

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION NO. 71 of 2015
In
COMPANY APPLICATION NO. 49 of 2015
With
COMPANY PETITION NO. 72 of 2015
In
COMPANY APPLICATION NO. 48 of 2015

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SHALBY LIMITED....Petitioner
 Versus
Respondent
 And
 HARI OM HEALTH CARE PRIVATE LIMITED....Petitioner
 Versus
Respondent

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Appearance:

MS DHARMISHTA RAVAL, ADVOCATE for the Petitioner
 MR DEVANG VYAS, ADVOCATE for the Respondent

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CORAM: HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 30/04/2015

COMMON ORAL ORDER

1. These petitions are filed by the petitioner Companies for sanction of the arrangement embodied in the Scheme of Arrangement Between Hari Om Health Care Private Limited (Transferor Company) and Shalby Limited (Transferee Company) and their respective shareholders and creditors under Sections 391 to Section 394 and other applicable provisions of the Companies Act, 1956.

2. Hari Om Health Care Private Limited, (Transferor Company) and Shalby Limited (Transferee

Company) are engaged in the similar line of business and intend to / can achieve larger product portfolio, economies of scale, efficiency, optimization of logistics and distribution network and other related economies of scale by consolidating the business operations being managed by different management teams. This Scheme of Arrangement intends to merge the operations of the Transferor Company with the Transferee Company to fulfill this objective. The Petitions give in detail the benefits envisaged due to the scheme.

3. With respect of Shalby Limited, it has been pointed out that vide the order dated 03.03.2015 passed in the Company Application No.49 of 2015 the meeting of the Equity Shareholders of Shalby Limited was dispensed with in view of the consent of 99.95% Equity Shareholders and 91.35% Preference Share Holders. The meeting of Secured Creditor was dispensed with in view of consent of all the secured creditors. The meeting of the unsecured creditors was dispensed with as the proposed scheme was under 391(1)(b) and not under 391(1)(a) and as there is no arrangement and/or compromise with the creditors as no sacrifice is called under the scheme.

4. With respect to Hari Om Healthcare Private Limited it has been pointed out that vide the order dated 03.03.2015 passed in the Company Application No.48 of 2015 the meetings of the Equity Shareholders and unsecured creditors were dispensed with in view

of the written consent letters of all the equity shareholders being placed on record and there being no Secured Creditors of Hari Om Healthcare Pvt. Limited.

5. The substantive petitions for the petitioner companies were admitted vide order dated 11th March 2015. The public notices for the same were duly advertised in the newspapers "Times of India" English daily, and "Sandesh", Gujarati daily, Ahmedabad Edition on 22.03.2015. The publication in the Government gazette was dispensed with. Affidavit dated 14th April, 2015 confirms the public notices in the newspapers.

6. Notice of the petition of the transferor company was served upon the Official Liquidator attached to this Court. The Official Liquidator has filed a report dated 13.02.2015 wherein it has been observed that the affairs of the transferor company have not been conducted in a manner prejudicial to the interests of its members or to the public interest. The Official Liquidator, however, has requested this Court to direct the transferor company to preserve the books of accounts and records for a period of 8 years from the date of sanctioning the scheme and not to dispose of the same without prior permission of the Central Government.

7. Having regard to the report filed by the Official Liquidator, the transferor company is

directed to preserve the books of accounts and records for a period of 8 years from the date of sanctioning the scheme and not to dispose of the same without prior permission of the Central Government.

8. Notice of the petition has been served upon the Regional Director (Western Region) Registrar of Companies and an Affidavit of service has been filed before this Court. Shri Devang Vyas, Assistant Solicitor General of India appears in Company Petition No.67 to 69 of 2015 and an affidavit dated 15.04.2015 has been filed by the Regional Director, North-Western Region, Ministry of Corporate Affairs. The Regional Director through his affidavit has made the following observations:-

i) That, the deponent submits that the scheme proposes the appointed date as 01.04.2014. The petitioner transferor company is not having enabling object clause for scheme of amalgamation as on the proposed date. The petitioner transferor company has added the separate enabling object clause no.3 for the scheme of amalgamation by way of special resolution passed in EGOM held on 23.12.2014, which is after the proposed date i.e. 01.04.2014. Therefore, the petitioner Company cannot have the appointment date before having the enabling object clause. In this regard this Court may be pleased to direct the petitioner company to place on record all the facts.

ii) That, the clause no.11(d) of the scheme reads as under:

“Any excess of the amount of the cancelled value of investment over the value of the net assets of the Transferor Company acquired by the Transferee Company shall be recognized in the Transferee Company's financial statements as identifiable intangible assets arising on amalgamation. For this purpose, the Transferee Company in consultation with its auditors may identify intangible assets to be recognized in its financial statements. If the amount of the consideration is lower than the value of the net assets acquired, the difference shall be treated as the General Reserve and the same shall be treated as the Free Reserve of the Transferee Company available for the distribution of dividend.”

It is observed that the petitioner companies have not ensured the compliance of AS-14 in the matter and also the said clause 11(d) is not in accordance with the Accounting Standard-14 as required. As per the requirements as AS-14 the excess of assets over liabilities should be credited to Amalgamation Reserve Account and shortfall, if any, should be debited to the Goodwill Account. Whereas the petitioner company proposes in the scheme to transfer the excess of Net Assets Value to General Reserve Account/Free Reserve of the transferee company. This Court may therefore be pleased to direct the petitioner companies to comply with strictly the requirements of Accounting

Standard – 14 and that the excess of assets over liabilities shall be credited to the amalgamation reserve account / capital reserve account on amalgamation and not to the general reserve account / free reserve account as proposed by the petitioner companies in the scheme. Further, the petitioner companies be directed to give undertaking that reserves so created, if any, shall not be available for distribution of dividend and also the petitioner companies to comply with AS-14 and amend the relevant clause of the scheme accordingly.

iii) The Ministry of Corporate Affairs vide its circular no.2/ 1/ 2014 dated 15th January 2014 has directed that the Regional Director concerned shall invite specific comments from the Income Tax Department giving 15 days' time to the Income Tax Department to inform objections, if any, for the proposed scheme under Section-391 or 394, as the case may be and to file the report on behalf of the Central Government accordingly. In this regard this Directorate vide letter dated 17th March 2015 had sent letter to the Chief Commissioner of Income Tax, Ahmedabad, Gujarat with a request to give specific comments of the Income Tax Department about the proposed scheme. It is submitted that no reply has been received from the Income Tax Department in this regard. This Court may therefore be pleased to direct the petitioner companies to undertake compliance of Income Tax Act and Rules in the matter.

9. Learned advocate for the petitioner companies responding to first observations submits that the object clause is required to be observed on the date of entering into scheme of arrangement. The petition for amalgamation was filled only after the enabling object clause was inserted into object clause of petitioner transferor company. Under the petition, it is proposed to amalgamate petitioner transferor company from 1st April 2014. Therefore, there is no lacuna in this connection. The appointed date can be fixed by both the companies internally. Further, there is no objection on appointed date from shareholders, creditors or any other person. Besides, there is no objection received in connection with this. Further the enabling object clause was inserted before the petitions were submitted before this Court. It is further submitted that even without the enabling clause, it is legally permissible for the transferor company to amalgamate. Therefore, this Court may please sanction the scheme with appointed date of 1st April 2014.

10. With reference to the second observation it has been observed by the Regional Director that the treatment envisaged by the said clause is not in accordance with the provisions of Accounting Standard-14. In this regard, it is respectfully submitted that the said accounting standard permits the specific accounting treatment to be prescribed under the scheme. Further, section – 129 (5) of the

Companies Act, 2013 provides that if the practice adopted for such accounting entry, varies from the said standard, necessary disclosure should be made in the financial statements. In view of the several decisions of various High Courts, on the said issue, it is hereby submitted that the compliance of the Accounting Standard – 14, if not made while passing the accounting entries, the petitioner hereby undertakes to abide by the directions that the Court may issue with regard to the disclosures to be made in the first financial statements of the transferee company after the scheme being sanctioned. With regard to the observation of the Regional Director with regard to the restriction on use of free reserves arising out of amalgamation for distribution of dividend, it is respectfully submitted that by a decision of the Division Bench of this Court in the matter of Adani Agro Private Limited vide the order dated 30th July 2012 passed in O.J. Appeal no.33 of 2012, the said issue has been settled and in view of the same, the petitioner company is not required to submit any such undertaking with regard to the use of such free reserves. Hence, no directions are required to be issued to modify any clause of the scheme or change the proposed accounting treatment.

11. With reference to third observation by the Regional director no reply received by the Income Tax Department. Since the statutory period of 15 days as envisaged by the relevant circular of the Ministry of Corporate Affairs is over, it can be presumed that

the Income Tax Dept. has no objection to the proposed scheme of arrangement. However, the petitioner company shall comply with applicable provisions of Income Tax Act and Rules.

12. It is further submitted that there are no complaints received by the Registrar of Companies as contended in the affidavit filed by the Regional Director and the Regional Director has confirmed that the scheme is not prejudicial to the interest of the shareholders of the petitioner company and public at large.

13. Heard Ms. Dharmishta Raval, learned advocate for the petitioner companies and the counsel appearing for the Central Government. Having gone through the petitions, and having considered the submissions made in this regard and being satisfied that arrangement under the proposed scheme would be in the interest of the companies and their members and creditors. The scheme deserves to be sanctioned. The arrangement otherwise seems to be appropriate, hence it is required to be sanctioned with specific observation that sanctioning of this scheme would not absolve anyone who is otherwise liable for any responsibility or liability, only on account of this sanctioning.

14. In light of the above discussion, the observations made by the Regional Director stand addressed. It is however directed that the petitioner

companies who are not complying with Accounting Standard – 14 shall make disclosures in the financial statements after the scheme is sanctioned. Further, the companies are directed to maintain the books of account for a period of 8 years from the date of sanctioning of the scheme and not to dispose of the same without prior permission of the Central Government.

15. Under the circumstances, there does not appear to be any impediment to the sanction of the proposed scheme of amalgamation. Having regard to the averments made in the memorandum of the petitions and the submissions advanced by the learned counsel, this Court is satisfied that the proposed scheme would be in the interest of the companies and their members and creditors. The scheme is hereby sanctioned.

16. The petitions stand disposed of accordingly.

17. So far as payment of costs to the Central Government Standing Counsel is concerned, the same are quantified at Rs.7,500/- per petition and shall be paid to the counsel appearing for the Central Government. Costs of Rs.7,500/- to be paid to the office of the Official Liquidator towards costs of the transferor company.

18. The petitioner companies are further

directed to lodge a copy of this order, the schedules of immovable assets of the transferor company as on the date of this order and the scheme duly authenticated by the Registrar, High Court of Gujarat, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty, if any, on the same within 60 days from the date of the order.

19. The petitioner companies are directed to file a copy of this order along with a copy of the scheme with the concerned Registrar of Companies, electronically, along with E-Form INC-28 in addition to physical copy as per relevant provisions of the Act.

20. Filing and issuance of drawn up order is hereby dispensed with.

21. All concerned authorities to act on a copy of this order along with the Scheme duly authenticated by the Registrar, High Court of Gujarat. The Registrar, High Court of Gujarat shall issue the authenticated copy of this order along with scheme as expeditiously as possible.

22. Registry to maintain copy of this order in Company Petition No.72 of 2015.

(S.R.BRAHMBHATT, J.)

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