IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY SCHEME PETITION NO. 280 OF 2016

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 492 OF 2015

Bharat Barrel and Drum Manufacturing Company
Private Limited ...Petitioner Company

AND

COMPANY SCHEME PETITION NO. 281 OF 2016

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 493 OF 2015

Steel Barrel Private Limited ...Petitioner Company

In the matter of Companies Act, 1956

And

In the matter under Section 391 & 394 of the Companies Act, 1956 (1 of 1956).

And

In the matter of "Bharat Barrel and Drum Manufacturing Company Private Limited" a company incorporated under Indian Companies Act, 1956

And

In the matter of Scheme of Arrangement for Demerger between Bharat Barrel and Drum Manufacturing Company Private Limited

With

Steel Barrel Private Limited

And
their respective shareholders and creditors

Called for Hearing

Mr. Sharan Jagtiani, Mr. Ravi Rattesar i/b. D. M. Harish & Co. a/w. Ms. Shruti Kelji and Ameya Lambhate, Counsels for the Petitioners
Mr. Sachin Kadam, i/b. Pankaj Kapoor for the Regional Director in both Company Scheme Petitions.

Coram : S. C. Gupte, J.
Date : 29th November, 2016

P.C:-

1. Heard Counsel for the parties. No objectors have come before the Court to oppose the Scheme nor any party has controverted any averments made in the Company Scheme Petition.

2. The sanction of the Court is sought under Sections 391 to 394 of the Companies Act, 1956 to a Scheme of Arrangement between Bharat Barrel and Drum Manufacturing Company Private Limited, the Demerged Company and Steel Barrel Private Limited, Resulting Company and their respective shareholders.

3. Learned Counsel for the Petitioner Companies state that the Demerged Company and Resulting Company is engaged in the business of iron founders, mechanical engineers and manufactures of drums and barrels and other related activities.

4. The proposed scheme of arrangement will ensure focused and enhance their business operations for enabling better and more efficient management, control and running of business.

5. The Petitioner Companies have approved the Scheme of Arrangement by passing Board Resolutions which are annexed to the Company Scheme Petition.

6. The Learned Counsel for the Petitioner further states that the 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 Order passed in Company Summons for Direction.

7. The Learned Counsel appearing on behalf of the Petitioner has stated that the Petitioner has complied with all requirements as per directions of this Court and they have filed necessary affidavit of compliance in the Court. Moreover, the Petitioner Company through its Counsel undertake to comply with all statutory requirements, if any, as required under the Companies Act, 1956/2013 and the Rules made thereunder. The said undertaking is accepted.

8. The Regional Director has filed an Affidavit on 7th September, 2016 stating therein, save and except as stated in paragraph 6 the affidavits, it appears according to the Regional Director that the Scheme is not prejudicial to the interest of the shareholders and public. The aforesaid paragraph 6 reads as under:

   (i) It is on perusal of Financial Statement of M/s. Bharat Barrel and Drum Manufacturing Company Private Limited (Transferor / Demerged Company) and M/s. Steel Barrel Private Limited (Transferee Company / Resulting Company) few facts are noticed which are prejudicial to the interest of M/s. Bharat Barrel and Drum Manufacturing Company Private Limited (Transferor / Demerged Company). The

Scheme is a reverse takeover of M/s. Steel Barrel Private Limited (Transferee Company / Resulting Company) which is prejudicial to the interest of shareholders of Transferor Company. Comparative study of Financial Statements of both the Companies for financial Year 2014-15 clearly indicates the contours of fairness of the Scheme.

Sr. No.	Particulars	M/s. Bharat Barrel	M/s. Steel Barrel
		B/s. as at 31/3/2015	
1.	Date of Registration	03.04.1951	23.4.2012
2.	Name of Directors	i) Mr. Ravindra Jalan ii) Mr. Gautam Kumar Jalan iii) Mr. Vishnu Kumar Jalan iv) Mr. Dilip Jalan v) Mr. Sanjeev Goenka	i) Mr. Sanjeev Goenka ii) Ms. Sonia Goenka Both directors hold entire Issued, Subscribed and paid-up
3.	Authorized Share Capital	75,00,000	5,00,00,000
4.	Issued Subscribed and paid-up Share Capital	54,75,000	1,00,000
5.	Reserves and Surplus	46,12,32,729	(4,87,354)
6.	Non-current Liabilities	1,78,76,594	--
7.	Current liabilities	13,94,08,347	74,76,859
8.	Fixed Assets	4,66,80,109	--
9.	Non Current Assets	1,06,00,930	-
10.	Currents Assets	56,67,11,631	70,89,505
		Profit and loss account ear ending on 31/3/2015	

1	*Income from Operations*	*48,07,05,025*	*53,164*
2	*Other Income*	*3,19,26,831*	*20,000*
3	*Materials consumed / Cost of goods sold*	*34,47,73,142*	*52,164*
4	*Employee Benefits*	*5,11,35,266*	*--*
5	*Other Expenses*	*8,61,60,216*	*65,616*
6	*Profit after Tax*	*1,15,67,137*	*(44,537)*
7	*Earnings Per Share (EPS) Equity share of Rs.1/-*	*2.11*	*(0.45)*

(A) <u>M/s. Bharat Barrel and Drum Manufacturing Company Private Limited (Transferor /Demerged Company) : -</u>

- *There are Relate Party Transactions in the Company.*
- *Mr. Sanjeev Goenka on of the director had given interest free loan amounting to Rs.74,01,472/- to M/s. Steel Barrel Private Limited in which Ms. Sonia Goenka appears to be his wife is a director.*
- *M/s. Steel Barrel Private Limited has granted loans and advances to M/s. Bharat Barrel and Drum Manufacturing Company Private Limited (Transferor / Demerged Company) Mr. Sanjeev Goenka is one of the director who is interested in both the companies.*

<u>Both the transactions can be attributed to book entry/circular entry.</u>

- *The company has given interest free loan amounting to Rs.20,00,00,000/- to Renaissance Trust (a related party transaction) without any stipulation as to repayment. The Statutory Auditor vide Annexure to the Auditor's Report, dated 11th August, 2015 at point (iii) had mentioned this aspect. Further, as observed in Valuation Report dated 10th*

December, 2013 by U.V. Parekh & Associates, Chartered Accounts indicates that said amount is pending 2012-13. Claim appears to be barred by limitation.

- *Further, the Valuation Report dated 10th December, 2013 by U.V. Parekh & Associates, Chartered Accounts indicates that as on 31/3/2015 an amount of Rs.6,00,00,000/- is receivable from Jalan Family Beneficiary Trust 2012-13. This also a Relate Party Transaction. The details regarding interest payable, stipulation as to repayment etc., is not known / made available.*
- *In the absence of financial statements of divisional financial statements of Demerged Undertaking and Remaining Undertaking it is not possible to ascertain / access the financial implication.*

(a) The Statutory Auditor vide Notes to Accounts for financial year 2014-15 at para 3 has observed that the company in its capacity as the owner of various piece or parcel of land had by and under an agreement (Development Agreement) dated 25th March, 1997 executed between the company and Kanha & Co. the firm of Mr. Vinod Tejraj Gowani and Mr. Hitesh Tejraj Gowani. Due to non-performance and breach by these two gentleman the Agreement is terminated. The company vide letter 5th October, 2011 throgh its Counsels had given notice for dissolution of the said firm and initiated arbitration procedure prescribed under the said the matter is still pending. The financial implication is not known

(b) Violation of provisions of Section 180 of the Companies Act, 2013 cannot be ruled out.

(B) ***<u>M/s. Steel Barrel Private Limited (Transferee Company / Resulting Company)</u>***

- *Company has no significant business in the Company.*
- *It appears that company has got only few books entries.*
- *Net worth of the Company is completely eroded. (in fact it is negative)*
- *Receipt of loan from Mr. Sanjeev Goenka one of the director of the company and advancing loan to M/s. Bharat Barrel and Drum Manufacturing Company Private Limited amounts can be attributed to diversion of funds.*

(ii) *The nexus between Goenkas and Jalans cannot be ruled out. Mr. Ravindra Jalan, Mr. Dilip Jalan and Mr. Sanjeev Goenka who are the directors of the Company have entered in to Related Party Transactions in M/s. Steel Barrel Private Limited (Transferee Company / Resulting Company as reported in Financial Statement financial year 2013-14. It is evident that Goenkas and Jalans can exercise significant control over the management of both them companies. The transactions between entities can be attributed to diversion of funds. Financial Statement of M/s. Steel Barrel Private Limited Transferee Company / Resulting Company is a paper Company.*

(iii) *Further, it is submitted that the "Appointed Date" should not be 01.04.2013. It should be the date and time of final hearing of the petition, as this requirement is statutory. The reasons are as under :-*

(a) *The expression "Appointed Date" is used to reflect the date of which assets and liabilities of the existing company were to be identified for the purpose of transfer to the Transferee*

Company / Resulting Company. The Assets and liabilities as on the date of "Appointed Date" stands lawfully transferred. Subsequent developments are not in the knowledge of this Hon'ble Court, Shareholders, Creditors etc., As per scheme the "Appointed Date" is 01.04.2013. Further, the shareholders, creditors etc. of the Transferor Company are entitled to know the details of transaction subsequent to the Appointed Date i.e. 01.04.2013.

(b) Further, it is submitted that the Transferor Company is seeking approval which is will have retrospective effect. The applicant has to explain and offer explanation to the satisfaction of this Court that why the "Appointed Date should be 01.04.2013). The gap between the date of audited balance sheet and the appointed date should be reasonable and nearer to the time of final hearing of the petition and this requirement is statutory."

(c) The Scheme should be fair and reasonable. As the Scheme once approved becomes binding "on the company".

(d) The court has got power to go into all the incidental and ancillary questions in an effort to satisfy itself whether the person who have approved the scheme have got the knowledge of subsequent developments and financial conditions prevailed to the "Appointed Date" i.e. 01.04.2013.

(e) The purpose of disclosure u/s. 393(1) is to enable the person participating in the meeting to exercise his discretion as to whether to approve or disapprove the scheme, disclosure under proviso to section 391(2) are to enable the Court to satisfy itself in all respect before granting its sanction. The sanction of Court operates as judgment in rem.

(f) *In view of the above the "Appointed Date" should not be 01.04.2013. It should be the date and time of final hearing of the petition, as this requirement is statutory. However, since there is a gap of more than 3 years between appointed date and the final date of hearing, the scheme has become obsolete, the scheme deserves to be rejected.*

(iv) *The Deponent herein crave leave of this Hon'ble High Court to file further affidavit if required.*

(v) *On perusal of financial Statement for 2014-15 and observations as mentioned clearly indicates that the Scheme appears to be an exercise to evade tax. The scheme is not bona fide, reasonable & fair. A profit making company which was registered/ incorporated on 03.04.1951 as a Limited company under the name "Bharat Barrel and Drum Manufacturing Company Limited" under Indian Companies Act, VII of 1913, later converted in to a Private Limited Company has a nationwide presence consisting manufacturing facilities at Kolkata, Haldia, Faridabad, and Mangalore. The Transferor Company is also one of the leading manufacturers of Barrels and Drums. With this demerger the Demerged company desires to transfer entire assets and liabilities of above mentioned units located various places as a going concern to M/s. Steel Barrel Private Limited (Transferee Company / Resulting Company) indicates that scheme is motivated to transfer valuable assets to a paper Company to evade Stamp Duty and Registration charges and Capital Gain Tax.*

9. The Petitioner Company has filed its Affidavit in reply dated 19th October, 2016 wherein the objections raised by the Regional Directors have been explained and clarified in detail. The Learned Counsel for the Petitioner submits that:

(i) As far as observations made in paragraph 6 (i) of Affidavit of the Regional Director is concerned, the Scheme is not a reverse takeover but is a Demerger. In the present scheme the demerged undertaking as mentioned in the Scheme is being transferred to the Resulting Company and hence the observation made by the Regional Director is unsustainable.

(ii) As far as observations made in paragraph 6(1)(A) of Affidavit of the Regional Director is concerned, Loan given by the Transferor Company to Renaissance Trust and amount receivable from Jalan Family Trust are concerned, both Related Parties and all disclosures and compliances in respect thereof have been made. The Loan is not barred by limitation and in any event the loan is being retained by the Transferor Company and the demerger would not be affected on this ground.

(iii) As far as observations made in paragraph 6 (1)(A) of Affidavit of the Regional Director is concerned The Transferor Company has initiated arbitration proceedings in relation to cancellation of the Agreement executed with Kanha & Co. in the year 1997 with respect to various piece or parcel of land and the same has been disclosed. These lands will be retained by the Demerged Company and the implications, if any, are of the Demerged Company.

(iv) As far as observations made in paragraph 6(1)(A) of Affidavit of the Regional Director is concerned, the Companies Act, 2013 has subsequently come into force and therefore the Petitioner being a Private Limited Company, Section 180 is not applicable pursuant to the notification dated 5th June, 2015 and hence, there is no question of any violation. Further, even if it is considered for the sake of arguments that Section 180 is applicable, the Petitioner Company has already undertakes to pass a special resolution, if required.

(v) As far as observations made in paragraph 6(1)(B) of Affidavit of the Regional Director is concerned, the Resulting Company was incorporated on 23.04.2012 to receive the manufacturing undertaking of the Demerged Company and hence, there is no significant business in the company. Therefore the net worth of the Resulting Company is small and in any event is not relevant.

(vi) As far as observations made in paragraph 6(1)(B) of Affidavit of the Regional Director is concerned, Mr. Sanjeev Goenka is Director of the Demerged as well as Resulting Companies and he has given a loan to the Demerged Company. The Petitioner Company has complied with provision of the Companies Act in respect of the same and therefore there is no violation of law.

(vii) As far as observations made in paragraph 6(1)(B) of Affidavit of the Regional Director is concerned, Goenka and Jalan family members are the shareholders of the

Demerged Company the transactions between them are in accordance with the provisions of the Companies Act and therefore there is no diversion of funds.

(viii) As far as observations made in paragraph 6 (iii) (a) to (f) of Affidavit of the Regional Director is concerned, the Counsel for the Petitioner states that Scheme was approved by the Board of Directors in their meeting held on 27th November, 2013 containing the Share Exchange Ratio as per the valuation report based on the available audited financial being 31st March, 2014 and therefore the Appointed Date was fixed as 1st April, 2013 as per the position of assets and liabilities based on the audited financials and not the provisional financials which are subject to change. Further the shareholders of the Petitioner Company and the Transferee Company have unanimously consented to the proposed scheme with appointed date as 1st April, 2013. The appointed date is the cut-off date for indentifying the date when the assets and liabilities of the Transferor Company would be transferred and vested in the Transferee Company and the swap ratio has been fixed taking into consideration the appointed date being 1st April, 2013. The shareholders of the Transferor Company and Transferee Company have already approved the scheme, therefore the appointed date cannot be shifted.

(ix) The Scheme is in compliance with the provisions of the Companies Act and in compliance with the Income tax Act and there is no evasion of tax. The Income tax authorities have been intimated and have yet not filed any objections.

Both the companies are surviving and there is no winding up of any of the companies and accordingly Income-tax demands if any, can be recovered.

(x) There is no evasion of any stamp duty and registration charges and in fact upon the Scheme being sanctioned the stamp duty will be paid as per the relevant stamp duty provisions in the various jurisdictions.

10. The Regional Director has filed an Affidavit-in-Rejoinder on 10th November, 2016 stating therein, save and except as stated in paragraph 6 in the affidavit, it appears according to the Regional Director that the Scheme is not prejudicial to the interest of the shareholders and public. The aforesaid paragraph 6 reads as under: -

(a) The surplus if any arising out of the scheme shall be credited to Capital Reserve and deficit if any arising out of the same shall be debited to Goodwill account of Transferee Company and will not be adjusted against any other reserves of the Transferee Company.

(b) 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 no9t deter the Income Tax Authority to scrutinize the tax return filed by the transferee Company after giving effect to the scheme. The decision of the Income Tax Authority is binding on the Petitioner Company.

(c) The approval of the scheme by this Hon'ble Court may deter the Ministry of Corporate Affairs to inspect the books and records of the Companies U/s. 207 of the Companies Act, 2013. The

charity commission or any other statutory / controlling authorities to verify books of accounts, records papers, etc., of the companies and trusts, and take necessary action in accordance with law.

11. So far as the observation made in paragraph 6(a) of the Affidavit-in-Rejoinder of the Regional Director is concerned, the Petitioners through their Counsel states that surplus, if any, arising out of this scheme will be credited to Capital Reserve Account of Transferee company and deficit if any will be credited to Goodwill Account of the Transferee company.

12. As far as the observations made in paragraph 6(b) of the Affidavit-in-Rejoinder of the Regional Director is concerned, the Petitioner Companies are bound to comply with all applicable provisions of the Income Tax Act, and all tax issues arising out of scheme will be met and answered in accordance with law.

13. So far as the observations made in paragraph 6(c) of the Affidavit-in-Rejoinder of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies states that the Ministry of Corporate Affairs may take inspection of books of accounts in accordance with law. The Learned Counsel for the Petitioner Companies state that the Trusts specified in the Regional Directors reply are not Public Trust and are Private Trusts and therefore the Charity Commissioner is not concerned with the same. Further, if any authority wants to inspect the same then the companies do hereby undertake to give inspection as provided in law.

14. The Learned Counsel for the Regional Director on instructions of Mr. S. Ramakantha, Joint Director in the office of the Regional Director states that they are satisfied with the undertakings given by the Petitioner Company. The said undertakings given by the Petitioner Companies are accepted.

15. 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.

16. Since all the requisite statutory compliances have been fulfilled, Company Scheme Petition No. 280 of 2016 and Company Scheme Petition No. 281 of 2016 are made absolute in terms of prayer clauses (a) to (c) respectively.

17. The Petitioner Company is directed 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 receipt of the order.

18. The Petitioner Company is further 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 INC 28 in addition to physical copies as per relevant provisions of the Companies Act, 1956/2013 whichever is applicable.

19. The Petitioner Companies to pay costs of Rs.10,000/- each to the Regional Director, Western Region, Mumbai in Company Scheme Petition No. 280 of 2016 and Company Scheme Petition No. 281 of 2016. Costs to be paid within four weeks from the date of the Order.

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

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

(S. C. Gupte, J.)

C E R T I F I C A T E

I certify that this Order uploaded is a true and correct copy of Original signed order.

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