

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P. No. 225/BB/17
Under Section 66 of Companies Act, 2013
Read with Rule 6 of the NCLT (Procedure for Reduction
of Share Capital of the Company) Rules, 2016

**IN THE MATTER OF
GOLDEN TREE HOTELS PRIVATE LIMITED**

Order delivered on: 30th August, 2018

GOLDEN TREE HOTELS PRIVATE LIMITED
'Vantage point', #945,
Opp. Ramkumar Mills,
4th Block, Rajajinagar,
Bangalore-560010

...Petitioner

Coram: Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
Hon'ble Shri Ashok Kumar Mishra, Member (Technical)

For the Petitioner: Shri. Pradeep B. Kulkarni,
Practising Company Secretary

Per: Hon'ble Shri Ashok Kumar Mishra, Member (Technical)

Heard on: 25.10.2017, 14.12.2017, 11.01.2018, 29.01.2018, 12.02.2018, 19.03.2018,
09.04.2018, 25.04.2018, 28.05.2018, 25.06.2018, and 17.07.2018

ORDER

1. This Company Application has been filed on behalf of the Petitioner Company under Section 66 of the Companies Act, 2013 read with National Company Law Tribunal (Procedure for Reduction Share Capital of the Company) Rules, 2016 for the purpose of confirmation of reduction of its share capital in pursuance of the Special Resolution dated 20th September, 2017 passed by the Petitioner Company.



2. The averments made in the Company Petition are briefly described hereunder:-
- A. The Petitioner Company seeks an order for reduction of its share capital as resolved by the Special Resolution dated 20th September, 2017.
- B. It is further averred in the Petition that the Petitioner Company was incorporated on 27th February, 2008 under the name and style of “**Golden Tree Hotels Private Limited**” vide Corporate Identity No. **U55101KA2008PTC045418** with the Registrar of Companies, Karnataka. The Registered office of the Petitioner Company is situated at ‘Vantage point’, #945, Opp. Ramkumar Mills, 4th Block, Rajajinagar, Bangalore-560010.
- C. The main objects of the Petitioner Company are to inter alia run, own, set up, establish, maintain, administer, manager take on lease or otherwise carrying on the business of Hotels; to carry on the business of Travel Agents, Tour Operators, Taxi Operators, Caterers; to carry on the business consultants, advisors in all kinds and branches Hotel Management, Travel Management, Fashion technology and allied areas, etc. It is also averred that, at present the Petitioner Company is not carrying on any business activities. The copies of Memorandum and Articles of Association of the Petitioner Company are shown as **Annexure-A and B** respectively.
- D. The latest authorized share capital of Petitioner Company is Rs.5,00,00,000/- divided into 50,00,000 Equity Shares of Rs.10/- each. The issued, subscribed and paid up share capital is Rs.4,81,00,000/- divided into 48,10,000 Equity Shares of Rs.10/- each fully paid up. The Audited financial statement including Auditors Report as on 31st March, 2017 is marked as **Annexure –C**.
- E. It is further averred that, the financial position of the company as on 31st March 2017 is as under:

Particulars	As on 31/03/2017 (in Rupees)	As on 31/03/2016 (in Rupees)
Revenue from Operations	-	-
Other Income	12,97,215	9,66,000
Total Income	12,97,215	9,66,000
Total Expenses	4,10,352	4,26,473
Profit/Loss before Tax	8,86,863	5,39,521
Less : Current Tax	2,66,539	1,46,123
Deferred Tax	-	(-)980
Profit/Loss after Tax	2,66,539	3,94,378

- F. The Petitioner Company submits that the company proposes to reduce its paid-up share capital from Rs. 4,81,00,000/- to Rs.5,13,000/- by cancelling 47,58,700 Equity shares of Rs.10/- each which has been lost or is unrepresented by available assets and adjusting the same against the accumulated losses. It is further averred that, out of total reduction of Rs 4,75,87,000/- divided into 47,58,700 Equity Shares of Rs 10/- each,
- a. Rs 2,48,00,000/- is proposed to be cancelled which is lost or is unrepresented by available assets and;
 - b. Rs 2,27,87,000/- is proposed to be paid off which is in excess of the wants of the company.
 - c. The details reduction of share capital shareholder wise is produced as **Annexure-D**.
- G. It is further averred that, the company has accumulated losses of Rs 2,48,60,274/- upto 31st March 2017, out of which Rs 2,48,00,000/- is proposed to be reduced and nominal loss of Rs 60,274/- will be left over. The company has not started its operations since inception and in-spite of various steps being taken by the Management; it has not been able to start the business as mentioned by the company in its objects clause of Memorandum of Association till date. Hence, the company is of the opinion that the existing paid up capital of the company is in excess of the wants of the company and wish to repay the part of the capital to the existing shareholders in their proportion of shareholding in the company after wiping out the aforementioned losses of the company.
- H. The Board of Directors of the Petitioner Company have approved the proposed reduction of share capital at the Meeting on 3rd August, 2017 subject to the passing of resolution by the Shareholders. The Copy of the resolution passed by the Board of Directors is shown as **Annexure-L**. The Shareholders of the Company have by special resolution approved the proposed reduction of share capital at the Annual General Meeting held on 20th September, 2017. The Copy of the special resolution passed by the Shareholders of the Company is shown as **Annexure-M**.
- I. It is further averred that, 8 (eight) members out of 9 (nine) members were present at the meeting representing 40,58,600 equity shares at such meeting; all the 8(eight)

members voted in favour of the resolution for reduction of share capital representing 40,58,600 equity shares at such meeting and no members voted against the said resolution.

- J. It is further averred that, the reduction of share capital does not involve extinction or reduction of any liability in respect of unpaid share capital as all the issued, subscribed and paid up shares are fully paid up. However, the reduction of share capital involves the payment to the shareholder(s) of paid-up equity share capital and cancellation of paid up share capital which is lost or is un-presented by available assets.
- K. The Statutory Auditors of the Petitioner Company have verified the Accounting Treatment stated in the scheme and has given a Certificate dated 17th October 2017 stating that the Accounting Treatment for reduction is in conformity with Accounting Standard under Section 133 of the Act read with Rule 7 of the Companies (Account) Rules, 2014. The copy of the certificate of Chartered Accountant is shown as **Annexure-J**. It is further averred that, the Petitioner Company has no creditors as on date as certified by the auditor. Copy of the certificate from the auditor is affixed as **Annexure-G**. The Company is not in arrears of the repayment of deposits or interest thereon as on date and the declaration given by the Director of the Company is shown as **Annexure-G, H and J** respectively.
3. This Tribunal vide order dated 12th February 2018 has directed to issue notices to the creditors and also to the Regional Director and Registrar of Companies and also directed to have an advertisement be published in “**The Hindu**” (Bangalore Edition) in English Language and Kannada Daily “**Vijaya Karnataka**” (Bangalore Edition) Newspapers stating that the next date of hearing of the present petition was on 19th March 2018.
4. In pursuance to this, the Practicing Company Secretary for the Petitioner Company has filed compliance Affidavit dated 19th February 2018 of the Director of the company stating that:
- i. the company has no creditors as on 15th February 2018.
 - ii. the company is not regulated by the Reserve Bank of India, the Securities and Exchange Board, Stock Exchanges, the competition Commission of India established under sub-section 91) of Section 7 of the Competition Act, 2002 and any sectoral regulator or authority and they are not affected in any way

by the proposed reduction of capital of the company under section 66 of the companies Act, 2013.

- iii. Further filed Copies of publication in the news paper “**The Hindu**” (Bangalore Edition) in English Language and Kannada Daily “**Vijaya Karnataka**” (Bangalore Edition) Newspapers dated 15th February 2018 and the same is produced as **Annexure-D** to the Affidavit.
5. The Registrar of Companies, Karnataka has filed Affidavit dated 23rd March 2018 on behalf of the Regional Director, Ministry of Corporate Affairs, South-East Region, Hyderabad stating that, the Petition filed by the Petitioner Company has been examined and the Directorate has no objection.
 6. Further the Practicing Company Secretary for Petitioner Company has filed Memo dated 6th January 2018 of the Authorised Signatory in furnishing the response to the observations made by the Tribunal on 14th December 2017 and stated as follows:
 - a) The company is not having any long term liabilities as on the date of this Memo.
 - b) The current liabilities are only in the form of short term provisions about Rs 3,28,343/- out of which Rs 51,804/- is payable as Audit Fees, Rs 2,66,539/- is provision for Tax and Rs 10,000/- is professional fee payable.
 - c) The company has advanced an amount of Rs 5,30,00,000/- to Sumangala Properties, a Partnership Firm and all the partners of that firm are the shareholders of the company. Such amount was advanced for their business operations. Out of the above advance balance as on 31st March 2017 is Rs 2,27,87,729/-. In case the reduction of capital is approved by the Hon’ble Tribunal the said loan (which is recoverable on demand) will be recovered from Sumangala Properties for the purpose of payment to shareholders under this scheme for reduction of capital.

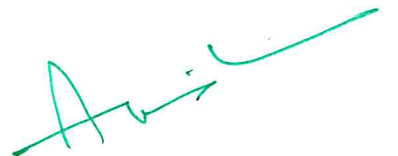
The amount advanced to Sumangala Properties is bearing current interest rate at 6% per annum and the company has not entered into any agreement in this regard.
 - d) There have been no show cause notices issued by any government Authority to the company as on 31st March 2017. The Statutory Auditor has also confirmed

that this sentence has been generically added to the Notes to Accounts and there is no specific show cause notice that has been referred to.

7. Further the Practicing Company Secretary for Petitioner Company has filed Memo dated 23rd January 2018 along with the letter of clarification given by the Statutory Auditors of the Company confirming that the company has not received any show cause notice during the financial year 2016-17 and no contingent liabilities are provided.
8. The Practicing Company Secretary for Petitioner Company has filed Memo on 08.05.2018 along with copies of “**The Hindu**” (Bangalore Edition) in English Language and Kannada Daily “**Vijaya Karnataka**” (Bangalore Edition) Newspapers dated 5th May 2018 stating that the next date of hearing of the present petition was on 28th May 2018.
9. The Practicing Company Secretary for Petitioner Company has filed Memo on 04.06.2018 along with the Affidavit of the Director dated 30th May 2018 stating that the Company has not received any objection/representation from any person.
10. We have seen the opinion given by the by the Registrar of Companies, Karnataka on behalf of the Regional Director, South East Region, Hyderabad in his report dated 23rd March 2018 and also and after seeing Articles of Association of the Petitioner Company, as it does not contain any specific clause in this regard. The Company has adopted Table-A as contained in first schedule of the companies Act, 1956 which empowers the Company to reduce its Share Capital. It is observed that objections have not been received from Creditors, if any and necessary measures to safeguard creditors, if any have been taken. The Practicing Company Secretary for Petitioner Company has been heard and the reports of Regional Director & the Registrar of Companies, Karnataka and the explanation given including certificate issued by Chartered Accountant have been considered.
11. It is observed that the as per the disclosures made in Statement on significant accounting policies for the year that ended on 31st March 2017, all the shareholders of the Company are related parties to all the Directors of the Company. The issued, subscribed and paid up share capital of the Company is Rs.4,81,00,000/- (Rupees Four Crores Eighty One Lakhs only) divided into 48,10,000 Equity Shares of Rs.10/- each fully paid up and the cash and cash equivalents currently available with the Company is just Rs.2,42,780/- (Rupees Two Crores Forty Two Thousand Seven Hundred and Eighty only). The authorised signatories of the Company in its Memo dated 6th January 2018 have

submitted that a loan of Rs 5,30,00,000/- (Rupees Five Crores Thirty Lakhs only) has been given by the Company to Sumangala Properties, a Partnership Firm wherein the current interest rate is at 6% per annum and the company has not entered into any agreement in this regard. Further it has been submitted that all the partners of that firm are the shareholders of the company, thus making the said loan a related party transaction as per section 188 of the Companies Act, 2013. It is further pertinent to note that no documents regarding the loan have been produced. The date and year of the sanction of the loan, the disbursement of instalments, terms and conditions thereof are not known. In the absence of the Board Resolution, the audit committee report, authorising the loan, there is nothing to say that the provisions of section 186 of the Companies Act, 2013 have been complied with.

12. It is further pertinent to note that as per the Special Board Resolution dated 20th September 2017, the amount which is in excess of the wants of the Company and shall be paid off to the shareholders is Rs. 2,27,87,000/- (Rupees Two Crores Twenty Seven Lakhs Eighty Seven Thousand only). As per the Memo dated 06th January 2018, the balance amount yet to be paid from the loan given to Sumangala Properties as on 31st March 2017 is Rs 2,27,87,729/- (Rupees Two Crores Twenty Seven Lakhs Eighty Seven Thousand Seven Hundred and Twenty Nine only), which is almost equivalent to the amount sought to be paid off to the shareholders for being in excess of the wants of the Company. The said Memo dated 06th January 2018 also states that the "said loan (which is recoverable on demand) will be recovered from Sumangala Properties for the purpose of payment to shareholders under this scheme for reduction of capital".
13. The fact that there is no mention in the Special Board Resolution dated 20th September 2017 of the said loan and its ramifications on the amount which is in excess of the wants of the Company which is to be allegedly paid off to the shareholders, indicates that the entire transaction is highly circumspect. The details of partners of the firm have not been produced before us and are hence, not known. In the said circumstances, there exists a possibility of mischief being perpetrated on the shareholders or on the Company, if not both.
14. In *Re Panruti Industrial Co. Private Ltd*, AIR 1960 Mad 537, it was held that the Court's power to sanction any reduction is to be determined by whether such reduction is fair and equitable. It held,



“10. The jurisdiction to confirm a reduction of capital is discretionary, and allows the Court to impose terms and conditions, as for instance a condition that the articles shall be so altered that the shares reduced in amount shall also be reduced in voting power: Re Pictuary [(1892) 3 CH 125]. The Court may, therefore, either confirm the reduction with or without [Re James Colmar (1897) 1 Ch 524], conditions or decline to confirm it. It is not necessarily confined to seeing that the creditors are properly protected, but may take into account whether the reduction would work injustice between the different classes of shareholders, and although it may not fall within its function to impose conditions which amount to an alteration of the scheme, yet if the such an alteration appears requisite, it may refuse to confirm the reduction, leaving the company to resolve on a reduction in altered form if it thinks fit. Re Barrow Hoemotite Steel Co. [(1900) 2 Ch 846; affirmed in (1901) 2 Ch 746].”

15. In *Re Reckitt Benckiser (India) Ltd.* [122 (2005) DLT 612], while distilling the principles governing the reduction of capital through various judgments, it has been held that,

21. The principles, which can be distilled from the aforesaid judicial dicta, are summarised as under:

(i)[...]

(ii) [...]

(iii) [...]

(iv) [...]

(v) “When the matter comes to the Court, before confirming the proposed reduction the Court has to be satisfied that (i) there is no unfair or inequitable transaction and (ii) all the creditors entitled to object to the reduction have either consented or been paid or secured.”

16. In *Indian National press (Indore) Ltd., In re* (1989) 66 Com Cases 387 (MP), it has been held as follows:

“21. The company has the right to determine the extent, the mode and incidence of the reduction of its capital. But the court, before it proceeds to confirm the reduction of capital, must see that the interests of the minority and that of the creditors are adequately protected and there is no unfairness to it,

even though it is a domestic matter of the company. The power of confirming or refusing to confirm the special resolution of a company to reduce its capital is conferred on the court in order to enable it to protect the interest of person who dissented or even of persons who did not appear, except on the argument and hearing of the petitioner.”

17. In *Sangramsinh P. Gaekwad and Ors. vs. Shantadevi P. Gaekwad (Dead) through LRs. and Others* [(2005)11SCC314], it has been held that,

“69. This Court therein also applied the bona fide test of the Director and for the benefit of the company as a whole. In that case, the directors assigned reasons which were tested from three angles view, viz., (i) whether the directors acted in the interest of the company; (ii), whether they acted on a wrong principle; and, (iii) whether they acted with an oblique motive or for a collateral purpose.”

“79. The law which emerges from the discussions made hereinbefore is that the directors do not have any fiduciary duty to advice shareholders as to when and in what manner they should enter with the transactions with the company including acceptance of offer of additional shares. Such a fiduciary duty would arise inter alia in exceptional situations when the directors take upon themselves the task of advising the shareholders who may be his family members or when a transaction of purchase or sale is entered into by and between the director and the shareholders wherein the former taking undue benefit or having ill or improper or ulterior motive or malafide act solely to make pecuniary benefit and gain for himself and to the detriment of such shareholders.”

18. After carefully going through the facts and circumstances of the case, it appears as though the reduction of shares is sought for purposes of disguising a related party transaction and to evade the provisions of the Companies Act, 2013. The lack of disclosure regarding the loan transactions, details of partners of the firm, and adjustment of the amount which is in excess of the wants of the Company which is supposed to be paid off to the shareholders, points to serious lapses by the Directors and other officers of the Company who are in a fiduciary position vis-à-vis the Company. This Tribunal is vested with the power to confirm or to partially confirm the Special Board Resolution if

it is satisfied that there is no unfair or inequitable transaction, and that the interests of the minority shareholders and the creditors are protected. Allowing the reduction of shares to the entire extent as sought for, may result in inequitable situations, not in the least owing to non-compliance of sections 186 and 188 of the Companies Act, 2013. Hence, CP No. 225/BB/2017 is partly allowed to the extent of capital losses of Rs.2,48,00,000/- (Rupees Two Crore Forty Eight Lakhs only) be adjusted against the accumulated losses, which has been lost or is unrepresented by available assets.

THIS TRIBUNAL DO ORDER:

- (1) That the reduction of the share capital of **GOLDEN TREE HOTELS PRIVATE LIMITED** resolved on and effected by the special resolution passed at a general meeting of the said company held on the 20th September, 2017, which resolution was in the words and figures following, viz..

The present paid-up value of Rs 4,81,00,000/- (Rupees Four Crore Eighty One Lakh only) divided into 48,10,000 (Forty Eight Lakh Ten Thousand) shares of Rs 10/- (Rupees Ten) each be and is hereby reduced to Rs. 2,33,00,000/- (Rupees Two Crores Thirty Three Lakh only) divided into 23,30,000 (Twenty Three Lakh Thirty Thousand) Equity Shares of Rs 10/- (Rupees Ten) proportionately, from each of the existing shareholders' share capital in the company, by cancelling the paid share capital to the extent of Rs 2,48,00,000/- (Rupees Two Crore Forty Eight Lakhs only) Equity Shares of Rs 10/- (Rupees Ten) be adjusted against the accumulated losses, which has been lost or is unrepresented by available assets.

be and the same is hereby **CONFIRMED**.

- (2) The certified copy of this Order should be delivered to the Registrar of Companies within thirty days of receipt of the Order.
- (3) The Notice of Reduction of paid-up Equity- Share Capital shall be published by the Registrar of Companies, Karnataka, in two newspapers namely i.e. "**The Hindu**" (Bangalore Edition) in English Language and Kannada Daily "**Vijaya Karnataka**" (Bangalore Edition) both having circulation in Bangalore within 30 days of registration.

FORM OF MINUTE

“The paid up capital of **GOLDEN TREE HOTELS PRIVATE LIMITED** is henceforth reduced from Rs 4,81,00,000/- (Rupees Four Crore Eighty One Lakh only) divided into 48,10,000 (Forty Eight Lakh Ten Thousand) shares of Rs 10/- (Rupees Ten) each to to Rs. 2,33,00,000/- (Rupees Two Crores Thirty Three Lakh only) divided into 23,30,000 (Twenty Three Lakh Thirty Thousand) Equity Shares of Rs 10/- (Rupees Ten) each”.

- (4) If at any point of time, any creditors oppose the scheme, they are free to approach the Tribunal for settling their dues, if the company fails to settle their dues as per terms and conditions of the contract/agreement with the company. Any person shall be at liberty to apply the Tribunal in the above matter for any directions that may be necessary.


(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL


(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

pv.