IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY SCHEME PETITION NO. 69 OF 2015

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 2 OF 2015

Lokhandwala Construction Industries Private Limited ...Petitioner Company
[CIN: U45250MH1983PTC031585]

AND

COMPANY SCHEME PETITION NO. 70 OF 2015

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 3 OF 2015

Picasso Properties Private Limited ...Petitioner Company
[CIN: U45200MH1984PTC033077]

In the matter of the Companies Act, 1956 or any re-enactment thereof;

And

In the matter of Petition under Sections 391 to 394, of the Companies Act, 1956 or any re-enactment thereof;

And

In the matter of Scheme of Amalgamation amongst

Lokhandwala Construction Industries Private Limited

and

Picasso Properties Private Limited

and their respective shareholders and creditors.

Called for Hearing:

Dr. Veerendra V. Tulzapurkar, Senior Advocate along with Mr. Tapan Deshpande and Mr. Vikash Kumar Jha, Advocates instructed by Amarchand & Mangaldas & Suresh A. Shroff & Co., Advocates for the Petitioner Companies.

Mr. Gautam Ankhad along with Mr. Swanand Ganoo, i/b. Hariani & Co., for objector Bombay Gow Rakshak Mandali

Ms. Jaymala Raut, Advocate i/b Jaymala Raut & Dipti Shah, for objectors Whispering Palms Building No. 1 CHSL, Whispering Palms Building No. 3 CHSL, Whispering Palms Building No. 4 CHSL, Whispering Palms Building No. 6 CHSL and Whispering Palms XXclusive CHSL.

Mr. C.J. Joy, Advocate along with Mr. M. Chandanamuthu, Joint Director Legal,in office of Regional Director, Ministry of Corporate Affairs, Western Region i/b. Mr. H. P. Chaturvedi, Regional Director in both Petitions

S. Ramakantha, Official Liquidator, present in CSP no. 69 of 2015

Coram : S. J. Kathawalla, J.
Date : 5th May, 2015

PC:

1. Heard learned counsel for the parties.

2. Learned Advocate for the Petitioner Companies state that the Petitions have been filed to seek sanction to the Scheme of Amalgamation amongst Lokhandwala Construction Industries Private Limited (Transferor Company) and Picasso Properties Private Limited (Transferee Company) and their respective shareholders and creditors (Scheme), pursuant to the provisions of Sections 391 to 394 of the Companies Act, 1956.

3. The Transferor Company is engaged in the business of builders, contractors, developers and promoters of Co-operative Societies and deals in real estate business by constructing, reconstructing, altering, improving offices, flats, houses, factories, warehouses, shops, buildings, works and conveniences by consolidating, connecting and sub-dividing immovable properties and by leasing and disposing off the same. The Transferee Company is engaged in the business of builders, contractors, developers and promoters of

Co-operative Societies and deal in real estate business by constructing, re-constructing, altering, improving offices, flats, houses, factories, warehouses, shops, buildings, works and conveniences by consolidating, connecting and subdividing immovable properties and by leasing and disposing off the same. The learned Advocate for the Petitioner Companies say that the rationale and significant benefits of the Scheme are that for enhancing shareholder value by simplifying the management structure, leading to better administration and a reduction in costs from more focused operational efforts, rationalization, standardisation and simplification of business processes, and the elimination of duplication, and rationalization of administrative expenses, and to simplify the shareholding structure and reduce shareholding tiers, and also to avoid tax inefficiencies.

4. The Board of Directors of the Transferor Company and the Transferee Company, have approved said Scheme by passing their respective board resolutions which are annexed to the respective Company Scheme Petitions.

5. The Learned Advocate for the Petitioner Companies states that the Petitioner Companies have complied with all the directions passed in the respective Company Summons for Direction and that the respective Company Scheme Petitions have been filed in consonance with the orders passed in the respective Company Summons for Direction.

6. The Learned Advocate for the Petitioner Companies has stated that the Petitioner Companies have complied with all requirements as per directions of This Court and they have filed necessary Affidavits of compliance in The Court. Moreover, the Petitioner Companies undertake to comply with all statutory requirements, if any, as required under the Companies Act, 1956 and 2013 and the Rules made thereunder, whichever is applicable.

7. The Regional Director has filed an Affidavit on 15th April 2015 in the Court, stating therein, that save and except as stated in paragraph 6 of the said Affidavit, it appears that the Scheme is not prejudicial to the interest of the shareholders of the Petitioner Companies and public. In paragraph 6 of the Affidavit it is stated that:

> "*6. That the Deponent further submits that:-*
>
> *(a) With reference to clause 16 (v) of the Scheme, it is submitted that, the surplus arising out of the scheme be credited to Capital Reserve Account of the Transferee Company, that part of the reserve may not be treated as free reserve of the Transferee Company.*
>
> *(b) Clause 16 (vi) of the scheme provides for adjustment for differences in Accounting Policies between Transferor Company and Transferee Comp[any. In this regard, it is submitted that in addition to the compliance of Accounting Standard – 14, the Transferee Company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standard such as AS-5 etc.*
>
> *(c) Clause 15 of the scheme provides for change of name of the Transferee Company. In this connection it is submitted that, Transferee Company may be directed to comply with the provisions of Section 21/23 of the Companies Act 1956 corresponding to new section 13 read with 16 of the Companies act, 2013 in respect of filing of necessary forms with the Registrar of Companies and the proposed new name will be allowed subject to availability of the same, by the Registrar of companies since under the computerized MCA 21 System of allotting names, it is systemically not possible to reserve the names. Therefore, the name is available at the time of filing of such application, shall be made available by the Registrar of Companies, Mumbai."*

8. The Transferee Company has filed its affidavit in Reply dated 17th April, 2015 (Reply) inter alia dealing with the observations made in paragraphs 6 (a), 6 (b) and 6 (c) of the Affidavit filed by the Regional Director. As regards the

observation set out in paragraph 6 (a), of the Affidavit of the Regional Director and the arguments placed before the Court by Counsel for the Regional Director, and Mr. M. Chandanamuthu, Joint Director, Legal, representing the Regional Director, that the surplus arising out of the scheme be credited to Capital Reserve Account of the Transferee Company and that part of the reserve may not be treated as free reserve of the Transferee Company is concerned, it is mentioned in the Reply that in terms of Section 129 of the Companies Act, 2013 (corresponding to Section 211 of the Companies Act, 1956), financial statements of the Transferee Company shall comply with the accounting standards and in any case of deviation from the accounting standards, the reasons for such deviation and the financial effects, if any, arising out of the deviation should be disclosed in the financial statements. The Scheme of Amalgamation in the present case is in the nature of purchase and hence paragraph Nos. 23 and 42 of the Accounting Standards are relevant since clause 16 (v) provides that excess of the recorded value of the net assets (i.e. assets minus liabilities) in the books of accounts of the Transferee Company over the amount credited by the Transferee Company to the share capital account and after making adjustments as set out in Clause 16 (ii), (iii) and (iv) in the Transferor Company, shall be credited to General Reserve. It is trite that paragraph 23 read with paragraph 42 of Accounting Standard 14 contemplates that where the Scheme sanctioned under a statute prescribes a different treatment to be given to the reserves of the Transferor Company after amalgamation as compared to the requirements of Accounting Standard 14, the same shall be followed with appropriate disclosures in the first financial statements of the Transferee Company following amalgamation. The present Scheme contemplates in clause 16(v) that the excess of the recorded value of net assets (i.e., assets minus liabilities) in the books of accounts of the Transferee Company over the amount credited by the Transferee Company to the share capital account and after making the adjustments shall be credited to General Reserve. The shortfall, if any, shall be debited to Goodwill Account of the Transferee Company. Deviation from accounting standards is permissible subject to compliance of the requirement of appropriate disclosure in the financial statement of the Transferee Company post amalgamation. 100% of shareholders of the Transferor Company and the Transferee Company have accorded their consent to the present Scheme, including the accounting treatment and there is no manifest unfairness to the shareholders in any manner.

9. The Senior Counsel for the Petitioner Companies relied upon two judgments passed by This Court being (i) an *order dated 11th September, 2009 passed by this Court in Laxmi Udyog Components Private Limited and Laxmi Agni Components & Forgings Private Limited*, inter alia dealing in respect of similar objections relating to the deviation from the accounting standards raised by the Regional Director and were dealt with; and (ii) a judgment of This Court in *the matter of Hindalco Industries Limited* wherein similar issues regarding the violation of Accounting Standards were raised by the shareholders and have been dealt with.

10. As regards the observation set out in paragraph 6 (b) of the Affidavit of the Regional Director is concerned, as mentioned in its Reply the Transferee Company will pass such accounting entries as may be necessary in connection with the Scheme of Amalgamation to comply with other applicable Accounting Standards.

11. As regards the observation set out in paragraph 6 (c), of the Affidavit of the Regional Director is concerned, as mentioned in its Reply, the Transferee Company will comply with the provisions of Sections 21/23 of the Companies Act 1956 corresponding to new Section 13 read with Section 16 of the Companies Act, 2013 in respect of filing of necessary forms with the Registrar of Companies. The Transferee Company through its

Senior Counsel also confirms that the name availability as envisaged by the Scheme, would be subject to availability of the same according to the computerized MCA 21 system of allotting the names.

12. All undertakings given by the Transferee Company in their affidavit dated 17th April, 2015 are accepted.

13. Respective Learned Counsel appeared for 6 unsecured creditors of the Transferor Company viz. Bombay Gow Rakshak Mandali, Whispering Palms Building No. 1 CHSL, Whispering Palms Building No. 3 CHSL, Whispering Palms Building No. 4 CHSL, Whispering Palms Building No. 6 CHSL and Whispering Palms XXclusive CHSL, and tendered respective Affidavits objecting the Scheme.

14. Counsel Mr. Gautam Ankhad representing Bombay Gow Rakshak Mandali tendered an affidavit dated 5th May, 2015 of one Mr. Rajneesh Agarwal constituted Attorney of Bombay Gowrakshak Mandali raising objection to the Scheme that the objector is the owner of the Kandivali property, which would be transferred to the Transferee Company. By Development Agreement dated 13th December, 1984, the Objector had granted development rights in respect of the said Kandivali property to Mr. Siraj Lokhandwala (since deceased) and by letter dated 28th November, 2011 the said Development Agreement was terminated. In view of termination of the Development Agreement the said Kandivali property cannot be transferred to the Transferee Company under the Scheme of Amalgamation. In reply to the said objection the Learned Senior Counsel for the Petitioner Companies, submitted that the Transferor Company has filed Suit No. 837 of 2014 in this Court against the said Objector seeking *inter alia* specific performance of the said Development Agreement dated 13th December, 1984 and the Objector has also filed Suit No. 239 of 2015 in this Court against the Transferor Company *inter alia* seeking declaration from the Court that the Development Agreement has been duly determined by the Objector. The Senior Counsel for the Petitioner Companies further submitted that in terms of Clause 9 of the Scheme all legal proceedings pending against the Transferor Company would be continued and/or enforced by or against the Transferee Company. Hence the Transferee Company is bound by the outcome of the said pending proceedings. The Senior Counsel then submitted that the Objector is therefore protected under the Scheme.

15. As far as the objectors viz., Whispering Palms Building No. 1 CHSL, Whispering Palms Building No. 3 CHSL, Whispering Palms Building No. 4 CHSL, Whispering Palms Building No. 6 CHSL and Whispering Palms XX-clusives CHSL are concerned, the Senior Counsel for the Petitioner Company stated that the Scheme does not affect the rights of the unsecured creditors of the Transferor Company as it would be open to the said unsecured creditors of the Transferor Company to pursue legal remedy as may be advised for recovery of their dues, if any, against the Transferee Company after the Scheme is sanctioned. The Senior Counsel for the Petitioner Company is correct in his submission. It will be open to the unsecured creditors of the Transferor Company including the above mentioned unsecured creditors, to pursue their legal remedies against the Transferee Company for recovery of their dues, if any. The Transferee Company, through the Senior Counsel gave an undertaking to the Court to abide by the final order passed by the Court in favour of any or all the unsecured creditors of the Transferor Company.

16. The Official Liquidator has filed his Report on 7th April, 2015 stating that the affairs of the Transferor Company have been conducted in a proper manner and that the Transferor Company may be ordered to be dissolved by this Court.

17. 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.

18. Since all requisite statutory compliance have been fulfilled, Company Scheme Petition No. 69 of 2015 filed by the Transferor Company is made absolute in terms of prayer clauses (a) and (b) and Company Scheme Petition No. 70 of 2015 filed by the Transferee Company is made absolute in terms of prayer clause (a).

19. The Transferee Company to lodge a copy of this order along with a copy the Scheme, duly authenticated by the Company Registrar, High Court [O.S.], Bombay, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, within 60 days from the date of the order.

20. The Petitioner Companies are directed to file a copy of this order along with a copy of the Scheme duly authenticated by the Company Registrar, High Court [O.S.], Bombay, with the concerned Registrar of Companies, electronically, along with e-form 21/ INC 28 in addition to physical copy as per the provisions of Companies Act, 1956/2013, whichever is applicable.

21. The Petitioner Companies in the respective Company Scheme Petitions to pay costs of Rs. 10,000/- each to the Regional Director, Western Region, Mumbai and the Petitioner Company in Company Scheme Petition No. 69 of 2015 to pay a sum of Rs. 10,000/- to the Official Liquidator, High Court, Bombay. Costs to be paid within four weeks from the date of this order.

22. Filing and issuance of the respective drawn up orders are dispensed with.

23. All concerned regulatory authorities to act on a copy of this order along with the Scheme, duly authenticated by the Company Registrar, High Court [O.S.], Bombay.

(S. J. Kathawalla, J.)