 232 of the Companies Act, 2013 and as per the reports submitted by RD, ROC and the Official Liquidator, no prosecution was filed, and no complaints were pending against the petitioner companies.

- *The important question that arose for consideration in the petition was whether an LLP can be allowed to amalgamate with a private limited company under a Scheme of Amalgamation filed before the Tribunal pursuant to section 230 to 232 of the Companies Act, 2013.*

[1] Company Appeal (AT) No. 352 of 2018 (NCLAT, 4 December 2019)
[2] Company Petition (CAA) No. 123 of 2018 (Tribunal Chennai, 11 June 2018)

- The Tribunal allowed the amalgamation of the LLP into the company considering the facts of the case and sanctioned the proposed scheme by applying the principle '*Casus Omissus',* by the said order.

- The RD and ROC aggrieved by the said order of the Tribunal preferred this appeal before NCLAT, challenging the ruling of Tribunal, contending that there is no provision for merger of an LLP into a company in the Companies Act, 2013.

Rationale of the Decision by the Tribunal

- The Tribunal held that the legislative intent behind enacting both the LLP Act, 2008 and the Companies Act, 2013, was to facilitate ease of doing business and to create a conducive business environment for companies and LLPs. For this purpose, both the Acts have provided for the amalgamation of two or more LLPs and Companies, respectively.

- The absence of a specific provision in the Companies Act, 2013, similar to section 394(4)(b) of the Companies Act, 1956, allowing merger of an Indian body corporate into a company, is a clear case of *Casus Omissus*.

- There appears to be no express legal bar to allow the merger of an Indian LLP with an Indian Company. Since the intention of the authorities was to permit merger of a foreign LLP with an Indian Company, it would be wrong to presume that the Companies Act, 2013 prohibits the merger of an Indian LLP with an Indian Company.

Contentions of Appellants

The various contentions put forth by the appellants are summarised below:

- As per section 232(1)(a) of Companies Act, 2013, a company can be merged with another company. Company is defined under 2(20) of Companies Act, 2013, meaning to include 'company' incorporated under this Act or any previous company law. Section 366 of the Companies Act, 2013, provides that for purpose of Chapter XXI, the word company includes any partnership firm, LLP, cooperative society or society of any other business entity formed and such company can apply for registration.

- If an Indian LLP is proposed to merge in an Indian company then firstly the LLP has to apply for registration under section 366 of the Companies Act, 2013 and when LLP has been registered as a company only then that company can be merged into another Indian company.

Submissions by the Respondents (Transferor LLP and the Transferee Company)

- Under section 394(4)(b) of the Companies Act, 1956, there was no bar for a transferor, in a Scheme of Amalgamation, to be a body corporate, including an LLP while a transferee company did not include any company other than a company covered under the Companies Act, 1956. The underlying rationale has been to ensure that the transferee company in a Scheme of Amalgamation is only a company and such prohibition was not

imposed on the transferor. However, section 232 of the Companies Act, 2013 does not contain the clause as stipulated under section 394(4)(b) of the Companies Act, 1956.

- Further, section 234 of the Companies Act 2013 permits the merger of a foreign company into a company registered under the Companies Act, 2013, or vice versa. The definition of 'foreign company' under the ambit of the said section includes a body corporate incorporated outside India, including a foreign LLP.

- Right to re-structure a business or corporate structure is implicit in the fundamental right to trade. Any restriction on such right is must be expressly provided for by the legislation. It cannot be read into statute by limitation. On the contrary, statute must be liberally interpreted to facilitate the constructional scheme of freedom of trade.

Observations of the NCLAT

The NCLAT allowed the appeal filed by the RD and ROC and set aside the Order of the Tribunal sanctioning the amalgamation of LLP into Company, declaring the said order to be unconvincing and unsustainable in law based on following observations:

- It is apparent that as per section 232 of Companies Act, 2013, a company or companies can be merged or amalgamated into another company or companies. The Act does not provide for merger of LLP into company.

- Further, section 366 of the Companies Act, 2013 provides that for the propose of Part I of Chapter XXI, the word 'company', includes any partnership firm, LLP, cooperative society, society or 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 only then it can be merged into another company as per section 232 of Companies Act, 2013.

- Considering the principle of '*Casus Omissus'* and its applicability, Supreme Court in the case of *Union of India* v. *Rajiv Kumar* [2003] 516 SCC 6 (SC), held that rules of interpretation cannot be supplied by Courts unless there is any clear necessity and when reason for it is found in the four corner of the law itself.

- *There is no occasion to apply the principle of 'Casus Omissus' in this case*.

- There is no question of infringement of any constitutional right of the respondents as provisions for conversion have been adequately covered under Companies Act, 2013 and LLP Act, 2008 respectively.

Dhruva Comments

- Under the Companies Act, 1956 there have been cases of mergers where the transferor entity has been an LLP or a partnership firm. The provisions of section 394(4)(b) of the Companies Act,1956 clearly supported that. However, in few instances, after Companies Act, 2013, came into effect, the concerned Tribunals have taken different positions.

- In the past, the National Company Law Tribunal ('Tribunal Mumbai Bench')[3], had also allowed a merger of an LLP into a Company in the case of Vertis Microsystems LLP with M/s Forgeahead Solutions Private Limited, although the question, whether a firm/ LLP can merge with an Indian Company, was not discussed in the said decision as the said Scheme was originally filed with the High Court under section 391-394 of the Companies Act, 1956 and was then transferred to the Tribunal Mumbai Bench when it assumed the jurisdiction over sanctioning schemes of amalgamation/ arrangement.

- In 2017, the National Company Law Tribunal ('Tribunal Ahmedabad Bench')[4]**,** considered a similar issue wherein a registered Indian partnership firm was proposed to be merged with an Indian company pursuant to a scheme of amalgamation and took a contrary view to that taken by Tribunal in the present case. The Tribunal Ahmedabad Bench held that since a registered partnership firm did not fall within the ambit of the term 'company' as per the Companies Act, 2013, it should not be permitted to be merged with another company. It further observed that if the legislative intent was to provide for a specific provision for a 'body corporate' to participate in the scheme of amalgamation the same would have been incorporated under the provisions of sections 230 to 234 of the Companies Act, 2013 and that the provisions of section 234 of the Companies Act, 2013 (which as noted above, allow such mergers in case of a foreign company) cannot be extended to a partnership firm, not being a body corporate incorporated outside India. Accordingly, Tribunal Ahmedabad Bench decided the issue under consideration in negative and rejected the scheme.

- While there are adverse views based on the literal interpretation of law, the decision of the Tribunal in the present case certainly appeared to be a pragmatic interpretation of the applicable legal provisions and widened the scope for undertaking mergers, arrangements, reconstruction, etc. amongst the companies and LLPs.

- This order from the NCLAT however gives primacy to the literal interpretation and disallows the pragmatic view of the Tribunal. It remains to be seen whether the Respondents will prefer an appeal with the Supreme Court against the order of the NCLAT.

[3] TCSP No. 190 and 191 of 2017 (Tribunal Mumbai, 23 March 2017)
[4] Company Application (CAA) No. 95 of 2017 (Tribunal Ahmedabad, 22 September 2017)

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