

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
TRANSFEREED COMPANY SCHEME PETITION NO 127 OF 2017
(COMPANY SCHEME PETITION NO 625 OF 2016)

Olive Realty Private LimitedPetitioner /Transferor Company 1

TRANSFEREED COMPANY SCHEME PETITION NO 128 OF 2017
(COMPANY SCHEME PETITION NO 626 OF 2016)

Yashowardhan Promoters and Developers Private Limited
.....Petitioner /Transferor Company 2
AND

TRANSFEREED COMPANY SCHEME PETITION NO 129 OF 2017
(COMPANY SCHEME PETITION NO 627 OF 2016)

Corolla Realty Limited
.....Petitioner /Transferor Company 3
AND

TRANSFEREED COMPANY SCHEME PETITION NO 130 OF 2017
(COMPANY SCHEME PETITION NO 628 OF 2016)

Jasmine Hospitality Private Limited
.....Petitioner /Transferor Company 4

In the matter of the Companies Act, 1956 (1 of 1956);

AND

In the matter of Sections 391 to 394 of the Companies
Act, 1956

AND

In the matter of Scheme of Amalgamation of Olive
Realty Private Limited and Yashowardhan Promoters
and Developers Private Limited and Corolla Realty
Limited and Jasmine Hospitality Private Limited with
Kolte-Patil Developers Limited and their respective
Shareholders

Called for Hearing

Mr. Hemant Sethi i/b Hemant Sethi & Co., Advocates for the Petitioners in all the
Petitions.

Mr. Ramesh Gholap, Assistant Director in the office of Regional Director

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

V. Nallasenapathy, Member (Technical)

Date : 9th March 2017

MINUTES OF ORDER

1. Heard the learned counsel for the Petitioner Companies. No objector has come before the Tribunal to oppose the Petition and nor any party has controverted any averments made in the Petition.
2. The sanction of the Tribunal is sought under Sections 230 to 232 of the Companies act, 2013, to the Scheme of Amalgamation of Scheme of Amalgamation of Olive Realty Private Limited and Yashowardhan Promoters and Developers Private Limited and Corolla Realty Limited and Jasmine Hospitality Private Limited with Kolte-Patil Developers Limited and their respective Shareholders.
3. The Counsel for the Petitioners submit that the Transferor Companies and the Transferee Company are inter alia, in the business of real estate development.
4. The Counsel for the Petitioners further submit that the rational for Scheme is that the Transferor Companies are 100% wholly owned subsidiary of the Transferee Company. With a view to maintain a simple corporate structure and eliminate duplicate corporate procedures it is desirable to merge and amalgamate all the undertakings of Transferor Companies with the Transferee Company. The amalgamation of all undertaking of Transferor Companies into the Transferee Company shall facilitate consolidation of all the undertakings in order to enable effective management and unified control of operations. Further, the amalgamation would create economies in administrative and managerial costs by consolidating operations and would substantially reduce duplication of administrative responsibilities and multiplicity of records and legal and regulatory compliances.
5. The Transferor Company and the Transferee Company have approved the said Scheme of Amalgamation by passing the Board Resolution which are annexed to the respective Company Scheme Petitions filed by the Petitioner Companies.
6. The Learned Counsel appearing on behalf of the Petitioner Company further states that the Petitioner Company has complied with all requirements as per directions of the Court/ Tribunal and the necessary affidavits of compliance has been filed in the Court. Moreover, the Petitioner Company through its Counsel undertakes to comply with all statutory requirements if any, as required under the Companies Act, 1956 / 2013 and the Rules made there under whichever is applicable. The said undertakings given by the Petitioner Company is accepted.

7. The Official Liquidator has filed his report on 20th February 2017 stating that the affairs of the Transferor Companies have been conducted in a proper manner and that Transferor Companies may be ordered to be dissolved.
8. The Regional Director has filed an Report dated 23rd February 2017 stating therein, save and except as stated in paragraph IV(a) to (c) , it appears that the Scheme is not prejudicial to the interest of shareholders and public. In paragraphs IV, of the said Report it is stated that:

- (1) 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.*
- (2) Income Tax Department vide its letter No. Pn/DCIT/Cir-3/OliveR./2016-17 dated 17.11.2016 inter alia mentioned that Olive Realty Private Limited had been selected for Income tax scrutiny for Financial year 14-15 on 04.04.2016 and is pending as on date. Service of notice under Section 143(2) dated 04.04.2016 had already been made. The time barring date for the said proceedings is 31.12.2017. Till such assessment is completed the amalgamation may not be approved as various Courts these days have taken a stand that once an entity whose case is pending for verification/ scrutiny cannot be carried out by the Depart. Requested not approving the Scheme.*
- (3) According to the provisions of Section 233(10) of the Act, 2013 the Transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished, whereas the Petitioner Company has not mentioned the same in the Scheme.*

In view of above, the petitioner may be asked to amend the Scheme accordingly.

- (4) A notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar, Official Liquidator issued by the Transferor companies or the Transferee Company is not found as required under the provisions of Section 233(1)(a) of the Companies Act, 2013;*
- (5) Objections or suggestions considered by the Companies in their respective general meeting, not found as required under the provisions of Section 233(1)(b) of the Companies Act, 2013;*
- (6) Declaration of solvency filed by each of the companies involved in the merger, in the prescribed Form in accordance with the provisions of Section 233(1)(c) before the concerned.*
- (7) As per the Scheme, Appointed date is 1st January 2016, Petitioner submitted Audited balance Sheet and Profit and loss Account as on 31st March 2016. According to provisions of Section 232(2)(e) A supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme is to be circulated for the meeting. The details are not available in Scheme.*

Hon'ble NCLT may be requested to decide on observations on point 4, 5, 6 and 7 on merits.

- (8) *Certificate by the Company's Auditor stating that the accounting treatment if any proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133 of the Companies Act, 2013 is not available.*

In view of above, petitioner may be asked to produce the certificate by the Company's Auditor.

- (9) *The petitioner Clause 3.2 of the Scheme has inter alia mentioned that notwithstanding anything contained in any document, papers or writings executed by the Transferor Companies, this Scheme shall not operate to enlarge the security for any loan, deposit or facility created by or available to the Transferor Companies which shall vest in the Transferee Company by virtue of the Scheme and Transferee Company shall not be obliged to create any further, or additional security thereof as a condition for approval of scheme, after the scheme has become effective or otherwise. Whereas, the petitioner in clause 4.2 of the scheme has mention that upon the Scheme of amalgamation coming into effect the Transferee Company shall create a first and exclusive charge in favour of IDBI Trusteeship Services Limited, (Debenture Trustee- IDFC Real Estate Yield Fund) by way of an English Mortgage on certain properties of CRL (Transferor Company 3) as more particularly set out in the debenture Trust cum Mortgage Deed dated October 5, 2015 entered into between CRL, Mr. Rajesh Patil, IDFC Real Estate Yield Fund and IDBI Trusteeship Services Limited, including but not limited to Mortgaged Property 1 and Mortgage Property 2.*

It is submitted that both the clauses are contradictory. Therefore, the petitioner may be asked to clarify and to amend the Scheme accordingly.

Petitioner in Clause 15 of the Scheme has inter alia mentioned that upon coming into effect of the Scheme, the Authorized Share Capital of the Transferor Company shall be deemed to be added to the Authorized Share Capital of the Transferee Company and the Authorized Share Capital of the Transferee Company shall be re-classified without any further act, deed or procedure, formalities or payment of any stamp duty and registration fees. The Authorized Share Capital of the Transferee Company shall be 149,450,000 Equity Shares of Rs.10 each.

It is noticed that Authorized share capital taken from B/S dated 31.3.16 of transferor companies are ORPL – 10,00,000 equity shares of Rs.10 each, YPDPL – 2,50,000 equity shares of Rs.10 each, CRL – 12,00,000 equity shares of Rs. 10 each, JHPL – 3,50,00,000 equity shares of Rs.10 each. The total of equity shares of all the transferor companies is coming only to 3,74,50,000 Equity shares of Rs. 10 each and not 149,450,000 Equity Shares of Rs. 10 each.

In view of above Petitioner may be asked to amend the Scheme accordingly.

9. As far as the observations made in paragraph IV(1) of the Report of Regional Director is concerned, the Petitioner submits that the Petitioner is bound to comply

with all applicable provisions of the Income Tax Act and all tax issues arising out of the Scheme will be met and answered in accordance with law.

10. In so far as observations made in paragraph IV (2) of the Report of Regional Director is concerned, the Counsel for the Petitioner submits that in terms of clause 7 of the Scheme all legal proceedings against the Transferor Companies shall not abate but will continue against the Transferee Company. Clause 7 of the Scheme is reproduced as under:-

“ If any suit, appeal or other legal proceedings of whatsoever nature by or against the Transferor Companies are pending, the same shall not abate or be discontinued or in any way be prejudicially affected by reason of the amalgamation and by anything contained in this Scheme, but the said suit, appeal or other legal proceedings may be continued, prosecuted and enforced by or against the Transferee Company in the same manner and to the same extent as it would or might have been continued, prosecuted and enforced by or against the Transferor Companies as if this Scheme had not been made. ”

11. In so far as observations made in paragraph IV (3) of the Report of Regional Director is concerned, the Counsel for the Petitioner submits that in terms of clause 12 of the Scheme, the Transferor Companies being wholly owned subsidiary of the Transferee Company and its entire share capital is held by the Transferee Company in its own name and/or jointly with its nominees. There would be no issue of shares of the Transferee Company to the shareholders (including those holding the shares as nominees of the Transferee Company) of the Transferor Companies. Pursuant to the merger of the Transferor Companies with the Transferee Company, the investment in the shares of the Transferor Companies, appearing in the books of account of the Transferee Company will stand cancelled. Therefore the question of Transferee Company as a result of compromise or arrangement, holding any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate Companies does not arise. Therefore, the question of amending the Scheme does not arise.
12. In so far as observations made in paragraph IV (4) of the Report of Regional Director is concerned, the Counsel for the Petitioner submits that the Petitioner has in response by their letter dated 03rd March 2017 informed the Regional Director

that notice of the Petition has been served upon the Official Liquidator. Further, the acknowledgement of service of notice is annexed to the affidavit of service a copy whereof was served along with other documents to the Regional Director. Similarly the notice to the Registrar of Companies was duly served and forms part of Report of Regional Director filed in this Hon'ble Tribunal.

13. In so far as observations made in paragraph IV (5) & (6) of the Report of Regional Director is concerned, the Counsel for the Petitioner submits convening and holding of meeting of Equity shareholders was dispensed with in pursuance of order dated 15th Day of March 2016 passed by the High Court. The Application and Petition was filed under the provisions of Section 391/394 of the Companies Act, 1956 and therefore the provisions of section 233(1)(b)& (c) of the Companies Act, 2013 are not applicable.
14. In so far as observations made in paragraph IV (7) of the Report of Regional Director is concerned, the Counsel for the Petitioner submit that provisions of 232(2)(e) are not applicable in the facts of present case as the provisions applies only in case if the Tribunal under the Companies Act, 2013 directs convening of the meeting of the shareholders. In the present case the Scheme was filed under the Companies Act, 1956 and by order dated 15th March, 2016 the meeting of the Equity Shareholders was dispensed with in view of consent given by all the Equity Shareholders. Therefore, the question of a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme is to be circulated for the meeting approval of scheme by the General Meeting does not arise.
15. In so far as observations made in paragraph IV (8) of the Report of Regional Director is concerned, the Counsel for the Petitioners submit that the Auditors of the Transferee Company M/s Deloitte Haskins & Sells LLP by their certificate dated 24th December 2015 confirmed that the proposed Accounting Treatment in

the scheme is in conformity with Section 133 of the Companies Act, 2013. has been filed with the office of Regional Director on 03rd March 2017.

16. In so far as observations made in paragraph IV (9) of the Report of Regional Director is concerned, the Counsel for Petitioners submit that post-Merger the Transferee Company shall continue the charge already created on properties by Transferor Company in favour of Lender and Form No. CHG 1, which had been filed and duly registered with Registrar of Companies Office by Transferor Company, shall be assigned to Transferee Company in the Records of ROC and the first and exclusive charge will continue in favour of existing Lender of Transferor Company and therefore, the Transferee Company will not file any further form for creation of any charge in the Office of Registrar of Companies. The clause in the Scheme therefore is in the nature of clarification.
17. Further in the scheme, clause 15 mentions about details of authorized capital of the Transferor Companies and after scheme becomes effective the authorized share capital of the Transferee Company will include 3,74,50,000 Equity shares so that aggregate share capital would be 149,450,000 Equity Shares of Rs.10 each.
18. The observations made by the Regional Director have been explained by the Petitioner in paragraphs 9 to 17 above. The clarifications and undertakings given by the Petitioner Company are hereby accepted.
19. 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.
20. Since all the requisite statutory compliances have been fulfilled, Transferred Company Scheme Petition No. 127 to 130 of 2017 filed by the Petitioner Companies are made absolute in terms of prayer clause (a) of the respective Petitions.
21. Petitioner Companies are directed to file 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 the physical copy within 30 days from the date of issuance of the order by the Registry.

22. The Petitioners to lodge a copy of this order and the Scheme duly certified by the Deputy Director, National Company Law Tribunal, Mumbai Bench, 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 date of receipt of the order.
23. The Petitioner Companies to pay costs of Rs. 25,000/- each to the Regional Director, Western Region, Mumbai and to the Official Liquidator, High Court, Bombay.
24. Costs to be paid within four weeks from today.
25. All authorities concerned to act on a certified copy of this order along with Scheme duly certified by the Deputy Director, National Company Law Tribunal, Mumbai Bench.
26. Any person interested shall be at liberty to apply to the Tribunal in the above matter for any direction that may be necessary.

Sd/-

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

Sd/-

V. Nallasenapathy, Member (Technical)