

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH

NEW DELHI

Present: SHRI R.VARADHARAJAN, MEMBER (JUDICIAL)

CAA-63 (PB)/2017

CONNECTED WITH

CA (CAA).13/PB/2017

IN THE MATTER OF SECTIONS 230-232 OF THE COMPANIES ACT, 2013

AND

IN THE MATTER OF SCHEME OF ARRANGEMENT

BETWEEN

**FAIRAIR ENGINEERS PRIVATE LIMITED**

Having its registered office at:

816, Devika Towers-6, Nehru Place,  
New Delhi-110019

....Petitioner Company-1/Demerged Company

AND

**FAIRAIR ENGINEERS (MUMBAI) PRIVATE LIMITED**

Having its registered office at:

816, Devika Towers-6, Nehru Place,  
New Delhi-110019

....Petitioner Company-1/Resulting Company

**ADVOCATE FOR THE PETITIONERS: Mr. Kunal Tandon, Advocate**

**FOR REGIONAL DIRECTOR,(NR), MCA: Ms. Sonam Sharma, Company Secretary**



Order Delivered on: 25<sup>th</sup> August, 2017

ORDER

1. The above Company Petition is filed by the Petitioner Companies above named and has come up finally before us on 6<sup>th</sup> July, 2017 for the purpose of the approval of the scheme of arrangement, as contemplated between the companies and its shareholders by way of demerger of "Mumbai Business" of the Demerged Company on a going concern basis and vesting of the same in the Resulting Company. A perusal of the petition discloses that initially the application seeking the directions for convening the meeting of equity shareholders, secured and unsecured creditors of the Petitioner Companies for dispensation were filed before this Tribunal in CA( CAA) 13/ PB/ 2017. The Tribunal vide its order dated 20.03.2017 was pleased to dispense with the requirement of convening of the meetings of the equity shareholders, unsecured creditors of the Petitioner Companies and secured creditor of the Demerged Company , in view of consents having been obtained and produced before it. However, in relation to the Secured Creditor of the Resulting Company, it was represented that there was none, therefore the necessity of convening of the meetings did not arise.



2. Under the circumstances, the Petitioners have filed their joint petitions for sanction of the Scheme of Arrangement before this Tribunal under the present provisions, subsequent to the order of dispensation of the meeting ordered by this Tribunal on 20.03.2017.
  
3. The Tribunal in the Second Motion petition before it in CAA 63 (PB)/2017 moved by the Petitioners under Sections 230-232 Companies Act, 2013 read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 in connection with the Scheme of Arrangement vide order dated 12.04.2017 has inter-alia, given directions for issuance of notice to the Registrar of Companies, Regional Director and Income Tax Department. The Petitioners herein were also directed to publish the notice of hearing in the newspapers "Business Standard" in English and 'Jansatta' (Hindi) both Delhi edition. The Petitioners vide affidavit dated 16<sup>th</sup> May, 2017 have stated that it had effected paper publication on 27.04.2017 in 'Business Standard' and 'Jansatta' as directed by this Tribunal. Further, it is also represented that notices had also been served on the statutory authorities as mandated including the Income Tax Department on 18.04.2017.



4. We have heard learned Counsel for the Petitioner as well as the representative of Regional Director, Northern Region, Ministry of Corporate Affairs. The Regional director vide affidavit dated 26<sup>th</sup> May, 2017 has made certain objections in para 4 and 5 of the affidavit stating that "as per clause 5.2 i.e. upon coming into effect of this scheme and in consideration for the demerger and transfer of the Demerged Unit, including the transfer and vesting thereof in the Resulting Company pursuant to Part II of the scheme, the Resulting Company shall, without any further act or deed and without any further payment, issue and allot equity shares credited as fully paid, to the "Eligible Shareholders' of the Demerged Company holding not less than three fourth in value of the shares of the Demerged Company on a record date. Further, clause 5.2 of the scheme defines the "Eligible Shareholders":

""Eligible Shareholders shall mean such shareholders, who, individually, own, possess atleast 25% equity shares in the shareholding of the Demerged Company. All other shareholders stands excluded from issuance of the shares in terms of this scheme".

Hence, it is seen from the list provided in Regional Director's report that 2 out of 5 holding 10.42% by one Mr. Suresh Virmani and 14.58% by one Ms. Manju Virmani are excluded from the allotment.



5. In response to the above observation Petitioner companies have filed an affidavit dated 29<sup>th</sup> June, 2017 stating that offering preferential treatment is perfectly justified. They further stated that three shareholders of the Demerged Company holding 25% each i.e total 75%-3/4<sup>th</sup> in value will only be the shareholders of the Resulting Company subsequent to the Demerger. Furthermore, they relied on the affidavits dated 29<sup>th</sup> June, 2017 of the shareholders who stand excluded as per the scheme and who have given their consent to such exclusion.
  
6. The Regional Director further vide paragraph 8 of its affidavit stated that the jurisdictional ROC has in para 31 of his report has made one observation regarding VAT appeal pending before Deputy Commissioner of ST (Appeal-VI), Mumbai in relation to an aggregate amount of Rs.10,91,996/- for the period 2008-09, 2010-11 and 2011-12.
  
7. In response to the aforesaid observation of ROC, Petitioner Companies have stated that dispute pertains to the demerged unit, and since the same will be merged in to the Resulting Company, the Resulting Company will contest the appeal after merger in accordance with law. Further, it is also represented that a stay is also in operation relating to the collection of disputed VAT passed by



Joint Commissioner of Sales Tax, (Appeal), Mumbai dated 21.03.2016 and the same continues as of date.

8. Learned Counsel for the Petitioner submits that no objections have been received from any quarters in relation to the proposed Scheme coming up for sanction before this Tribunal. Further, it is also represented that Certificate from the Statutory Auditor of the Demerged and Resulting Companies confirming the compliance with Accounting Standards as prescribed by the Central Government under section 133 of the Companies Act, 2013 have also been complied in terms of the directions of this Tribunal.
  
9. In relation to payment of VAT pertaining to the years 2008-09 of Rs. 1,72,196/-, 2010-11 of Rs. 4,43,441/- and for 2011-12 of Rs. 4,76,358/- aggregating to Rs. 10,91,996/- is concerned, the petitioner states that for the year 2008-09, by virtue of the Amnesty Scheme floated by the Department it had accepted Rs. 94,717/- and waived off the rest of the amount pertaining to the said year as evidenced by the order of settlement dated 06.12.2016. In relation to years 2010-11 and 2011-12, the petitioners have annexed stay orders passed by the appellate authority along with the affidavit filed on 06.07.2017. Taking into consideration the said

documents which is annexed and in view of clause (12) of this order the above said objections stands disposed.

10. Further coming next to the observation of learned RD/ ROC that all the Equity shareholders are to be issued/ allotted shares equally in the decided ratio and that two of the shareholders have been left out thereby giving a differential treatment, it is seen that the petitioners have filed affidavits from the two shareholders who can if at all be aggrieved. Perusal of the said affidavits disclose that they have consented to the scheme consciously without any undue influence, misrepresentation or otherwise. The company's auditor of Demerged Company/ Resulting Company has also not made any adverse comments in relation to differential treatment meted out as stated above. Further despite notice, the Income Tax Department who, if at all, can have any objection has not chosen to appear or file any representation. We are in this regard persuaded by the decision of Hon'ble High Court of Gujarat rendered in NAVAJEEVAN MILLS LTD, in re (1972) Com Cas 265 (Guj) and the relevant portion of which is reproduced below:-

*"There are certain well organized limitations on the court's power to sanction the scheme. First limitation is that the court would not sanction a scheme which would be invalid without the court's sanction if every creditor or member concerned agreed to it. In*





*other words, the court has no power to sanction something which the parties could not do by agreement. The second fetter on the court's power is that the court cannot sanction an act being done if the law permits it only subject to conditions and the agreement seeks to dispense with those conditions such as where the scheme of compromise and arrangement also includes within its ambit reduction in share capital in respect of which special procedure provided in the Act and the rules has not been carried out. Third known fetter on the court's power is that the court would not only ordinarily sanction a scheme which includes something which can ordinarily be effected by resort to other provisions of the Companies Act. Within the limitations set out above, the court allow the companies the greatest freedom in devising scheme to suit their requirements and will approve those schemes if they are fair to all whose interests are affected."*

11. The above position is also reaffirmed by the decision of the Hon'ble Supreme court in MIHEER H. MAFATLAL v MAFATLAL INDUSTRIES LTD [(1996) 87 Com Cas 792; AIR 1997 SC 506] where one of the requisites required to be seen by the Tribunal while sanctioning the scheme is that *"the company court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent"*.

12. Thus as long as the scheme is approved by the shareholders, in this case consciously and the same is not in violation of any law or any of the above., three



situations visualized as above in NAVAJEEVAN MILLS LTD Case as well as the requisites enunciated by the Hon'ble Supreme Court in the case cited above, this Tribunal cannot hold back the sanction as the learned RD/ ROC has failed to state as to how the scheme fails taking into consideration the above principles laid down. Hence in the circumstances the sanction of the scheme cannot be held back.

13. In this connection reference to section 62 (1) (a) (iii) will be apposite where the shareholder is given a right at the time of issue of further capital to decline to accept the shares offered in the same company, even though in the instant case it is the shares of the other company which is declined to be accepted.

14. However, the sanctioning of the scheme is always subject to paragraph 13 and 14 and in case any authority including fiscal finds any inconsistency or violation, it is at liberty to take suitable action and also approach this Tribunal bringing to its notice of such infraction and for remedial action.



15. Taking into consideration all the above, this Tribunal sanctions the Scheme of Arrangement as set-forth in Annexure-A to the Company Petition and we also grant the prayers made in the Petition.
16. Notwithstanding the above, if there is any deficiency found or, violation committed qua any enactment, statutory rule or regulation, the sanction granted by this court will not come in the way of action being taken, albeit, in accordance with law, against the concerned persons, directors, and officials of the petitioners
17. While approving the Scheme as above, we further clarify that this order should not be construed as an order in any way granting exemption from payment of stamp duty, taxes or any other charges, if any, and payment in accordance with law or in respect to any permission/compliance with any other requirement which may be specifically required under any law.



**THIS TRIBUNAL DO FURTHER ORDER:**

That in terms of the Scheme,

(1) That the whole of the "Mumbai Business" (Demerged Undertaking), shall pursuant to the provisions contained in Sections 391 to 394 of the Companies Act, 1956 (presently Sections 230-232 of the Companies Act, 2013) and all other applicable provisions, if any, of the Companies Act, 1956, and/or the Companies Act, 2013, and without any further act, deed, matter or thing, stand transferred to and vested in and/or be deemed to be transferred to and vested in the Resulting Company so as to vest in the Resulting Company all rights, titles and interests pertaining to the Investment and financing business as an ongoing concern basis subject nevertheless to all charges now effecting the same; and

(2) That In terms of the Scheme, all the debts, liabilities, contingent liabilities, secured and unsecured loans, duties and obligations of every kind, nature and description of the Demerged Company pertaining to "Mumbai Business" shall also, under the provisions of Sections 391 to 394 of the Companies Act, 1956, presently 230-232 of companies act, 2013 and all other applicable provisions, if any, of the Companies Act, 1956 and/or the Companies Act, 2013, and without any further act, application, instrument, deed matter or thing stand transferred




to and assumed by and/or be deemed to be transferred to and assumed by the Resulting Company, so as to become from the Appointed Date the debts, liabilities, contingent liabilities, secured and unsecured loans, duties and obligations of the Resulting Company.

- (3) That all proceedings now pending by or against the "Mumbai Business" being the Demerged undertaking of the Petitioner/Demerged Company be continued by or against the Petitioner/Resulting company; and
- (4) Upon the Scheme becoming effective and in consideration of the demerger including the transfer and vesting of the "Mumbai Business" of the Demerged Company in the Resulting Company, the Resulting Company shall, without any further act, application, instrument or deed, issue and allot shall as per clause 8 of the scheme.
- (5) That Petitioner /Resulting company shall within thirty days of the date of the receipt of this order cause a certified copy of this order to be delivered to the Registrar of Companies for registration;



(6) That any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary.

  
(R. VARADHARAJAN)  
MEMBER (JUDICIAL)

**U.D MEHTA**