IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY SCHEME PETITION NO. 594 OF 2014

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 163 OF 2014

PRIMA BUILDERS PRIVATE LIMITED

…………Petitioner / Transferor Company

AND

COMPANY SCHEME PETITION NO. 595 OF 2014

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 164 OF 2014

KAPSTONE CONSTRUCTIONS PRIVATE LIMITED

…………Petitioner / Transferee Company

In the matter of the Companies Act, 1956 (1 of 1956);

AND

In the matter of Sections 391 to 394 of the Companies Act, 1956;

AND

In the matter of Scheme of Amalgamation

of

Prima Builders Private Limited

with

Kapstone Constructions Private Limited

and

their respective shareholders

Called for hearing

Mr. Virag Tulzapurkar, Senior Counsel with Mr. Hemant Sethi i/b M/s Hemant Sethi & Co., Advocates for the Petitioner

Mr. Shyam Mehta, Senior Counsel, i/b Mr. S Ramakantha, Official Liquidator, present in the Company Scheme Petition No. 594 of 2014

Mr. A.R. Varma i/b H.P. Chaturvedi for Regional Director in both Petitions.

CORAM: S. J. Kathawalla, J.

DATE: 26th March, 2015

<u>P.C. :-</u>

1. Heard the Learned Counsels for the parties. No objector has come before the Court to oppose the Scheme of Amalgamation and nor any party has controverted any averments made in the Petition.

2. The sanction of the Court is sought under Sections 391 to 394 of the Companies Act, 1956, to the Scheme of Amalgamation of Prima Builders Private Limited with Kapstone Constructions Private Limited and their respective shareholders.

3. Learned Senior Counsel for the Petitioner Companies states that the Petitioner in Company Scheme Petition No.594 of 2014 is presently engaged in the business of real estate development and Petitioner in Company Scheme Petition No.595 of 2014 is presently engaged in the business of real estate development.

4. The rationale for the Scheme of Amalgamation is to integrate the business operations and rationalise administrative, operative and financial costs, simplify group structure and eliminate multiple entities within the group and result in efficient management control and system.

5. The Transferor Company and the Transferee Company have approved the said Scheme by passing Board Resolutions which are annexed to the respective Company Scheme Petitions.

6. The Learned Counsel for the Petitioners state that Petitioner Companies have complied with all directions passed in

Company Summons for Direction and that the Scheme has been filed in consonance with the orders passed in respective Company Summons for Directions.

7. The Learned Senior Counsel appearing on behalf of the Petitioners has stated that they have complied with all requirements as per directions of this Hon'ble Court and they have filed necessary Affidavits of compliance with the Hon'ble Court. Moreover, Petitioner Companies undertakes to comply with all statutory requirements, if any, as required under the Companies Act, 1956 /2013 and the Rules made there under. The said undertakings given by the Petitioner Companies are accepted.

8. The Regional Director has filed an Affidavit on 30th October 2014 stating therein that save and except as stated in paragraph 6 (a), (b) & (c) of the said affidavit, it appears that the Scheme is not prejudicial to the interest of shareholders and public. In paragraph 6(a), (b) & (c) of the said affidavit it is stated that:

"That the deponent further submits that,

a) *Clause 6.5 of the Scheme provides for adjustment for differences in Accounting Policies between Transferor company and Transferee company. In this regard, it is submitted that 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.*

b) *Clause 6.6 of the Scheme provides for Accounting Treatment. In this regard it is submitted that the Reserve, if any arising out of this scheme may be credited to Capital Reserve Account of Transferee Company and the deficit, if any arising, the same shall be debited to Goodwill Account of the Transferee Company.*

c) *The Scheme provides for issue of preference shares by the Transferee Company to the equity shareholders of the Transferor Company. The Income Tax Department also vide its letter dated 27/08/2014, annexed hereto* *as Exhibit – D, have submitted that the right of the Income Tax department to ascertain / assess correct income in correct hands as per the provisions of the Income Tax Act may be kept reserved. In this regard, the deponent respectfully submits that the tax implications, if any, arising out of the Scheme is subject to final decision of Income Tax Authorities. The approval of the Scheme by this Hon'ble Court may not deter the Income Tax Authority to scrutinize the tax returns filed by the Petitioner Company after giving effect to the Scheme. The decision of the Income Tax Authority is binding on the Petitioner Company.*

9. As far as observation made in paragraph 6 (a) of Regional Director Affidavit is concerned, the Petitioner/Transferee Company undertakes that the Transferee Company shall pass such accounting entries as may be necessary in connection with the Scheme of Amalgamation to comply with any other applicable Accounting Standards.

10. As far as observation made in paragraph 6 (b) of Regional Director Affidavit is concerned, the Petitioner/Transferee Company submits that :

    a. Paragraph 19 of Accounting Standard-14 provides for amortization of goodwill arising on amalgamation over its useful life. In the instant case, in the opinion of the management of the Petitioner Company there is no useful life of the goodwill arising on amalgamation and therefore the goodwill arising on the amalgamation will have to be written off in the profit and loss account immediately. Hence, the accounting treatment suggested under clause 6.6 in the Scheme of Amalgamation is justified for adjusting the deficit arising on account of amalgamation to Profit and Loss Account of the Company. The said accounting is therefore not in violation to the prescribed Accounting Standard. The Petitioner Company thereby undertakes to make necessary disclosures in the financial statements for the Petitioner Company.

b. Without prejudice to above, the provisions of Section 129 sub-section (1) of the Companies Act, 2013 envisage that every profit and loss account and balance-sheet of the Company shall comply with the accounting standards. Sub-section (5) provides that where the Profit and Loss Account and Balance Sheet of the Company did not comply with the accounting standards, the said Company shall disclose in its profit and loss account and balance sheet, the deviation from the accounting standards, reasons for such deviation and financial effects, if any, arising due to such deviation. The Petitioner Company thereby undertakes to make required disclosures pursuant to section 129 of the Companies Act, 2013, if any required in the financial statements for the Petitioner Company.

11. As far as observation made in paragraph 6(c) of Regional Director Affidavit is concerned, the Petitioner/Transferee Company submits that the Transferee Company is bound to comply with all applicable provisions of the Income Tax Act and all tax issues arising out of the Scheme of Amalgamation will be met and answered in accordance with law.

12. The Counsel for the Regional Director on instructions of Mr. M Chandanamuthu, Joint Director (Legal) in the office of Regional Director, Ministry of Corporate Affairs, Western

Region, Mumbai, states that they are satisfied with the undertaking and submission made by the Petitioner Company. The said undertaking given by the Petitioner Company is accepted.

13. The Official Liquidator has filed his report on 5th January 2015 placing on record the report of the Chartered Accountants, M/s Samria & Co, in which the Chartered Accountant has opined that the affairs of the Transferor Company have been conducted in a manner prejudicial to the interest of the members as well as prejudicial to the public interest. In view of the report of the Chartered Accountant, the Official Liquidator has submitted that the proposed scheme is liable to be rejected.
14. This court directed the Regional Director to independently examine the findings of the Chartered Accountant. The Regional Director accordingly looked into the findings of the Chartered Accountant and called for further information and documents from the Petitioner Company, which were not available with the Chartered Accountant at the time when they made their report. Upon considering the information and material provided by the Petitioner Company and in the light thereof examining the findings of the Chartered Accountant, the Regional Director has come to the conclusion that the findings of the Chartered Accountant are not justified. The Regional Director has filed an affidavit dated 12th March 2015 placing on record his opinion alongwith the information and material in support thereof. The Official Liquidator has not controverted the stand of the Regional Director.
15. The Petitioner Company has also filed a detailed affidavit on 14th January 2015 clarifying its stand on the issues raised by the Chartered Accountant. The Petitioner Company has inter-alia pointed out that the company is a closely held

company and all its shareholders have approved the scheme.

16. In view of the above, the objections of the Official Liquidator does not survive and the same are accordingly rejected.

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 the requisite statutory compliances have been fulfilled, the Company Scheme Petition No. 594 of 2014 filed by the Petitioner Company are made absolute in terms of prayer clauses (a), (c) and (d) and the Company Scheme Petition No. 595 of 2014 filed by the Petitioner Company are made absolute in terms of prayer clauses (a) and (c).

19. The Petitioner Companies to lodge a copy of this Order and 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, on the same within 60 days from the date of the order.

20. 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 the provisions of the Companies Act 1956 / 2013.

21. The Petitioner Companies in both the Company Scheme Petitions to pay costs of Rs.10,000/- each to the Regional Director, Western Region, Mumbai and the Petitioner in Company Scheme Petition No. 594 of 2014 to pay costs of Rs.10,000/- to the Official Liquidator, High Court, Bombay. Costs to be paid within four weeks from the date of the Order.

22. Filing and issuance of the drawn up Order is dispensed with.

23. All concerned authorities to act on a copy of this Order along with Scheme duly authenticated by the Company Registrar, High Court (O. S.), Bombay.

(S.J. Kathawalla. J.)