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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CO.PET. 2/2014

IN THE MATTER OF

**EARTHCON VERTICAL LIMITS INFRACON PRIVATE
LIMITED & ANR Petitioners**

Through: Mr. Rajiv Tyagi and Mr. Ajay
Kumar, Advocates for the
Petitioners.

Mr. Atma Sah, Assistant
Registrar of Companies for the
Regional Director.

Mr. Rajiv Behl, Advocate for the
Official Liquidator.

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

ORDER

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23.12.2014

SANJEEV SACHDEVA, J (ORAL)

1. This second motion joint petition has been filed under sections 391 & 394 of the Companies Act, 1956

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(“Act”) seeking sanction of the Scheme of Amalgamation (“Scheme”) of Earthcon Vertical Limits Infracon Pvt. Ltd (hereinafter referred to as Transferor Company) with Earthcon Constructions Private Limited (hereinafter referred to as Transferee Company) (hereinafter both Companies collectively referred to as Petitioner Companies). A copy of the scheme has been enclosed with the petition.

2. The registered offices of the Petitioner Companies are situated at New Delhi, within the jurisdiction of this Hon’ble Court.
3. Details with regard to the date of incorporation of the Petitioner Companies, their authorized, issued, subscribed and paid up capital have been given in the Petition.
4. Copies of the Memorandum and Articles of Association as well as the audited Accounts of the Petitioner Companies have also been enclosed with the Petition.
5. Copies of the Resolutions passed by the Board of Directors of the Petitioner Companies approving the

Scheme of Amalgamation have also been placed on record.

6. Learned Counsel for the Petitioner Companies submits that no proceedings under Sections 235 to 251 of the Companies Act, 1956 is pending against the Petitioner Companies.
7. The Petitioner Companies had earlier filed an Application C.A (M) No. 127 of 2013 seeking directions of this Court for dispensation of requirement of convening meetings of Shareholders, Secured Creditors and Unsecured Creditors of the Petitioner Companies. Vide order dated 24th September, 2013, this Court allowed the Application and requirement of convening meetings of Shareholders and Secured Creditors of the Transferor Company; and the meetings of Shareholders and Secured Creditors of the Transferee Company; were dispensed with. This Court further directed for convening of separate meetings of Un-secured Creditors of the Transferor Company and the Transferee Company under its supervision to consider and approve the proposed Scheme of Amalgamation. The Scheme of Amalgamation was unanimously approved and adopted in the meetings of

Unsecured Creditors of the Transferor Company and the Transferee Company.

8. The Petitioner Companies had thereafter filed the present Petition seeking sanction to the Scheme of Amalgamation. Vide Order dated 3rd January, 2014, notice of the Petition was directed to be issued to the Registrar of Companies, Central Government through the Regional Director, Northern Region, Ministry of Corporate Affairs, Noida and the Official Liquidator attached with this Court. Citations were also directed to be published in 'Business Standard' (English, Delhi Edition) and 'Dainik Bhaskar' (Hindi, Delhi Edition). Affidavit of Service and Publication has been filed by the Petitioners showing compliance regarding service of the Petition on the Regional Director, Northern Region and the Official Liquidator and also regarding publication of citations in the aforesaid newspapers. Copies of the newspaper cuttings, in original, containing the publications have also been filed along with the Affidavit of Service.

9. In response to the notice issued, the Official Liquidator sought information from the Petitioner Companies. Based on the information received, Learned Official

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Liquidator has filed his report dated 15th April, 2014 wherein he has stated that he has not received any complainant against the proposed Scheme from any person/party interested in the Scheme in any manner and that the affairs of the Transferor Company, which is subject matter of dissolution, do not appear to have been conducted in a manner prejudicial to the interest of its members, creditors or to public interest as per the 2nd proviso of section 394(1) of the Act.

10. The learned Official Liquidator has also pointed out that the Petitioner Companies by the Board Resolution dated 13th October, 2014 have amended the Paragraph 12.2 of the Scheme of Amalgamation providing for the occurring of the effective date on or before 31.12.2014 in substitution of 01.04.2012 mentioned in the draft Scheme filed along with the First Motion.
11. The Official Liquidator in his report dated 15th April, 2014 has made the following observations :
 - i. That it is pertinent to mention here that it is provided in Para 12.2 of the scheme that in the event of non-occurrence of Effective Date before December 31, 2014 or such further time as may be agreed to by the Boards of Directors of petitioner companies, this scheme shall become

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null and void. However, the petitioner companies have passed the Board Resolution on 1st April, 2013 for modification of the said scheme by amending the above date as 31st December, 2014 subject to the sanction of the modified scheme by the Hon'ble Court.

- ii. That it is observed that the Share Valuation Report for the proposed amalgamation was prepared by "M/s Hemant Gosain & Associates for the Transferor Company and by M/s Deepak Gulati & Associates, Chartered Accountants for the Transferee Company". The valuation report by M/s Hemant Gosain & Associates is undated while the valuation report by M/s Deepak Gulati & Associates for the Transferee Company is dated as 23.05.2013. However, the Board of the Petitioner companies approved the draft scheme on 01/04/2013. Petitioner companies may be asked to clarify the same as the modalities/procedure followed by them appears to be improper.
- iii. That as per Para 25 of the petition, the Transferee Company shall allot equity shares as set out in the Share Valuation Report dated 25.08.2013 submitted by M/s Deepak Gulati & Associates, Chartered Accountants. But, the share valuation report by M/s Deepak Gulati & Associates is dated 23.05.2013 which does not indicate how the share exchange ratio i.e. 127:100 has been arrived at. Further, as per Para 6.2 in Part C of the affidavit attached to Application C.A. 127/2013, Share Exchange Ratio is 1:1 and as per the Scheme, the share exchange ratio is 127:100.

Petitioner Companies may be asked to clarify the above discrepancies.

- iv. That Para 17 of the affidavit to the Application C.A. 127/2013 is as follows:

Upon sanction of the scheme, the Transferee Company shall allot Equity Shares of Rs. 10/- each fully paid up to the shareholders of the Transferor Company as per the share exchange ratio set out in the Share Valuation Report dated 1st April, 2013 issued by M/s. Hemant Gosain & Associates, Chartered Accountants the Share Valuation report dated Nil, issued by M/s Deepak Gulati & Associates, Chartered Accountants.

It is observed that the above Para is not correct as the share exchange ratio is not derived in the Share Exchange Report submitted by M/s Deepak Gulati & Associates. Further, the report is dated as 23/05/2013 and the report of M/s. Hemant Gosain & Associates is dated 24.05.2013.

- v. That it is observed that the Share Valuation Report for the proposed amalgamation was prepared by “M/s. Hemant Gosain & Associates for the Transferor Company and by M/s. Deepak Gulati & Associates, Chartered Accountants for the Transferee Company”. The valuation report by M/s. Hemant Gosain and Associates is dated 24.05.2013 while the valuation report by M/s. Deepak Gulati & Associates for the Transferee Company is dated as 23.05.2013. However, the Board of the Petitioner Companies approved the

draft scheme on 01.04.2013. Petitioner Companies may be asked to clarify the same as the modalities/procedure followed by them appears to be improper.”

12. In response to the above observation raised by the Official Liquidator it has been submitted by the Petitioner Companies that the Petitioner Companies maintain their account electronically and the financial statements as on 31.03.2013 were available on that very date for the purpose of computing the value of the shares. The valuation of shares has been done as on 31.03.2013 and the same was considered by the Board of the Petitioner Companies on 01.04.2013 and approved on that date. The brief Share Valuation Reports prepared by “M/s. Hemant Gosain & Associates for the Transferor Company and by M/s. Deepak Gulati & Associates, Chartered Accountants for the Transferee Company” on 31.3.2013 was used as the basis for the final and formal share valuation reports dated 24.5.2013 and Nil prepared by “M/s. Hemant Gosain & Associates for the Transferor Company and by M/s. Deepak Gulati & Associates, Chartered Accountants respectively. It is further submitted that the Annual Return and the Balance

Sheets as on 31.03.2013 have been filed along with Additional fees and the Proof of filing has also been filed along with the Affidavit.

13. In response to the notices issued in the petition, Mr. A.K. Chaturvedi, Regional Director, Northern Region, Ministry of Corporate Affairs, has filed his Affidavit on 1st April 2014 and 2^{9th} September 2014. Relying on the Scheme of Amalgamation, he has stated that, upon sanction of the Scheme, all the employees of the Transferor Company shall become the employees of the Transferee Company without any break or interruption in their services.
14. Further, the learned Regional Director in his Affidavit dated 11th April 2014 and 29th September, 2014. Relying on the Scheme of Amalgamation, it has been stated that, upon sanction of the Scheme, all the employees of the Transferor Company shall become the employees of the Transferee Company without any break or interruption in their services.
15. Further Learned Regional Director has observed that the Appointed Date as per the Scheme shall be 01.04.2012 and since the Financial Year ended

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21.03.2013 is already complete, the Appointed Date be shifted to 01.04.2013 to avoid any revision of Balance Sheet and Profit & Loss Account and other returns including Tax Returns. Further, it is submitted that since the Financial Year 31.03.2014 is already over, the appointed date be shifted to 01.04.2014.

16. In reply to the above observation, the Petitioner Transferee Company in the Reply Affidavit dated 15th December, 2014, has submitted that Clause 2.1.3 of the draft Scheme has been amended to define the Appointed Date as 1st April, 2014 instead of April 1, 2012. The Petitioners Transferor Company and Transferee Company has filed the Board Resolution dated 01.12.2014 in this regard. By the separate Board Resolutions both dated 13.10.2014, the Transferor Company and Transferee Company have amended paragraph 12.2 of the Scheme of Amalgamation to provide the last effective date i.e. 31st December, 2014. Learned Counsel for the Petitioner Companies submits that the Petitioners have confirmed that they are agreeable to any such date as the Appointed Date. It is clarified that the Scheme is modified and the Appointed Date is shifted to 01.04.2014.

17. Further it is directed that the Registrar of Companies is also at liberty to independently examine the books of accounts irrespective of the sanction of the scheme and in case any violation or breach of any statutory provision is found, the directors of the transferor and the Transferee Company shall be liable, despite the sanction of the Scheme.
18. Learned Regional Director has further observed in his Affidavit that the Transferor Company has shown M/s. Vertical Limits Infratech Private Limited (now known as Home & Soul Infratech Private Limited) holding 3300 shares, whereas, as per Note 12 to the Balance Sheet as on 31.03.2013, the said shareholding has been shown under the head “Investment in Subsidiaries” which is contrary to the averments made in the petition.
19. In response to above observation, learned Counsel for the Petitioner Companies submits that M/s. Vertical Limits Infratech Private Limited (now known as Home & Soul Infratech Private Limited) holds only 3300 shares and the Transferor Company is not a subsidiary of the said Company. It is submitted that erroneously it has been shown under the head “Investment in Subsidiaries”

20. Further, learned Regional Director has raised another concern raised that the Transferee Company had allotted 11,134 shares of Rs.10 each at a premium of Rs.1090 per share on 01.09.2011 and, ultimately, the shares have been repurchased on 01.04.2013 at Rs.194 per share. It is contended that in this fashion, revenue has been generated for the Company. Further it is submitted that the Income Tax may be permitted to examine this aspect irrespective of the sanction of the Scheme.
21. It is directed that the Income Tax Authorities are at liberty to assess the income of the Transferor and Transferee Companies irrespective of the sanction of the Scheme and are also at liberty to examine the issue of allotment of shares at a premium and in case any tax liability arises, the Transferee Company shall be liable to pay the same, irrespective of the sanction of the Scheme.
22. It is further clarified that the sanction of the Scheme would not affect the powers of the Income Tax Department for recovery, including imposition of penalties, etc. as permissible under law.

23. Further, learned Regional Director has also observed that e- form 8 in respect of registration of charges has not been filed by the Transferee Company.
24. In response to the above observation, learned Counsel for the Petitioner Companies submits that the Petitioner Companies undertakes that the said form shall be duly filed within six weeks of the sanction of the Scheme.
25. Further, the Regional Director has raised a concern that the Transferee Company has admitted the default of contravention of provisions of Section 210(1) of the Act and in respect of this has been submitted that the Registrar of Companies be permitted to examine the accounts in detail irrespective of the sanction of the Scheme and, in case, any lapse or contravention is found, the Director of the petitioner Company and the Transferee Company shall continue to be liable for any breach.
26. Further it is clarified that the Registrar of Companies is also at liberty to independently examine the books of accounts irrespective of the sanction of the scheme and in case any violation or breach of any statutory provision is found, the directors of the transferor and

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the Transferee Company shall be liable, despite the sanction of the Scheme.

27. Learned Counsel for the Petitioner Companies submits that no objection has been received to the Scheme from any other party. The Petitioners have filed an affidavit confirming that neither the Petitioner Companies nor their Legal Counsel has received any objection pursuant to citations published in the newspapers.
28. In view of the approval accorded by the Shareholders and Creditors of the Petitioner Companies, representation/affidavit/report filed by the Regional Director, Northern Region and Official Liquidator attached with this Court to the proposed scheme, there appears to be no impediment to the grant of Sanction to the Scheme. Consequently, sanction is hereby granted to the Scheme under sections 391 and 394 of the Companies Act, 1956. The Petitioner Companies will comply with the statutory requirements in accordance with law.
29. Certified copy of the order will be filed with the Registrar of Companies within 30 days from the date of receipt of the same. In terms of the provisions of

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sections 391 and 394 of the Act, and in terms of the Scheme the whole of the undertaking, the properties, rights and powers of the Transferor Company be transferred to and vest in the Transferee Company without any further act or deed. Similarly, in terms of the Scheme, all the liabilities and duties of the Transferor Company be transferred to the Transferee Company without any further act or deed. Upon the Scheme coming into effect, the Transferor Company shall stand dissolved without following the process of winding up.

30. It is, however, clarified that this order will not be construed as an order granting exemption from payment of stamp duty or taxes or any other charges, if payable in accordance with any law; or permission/ compliance with any other department which may be specifically required under any law.
31. Learned Counsel for the Petitioner states that the Petitioner Companies (collectively) would voluntarily deposit a sum of Rs. 1,00,000/- in the Common Pool fund of the Official Liquidator within three weeks from today. The statement is accepted.

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32. The Petition is allowed in the above terms.

Order Dasti.

SANJEEV SACHDEVA, J

DECEMBER 23, 2014
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