

**IN THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"**

**CP NO.112/2016
RT CP(CAA) NO.140/Chd/Pb/2017**

**Under Sections 391 to 394 read with
Sections 100 to 103 of the Companies
Act, 1956 or Section 61 or 66 of the
Companies Act, 2013.**

In the matter of:

Scheme of Arrangement between:

Kamesh Bhargava Hospital & Research Centre Pvt. Ltd.
having its registered office at Silver Oaks Hospital Complex
Phase-IX, Sector 63, Mohali-160062, Punjab.

..Transferor/Petitioner Company

WITH

Shalby Limited having its registered office at SHALBY
Hospitals, Opp. Karnavati Club, S.G. Road,
Ahmedabad, Gurarat-380015, India.

..Transferee Company

Order delivered on: 13.07.2017

Coram: Hon'ble Mr. Justice R.P.Nagrath, Member(Judicial).

For the Petitioner: Mr. Atul V. Sood, Advocate.

For Registrar of Companies and Regional Director: Dr. Raj Singh, Registrar of Companies,
Punjab, Chandigarh and Himachal Pradesh.

For Official Liquidator: Ms. Amarpreet Kaur, STA



JUDGEMENT

The petitioner hereinafter called the 'Transferor-Company' filed the instant petition under Sections 391-394 read with Sections 100-103 of the Companies Act, 1956 with prayer for dispensing with the meetings of its equity shareholders, secured and unsecured creditors and for sanction of 'Scheme' of arrangement (for brevity, 'Scheme') Annexure P-1. The 'Scheme' is to the effect that Hospital Division of the 'Transferor-Company' was to vest in the 'Transferee-Company' viz. Shalby Ltd. Having its registered office at SHALBY Hospitals, Opposite Karnavati Club, S G Road, Ahmedabad, Gujarat-380 015, India w.e.f. the Appointed Date without any further act, deed or things. It is submitted that the 'Transferee-Company' has filed a separate petition before the Hon'ble Gujarat High Court. The 'Scheme' further, provides that all assets, liabilities, proceedings and interest of Hospital Division of the 'Transferor-Company' subject to all charges, if any, existing on such assets as well as all applications concerning the same or any part thereof on the transfer date shall be deemed to have vested with the 'Transferee-Company.'

2. Registered office of the 'Transferor-Company' is situated at Mohali, in the State of Punjab and therefore, the matter falls within the jurisdiction of this Tribunal. This company was incorporated on 27.07.1997. Originally, it was a Public Limited Company by the name of Kamesh Bhargava Hospitals and Research Centre Ltd. and later on converted into a Private Limited Company under its present name. The fresh certificate of Incorporation dated 03.12.2009 is at Annexure P-2 with which the Memorandum and Articles of Association are attached. However, the 'Transferor-Company' filed the correct copy of the

Memorandum and Articles of Association as at Annexure P 16.

3. The Board of Directors of 'Transferor-Company' and 'Transferee Company' have approved the 'Scheme' in their respective meetings held on 05.01.2016 and 12.01.2016, vide Resolutions annexed with the petition as Annexures P 7 and P 6, respectively.

4. As on 31.03.2015, the share capital of the Transferor/Petitioner Company is as under:-

Authorised Share Capital		Amount(₹)
1,30,00,000	Equity Shares of ₹10/- each	130,000,000
Issued, subscribed and Paid-up		
1,23,59,373	Equity Shares of ₹10/- each	12,35,59,400

5. It has been mentioned in the petition that there is no change in the issued, subscribed and paid-up Share Capital of the Transferor/Petitioner Company subsequent to 31.03.2015.

6. As on 31.03.2015, the authorized, issued, subscribed and paid-up Capital of the Transferee Company is as under:-

Particulars	Amount(₹in lacs)
Authorised Share Capital	
9,22,50,000 Equity Shares of ₹10/ each	92,25,00,000
20,00,000 Convertible/Redeemable Preference Shares of ₹10/- each	2,00,00,000
Total:	94,25,00,000
Issued, Subscribed and Fully Paid Up	
3,49,41,972 Equity Shares of ₹10/- fully paid-up	34,94,19,720

4,30,100 5% Convertible/ Redeemable Preference Shares of ₹10/- each fully paid-up	43,01,000
Total	35,37,20,720

7. It is also averred in the petition that as on 21.05.2015, Resulting Company has issued and allotted 1,03,000 5% Optionally Convertible/Redeemable Preference Shares of ₹10/- each and further issued and allotted 5,24,12,960 equity shares as bonus shares on 26th March, 2016 hence, issued, subscribed and paid-up share capital of Resulting Company as on date is as follows:-

Issued, Subscribed and Paid Up Share Capital	
9,22,50,000 Equity Shares of ₹10/ each	92,25,00,000
20,00,000 Convertible/Redeemable Preference Shares of ₹10/- each	2,00,00,000
Total:	94,25,00,000
Issued, Subscribed and Paid Up Share Capital	
8,73,54,932 Equity Shares of ₹10/- each	87,35,49,320
5,33,100 Preference Shares of ₹10/- each	53,31,000
Total	87,88,80,320

8. It has been mentioned in the petition that the authorized, issued, subscribed and paid-up capital of Transferee-Company is the same as above as on the date of Board Meeting approving the 'Scheme'.

9. It was stated that the main objects of the 'Transferor-Company' as per the Memorandum of Association are to take over the running profession including all assets and liabilities of Bhargava Nursing Home and Bhargava Cardiac Care Centre, Sector 8, Chandigarh; to acquire, establish, run and maintain one or more hospital/hospitals, nursing homes, clinics and/or medical research centres in India or outside, for the reception and treatment of persons suffering from any kind of illness, or for the reception and treatment of persons during convalescence, or for persons requiring medical attention or rehabilitation; and to provide clinical, diagnostic and nursing home facilities and medical relief etc.

10. The main objects of the 'Transferee-Company' are to undertake, promote, assist or engage in all kinds of research and development work required to promote assist or engage setting up hospitals and facilities for manufacturing medical equipment, medicines, pharmaceuticals, chemical, artificial human body parts and other applied goods and articles; to set up laboratories, purchase and acquire any equipment and instruments required for carrying out medical research etc. Annexure P-4 is the copy of Certificate of Incorporation of the 'Transferee-Company' with which the Memorandum and Articles of Association has also been attached.

11. The 'Transferor-Company' has also attached copy of the latest Balance Sheet and Profit and Loss Account of the 'Transferor-company' as on 31.03.2015 at Annexure P-3 and that of the 'Transferee-Company' as on 31.03.2015 at Annexure P-5. The petitioner-companies filed the corrected copy of the Balance Sheet for the year ending 31.03.2015 as at Annexure P-18. This

As per

was filed with CA No.395/2016 while the matter was pending in the Hon'ble High Court.

12. During the pendency of the petition before Hon'ble Punjab and Haryana High Court there was an application by an intervener. As per the list of shareholders (Annexure P-8) there were 14 shareholders of the 'Transferor-Company' and one of them is Dr. Manjari Bhargava having 13,72,569 equity shares in the 'Transferor-Company' which were ordered to be attached by the Civil Court in the execution of a decree against her. Copy of the order passed by the Civil Court is at Annexure R-2 annexed with CA No.486 of 2016. However, the matter was settled and the equity shares of Dr. Manjari Bhargava aforesaid were released as per order Annexure P 20 dated 25.10.2016 of the Civil Court. The Memorandum of Understanding dated 15.12.2016 in the aforesaid matter was filed before the Hon'ble High Court and the same was taken on record on 23.12.2016.

13. Having considered the matter, the Hon'ble High Court dispensed with the meetings of shareholders, secured and unsecured creditors of the 'Transferor-Company' in view of the 100% consents of the concerned stakeholders vide detailed order dated 19.01.2017. The Hon'ble High Court treated the case as Second Motion petition and directed issuance of notices to the Regional Director, Northern Region, Ministry of Corporate Affairs, New Delhi and the Official Liquidator. Notice was also directed to be published in the 'Indian Express' English and 'Jagbani' Punjabi, both Punjab Editions and in the official gazette of Government of Punjab.

14. Learned counsel for petitioner submits that he has filed his own affidavit dated 12.07.2017 about the publication of the notice in 'Indian Express' (English) and

'Jagbani' (Punjabi) dated 13.03.2017 and 07.03.2017, respectively. It is also stated that the notice was published in the official Gazette of Government of Punjab on 31.03.2017, but copy of the Notification Annexure-3 referred to in the affidavit is dated 31.03.2017. A certificate by Company's Auditor M/s. Jain Suresh & Company, Chartered Accountants has also been attached. It states that on the basis of examination and as per the information and explanations, it was confirmed that the accounting treatment specified in the 'Scheme' is in compliance with the applicable Accounting Standards specified under Section 133 of the Companies Act, 2013 read with rule 7 of the Companies (Accounts) Rules, 2014 and other generally accepted accounting principles.

15. I have heard the learned counsel for the petitioners, Registrar of Companies assisted by Ms. Amarpreet Kaur, STA on behalf of the Regional Director, Northern Region, Ministry of Corporate Affairs, New Delhi and the Official Liquidator. This is a case of demerger of Hospital Unit of the Transferor-Company to be merged in the Transferee-Company. The registered office of the Transferor-Company is at Mohali, Punjab whereas the registered office of the Transferee-Company is at Ahmedabad, Gujarat. Learned counsel for the petitioner has stated that the 'Scheme' has since been sanctioned by the Hon'ble Gujarat High Court in CP No.327 of 2016 decided on 30.09.2016.

16. Before discussing other aspects, it would be required to refer to some salient features of the 'Scheme'. The appointed date as per the 'Scheme' is 07.09.2015 which refers to the re-organization of the Authorised Share Capital and amendment in the Memorandum and Articles of Association of both the companies.

So far as the 'Transferor-Company' is concerned, it is provided as under:-

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- a) Upon the 'Scheme' becoming effective, the Authorised Share Capital of the 'Transferor-Company' shall stand transferred to the 'Transferee-Company' without any further act, instrument or deed and without payment of any fees, stamp duty etc. to the extent of ₹6,50,00,000/- (Rupees Six Crore Fifty Lacs only) pursuant to sections 16, 31, 94 and 394 and other applicable provisions of the Act, as the case may be.
- b) Consequentially, upon 'Scheme' being effective, Clause V of the Memorandum of Association of the 'Transferor-Company' (relating to authorized share capital) shall, without any further act, instrument or deed, be and stand altered, modified and amended pursuant to sections 16, 31, 94 and 394 and other applicable provisions of the Act, as the case may be, in the manner set out below and be modified accordingly.

17. Consequently, the Authorised Share Capital of the 'Transferee-Company' would stand increased by ₹6,50,00,000 to be transferred from the Authorised Share Capital of 'Transferor-Company' to the 'Transferee-Company' without any further act, instrument or deed and without payment of any fees, stamp duty etc. It will also have effect of reduction of the issued, subscribed and paid-up equity share capital of the 'Transferor Company' from ₹12,35,93,730 divided into 61,79,687 equity shares of ₹10/- each.

18. It is further provided in the 'Scheme' that all employees of the Hospital Division of the 'Transferor-Company' shall become the employees of the 'Transferee-Company' with effect from the Appointed Date and their services shall be deemed to have continued without interruption by the vesting of the assets and liabilities of the Hospital Division to the 'Transferee-Company' under the 'Scheme' and the terms and

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conditions of service applicable to them, as aforesaid, will continue to govern them as employees of the 'Transferee-Company.'

19. In his report submitted by way of affidavit Mr. Mahesh Kumar, Regional Director Incharge, Northern Region, Ministry of Corporate Affairs, New Delhi, certain observations have been recorded. One such observation pertains to the mode of consideration mentioned in paragraph 11.1 of the 'Scheme' (Annexure P1) It is stated that on the 'Scheme' becoming effective, 'Transferee-Company' shall make the payment to the extent and the manner indicated in this paragraph of the 'Scheme' on behalf of all the members of the Transferor-Company, whose names appear in the Register of Members as on the Effective Date, or to their respective heirs, executors, administrators or other legal representatives or other successors in title as may be recognized by the Board of Directors of the 'Transferee-Company' and approved by them to be placed on its register of names. ₹37,13,75,350/- to be paid against 1,23,59,373 equity shares of the 'Transferee-Company' to the shareholders of the Transferee-Company (since corrected to 'Transferor-Company') and the amount to be deposited in the 'Escrow Account of the shareholders of the Transferor-Company i.e. the petitioner as per the Escrow Agreement.

20. It is also observed in the report, that the petitioner-company be directed to ensure compliances with the provisions of Section 2 (19 AA) [Section 2 (17 AA sic] of the Income Tax Act, 1961. Learned counsel for the petitioner relies upon the judgement of Hon'ble Delhi High Court in CP No.4/2003 in Re: M/s Indo Rama Textile Ltd. (2013)4CompLJ141(Del) wherein it was held as under:-

"Consequently, the contention urged by the Applicant that in view of Section 2 (19 AA) of the Act, 1961, the Scheme of Demerger must necessarily comply with Section 2 (19AA) which is meant for availing tax concession cannot be read as a mandatory requirement

for all schemes of amalgamation/arrangement/de-merger under Sections 391/392/394 of the Act, 1956. The said provision cannot be read and interpreted to include assets/units/undertakings/business belonging to the respondent-IRTL which were never transferred or intended to be transferred to IRSL and which are not mentioned in the Scheme of Arrangement. In the opinion of this Court, the Applicant is in error in contending that the common infrastructure is liable to be made over to them by virtue of reasoning of Section 2 (19AA) of the Act, 1961 as the division of assets was indicated in the Scheme."

21. Learned counsel for the petitioner submits that since the amount is to be deposited in the 'Escrow Account' the payment of the amount has to be through banking channels and not in cash though indicated as such in the report of the Regional Director. Anyhow, it is contended by the learned counsel for petitioner that in any case the petitioner would not qualify for any concession or exemption in terms of Section 2 (19 AA) of the Income Tax Act, 1961 since payment is being made to shareholders of 'Transferor-Company' (as stated in para 11 of the 'Scheme) in place of allotment of the shares, as observed by the Regional Director. This aspect has been dealt with in the above manner in the affidavit dated 11.07.2017 of the Authorised Representative of the petitioner.

22. In the affidavit filed by way of reply to the report of Regional Director, the Authorised Representative of the petitioner-company has stated that the petitioner undertakes to be liable for any of Income Tax implications on account of not qualifying in terms of the aforesaid provision i.e. Section 2 (19AA) to avail concession by the demerged company. This undertaking shall form part of this order.

23. It is further pointed out by the Regional Director that in paragraph 11.1 of the 'Scheme' reference is made to the payment of consideration against the shares

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of 'Transferee-Company' which should have been in fact the 'Transferor-Company.' In response thereto the petitioner has filed corrected 'Scheme' along with the affidavit dated 11.07.2017 of the Authorised Signatory of the petitioner.

24. The next observation of the Regional Director is that three of the shareholders of the company are Non Resident Indians viz. Rajnish Rametra, Surinder Rametra and Vijay Rametra constituting 06.84% of the total shareholding. It is directed that for making payment to these shareholders who are NRIs the petitioner-company shall comply with the provisions of the FEMA and Reserve Bank of India guidelines. The Authorised Representative of this company has also given an undertaking to this effect in the affidavit in paragraph No.3 and it is observed that the said undertaking shall form part of this order.

25. It is further observed by the Regional Director that the petitioner-company has not stated about the pendency of prosecution proceedings against the petitioner-company or its Directors under the Companies Act, 2013. In this regard, in affidavit in reply filed by the petitioner it is stated that no prosecution is pending against the petitioner-company or its Directors under Companies Act, 1956; Companies Act, 2013; FEMA; IPC; SEBI and Reserve Bank of India Act etc.

26. With regard to the observation of the Regional Director that 'Transferor-Company' was bound to appoint Company Secretary and there is a violation of the said provision, the Company must comply with Section 383 (A) of the Companies Act 1956 corresponding to Section 203 of the Companies Act, 2013 and also to file compounding application for the said violation. Dr. Raj Singh, Registrar of Companies who is present states that this is a closely held private limited company and the requirement to comply with the aforesaid provision has been considered and

Raj Singh

the proceedings dropped. This fact is also affirmed in paragraph 5 of the affidavit dated 11.07.2017 of Authorised Signatory of the petitioner.

27. It has been proposed in the 'Scheme' in Clause 16 for reduction of the paid up equity share capital of the Transferor-Company by a sum of ₹6,17,96,860/-, as an integral part of the 'Scheme'. It has been contended that the issued, subscribed and paid up capital of the Transferor-Company shall be reduced from ₹12,35,93,730/- divided into 1,23,59,373 equity shares of ₹10/- each to ₹6,17,96,870/- divided into 61,79,687 equity shares of ₹10/- each.

28. The Senior Technical Assistant appearing on behalf of the Official Liquidator has also referred to the report of Official Liquidator vide letter dated 13.04.2017 in which certain observations have been made with regard to the 'Transferor-Company' having accepted unsecured loan from a Trust named Silver Oaks Foundation; that the company is not regular in depositing with appropriate authorities undisputed statutory dues with Employees' State Insurance(ESI), Provident Fund, VAT and TDS pertaining to the Financial Year 2012-13 and TDS relates to the Financial Year 2014-15.

Reference is also made to the loss of ₹319.49 lacs having incurred during the financial year covered by audit as per the Balance Sheet ending as on 31.03.2015; and that the 'Transferor-Company' is irregular in repayment of dues to Financial Institutions.

29. The learned counsel for petitioner submits that creditors of the company have given their consent and meetings were dispensed with. So far as the payment of ESI, PF, VAT and TDS are concerned, the 'Transferee-Company' shall always be bound and liable for which authorities can initiate the appropriate proceedings for recovery thereof for which provision has been made in the 'Scheme' and that would be binding upon the 'Transferee-Company'. Learned counsel for petitioner further

submits that it is only the Central Government through the Regional Director which can represent and file objections in this petition because Official Liquidator may not have much role to play as the petitioner company is not being wound up, this is a case of demerger of the company.

30. For the reasons stated above and considering all relevant facts, procedural requirements of the Act and the Rules, and going through the reports of Regional Director, Northern Region, Ministry of Corporate Affairs, New Delhi and the Official Liquidator, the 'Scheme' Annexure A attached with the reply dated 11.07.2017 as corrected by the 'Scheme' at page No.1 in the affidavit dated 11.07.2017 by rectifying the typographical mistake in paragraph 11.1 to be mentioned as 'Transferor-Company' instead of 'Transferee-Company' is sanctioned as a result whereof the Hospital Unit of the 'Transferor-Company' shall stand vested in the 'Transferee-Company' subject to the approval of the 'Scheme' by the Hon'ble High Court of Gujarat. Consequently, the share capital of the petitioner-company would decrease. The 'Scheme' shall be binding on the shareholders, creditors and all concerned.

31. While approving the 'Scheme', as above, it is clarified that this order should not be construed as an order in any way granting exemption from payment of any stamp duty, taxes or any other charges, if any, and payment in accordance with law or in respect of any permission/compliance with any other requirement which may be specifically required under any law.

32. The petitioner-company shall deposit ₹20,000/- with the Official Liquidator within a period of five weeks from the date of this order.



THIS TRIBUNAL DO FURTHER ORDER

- i) That all the property, rights and powers of the Hospital Division of the Transferor-Company be transferred without further act or deed to the Transferee-Company and accordingly the same shall pursuant to Section 232 of the Act, be transferred to and vested in the Transferee Company for all the estate and interest of the Transferor-Company therein but subject nevertheless to all charges now affecting the same; and
- ii) That all the liabilities and duties of the Hospital Division of the Transferor-Company be transferred without further act or deed to the Transferee-Company and accordingly the same shall pursuant to Section 232 of the Act, be transferred to and become the liabilities and duties of the Transferee-Company; and
- iii) That all the employees of the Hospital Division of the Transferor-Company shall be transferred to the Transferee-Company in terms of the 'Scheme'; and
- iv) That the fee, if any, paid by the Transferor-Company on its authorized capital shall be set off against any fees payable by the Transferee-Company on its authorized capital subsequent to the sanction of the 'Scheme'; and
- v) The issued, subscribed and paid up capital of the Transferor-Company shall be reduced from ₹12,35,93,730/- divided into 1,23,59,373 equity shares of ₹10/- each to ₹6,17,96,870/- divided into 61,79,687 equity shares of ₹10/- each; and
- vi) That the Transferor-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; and
- vii) That any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary.



33. The formal order be issued on the petitioners on filing of the Schedule of Property i.e. (i) freehold property of the Transferor-Company; and (ii) leasehold property of the Transferor-Company as per Form No.CAA 7 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

Sd/-
(Justice R.P. Nagrath)
Member(Judicial)

July 13, 2017
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