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IN THE HIGH COURT OF KARNATAKA, BANGALORE

DATED THIS THE 13th DAY OF JULY, 2005

BEFORE

THE HON'BLE MR. JUSTICE RAM MOHAN REDDY

COMPANY PETITION NO.198/2004

BETWEEN

VIBANK HOUSING FINANCE LTD.,
A COMPANY INCORPORATED UNDER
THE COMPANIES ACT, 1956, HAVING
ITS REGD. OFFICE AT 15-16,
VAYUDOOTH CHAMBERS, 4TH FLOOR,
TRINITY JUNCTION, M G ROAD,
BANGALORE - 560 001,
REP. BY ITS MANAGING DIRECTOR
MR. M R ADYANTHAYA. ----PETITIONER

(BY SRI UDAYA HOLLA, ADV.,)

AND

NIL ----RESPONDENT

THIS PETITION IS FILED UNDER SECTIONS 391 TO 394 OF THE COMPANIES ACT, 1956 TO SANCTION THE SCHEME OF AMALGAMATION AND ETC.,

THIS PETITION COMING ON FOR ORDERS, THIS DAY THE COURT MADE THE FOLLOWING:

ORDER

The petitioner a Company, for short the 'Transferor company' incorporated on 20th October 1995 under the Companies Act, 1956 (for short 'Act') having its registered office at No.15-16, Vayudooth Chambers, 4th Floor, Trinity Junction, M.G. Road, Bangalore-560 001 has presented this petition seeking sanction of the scheme of amalgamation Exhibit-"E".

2. The main objects of the Transferor company is to carry on business of providing long term finance to any person or persons, firm, company, corporation, society, association of persons on such terms and conditions as the company may deem fit for the purpose of construction or purchase of house/flat in India for residential purpose, amongst other objects set out in the Memorandum and Articles of association Exhibit-"B".

3. The Authorised share capital of the Transferor company is Rs.10 crores divided into 1 crore Equity shares of Rs.10/- each while the Issued, subscribed and paid up

share capital is Rs.10 crores divided into 10 lakh Equity shares of Rs.10/- each.

4. The Balance Sheet made up to 31-03-2004 Exhibit-"A" of the Transferor company duly audited by its Auditors discloses its assets and liabilities.

5. The Board of Directors of the Transferor company, in its meeting approved and adopted the scheme of amalgamation Exhibit-"E" whereunder the Transferor company is proposed to be merged with M/s Vijaya Bank, for short the 'Transferee company', a Company constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (for short 'Banking Companies Acquisition Act') having its registered office at 41/2, M.G. Road, Bangalore, subject to the sanction of the scheme of amalgamation by this Court.

6. The Transferor company is the wholly owned subsidiary of the Transferee company which holds all the shares issued by the Transferor company either in its own name or by its nominees. The Transferor Company made an

application in C.A.No.764/2004 seeking permission to convene and hold the meetings of the members and creditors for considering the scheme of amalgamation Exhibit-"E". This Court, by order dated 2-11-2004 allowed the application and granted permission sought for. The meetings of the members and creditors of the Transferor Company were held on the appointed date, time and place in compliance with the order dated 2-11-2004 of this Court. All the members and creditors who attended the meeting unanimously approved the scheme of amalgamation Exhibit-"E" as is evident from the report of the Chairman of the meeting Exhibit-"G".

7. The main objects of the Transferee company is to establish and carry on the business of a Bank amongst other objects set out in the Memorandum and Articles of Association Exhibit-"D".

8. The Authorised share capital of the Transferee company is Rs.1,500 Crore divided into 150 crore Equity shares of Rs.10/- each while the Issued, subscribed and

paid-up share capital is Rs.433,51,78,000/-. The Transferee company has produced the latest Balance Sheet Exhibit-"C" made up to 31-03-2004 duly audited by its Auditors disclosing its assets and liabilities.

9. The memorandum of association of both the Companies permit amalgamation while Section 6(1)(m) of the Banking Companies Regulation Act, 1949 (for short 'Banking Regulation Act') also permits the amalgamation. The Reserve Bank of India, by its letter dated 21-07-2004 Exhibit-"H" accorded approval to the scheme of amalgamation.

10. The petition was admitted and notices ordered on the Regional Director of Company Affairs, Chennai and the Official Liquidator. The request of the Official Liquidator for appointment of a Chartered Accountant to investigate into the affairs of the Transferor company was allowed by order dated 14-02-2005 in OLR No.61/2005 and 198/2004. The Official Liquidator, in his report dated 28-03-2005 enclosed the report Dt.10.3.2005. Sri. Anand Rao, Chartered Accountant, who after having investigated into the affairs of

the Transferor company for a period of five years preceding the accounting year 2004-05, opined that the affairs of the Transferor company have not been conducted in a manner prejudicial to the interest of its members or the public.

11. The Regional Director of Company Affairs filed a report dated 28-03-2005 stating that the Transferee company is a scheduled Bank a company, within the meaning of the said term under the Banking Companies Acquisition Act, and hence, not a transferee company under Section 394(4)(b) of the 'Act'. In addition it is stated that no separate petition is filed by the Transferee company.

12. The material on record discloses that the entire shares of the Transferor company is held by the Transferee company and its nominees as reflected in the Balance Sheets Exhibits "A" and "C". The Board of Directors of both the Companies have opined that the merger of the companies would be beneficial and profitable to operate as a single unit instead of two different units. The Transferee company is said to be a consistent profit making company. In order to

have synergy of operation and also to avoid administrative overheads, they have decided to amalgamate into one unit so that they can avail the advantage of large-scale operation. It is also said that the financial base of the amalgamated company would be considerably enhanced. Since the Transferor company is the subsidiary of the Transferee company, its holding company, it is contended that the scheme does not affect the rights of members or creditors of the Transferee company as between themselves and the Transferor company or does not involve re-organisation of the share capital of the Transferee company.

13. The material on record further discloses that the Transferor company convened and held the meeting of shareholders and creditors in accordance with Section 391 of the Act and in terms of the order dated 2-11-2004 passed by this Court in C.A.No.764/2004. The members of the Transferor company who are none other than the members of the Transferee company, who attended the meeting unanimously approved the scheme of amalgamation Exhibit-"E". The coreditors of the Transferor company who attended

the meeting, too, unanimously approved the scheme of amalgamation. The statutory requirement as contained in Section 391(2) of the Act is complied with. The Auditors' report discloses that the affairs of the Transferor company are not conducted in a manner prejudicial to the interest of the members, creditors or the public. Despite the publication of the hearing of this petition, none of the members, creditors, employees or any other person have appeared before this Court to oppose the scheme of amalgamation. The report of the Official Liquidator discloses that he has no objection for according sanction.

14. The terms of the scheme of amalgamation Exhibit-"E" indicate that, with effect from the said date, all debts, liabilities, dues and obligations of the Transferor company and any accretions or additions or deletions thereto, after the appointed date, shall without any further act or instrument or deed stand transferred or deemed to be transferred and vested in the Transferee company so as to become as and from that date, the debts, liabilities, dues and obligations of the Transferee Company. Upon the Scheme of

Amalgamation being sanctioned and becoming finally effective, no fresh shares of the of the Transferee company are to be allotted to acquire the assets and liabilities of the Transferor company while the share capital of the Transferor company stands cancelled and reduced together with the reserves. Balance in the Profit and loss account of the Transferor company is to be set off against the investments as reflected in the books of account of the Transferor company while the debt if any, to be adjusted against the reserves of the Transferee company.

15. All the employees of the Transferor company in service on the effective date, shall become the employees of the transferee company on such date without any break or interruption in service and on the terms and conditions not less favourable than those subsisting with the transferor company. No employee of the Transferor Company has appeared before the court to oppose the Scheme of Amalgamation, Exhibit-"E". Thus, the interest of the employees is taken care of.

16. On a perusal of the reply of the Regional Director for Company Affairs, the following two questions arise for decision making in this petition:

I) Whether sanction of a scheme of amalgamation of the Transferor Company, a subsidiary of the Transferee Company, a body corporate, under the Banking Companies Acquisition Act, is permissible under Section 391 to 394 of the Companies Act, 1956?

II) Whether the Transferee company, a body corporate is required to file separate petitions under Section 391 to 394 of the Act for sanction of the scheme of amalgamation?

Regarding Point No.(I):

M/s. Vijaya Bank is a Banking company as defined in the Banking Companies Regulation Act, 1949 and a body corporate under the Banking Companies Acquisition Act. The term 'Body corporate' is defined under Section 2(7) of the Act which reads thus:

"Body corporate" or "Corporation" includes a company incorporated outside India but does not include—

a) a corporation sole;

b) a co-operative society registered under any law relating to co-operative societies; and

c) any other body corporate (not being a company as defined in this Act) which the Central Government may, by notification in the Official Gazette, specify in this behalf;

The term 'body corporate' is wider than the expression 'company' and is used in several sections of the Act to denote not only a company incorporated in India, but also a foreign company. It includes a corporation formed under any special law of India or a foreign country, except as expressly excluded by the definition. It includes all public financial institutions mentioned in section 4-A as well as the nationalised banks incorporated under section 3(4) of the Banking Companies Acquisition and Transfer of Undertakings Act, 1970. However it excludes a Body corporate, which is not a company under the Act, and which is specified by the Central Government in the notification in the official gazette. In other words, it includes a body corporate other than which the Central Government may by notification in the official gazette specify. M/s Vijaya Bank squarely falls within the aforesaid definition of the term body corporate.

17. The terms 'Holding company' and subsidiary are defined in Section 4 of the Act, which reads as follows:

"4. Meaning of 'holding company' and subsidiary'- (1) For the purposes of this Act, a company shall, subject to the provisions of sub-section (3), be deemed to be a subsidiary of another if, but only if,--

(a) that other controls the composition of its Board of directors; or

(b) that other—

(i) where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;

(ii) where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital; or

(c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary."

The effect of Section 4 is that Company A is deemed to be a subsidiary of Company B if one of the following conditions are complied with:

1) Company B is both a member of Company A and controls the composition of the Board of Directors;or
2) Company B holds more than half of the Company-A's equity share capital in nominal value; or
3) Company A is a subsidiary of any subsidiary of Company B.

As a necessary concomitant, a Company is defined as a holding company of another company when other company fulfils the above conditions so as to make it a subsidiary of the first.

18. Sub-sections (1) and (3) determine, for the purpose of the Act, a company to be a subsidiary of another. Suffice it to state that under Sub-section 1(b)(ii) if a Company holds more than half of the total of the equity shares, that is the holding company of the company issuing and allotting the shares. Applying the same to the instant case the entire

equity shares issued by the Transferor company being held by the Transferee company, it could be safely concluded that the Transferor company is the subsidiary of the Transferee company which is its holding company. In view of sub-section (4), the Transferor being the subsidiary of the other company, the Transferee company is deemed to be a holding company for the purpose of the Act. Sub-section (5) provides that the expression 'Company' in the said section includes any body corporate. Thus, under this clause the term 'Company' under the Act includes any 'body corporate'.

(Emphasis supplied)

Section 394 of the Act reads thus:

"Provisions for facilitating reconstruction and amalgamation of companies:- (1) Where an application is made to the Court under Section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court-

(a) that the compromise or arrangement has been proposed for the purposes of, or in

connection with, a scheme for the reconstruction of any company or companies, 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 concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as the "transferee company");

the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provisions for all or any of the following matters:-

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be

allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the court unless the court has received a report from the Company Law Board

or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest:

Provided further that no order for the dissolution of any transferor company under Clause (iv) shall be made by the court unless the Official Liquidator has, no scrutiny of the books and papers of the company, made a report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

(2) where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Within thirty days after the making of an order under this section, every company in relation to which the order is made shall cause a

certified copy thereof to be filed with the Registrar for registration.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

(4) In this section -

(a) 'property' includes property, rights and powers of every description; and 'liabilities' includes duties of every description; and

(b) '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."

A bare reading of the said provisions in conjunction with Sections 391 to 393 in Chapter-V of the Act, leaves no room for doubt that the Legislature invested in the Court, powers of wide amplitude having regard to arbitration, re-construction, compromise and arrangement entered into between companies, for any purpose conducive to the

interest of the shareholders, without any fetter, while according sanction to the scheme.

19. In the case of sanction of a scheme of amalgamation between two companies, what is essential is a Transferor company and a Transferee company. Sub-section 4(b) of Section 394 of the Act defines Transferee company as not to include any company other than a company under the Act while the Transferor company to include any body corporate, whether a company within the meaning of the Act or not. At first blush, one gets the impression that the definition of Transferor company includes a foreign company and when read with the definition of the body corporate in Section 2(7) of the Act, the purpose of the Section is to enable the compromise between a foreign company and an Indian company, the Transferee company. Nevertheless the term Transferee company includes any company within the meaning of the Act. A careful examination of the definition of body corporate under sub-section (7) of Section 2, reveals that, it is wider than the term 'company' which takes into its fold any foreign company, a corporate constituted under any

special law of India and the body corporate, a company defined under the Act, while excluding a Corporation or a Co-operative Society. M/s. Vijaya Bank, a body corporate constituted under the Banking Companies Acquisition Act is the holding company for the purposes of this Act as defined in Section 4 of the Act, in respect of the petitioner-company, the subsidiary company. Hence, it is not difficult to hold that Vijaya Bank, though a body corporate is a company for the purpose of the Act. If that be so, then Vijaya Bank is the Transferee company for the purpose of Section 394 of the Act. (emphasis supplied)

20. The learned Senior counsel Sri. Udaya Holla would make reference to the decision of the High Court of Andhra Pradesh in the case of **Andhra Bank Housing Finance Limited** [1] (SEBI and Corporate Laws-Reports), which, too, was a case of a scheduled Bank, a body corporate and a company under the Banking Companies Acquisition Act, a Transferee company seeking to take over its subsidiary M/s. Andhra Bank Housing Finance Limited,

[1] re(AP) (2003)47 SCL 513

the Transferor company which was the petitioner in the Company petition. In identical circumstances, the Andhra Pradesh High Court held that, under Section 4(5) of the Act, the expression 'Company' includes a body corporate and therefore, the Bank which is a body corporate and a holding company fell within the expression 'Company' for the purpose of the Act. Hence, Point No.(I) is answered in the affirmative.

Regarding Point No.(II):

Sri. Udaya Holla, learned Senior Counsel contends that M/s. Vijaya Bank, the Transferee Company being a 100% holding company wherein all the shareholders or the shareholders of its subsidiary the Transferor company having consented to the scheme of amalgamation, the contract between two companies, there is no need for a separate petition to seek the imprimatur of this Court to the scheme of amalgamation. Amplifying the said contention, Sri. Udaya Holla points out to the report Exhibit 'G' of the Chairman of the meeting of the shareholders of the

Transferor company, none other than the members of the transferee company convened to consider the scheme of amalgamation pursuant to the directions of this Court in C.A.No.764/2004 whence all the members who attended the meeting unanimously approved the scheme, and agreed that upon the scheme becoming effective, the share capital of the Transferor company would stand automatically cancelled and no shares in the Transferee company would be allotted to them. Further that in terms of the scheme, the creditors of the Transferor company would not be affected since the Transferee company is a consistent profit making company having an excess of assets over liabilities to the extent of Rs.1589.19 Crores while the Transferor company has an excess of assets over liabilities to the extent of Rs.18.72 Crores. Sri. Holla relies upon the decision of the Bombay High Court in the case of **Mahaamba Investments Ltd. Vs. IDI Limited**[2] while at the same time, seeking to distinguish on facts the decision of this Court in the case of **Kirloskar Electric Company Limited**[3].

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[2]2001 Vol.105 Company cases Pg.16
[3]2003 Vol.113 Company cases Pg.670

21. The factual matrix noticed supra demonstrates that the petitioner the Transferor company is sought to be merged with M/s. Vijaya Bank, the Transferee company. That the Transferor company is a subsidiary of the Transferee company, the Holding Company by now is well established. Clause 11 of the scheme of amalgamation Exhibit-"E" provides that on the scheme becoming effecting, the said share capital of the Transferor company automatically stands cancelled and no shares will be allotted to any of the shareholders of the Transferor company as the Transferee company holds all the shares issued by the Transferor company. The scheme is not likely to affect the interest of the creditors of the Transferor company in view of the financial position of the Transferee company. The scheme Exhibit-"E" does not involve re-organisation of the share capital of the Transferee company.

22. Keeping in mind the established facts, I proceed to examine the decision of this Court in Kirloskar's case supra. Certain essential facts must be first noticed. M/s Kirloskar Electric Company filed a petition under Section 391 to 394 of

the Act seeking sanction of the scheme of arrangement whereunder some of the divisions/undertakings of the petitioner Company were sought to be hived off and transferred in favour of K.T. Switch Gear Private Limited and M/s. Best Trading Agencies Limited, which Transferee companies did not file petitions before the Court. However, on the objections taken by the Regional Director of Company Affairs, the said two Transferee companies sought to come on record by filing applications under Rule 9 of the Company Court Rules, 1959. In addition, secured creditors as well as the employees association objected to the sanction of the scheme of arrangement. This Court, having taken note of the material terms of the scheme, held that prima facie the real purpose was to transfer primary and valuable assets of the company which included the entire movable properties of the company to the Transferee companies which are said to be paper companies without paying the stamp duty and that it was not in public interest. Having found that the petitioner-company therein had followed the formalities, the learned Judge proceeded to answer the question as to

whether a similar requirement is necessary qua the shareholders of the Transferee company. Having thoroughly scanned and examined the scope and object of Sections 391 to 394 of the Act, His Lordship H.L. Dattu was of the view that the application under Sub-sections (ii) and (iii) of Clause (b) of Section 394 of the Act, referable to the Transferee companies, were required to petition the company by making an application under Section 391 of the Act and thereafter a petition under Section 394. The observations, in the very words of His lordship is thus:

> "In view of the above, it can safely be said that both the transferor and transferee company should make either a joint petition or separate petition as envisaged under section 394 of the Companies Act. Sub-clause (v) of the section is equally applicable to the transferor and the transferee company, for it cannot be the position that it is only the shareholders of the transferor company, who can dissent. The general powers contained in clause (vi) may require application both in the case of transferor company and the transferee company. If an arrangement is

sanctioned and directions are given under clauses (l) and (ii) of section 394 of the Act, on a petition filed by the transferor company, then the orders so made by the court may not bind the transferee company, its members and creditors and the same would lead to incongruous situation. In my view, the various sub-clauses of section 394 of the Act, confirm the view that both the transferor and the transferee company should make an application under sections 391 to 394 of the Act before the scheme of arrangement is sanctioned. Therefore, mere filing of application under rule 9 of the Companies (Court) Rules by the transferee companies would not satisfy the requirement under sections 391 to 394 of the Act. Therefore, in my opinion, each of the companies for the scheme of arrangement must comply with the requirements of section 391(1) of the Act by obtaining directions, inter alia for holding the meeting of the shareholders and creditors of the companies.

To sum up, this petition is only by the transferor company and the prayer made in the petition is to sanction the scheme of arrangement so as to be binding on all members,

secured creditors, unsecured creditors of the petitioner-company, as well as on the petitioner-company and that by true construction of sections 391 to 394 of the Companies Act, the transferee company should also join in this petition and there should be meeting of the shareholders of the transferee company after obtaining directions from this Court for convening the meeting as well as approving the scheme of arrangement. Since the assets and liabilities of the petitioner-company will be transferred to the transferee companies under the scheme of arrangement, the shareholding and other rights of the transferee companies would be affected and it is going to change the capital structure of the transferee companies."

23. The question as to whether a joint petition or a separate petition as envisaged under Section 394 of the Act is required to be filed by both the Transferor and Transferee companies fell for consideration in the case of **Electro Carbon Private Limited**[4] wherein a learned Single Judge of

[4] re(KAR) 1979 Vol.19 Pg.825

this Court held that a joint petition is impermissible and that only separate petitions are required to be filed. It appears that this judgment was not brought to the notice of His lordship H.L. Dattu, J., and therefore, His Lordship held that it could be either a joint petition or a separate petition. Of course this is only noticed as it may have no bearing on the conclusions in this petition.

24. There is considerable force in the submission of the learned Senior counsel that the judgement in Kirloskar's is distinguishable on facts, since that was not a case of amalgamation of a subsidiary company with its holding company. The holding Company being the holder of 100% of shares of its subsidiary company, in the meeting of the shareholders of the Transferor company convened as directed by this Court under Section 391 of the Act, the very same shareholders of the Transferee company having participated in the said meeting and approved the scheme of amalgamation, it cannot be said that the decision cannot bind the Transferee company, its members and creditors. The Board of Directors of the Transferee company in the

meeting held approved and adopted the scheme of amalgamation Exhibit-"E". The Reserve Bank of India permitted the Transferee company to enter into a contract to take over its subsidiary. The scheme of transfer does not affect the rights of the members or creditors of the Transferee company as between themselves and the company. No new shares are issued, there being no reorganisation of the share capital of the Transferor company. In these circumstances, I am of the considered opinion, that there is no need for the Transferee company to file an application and a petition under Section 391 to 394 of the Act.

25. For the reasons stated supra, the petitioner has made out a case for according sanction of this Court to the scheme of amalgamation Exhibit-"E". Hence, the following order:

i) The scheme of amalgamation, Exhibit-"E", proposed by the Transferor Company is sanctioned and is binding on the

Transferor Company, their shareholders and creditors;

ii) The Transferor Company shall stand dissolved without there being an order of winding up.

(iii) Office is directed to draw up a decree in Form No.42.

(iv) The Transferor Company is directed to serve a copy of this order on the Registrar of Companies in Karnataka within 30 days.

Sd/-
JUDGE

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