

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
TRANSFERRED COMPANY SCHEME PETITION NO. 43 OF**

2017

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 53 OF 2016

(HIGH COURT TRANSFERRED PETITION)

EVERSHINE NESTS PRIVATE LIMITED

....Petitioner/the First Transferor Company

AND

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH
TRANSFERRED COMPANY SCHEME PETITION NO. 42 OF**

2017

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 54 OF 2016

(HIGH COURT TRANSFERRED PETITION)

DEVSHEEL ESTATE PRIVATE LIMITED

....Petitioner/the Second Transferor Company

AND

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH
TRANSFERRED COMPANY SCHEME PETITION NO. 44 OF**

2017

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 55 OF 2016

(HIGH COURT TRANSFERRED PETITION)

EVERSHINE BUILDERS PRIVATE LIMITED

....Petitioner/the Transferee Company

In the matter of the Companies Act, 2013
(18 of 2013);

AND

In the matter of the Companies Act, 1 of
1956 and other relevant provisions of the
Companies Act, 2013;

AND

In the matter of Sections 391 to 394 of the
Companies Act, 1956 and other relevant
provision of Companies Act, 2013

And

In the matter of Scheme of Amalgamation of
Evershine Nests Private Limited, the First
Transferor Company

And

Devsheel Estate Private Limited, the Second
Transferor Company

With

Evershine Builders Private Limited, the
Transferee Company
and their respective shareholders and
creditors.

Called for hearing

Mr. Prashant H. Bare i/b. Bare Legal Chambers, Advocates for the
Petitioner.

Mr. S. M. Saidane, Joint Director in the office of Regional Director in all
Transferor Companies Scheme Petitions

Coram: B.S.V. Prakash Kumar, Member (Judicial)

V. Nallasenapathy, Member (Technical)

Date: 5th July, 2017

MINUTES OF THE ORDER

1. Heard learned counsel for parties. No objector has come before this Tribunal to oppose the Scheme and nor has any party controverted any averments made in the Petitions to the Scheme

of Amalgamation of Evershine Nests Private Limited, the First Transferor and Devsheel Estate Private Limited, Second Transferor Company with Evershine Builders Private Limited, the Transferee Company and their Respective Shareholders and Creditors.

2. The sanction of the Tribunal is sought under Sections 391 to 394 of the Companies Act, 1956 and Sections 230 to 232 of the Companies Act, 2013 to a Scheme of Amalgamation of Evershine Nests Private Limited, the First Transferor and Devsheel Estate Private Limited, Second Transferor Company with Evershine Builders Private Limited, the Transferee Company and their Respective Shareholders and Creditors.
3. The Petitioner Companies have approved the said Scheme of Amalgamation by passing the Board Resolution which are annexed to the respective Company Scheme Petitions.
4. The Learned Advocate appearing on behalf of the Petitioners states that the Petitions have been filed in consonance with the order passed in their Company Summons for Direction Nos. 53 of 2016 to 55 of 2016 of the Hon'ble Bombay High Court.
5. The Learned Advocate appearing on behalf of the Petitioners further states that the Petitioner Companies have complied with all requirements as per directions of the Hon'ble Bombay High Court and National Company Law Tribunal, Mumbai Bench and they have filed necessary affidavits of compliance in the Hon'ble Bombay High Court and National Company Law Tribunal,

Mumbai Bench. Moreover, Petitioner Companies undertake to comply with all the statutory requirements if any, as required under the Companies Act, 1956/2013 and the Rules made there under whichever is applicable.

The said undertaking is accepted.

6. The Learned Counsel for the Petitioners state that the first Transferor Company had been carrying on the business as, builders, civil and structural engineers, supervisors, surveyors, estate agents, owners, contractors, architects and developers of and dealers in plot, land, building, houses, bungalows, industrial complexes, godowns, hospitals, hotels, bungalows, industrial complexes, all types of building complex and the Second Transferor Company had been carrying on business as purchase, lease, exchange or otherwise and make advance on the security of and deal in land buildings and hereditaments of any tenure or description and estate or interest therein and the Transferee Company has been carrying on business of builders, contractors, plumbers, architects of residential, commercial, industrial, theatrical builders, houses, apartments, clinics, guest houses, hotels, laboratories anywhere in India and abroad. As per the opinion of the management all the Companies are under the same management and controlled by same promoters and it would be advantageous to combine the activities and operations in a single Company and that the amalgamation would provide synergistic linkages besides economies in costs by combining the total business functions and the related activities and operations and thus contribute to the profitability of the amalgamated Company

and that all the Companies are well established companies engaged in the business of investments, lending and borrowing and arranging finance and it is considered desirable and expedient to reorganise and amalgamate the business of all the companies so as to have a stronger assets base and skills to conduct the business in the emerging environment and to rationalise the costs of business.

7. The Regional Director has filed a Report on 17th November, 2016 stating therein, save and expect as stated in Para 6(a) to (d), it appears that the Scheme is not prejudicial to the interest of shareholders and public. In Paragraph 6 of the said Report, the Regional Director has stated that:-

“a) In addition to compliance of AS-14 the Transferee Company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5 etc,

b) Further, As per Definitions 2.5 of the Scheme the Appointed date is 1st April, 2014 or such other date as the Hon'ble Court at Judicature of Bombay may direct. In this regard it is submitted that the Transferor Company is seeking approval which will have retrospective effect. The gap between the date of audited balance sheet and the appointed date should be reasonable and nearer to the time of final hearing of the Petition and this requirement is statutory” it is pertinent to mention that all the Companies to the Scheme, the balance sheet is available up to 31.03.2015. Further, the Balance Sheet as at 31.03.2016 is also due. Hence, the

Appointed date should be 1st April, 2015 and not 1st April, 2014 as sought by the Company. Accordingly, this Hon'ble Court may kindly fix the appointed date as 1st April, 2015.

c) As per regarding Clause 11.1 of the Scheme the M/s Evershine Builders Private Limited, the Transferee Company upon the Scheme becoming effective, inconsideration of the transfer and vesting of undertaking of the Transferor Companies, the Transferee Company shall allot shares to both the Transferor Companies. In this regard it is submitted that as per balance sheet as at 31-03-2015, (1980 shares of rupees 100/- each) 99% of the paid up capital of M/s Evershine Nests Private Limited, the Transferor Company – 1 is held by M/s Evershine Builders Private Limited, the Transferee Company which results in existence of subsidiary relationship between Transferor Company and the Transferee Company. Hence, to the extent of share held by the Transferor Company in Transferee Company, upon the scheme coming into effect shall stand cancelled. The Hon'ble Court may kindly direct the Petitioner to amend the consideration clause accordingly.

d) The tax implication if any arising out of the scheme is subject to final decision of Income Tax Authorities. The approval of the scheme by this Hon'ble Court may not deter the Income Tax Authority to scrutinize the tax return filed by the Transferee Company after giving effect to the Scheme. The decision of the Income Tax Authority is binding on the Petitioner Company.

8. As far as the observation made in paragraph 6(a) of the Report of the Regional Director is concerned, the Petitioner companies undertakes that in addition to compliance of Accounting standards 14 the Transferee Company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5 etc.

9. As far as the observation made in Paragraph IV (b) of the Report of the Regional Director is concerned, the Petitioner companies submit that as per Definitions 2.5 of the Scheme the Appointed date is 1st April, 2014 or such other date as the Hon'ble Court at Judicature of Bombay may direct. In this regard it is submitted that the Transferor Company is seeking approval which will have retrospective effect. The gap between the date of audited balance sheet and the appointed date should be reasonable and nearer to the time of final hearing of the Petition and this requirement is statutory" it is pertinent to mention that all the Companies to the Scheme, the balance sheet is available up to 31.03.2015. Further, the Balance Sheet as at 31.03.2016 is also due. Hence, the Appointed date should be 1st April, 2015 and not 1st April, 2014 as sought by the Company. Accordingly, this Hon'ble Court may kindly fix the appointed date as 1st April, 2015. The Petitioners undertakes that they will consider the Appointed date 1st April, 2015.

10. As far as the observation made in Paragraph IV (c) of the Report of the Regional Director is concerned, the Petitioner companies submit that as per regarding Clause 11.1 of the Scheme the M/s

Evershine Builders Private Limited, the Transferee Company upon the Scheme becoming effective, inconsideration of the transfer and vesting of undertaking of the Transferor Companies, the Transferee Company shall allot shares to both the Transferor Companies. In this regard it is submitted that as per balance sheet as at 31-03-2015, (1980 shares of rupees 100/- each) 99% of the paid up capital of M/s Evershine Nests Private Limited, the Transferor Company – 1 is held by M/s Evershine Builders Private Limited, the Transferee Company which results in existence of subsidiary relationship between Transferor Company and the Transferee Company.. Hence, to the extent of share held by the Transferor Company in Transferee Company, upon the scheme coming into effect shall stand cancelled. As per direction of this Hon'ble Tribunal on 27th April, 2017 to the Petitioners. The Petitioners have carried out amendment in the paragraph 11.1 of the Scheme.

11. As far as the observation made in Paragraph IV (d) of the Report of the Regional Director is concerned, the Learned Advocate for Petitioner Companies submits that the tax implication, if any, arising out of the Scheme is subject to final decision of the Income tax Authority of the Income Tax Authority and the decision of the Income Tax Authority shall be binding on the Petitioner Companies.
12. The observations made by the Regional Director have been explained by the Petitioner Companies in Para 8 to 11 above. The

clarifications and undertakings given by the Petitioner Companies are accepted.

13. The Registrar of Companies, Mumbai has filed a Report on 15th September, 2016 stating therein in Para 1 and 2 of the said Report, the Registrar of Companies, Mumbai has stated that:-

1. With reference to the Para No. 13 of the Scheme, regarding accounting treatment, As-14 (Pooling of Interest method) is required to be strictly complied with as all the applicable conditions of pooling of interests method are met.

2. With reference to the Para No. 11.1 of the scheme, vis-à-vis transferor company 1, it is noticed that scheme envisage allotment of equity shares to the share holders of the both the transferor companies, whereas it is noticed that transferor company 1 is a subsidiary of transferee company and hence allotment of equity shares to the self (being the share holder of transferor company1) does not arise.

14. As far as the observation made in paragraph 1 of the Report of the Registrar of Companies, Mumbai is concerned, the Petitioner companies undertakes that in addition to compliance of Accounting standards 14 (pooling of interest method) the Transferee Company shall pass such accounting entries which are necessary in connection with the scheme to comply with as all the applicable conditions of pooling of interest method are met.

15. As far as the observation made in paragraph 2 of the Report of the Registrar of Companies, Mumbai is concerned, the Petitioner

companies has amended the paragraph 11.1 of the Scheme, as per the order dated 27th April, 2017 passed by this Hon'ble Tribunal same is reproduce as under:

"11.1 Upon the Scheme becoming finally effective, in consideration of the transfer and vesting of the Undertaking of the Transferor Companies in the Transferee Company in terms of the Scheme, the Transferee Company shall subject to the provisions of the Scheme and without any further application or deed.

Since the Transferor Company No.1, "ENPL" is a subsidiary of the Transferee Company; no shares will be issued by the Transferee Company pursuant to this Scheme. Upon scheme becoming effective, the entire issued share capital and the share certificates of the Transferor Company No. 1 "ENPL" shall automatically stand cancelled.

AS per the valuation report dated 30.4.2015 recommended share exchange ratio of Evershine Builders Private Limited (hereinafter referred to as EBPL) with Devshil Estate Private Limited (hereinafter referred to as DEPL), 19 Equity share of EBPL in exchange of 840 Equity Shares of DEPL.

credited as fully paid-up in the capital of Transferee Company to Equity Shareholders of the Transferor Company No. 2 "DEPL", whose names appear in the Register of Members, on a date to be fixed by the Board of Directors of Transferee Company"

11. The Official Liquidator has filed his report on 5th April, 2017 in the transferred Company Scheme Petition No. 43 & 42 of 2017 inter alia, stating therein that the affairs of the Transferor Company have been conducted in a proper manner. Therefore, the

representation of the Official Liquidator has been taken on record by this Hon'ble National Company Law Tribunal Mumbai Bench, Mumbai.

12. From the material on record, the Scheme appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy.
13. Since all the requisite statutory compliances have been fulfilled, Transferred Company Scheme Petition No. 43 of 2017 is made absolute in terms of prayers clause (a) to (d) and Transferred Company Scheme Petition No. 42 of 2017 is made absolute in terms of prayers clause (a) to (d) and Transferred Company Scheme Petition No. 44 of 2017 is made absolute in terms of prayers clause (a) to (d).
14. The Petitioner Companies are directed to lodge a copy of this order and the Scheme duly certified by the Deputy Director, National Company Law Tribunal, Mumbai Bench, Mumbai with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, on the same within 60 days from the receipt of the order.
15. The Petitioner Companies are further directed to lodge a copy of this order along with a copy of the Scheme of Amalgamation with the concerned Registrar of Companies, electronically along with E-Form INC-28, in addition to physical copy, as per the relevant provisions of the Companies Act 1956/2013.

16. The Petitioner Companies to lodge a copy of this order and the Scheme duly certified by the Deputy Registrar, National Company Law Tribunal, Mumbai Bench, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any.
17. The Petitioner Companies to pay costs of Rs. 25,000/- each to the Regional Director, Western Region, Mumbai.
18. Cost to be paid within four weeks from the date of the Order.
19. All concerned regulatory authorities to act on a copy of this order along with the Scheme duly certified by the Deputy Director, National Company Law Tribunal, Mumbai Bench, Mumbai.
20. Any person interested shall be at liberty to apply to the Tribunal in the above matter for any direction that may be necessary.

Sd/-

V. Nallasenapathy, Member (T)

Sd/-

B.S.V. Prakash Kumar, Member (J)