

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

**Company Petition No.89/ALD/2016**

*(Section 14 and other provisions of  
the Companies Act, 2013 read with  
NCLT Rules, 2016)*

**IN THE MATTER OF THE COMPANIES ACT, 2013**

**IN THE MATTER OF**

**EARTHSTONE HOLDER (TWO) LIMITED.**

**.....APPLICANT/PETITIONER**

**JUDGMENT/ORDER DELIVERED ON 14.08.2017**

**Coram** : Hon'ble Shri H.P. Chaturvedi, Member (J).

**For the petitioner** : Sh. Amit Gupta, PCS for the petitioner.

**For the Central Government** : Sh. Shivendra Bahadur Singh, CGSC.



**ORDER**

The applicant company files the present application under Section 14 of the Companies Act, 2013 read with NCLT Rules, 68 and other applicable provisions for seeking its conversion from public limited to private limited company.

It is stated that the applicant company is a public company with liability limited by shares. It was incorporated under the provision of the Companies Act, 1956 on 29<sup>th</sup> May, 2008, having its registered office at Hindustan Times House 25, Ashok Nagar Marg, Lucknow.

It is also stated that the applicant company was originally incorporated as private limited company and once earlier has been converted into a public limited company with the approval of its shareholder and by way of a special resolution passed in extraordinary general meeting of the company on 24<sup>th</sup> February, 2014.



Accordingly, the Registrar of the companies issued a fresh certificate of incorporation to this effect on 15<sup>th</sup> April, 2014.

It is stated that originally the registered office of the company was situated at New Delhi in the premises of Hindustan Times House II<sup>nd</sup> Floor, Kasturba Gandhi Marg, New Delhi in the National Capital Territory of Delhi. Later on 2<sup>nd</sup> June, 2014. Later on, the company's Registered office was shifted to the Uttar Pradesh to the present premises and address. The Registrar of the companies again issued a fresh certificate to this effect in favour of the company on 31<sup>st</sup> July, 2014.

The applicant company further states that it is having share capital of Rs.86,00,00,000/- (Rupees eighty six crores) dividing into seven lakhs equity shares of Rs.10/- each and 853 preference share of Rs.10 crores and at present it is having paid up share capital of Rs.79 crores 1 lakh only divided into equity share capital of Rs.1 lakh only divided into Rs.10,000/- equity share of Rs.10 and preference share capital of 79 crores divided into 790 preference share of 10 lakhs each.



The main object of the company as stated in memorandum of article of association read as under:-

- i. To subscribe for, acquire, hold and sell shares, share stocks, debentures, debenture stocks, bonds, mortgages, obligations, securities of any kind issued or guaranteed by any Company, body corporate or undertaking of whatever nature and whatsoever constituted or carrying on business and to subscribe for acquire hold and sell shares, debentures and debentures stocks and debenture bonds, mortgages and obligations and such other securities issued or guaranteed by any Government, Sovereign rules,



Commissioners, trust, municipal, local or such other authority or body of whatever nature, whether in India or elsewhere as may be conducive to the business of the Company.

ii. To invest, purchase, sell, own, improve, let, take on lease, assign and/or dispose off or let out or give on rent land and buildings of any tenure or interest therein and to furnish Industrial, residential, commercial, social Rural and/or urban township or estates and to rebuild, enlarge, alter and improve existing structures and work thereon.

iii. To carry on the business of holding investment, import, export and deal in precious metals and its articles, precious stones, painting, artifacts, sculptures, idols, securities, arts and any kind/type of valuable articles.

(f) A certified true copy of the Memorandum and Articles of Association of the Applicant Company alongwith certificate of Incorporation is place at **Annexure-A1**.

Thus, the petitioner company has sought a prayer from this court for an appropriate order to be passed by giving permission and making approval of the applicant company's special resolution for its reconversion from public limited to a private limited and further to make necessary changes in its memorandum of article of association, in terms of the provision of Section 14 read with other applicable provision of Companies Act, 2013, Rule 33 of the Companies Incorporation Rules, 2014, and NCLT Rule 2016. The applicant company has sought for other reliefs also which this Tribunal may deem fit and proper.

The petitioner company submitted that its Board of Directors in its meeting held on 22<sup>nd</sup> April, 2016 felt such that the company has not been able to





take advantage of its public limited status by way of approaching public to raise capital, further in near future also, there seems no possibility for raising public fund or capital from the public. Hence, the petitioner company and its Board of Directors by their resolution passed in meeting dated 22<sup>nd</sup> April, 2016 have recommended for its reconversion from public to private limited.

It is also submitted that the shareholders of the company have accorded their approval and passed a special resolution to this effect in their extraordinary general meeting held on 20<sup>th</sup> May, 2016. However, such resolution can be given effect only after getting approval from this Tribunal by granting permission U/s 14(1) of the Companies Act, 2013 for conversion of the company from public limited to private limited. Being such position the Company's Board of Director reconsidered its resolution in its meeting held on 3<sup>rd</sup> June, 2016 and again recommended for conversion of the nature of the company from public to private

limited alongwith proposed amendments/changes in the memorandum of article of association and adoption of amended article of association of the company, by incorporating such restriction imposed as per Section 2 (68) of the Companies

Act. It is submitted that such Board Resolution has further been ratified and approved by the shareholders of the company in the light of the amended provision of the Act, by a resolution passed in extraordinary general meeting of the applicant company, held on 15<sup>th</sup> July, 2016. Such resolution incorporating the restriction as per Section 2 (68) of the Companies Act has been approved by 100% shareholders of the company. In support of this, the company has filed an extract of the Resolution and copy of minutes of its general meeting dated 15<sup>th</sup> July, 2016 alongwith the present petition. The applicant company has further annexed a copy of the statutory form no.MGT-14 in respect of the special resolution passed by its shareholders alongwith its proposed memorandum of article of association which is required to be filed with the Registrar of the





Company. A copy of such form is annexed to the present petition as Annexure A5. The same are perused.

The company in support of its proposal/decision submitted such that its conversion from public to a private limited company would be appropriate as there is no involvement of public in its shareholdings or management and it will save it from restriction imposed on a public limited company. Further, at the same time the company would also be eligible for privileges given to a private limited company, this would enable the management of the company to carry its affair efficiently. It is also clarified that by such proposal of conversion no interest of any Directors, Shareholder or public is going to be affected adversely and such conversion would be in the interest of its stake holders.

The applicant company further clarify that it is having no secured or unsecured creditors nor any debenture holders. In support of its contention the applicant company has annexed with the petition, a list of creditors and debenture holders as on 16<sup>th</sup> November, 2016 showing NIL creditors and debenture holders. Such list of creditors is supported by the affidavit of the key managerial person as well as Director of the Company. The company in support of the present application has further annexed its latest balance-sheet and annual account of the company for the year 2016. Such balance-sheets and annual account have been duly adopted in the annual general meeting of the company on 26<sup>th</sup> September, 2016.

It is further contended that the proposal of the company seeking conversion of the applicant company from public to private limited was duly advertised in prescribed form NCLT 3A as per the Rule 5(68)(a) read with 35(1) of the NCLT Rules by prescribing minimum statutory period to invite, response/objection, if any, from public concern. However, it is reported that no



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such kind of objection/comments against the proposed reconversion and special resolution passed by the Board of Directors and duly ratified by the shareholders of the company has been received. The applicant company further states that it is not being regulated any sectoral regulator. Hence, requirement of their consent/NOC is not mandatory.

Thus, the applicant company has prayed for approval of its resolution for proposed reconversion from public limited to a private limited company.

During the course of hearing, this Tribunal felt it appropriate to call for a report from the Registrar of the Company on company's proposed resolution. The same was received on 6<sup>th</sup> March, 2017 whereby the office of ROC reported about the status of the company furnished necessary particulars about Directors of the company. The ROC went on further to make such observation in column 17 of its report pointing out that there are 20 subsidiaries of the company out of which four companies are shown as a listed company. Hence, the effect of such proposed conversion on its holding companies to be ascertain before passing an appropriate order for approval.

By considering this and in order to examine the impact of proposed reconversion of the company on its subsidiaries specifically of four subsidiaries those are stated to be listed companies, this Tribunal vide its order dated 06.06.2017 further issued a notice to the office of Central Government Standing Counsel to inform the stand of Government as well as to the petitioner company to clarify its position and stand.

The petitioner company in response to the above stated observation of this Tribunal submitted a supplementary affidavit dated 14<sup>th</sup> June, 2017 of its CEO Sh. Naresh Kumar Gupta and clarified its position, deposing as under:-



4.2. That even if the company is converted from public limited company to private limited company:

4.2.1 All the subsidiaries of the company shall continue to remain its subsidiaries with no change in the constitution of any of its subsidiaries from public to private. Similarly, all the above mentioned listed subsidiary companies shall continue "as is" and shall not become unlisted public/private limited company.

4.2.2 The status of none of the subsidiaries is not going to change in any manner whatsoever and all the subsidiary companies shall continue to make compliances as are applicable to them in terms of the provisions of the Companies Act, 2013 and SEBI Regulations/Guidelines.

4.2.3 Further, the rights of any shareholders (including public shareholders) of the above mentioned listed companies are not going to be affected in any manner whatsoever, by virtue of the said conversion from "public" to "private".

4.3 That the conversion of the Company from public to private could only have had a limited impact on the status of such subsidiaries which became "deemed public companies" by virtue of proviso of Section 2(71) of the Companies Act, 2013 because of becoming a subsidiary of the Company which is a public company; and now if the company converts into a private company then such subsidiaries that became "deemed public company" by virtue of this, would not remain so and would become private companies.

In this regard, it is humbly stated that none of its subsidiaries are "deemed public company" because of the reason of the Company being



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*a public company. This is because either the subsidiaries are (i) already registered as a public company (hence they shall continue to be public companies) or (ii) subsidiary of another public company and by virtue of that they shall continue to be "deemed public company" (hence the change of status of the company will not have any impact on such companies as they are deemed public companies because of being a subsidiary of another public company and will continue to remain subsidiary of such public companies) or (iii) are companies incorporated outside India (since these are incorporated under an offshore law hence the question of change of their status under the Companies Act, 2013 does not arise). Thus, as such there will no impact of the conversion of the Company from public to private on the status of its subsidiaries. The status of each of the 20 (Twenty) subsidiaries of the Company (as listed in the annual return for 2016 that is referred to in the report of ROC in paragraph 3 above) pre and post such conversion of the Company from "public" to "private" is set out in "Annexure-A" hereto.*



*4.4 That petitioner is closely held public limited company and none of the securities of the petitioner are listed on any of the recognized stock exchange, therefore, the petitioner is an unlisted company with no public shareholder. That the petitioner has neither accepted any deposits from public nor has issued any shares to public. Therefore, if conversion of the petitioner from public limited company to private limited company is allowed, the public interest shall not be affected in any manner, whatsoever.*

Thus, it may be seen the applicant company by the above stated affidavit has duly substantiated its position and stand. Further petitioner's company through its practising Company Secretary Mr. Arun Kumar Soni duly certified



that such change in nature of the company from public to private vice-versa will not have any impact on the public sector, and there seems no adverse effect of such conversion on its shareholders, creditors and other related parties or public at large. The petitioner company has also clarified that it did not receive any kind of objection from any person against its special resolution on proposed conversion from public to private limited. Thus, the petitioner company duly fulfils all the requirement for seeking approval under Section 14 read with other applicable provision of the Companies Act, 2013 and inconformity with the Rules 68 of the NCLT Rules, 2016. Therefore, the present application deserves to be allowed for grant of relief being prayed for.

In response to this court observation dated 6<sup>th</sup> June, 2017, the Central Government through the Standing Counsel Sh. Shiv Bahadur Singh, has further furnished this Court the ROC's reply/comments as received by him vide letter dated 08.08.2017. In such reply/comment, the Registrar of the Companies has categorically expressed his opinion that after examination of the affidavit of the CEO of the Company and certificate of the Company Secretary regarding impact of conversion of petitioner company from public limited to private limited on its subsidiaries, **It appears that such conversion will not impact the status of its subsidiaries, because the company being converted is an unlisted closely held company and it has not accepted any deposits from public. Thus, it may be seen that the report of the ROC, no public interest is going to be affected by such conversion.**

We duly considered the above stated submission<sup>as</sup> put forth before us by both the parties. We also perused the relevant provision of the Section 14(1) of Companies Act, 2013, which reads as under:-





1. *Subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution, alter its articles including alterations having the effect of conversion of:-*

- (a) *A private company into a public company; or*
- (b) *A public company into a private company:*

*Provided that where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, the company shall, as from the date of such alteration, cease to be a private company:*

*Provided further that any alteration having the effect of conversion of public company into a private company shall not take effect except with the approval of the Tribunal which shall make such order as it may deem fit.*

In addition to the above The guiding principles for converting a public company into a private limited company have been described in detail in Ramaiya's commentary on Companies Act which are reproduced herein below:

*"In considering application for conversion, the guiding criterion is whether a proposal would be in best interests of the company itself and that there is a large measure of agreement among the shareholders to the proposed conversion. In particular, an attempt is made to ascertain if the proposal is prompted merely by a desire to overcome the restriction imposed by some of the provision of the Companies Act, which apply only to public companies e.g., u/ss 295, 372 etc., or if the conversion is generally needed for carrying on the business of the company more efficiently. A company having more*





*than 25 shareholders is advised to obtain written consent of all the shareholders who had not voted for the conversion before Government's approval is considered. To protect the interest of unsecured creditors, the Department has also been insisting on companies obtaining the consent to conversion of every creditor to whom the company owes substantial amount."*

*In almost all the cases where a public company is converted into a private company, one of the motives which prompts such conversion is to avoid the restriction imposed on the public companies and enjoy the special privileges and exemption available to the private companies under the Act. If the Central Government (as the authority for such approval under the 1956 Act) should refuse to accord its approval to conversion on this ground, it will be improper and legally challengeable.*

*After a public is converted into private company, it is important that a copy of special resolution authorising the conversion and altering the Articles so as to comply with S.40 of the 1956 Act (Now s.15 of the 2013 Act) should be included in every copy of the articles issued thereafter. The company must be in a position to give the certificate required by s.161(2) (b) of the 1956 Act (now s.92 of the 2013 Act). [A Ramaiya Guide to the Companies Act 18<sup>th</sup> Edition Volume -I p.604, 605]*

That apart the Hon'ble High Court of Kerala also in its matter *Mathurabhumi Printing and Publishing Co. Ltd. Vardhaman Publishers Ltd., (1992)* has observed that the power is conferred on the company under the Act to alter the article by special resolution, however such power shall not be abused by the majority of shareholders so as to oppress the minority.





The relevant portion of the above judgment may be reproduced herein below:

(a) *It is too late in the day to contend that a company has no authority to alter the articles. A company has the power to alter its articles by special resolution passed at a general meeting. Such alterations will be valid provided they are not inconsistent with the provisions of the Companies Act and the memorandum of association (see para 4 to 7 of Gore-Broume on Companies, volume 1, 44<sup>th</sup> edition). A reference in this connection to Sections 31 and 38 of the Act also is profitable.*

(b) *With respect we agree with the view expressed by the Madras High Court. It is pertinent to note in this connection that counsel representing both the appellant and the transferees have very fairly conceded that the amended article has no retrospective operation. An incidental question, however, would arise immediately and it is this: Whether the altered article would interfere with the transfer of shares effected by the shareholder prior to the resolution amending the articles. We are of the view that the transferor remains subject to the altered article if it is shown that he continues to be a shareholder of the company. We are fortified in this view by the decision in Pepe's case [1893] 2 Ch 311, where after considering an amendment to the rule divesting a member of the society of his vested right to withdraw his shares, passed after the issue of the notice in writing expressing his desire to withdraw the shares, was held binding on the member because at the time of altering the article he continued to be a member of the society. We shall in this connection*



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*reproduce relevant parts of the ruling in Pepe's case [1893] 2 Ch 311, 313.*

*"It has been settled by a series of authorities that a person in such a position is still a member of the society, and it follows that, under his contract with a society which has power to alter its rules, he remains subject to the rules when duly altered."*

(c) *The High Court of Australia, after reviewing the decisions in Pepe [1893] 2 Ch 311 and Sidebottom [1920] 1 Ch 154, have held in Peters' American Delicacy Company Ltd. v. Heath (61 CLR 457) thus:*

*"(i) Section 20 (corresponding to Section 31 of the Act) empowers-a company to alter its articles only subject to the conditions contained in the memorandum of association.*

*(ii) An alteration in a particular case may constitute a breach of contract with a shareholder, but such a breach of contract does not invalidate the resolution to alter the articles (see Allen's case [1900] 1 Ch 656 at p.672).*

*(iii) The fact that an alteration prejudices or diminishes some of the rights of the shareholders is not in itself a ground for attacking the validity of an alteration (see Sidebottom [1920] 1 Ch 154, Shuttle worth [1927] 2 KB 9 and Allen's [1900] 1 Ch 656 cases). Any other view would, in effect, make unalterable and permanent any articles of association which conferred rights upon a class of shareholders, or possibly upon any shareholder, if they or he desired that those rights should continue to exist unchanged. It is plainly not the law that the fact that an alteration of articles alters the rights or prejudices the rights of some shareholders is sufficient to prevent the alteration from being validly made.*



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(iv) *The power to alter articles must be exercised bona fide. It is generally said that the power must be exercised bona fide for the benefit of the company as a whole, and all the recent authorities refer to the statement by Lindley M.R. in Allen's case [1900] 1 Ch 656... It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded.*

(v) *It is not for the court to impose upon a company the ideas of the court as to what is for the benefit of the company. It is for the shareholders to determine whether an alteration of the articles is or is not for the benefit of the company, subject to the proviso that the decision is not such as no reasonable man could have reached.*

(vi) *An alteration which is made bona fide and for the benefit of the company, if otherwise within the power, will be good, but it is not the case that it is necessary that shareholders should always have only the benefit of the company in view ... But though a shareholder may vote in his own interests the power of shareholders to alter articles is limited by the rule that the power must not be exercised fraudulently or for the purpose of oppressing a minority.*

(vii) *When the validity of a resolution of shareholders is challenged, the onus of showing that the power has not been properly exercised is on the party complaining. The court will not presume fraud or oppression or other abuse of power. ... It cannot be the law that a resolution of shareholders is to be presumed to be invalid until the defendants in an action positively establish that it is valid.*



22



*If, however, the resolution was passed fraudulently or oppressively or was so extravagant that no reasonable person could believe that it was for the benefit of the company, it should be held to be invalid."*

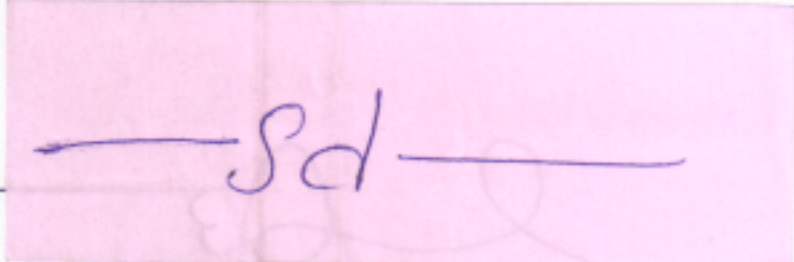
In the light of above stated discussion and having heard the argument of learned PCS, Sh. Amit Gupta for petitioner and Sh. Shivendra Bahadur Singh, CGSC for the ROC and by making further perusal of the present application alongwith the documents annexed therewith and the report of ROC, Kanpur read with its supplementary reply/comments. We find that the present application can be allowed by taking into consideration the undertaking cum affidavit of its CEO of the company as well as certificate of its PCS. Hence, the same is allowed.

Consequently, the special resolution dated 15<sup>th</sup> July, 2016 passed by the extraordinary general meeting of the company for proposed reconversion from public to private limited company is hereby approved as per the provision of the Companies Act, 2013.



The applicant company is further directed to file a draft of minutes special resolution dated 15.07.2016 alongwith authentic copy of this order with the Registrar of the Company, Kanpur under Section 14(2) of the Companies Act, 2013 for information and necessary action.

The petitioner company to take further follow up action-public authorities concern as required under the provision of the Companies Act and other statutory laws in the light of the order of this Tribunal. Thus, the petition is allowed and stand disposed of with no order as to cost.



**Dated:14.08.2017**

**Shri H.P. Chaturvedi, Member (Judicial)**

Typed by:  
Kavya Prakash