IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY SCHEME PETITION NO. 21 OF 2015.
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO. 875 OF 2014.

BILFINGER PLANT EQUIPMENTS PRIVATE LIMITED,

....Petitioner/ Transferor Company.

WITH

COMPANY SCHEME PETITION NO.22 OF 2015.
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO. 876 OF 2014.

BILFINGER NEO STRUCTO PRIVATE LIMITED

....Petitioner/ Transferee Company.

In the matter of the Companies Act 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 between Bilfinger Plant Equipments Private Limited,

AND

Bilfinger Neo Structo Private Limited and Their Respective Shareholders and Creditors.

Called for hearing

Mr. Rahul Oak, Advocate for the Petitioners in both Petitions.

Mr. S. Ramakantha, Official Liquidator, present in Company Scheme Petition No. 21 of 2015.

Mr. A. R. Verma i/b A. A. Ansari for Regional Director in both Petitions.

Mr. Chirag Mody i/b DSK Legal for the Creditors

CORAM: S. J. Kathawalla, J.

DATE : 27th April, 2015

PC:

1. Heard learned counsel for the parties.

2. The sanction of the Court is sought to a Scheme of Amalgamation and Arrangement of Bilfinger Plant Equipments Private Limited and Bilfinger Neo Structo Private Limited and their Respective Shareholders and creditors, under Sections 391 to 394 of the Companies Act, 1956.

3. Learned Counsel for the Petitioners states that the Transferor Company is in business of fully fledge heavy engineering shop involved in fabrication of custom-designed tanks and vessels, equipments, modules, boilers and technological structures. It has a manufacturing facility located in Sachin, Surat and the Transferee Company is in business of providing mechanical construction service provider in the area of modular fabrication of various process systems, pressure vessels, heaters and reformers, piping and structures, cryogenic liquid tanks and material handling system. The proposed scheme of Amalgamation will have the benefit of integration of the operations of Transferor Company and Transferee Company thereby eliminating duplication of processes and structures resulting in cost savings and a simplified corporate structure and improved management focus and centralizing the activities of the two companies is expected to lead to improvement in operational and cost efficiency through economies of scale, optimization of resources, expansion of asset base and a stronger balance sheet of the enlarged company.

4. The Transferor Company and Transferee Company has approved the said Scheme of Amalgamation by passing the Board Resolutions which are annexed to the respective Company Scheme Petitions.

5. The learned Advocate for the Petitioners further states that, Petitioner Companies have complied with all the directions passed in Company Summons for Directions and that the Company Scheme Petitions have been filed in consonance with the orders passed in respective Company Summons for Directions.

6. The learned counsel appearing on behalf of the Petitioners have stated that the Transferor Company and Transferee Company have complied with all requirements as per directions of this Court and they have filed necessary Affidavits of compliance in the Court. Moreover, Petitioner Companies undertake to comply with all statutory requirements if any, as required under the Companies Act, 1956 / 2013 and rule made there under whichever is applicable. The said undertaking is accepted.

7. Learned Counsel for the Petitioner Company states that Ms. Deepu Syamaprakash, N. Syamaprakash, Mr. Suraj S. Vaidyan, N. Syamaprakash, Mr. Sonu S. Vaidyan and Mr. Dipin S. Vaidyan creditors of the Transferor Company through their counsel M/s. DSK Legal has filed their vakalatnama as objectors. However, the abovementioned creditors has not filed any Affidavit for opposing the scheme. The learned counsel for the abovementioned creditors has appeared before the court and submits that now the abovementioned creditors have no objection to the proposed scheme. Statement made by the counsel on behalf of the abovementioned creditors is accepted.

8. The Official Liquidator has filed his report on 27th March, 2015 in Company Scheme Petition No. 21 of 2015 stating that the affairs of the Transferor Company has been conducted in a proper manner and that the Transferor Company may be ordered to be dissolved.

9. The Regional Director has filed an Affidavit on 06th April, 2015 stating therein, save and except as stated in paragraph 6, it appears that the Scheme is not prejudicial to the interest of shareholders and public. In paragraph 6 of the said Affidavit, it is stated as under.

(a) The Shares of Transferor Company are held by Foreign Body Corporate. Hence, while giving effect to the Scheme, by issuing new shares by the Transferee Company to the shareholders of Transferor Company, the Transferee Company has to comply with the provisions of FEMA/ RBI regulations etc. applicable in this regard.

(b) It is respectfully submitted that the tax implication, 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 Tux Authority to scrutinize the tax returns filed by the Transferee Company after giving effect to the Scheme. The decision of the Income Tax Authority is binding on the Transferor company and Transferee company.

(c) Clause 10.11 of the Scheme provides that, "upon the scheme becoming effective, the main objects as well as relevant incidental objects of the Memorandum of Association of the Transferor Company shall form part of the Memorandum of Association of the Transferee Company". The relevant incidental objects which will become part of the Memorandum of Association of Transferee Company is unknown at this stage even for the petitioner. In this regard, it is submitted that the Transferee company shall pass necessary resolution for amendment of object clause and further it may be directed to comply with provision of Section l3(1) & (6) read with Section I5 of the Companies Act,2013 corresponding to section 40 read with section 18 of the Companies Act, 1956 and to file amended copy of Memorandum of Association alongwith necessary form with Registrar of Companies.

(d) Clause 13.4 of the Scheme provides for adjustment difference arising out of the Scheme of Amalgamation. In this regard, it is submitted that the Surplus, if any arising out of the scheme shall be credited to Capital Reserve Account of Transferee Company and the Deficit, if any arising, shall be debited to Goodwill Account of the Transferee Company.

(e) The Appointed Date as per Clause No. 1.2 of the Scheme is 01/04/2012. In this regard, it has been observed that the Board of Directors have approved the Scheme on 25/07/2014 by that time, the financial year ended 31/03/2012, 3l/03/2013 and 31/03/2014 have already expired. As per the provisions of Section 139 of Income Tax Act, the assesses cannot file a regular or revised return of income for any assessment year, one year from the end of the assessment year in which the return becomes due. It is further observed that the Transferor company had already filed its return for their financial year ending 31/03/2012, 3l/03/2013, etc. Under these facts and circumstances of the case, it is not justified for keeping the Appointed Date as 01/04/2012 on the pretext that the Transferor Company was acquired by Bilfinger Industrial Services Gmbh, Germany (now merged with Bilfinger SE, Germany) during the Financial Year 2011-12. It is therefore suggested that the Hon'ble High Court may prescribe the following conditions:-

i) The issue regarding the liability, if any, of the Petitioner or Transferee company towards payment of income tax or any other tax that may arise pursuant to the sanction of the scheme, are left open to the Income Tax Department to decide in accordance with law at the appropriate stage without being bound by the Appointed Date of l April, 2012 fixed by the Scheme;

ii) In the event of the Petitioner or Transferee company filing revised income tax returns, the validity and permissibility thereof will be decided by the Income Tax Department, and while doing so, the Income Tax Department will not be bound by the Appointed Date of I" April, 2012 fixed the Scheme;

iii) The Income Tax Department shall not be bound by the Appointed Date of 1" April 2012 fixed under the Scheme while carrying out pending and/or future assessments of the Transferor and Transferee companies whether on the basis of the income tax returns already filed or revised returns, if any, that may be filed, or otherwise, and shall carry out such assessments without being bound by the Appointed Date of 1st April 2012 fixed by the Scheme.

(f) Clause 13.5 of the Scheme provides for adjustment for differences in Accounting policies between Transferor Company and Transferee Company. In this regard, it is submitted that in addition to compliance of Accounting Stundard-l4, 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."

10. In so far as the observation in paragraph 6 (a) of the Affidavit of Regional Director is concerned, the Transferee Company through its counsel undertakes to comply with the provisions of FEMA/ RBI regulations etc.,

while giving effect to the Scheme, by issuing new shares by the Transferee Company to the shareholders of Transferor Company.

11. In so far as the observation in paragraph 6(b) of the Affidavit of Regional Director is concerned, the Petitioner Companies are bound to comply with all applicable provision of Income Tax Act, and all tax issues arising out of Scheme will be met and answered in accordance with law.

12. In so far as the observation in paragraph 6 (c) of the Affidavit of Regional Director is concerned, the Transferee Company through its counsel for the undertakes that Transferee company shall pass necessary resolution for amendment of object clause and will comply with provision of Section l3(1) & (6) read with Section 15 of the Companies Act, 2013 corresponding to section 40 read with section 18 of the Companies Act, 1956 and file amended copy of Memorandum of Association alongwith necessary form with Registrar of Companies.

13. In so far as the observation in paragraph 6 (d) of the Affidavit of Regional Director is concerned, the Transferee Company through its counsel for the undertakes that the Surplus, if any arising out of the scheme shall be credited to Capital Reserve Account of Transferee Company and the Deficit, if any arising, shall be debited to Goodwill Account of the Transferee Company.

14. In so far as observation made in paragraph 6(e) of the Affidavit of the Regional Director is concerned, The Transferee Company through their counsel undertakes that the Appointed Date in clause 1.2 of the Scheme be

amended as April 1, 2014 instead of April 1, 2012 and seeks leave of this court to amend the same.

15. So far as the observation in paragraph 6 (f) of the Affidavit of Regional Director is concerned, the Transferee Company through its counsel undertakes that Transferee Company shall pass such accounting entries which are necessary in connection with the Scheme to comply with other applicable Accounting Standard.

16. The counsel for the Petitioner submits that the registered office address of the Transferor Company and Transferee Company has been changed as Level 2, Raheja Centre Point, 294 CST Road, Near Mumbai University, Off Bandra-Kurla Complex, Santacruz (E), Mumbai - 400098. Hence, counsel for the Petitioner seeks leave to amend the registered office address of the Transferor Company and Transferee Company mentioned in Clause 1.3 and 1.4 of the Scheme as "Level 2, Raheja Centre Point, 294 CST Road, Near Mumbai University, Off Bandra-Kurla Complex, Santacruz (E),Mumbai-400098 instead of 312, 3rd Floor, Gemstar Commercial Complex, Ramchandralane Ext., Malad West, Mumbai, Maharashtra-400064" instead of "312, 3rd Floor, Gemstar Commercial Complex, Ramchandra Lane Extension, Malad (W), Mumbai, Maharashtra-400064".

17. The Learned Counsel for Regional Director on instructions of Mr. M. Chandana Muthu, Joint Director Legal in the office of the Regional Director, Ministry of Corporate Affairs, Western Region, Mumbai states that they are satisfied with the undertaking given and amendment sought by the Advocate

for the Petitioner Company. The said undertaking is accepted. Leave to amend is granted. Amendment to be carried out within period of three weeks from date of the order.

18. 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.

19. Since all the requisite statutory compliances have been fulfilled, Company Scheme Petition No. 21 of 2015 and 22 of 2015 are made absolute in terms of prayer clause (a).

20. The Petitioner Companies to lodge a copy of this order and the amended 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.

21. Petitioners are directed to file a copy of this order along with a copy of the amended Scheme of Amalgamation with the concerned Registrar of Companies, electronically, along with E-Form INC 28 in addition to physical copy as per the relevant provisions of the Companies Act, 1956/2013 whichever is applicable.

22. The Petitioner Companies to pay costs of Rs.10,000/- each to the Regional Director, Western Region, Mumbai and the Petitioners in the Company Scheme Petition No. 21 of 2014 to pay costs of Rs.10,000/- each

to the Official Liquidator, High Court, Bombay. Costs to be paid within four weeks from the date of the Order.

23. Filing and issuance of the drawn up order is dispensed with.

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

(S. J. Kathawalla, J.)