

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH
COMPANY PETITION NO. 38 OF 2017.
(HIGH COURT TRANSFERRED PETITION)
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO. 1021 OF 2016.
WADHWA GROUP HOLDINGS PRIVATE LIMITED
....Petitioner/ the Transferor Company
AND

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH
COMPANY PETITION NO. 39 OF 2017.
(HIGH COURT TRANSFERRED PETITION)
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO. 1022 OF 2016.
EPITOME RESIDENCY PRIVATE LIMITED
....Petitioner/ the Transferee Company

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

AND

In the matter of Sections 230 to 232 of the
Companies Act, 2013 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 provisions
of Companies Act, 2013;

AND

In the matter of Scheme of Arrangement between
WADHWA GROUP HOLDINGS PRIVATE LIMITED,
the Transferor Company and EPITOME
RESIDENCY PRIVATE LIMITED, the Transferee
Company.

Called for hearing

Mrs. Alpana Ghone, Mr. Rajesh Shah with Mr. Ahmed M Chunawala i/b M/s. Rajesh
Shah & Co., Advocates for the Petitioners.

Mr. S. Ramakantha, Joint Director for the Regional Director.

Coram: Shri. B.S.V. Prakash Kumar Hon'ble Member (J) and

Shri. V .Nallasenapthy Hon'ble Member (T)

Date: 23rd March , 2017

1. Heard Learned Counsel for the parties. No objector has come before this Tribunal to oppose the Scheme nor has any party controverted any averments made in the Petitions to the Scheme of Arrangement between WADHWA GROUP HOLDINGS PRIVATE LIMITED, the Transferor Company and EPITOME RESIDENCY PRIVATE LIMITED, the Transferee Company.
2. The sanction of this 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 Arrangement between WADHWA GROUP HOLDINGS PRIVATE LIMITED, the Transferor Company and EPITOME RESIDENCY PRIVATE LIMITED, the Transferee Company.
3. The Learned Counsel for the Petitioners states that the Transferor Company is engaged in the business of construction and development of residential and commercial projects and renting out of commercial properties. The Transferee Company is a wholly owned subsidiary of the Transferor Company and proposes to commence and undertake the business of construction and real estate development. The Scheme of Arrangement envisages the transfer and vesting of the Transferred Undertaking (as defined in the Scheme) of the Transferor Company comprising of the entire business of real estate development of the Transferor Company under development agreements with Brihan Mumbai Electric Supply and Transport Undertaking (BEST) on BEST real estate sites consisting of certain real estate projects to the Transferee Company.
4. The rationale of the Scheme is that (a) the transfer of Transferred Undertaking of the Transferor Company is likely to enable the business and activities to be pursued and carried on with greater focus and attention through two separate Companies each having its own administrative set up. Independent setup of each of the undertaking of the Transferor Company

and the Transferee Company will ensure required depth and focus on each of the Companies and adoption of strategies necessary for the growth of the respective Company. The structure provides independence to the management in decisions regarding the use of their respective cash flows for dividends, capital expenditure or other reinvestment in their respective businesses; (b)The transfer of Transferred Undertaking would assist in induction of joint venture partner/strategic investor/ financial investor and pursue inorganic and organic growth opportunities in such businesses (c)

The restructuring under this scheme would enable focused business approach for maximization of benefits to all stakeholders and capitalize on the opportunity for the growth.

5. The Petitioner Companies have approved the said Scheme of Arrangement by passing Board Resolutions which are annexed to the respective Company Scheme Petitions.
6. The Learned Advocate appearing on behalf of the Petitioners states that Petitions have been filed in consonance with the orders passed in Company Summons for Direction Nos. 1021 of 2016 and 1022 of 2016 of the Hon'ble Bombay High Court.
7. 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, the Petitioner Companies undertake to comply with all statutory requirements if any, as required under the Companies Act, 1956 /2013 and rules made there under whichever is applicable. The said undertaking is accepted.
8. The Regional Director has filed his Report dated 20th day of March, 2017 stating therein, save and except as stated in paragraph IV, it appears that the Scheme is not prejudicial to the interest of shareholders and public. In paragraph IV of the said Report, the Regional Director has stated that:-

"IV. The observations of the Regional Director on the proposed Scheme to be considered by the Hon'ble NCLT are as under:

"(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) As per clause Part II Definitions and Share Capital of the Scheme "The Appointed Date" means 1st April 2016 or such other date as the Hon'ble NCLT of Judicature at Mumbai or other competent authority as may otherwise direct/fix. In this regard, it is submitted in terms of provisions of section 232(6) of the Companies Act, 2013 it should be 1st April 2016,

(c) Clause 4.8 of the Scheme (Consideration) it is submitted that the total consideration payable as a result of demerger is not quantified/certain. Share exchange ratio (consideration payable) is not determined. Hence, the scheme is defective and deserves to be rejected.

(d) The statutory auditor of M/s Wadhwa Group Holdings Private Limited (the Transferor Company) in his report dated 05.10.2016 for the financial year 2015-16, under the head "Basis for qualified opinion" has stated that "as stated in note no.18 and 45 to the financial statements, the company has included certain items of cost aggregating to Rs.253,774,151/- (previous year: Rs. 274,416,753/-) which is in contravention to the accounting principles laid down under Accounting Standard 2 (AS 2) "Valuation of Inventories". In our opinion, these costs do not relate to bringing the inventories to their present location and condition. Had the Company followed principles of costs as laid down under AS 2, loss for the year would have been increased by Rs.181,786,372/- (previous year profit higher by: Rs.31,492,627/-), inventories as on 31st March 2016 would have been reduced by Rs.228,499,689/- (previous year: Rs.55,304,357/-) and revenue for the year would have been lower by Rs.147,011,906/- (previous year higher by : Rs.22,494,063/-)." This amounts to violation of Violation of AS-2 r/w Section 129 of the Companies Act, 2013;

(e) As per existing practice, the Petitioner Companies are required to serve Notice of Scheme of Arrangements to the Income Tax Department for their comments. It appears that the company vide its letter dated 23rd January 2017 has served a copy company petition No.38 & 39/2017 along with relevant orders etc., to IT Department. Further, this office has also issued remainder letter dated 17.03.2017 to the concerned Income Tax authorities;

(f) 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.

(g) Regarding the remarks made by the Registrar of Companies_” with reference to accounting treatment in para 6.1 and 6.2 of this scheme, a certificate by the Company’s auditors maybe enforced vide proviso to section 230 (7) of the Companies Act, 2013.- However, he as mentioned, may be decided on its merits”. In this regard Hon’ble NCLT may pass appropriate orders as deem fit and proper in the light of facts of the case.

9. So far as the observation in paragraph IV (a) of the Report of Regional Director is concerned, this Tribunal directs the Transferee Company to comply with the said observation. Accordingly, the Learned Counsel for the Petitioner/Transferee Company undertakes that in addition to the accounting treatment given in the Scheme, the Petitioner/ Transferee Company shall pass accounting entries as may be necessary in connection with the Scheme to comply with any other Accounting Standard.
10. As far as the observation made in paragraph IV (b), of the Report of the Regional Director is concerned, this Tribunal directs that the Appointed Date for the present Scheme shall be 1st April, 2016. Accordingly, the Petitioner Companies through their Counsel undertake that in terms of provisions of section 232(6) of the Companies Act, 2013, the Appointed Date of the scheme would be 1st April 2016.

11. As far as the observation made in paragraph IV (c), of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that a conjoint reading of Clause 4.8 of the Scheme with Clause 2.1(h) makes it clear that the consideration under the Scheme for transfer of "transferred undertaking" is 35,30,000 number of fully paid up 9% non-cumulative redeemable preference shares to be issued to the Transferor Company of the face value of Rs.10/- each. The terms and conditions of the issue and redemption of the Redeemable Preference Shares are set out in Clause 2.1(h) of the Scheme. The said explanation is found to be satisfactory.
12. As far as the observation made in paragraph IV (d), of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies states that the Transferor Company has filed an Affidavit dated 22nd March, 2017 explaining the reason for deviation from AS-2. The Learned Counsel further submits that the net worth of the Transferor Company as on 31st March, 2016 is Rs. 722.50 crores. Even if effect is given to AS-2 then too the net worth of the Transferor Company as on 31st March, 2016 would be Rs.699.65 crores. Also, the net worth of the Transferor and Transferee companies' pre and post scheme of arrangement would be positive. It is made clear that the sanctioning of the present Scheme will not prevent the office of the Regional Director and/or Registrar of Companies and/or any other like authority from initiating any action under section 129 of the Companies Act, 2013. Needless to add, the Petitioner Companies reserve their right to defend such action if taken.
13. As far as the observation made in paragraph IV (e), of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that vide letter dated 23rd January, 2017 they have served a copy of the company petition No. CSP 38 and 39 of 2017 along with relevant orders etc, to IT Department for their comments.
14. As far as the observation made in paragraph IV (f), of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the tax implication if any arising out of the Scheme is subject to final

decision of the Income Tax Authorities and the decision of the Income Tax Authority shall be binding on the Petitioner Companies

15. As far as the observation made in paragraph IV (g), of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the certificate from the auditors of the Petitioner Companies with reference to accounting treatment in para 6.1 and 6.2 of the scheme as required under the applicable provisions of the Companies Act, 2013 has been obtained and filed with the Hon'ble Tribunal by the Petitioner Companies vide their affidavits dated 22.02.2017.
16. 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.
17. Since all the requisite statutory compliances have been fulfilled, Company Petition No.38 of 2017 is made absolute in terms of prayers clause (a) to (c) and Company Petition No.39 of 2017 is made absolute in terms of prayer clauses (a) to (c).
18. Petitioners are directed to lodge a certified copy of order along with a copy of the Scheme of Arrangement 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.
19. The Petitioner Companies to pay costs of Rs.25,000/- each to the Regional Director, Western Region, Mumbai. Cost to be paid within four weeks from the date of the Order.
20. All concerned regulatory authorities to act on a copy of this order along with Scheme duly authenticated by the Company Registrar, National Company Law Tribunal, Mumbai.

Sd/-

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

Sd/-

V. Nallasenapthy, Member (Technical)