IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY SCHEME PETITION NO. 380 OF 2016

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 102 OF 2016

Lands End Properties Private Limited …Petitioner Company
[CIN: U70100MH2009PTC197920]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY SCHEME PETITION NO. 381 OF 2016

CONNECTED WITH

COMPANY SUMMONS FOR DIRECTION NO. 103 OF 2016

The Indian Hotels Company Limited …Petitioner Company
[CIN: L74999MH1902PLC000183]

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

And

In the matter of Petition under Sections 391 to 394 read with Section 52 of the Companies Act, 2013, Sections 78, 100 to 104, of the Companies Act, 1956 or any re-enactment thereof;

And

In the matter of Scheme of Arrangement amongst Lands End Properties Private Limited and The Indian Hotels Company Limited and their respective shareholders and creditors and reduction of share capital of The Indian Hotels Company Limited.

Called for Hearing

Dr. Birendra Saraf, Counsel with Mr. Tapan Deshpande, Advocate of Cyril Amarchand Mangaldas, Advocates for the Petitioner Companies.

Mr. Dushyant Kumar, i/b Mr. A. K. Chaturvedi for Regional Director in both Petitions

Ms. Yogini Chouhan, Deputy Official Liquidator, present in CSP no. 380 of 2016

Coram: A.K. Menon, J.
Date: 13th October, 2016

MINUTES OF THE ORDER

PC:

1. Heard Counsel for the parties. No objector has come before the Court to oppose the Scheme nor has any party controverted any averments made in the Petitions.

2. Learned Advocate for the Petitioner Company states that the Petition has been filed to seek sanction to the Scheme of Arrangement amongst Lands End Properties Private Limited (hereinafter referred to as "**Transferor Company**") and The Indian Hotels Company Limited (hereinafter referred to as "**Transferee Company**") (together Petitioner Companies) and their respective shareholders and creditors and reduction of share capital of the Transferee Company (the "**Scheme of Arrangement**" or the "**Scheme**"), pursuant to the provisions of Sections 391 to 394 read with Section 52 of the Companies Act, 2013, Sections 78, 100 to 104, of the Companies Act, 1956 or any re-enactment thereof.

3. The Learned Counsel 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 respective Company Summons for Directions.

4. The Learned Advocate for the Petitioner Companies has stated that the Petitioner Companies have complied with all requirements as per the directions of this Court and 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 / Companies Act, 2013 and the Rules made thereunder. The said undertakings are accepted.

5. The Transferor Company is engaged *inter alia* in the business of owning and developing, hotels, shopping malls, etc. The Transferor Company is a wholly owned subsidiary of the Transferee Company. The Transferee Company is engaged in the business of owning, operating and managing hotels, palaces and resorts. The learned Advocate for the Petitioner Companies says that the rationale and significant benefits of the Scheme are that (i) simplifies management structure, leading to better administration; (ii) a reduction in costs from more focused operational efforts, rationalization, standardization and simplification of business processes; (iii) the elimination of duplication, and rationalization of administrative expenses; (iv) simplify shareholding structure and reduce shareholding tiers; and (v) facilitating a wider and stronger base for future growth through the addition of assets by leveraging upon benefits of

scale, translating into increased business opportunities and reduced expenses, pursuant to Sections 391 to 394 and other relevant provisions of the Act. The Scheme is sought to be undertaken to amalgamate the Transfer Company being wholly owned subsidiary of the Transferee Company with the Transferee Company. The Board of Directors of the both the Petitioner Companies have approved the said Scheme by passing in their respective Board meetings, resolutions which are annexed to the Petition. As its integral part, the Scheme of Arrangement also postulates reduction of the Securities Premium Account of the Transferee Company. In terms of Clause 18 (c) of the Scheme, the Scheme was to be made effective by 30th September, 2016 or such later date as may be agreed by the Board of Director of the respective Petitioner Companies. The Petitioner Companies have filed their respective affidavits in this Court placing on records the resolutions passed by their respective Board meetings, extending the date of 30th September, 2016 as set out in Clause 18 (c) of the Scheme for the effectiveness of the Scheme from 30th September, 2016 to 31st March, 2017.

6. The Regional Director has filed an Affidavit dated 16th September, 2016, stating therein, that save and except as stated in paragraph 6 of the said Affidavit, it appears accordingly to the Regional Director that the Scheme is not prejudicial to the interest of the shareholders of the Petitioner Company and public. In paragraph 6 of the Affidavit of the Regional Director, it is stated that:

"*6. (a) Regarding Clause 1.1.2 of the scheme the appointed date means the close of business on 31st March 2016 or such other date as may be determined by the Boards of Directors of the Transferor*

Company and the Transferee Company. In this regard the appointed date should be the close of business on 31st March 2016 or other date, the Hon'ble High Court at judicature of Bombay may direct.

(b) Regarding Clause 17 (a) of the scheme(Reduction of the Securities Premium Account of the Transferee Company) it is submitted that since the shares are not subscribed but purchased and any amount paid to the transferor of the shares over and above the face value is to be considered as commercial transaction concluded at market value. It should not be treated as a premium as shares are not subscribed but purchased. Further, it is not provided under the provisions of the Act. (Companies Act, 1956/2013) Hence, the Transferee Company is not entitled to adjust the amount claimed (as share premium) against the Securities Premium account of the Transferee Company.

(c) Regarding clause 17(b) of the scheme, (Reduction of the Securities Premium Account of the Transferee Company)the debit balance in profit and loss account of the Transferee Company (including the debit balance of the Transferor Company) that would be recorded in the books of accounts of the Transferee Company at their existing carrying amounts in the same form in accordance with clause 16(a) (ii) of the scheme

shall also be adjusted against the Securities Premium Account of the Transferee Company. However, as clause 17(b) of the scheme (Reduction of the Securities Premium Account of the Transferee Company) the balance in profit and loss account of the Transferee Company shall also be adjusted against the Securities Premium Account of the Transferee Company. It is submitted that such adjustment will show true and fair view of the affairs of the company. Further, it is not provided under the provisions of the Act, (Companies Act, 1956/2013) Hence, the same should not be allowed.

(d) *Clause 14 of the scheme, it is submitted that the surplus if any out of the scheme shall be credited to Capital Reserve and deficit if any arising out of the scheme shall be debited to goodwill account and will not be adjusted against any other reserves/accounts of the Transferee Company.*

(e) *That the Deponent further submits that the Tax implication if any arising out of this scheme shall be subject to final decision of Income tax Authority and approval of the scheme by Hon'ble High Court may not deter the Income Tax Authority to scrutinize the tax returns filed by the petitioner company after giving effect to the amalgamation The decision of the Income Tax Authority is binding on the petitioner company."*

7. The Transferee Company has filed an affidavit dated 5th October, 2016 dealing with the said observations.

8. As regards the observation set out in paragraph 6 (a) of the Affidavit of the Regional Director, the Petitioner Company through its Advocate undertakes that the appointed date applicable to the Scheme shall be close of business hours on 31st March, 2016 or such other date as may be approved by this Court as mentioned in the Scheme.

9. As regards the observation set out in paragraph 6 (b) of the Affidavit of the Regional Director, the Counsel for the Petitioner Company submits that Clause 17 of the Scheme in effect provides for a reduction of the securities premium account in accordance with the applicable provisions of the Companies Act, 1956 and the Companies Act, 2013. Section 52(1) of the Companies Act, 2013 as well as Section 78(1) of the Companies Act, 1956, *inter alia*, provide that the provisions relating to reduction of share capital of a company stipulated under the Act are applicable in relation to the Securities Premium Account, except as provided in those sections, as if the Securities Premium Account were the paid-up share capital of the company. Further, Section 100(1) of the Companies Act, 1956, *inter alia*, provides that a company may reduce its share capital in any way, including the specific methods mentioned therein, by complying with the procedure set out therein. The Transferee Company has followed the procedure laid down in Section 100 of the Companies Act, 1956 and the only step that now remains is to obtain confirmation of this Court. The counsel for the Petitioner Company further submits that the observation of the Regional Director with regard to purchase of the shares and it being a commercial transaction, are not relevant, in light of the legal provisions referred to in the Companies Act, 1956. The Scheme provides for accounting based on the

"Pooling of Interests Method" as per Accounting Standard – 14 (AS-14) on Accounting for Amalgamations. As the amalgamation under the Scheme complies with all conditions of paragraph 3(e) of AS-14 as on the "Appointed Date", the amalgamation will be an "amalgamation in the nature of merger". Consequently, upon amalgamation, the difference between the amount recorded as Investment in shares of the Transferor Company in the books of account of the Transferee Company and the amount reflected as Share Capital in the books of account of the Transferor Company is required by the provisions of paragraph 16 of AS-14 to be adjusted in the reserves in the financial statements of the Transferee Company and the "Reserves" includes Securities Premium Account.

10. At the hearing, the learned counsel for the Regional Director stated that the Regional Director is not pressing the objection set out in pargaraph 6(b) of the Regional Director's Affidavit. In light of the same, the said objection need not be dealt with.

11. As regards the observation set out in paragraph 6 (c), of the Affidavit of the Regional Director is concerned, the Counsel for the Petitioner Company submits that Clause 17 of the Scheme provides for a reduction of the securities premium account, as specifically permitted by and pursuant to Section 52(1) of the Companies Act, 2013 as well as Section 78(1) of the Companies Act, 1956, read with Section 100 of the Companies Act, 1956, which has been approved by a special resolution of its shareholders at the general meeting held on May 4, 2016. The only step now remaining is to obtain confirmation of this Court.

Section 78 of the Companies Act, 1956 and Section 52 of the Companies Act, 2013 provide that the provisions relating to reduction of share capital of a company shall, except as provided therein, apply to reduction of the securities premium account as if it were the paid up share capital of the company. Accordingly, a company can reduce its share premium account in the same manner as if it were the paid up capital of the company, and that is what the Transferee Company is seeking to do in terms of Clause 17 of the Scheme. The Counsel for the Transferee Company further submits that it would be appropriate to point out that Section 100(1)(b) of the Companies Act, 1956 contemplates that a company may reduce its share capital (and, therefore, by extension, its securities premium account) by *inter alia* canceling any paid up capital (and, therefore, by extension, its securities premium account), which is lost or is unrepresented by available assets. The debit balance in the profit and loss account of the Transferee Company as well as the debit balance in the profit and loss account of the Transferor Company would represent capital that is lost and/or that is unrepresented by available assets. Accordingly, the reduction of the securities premium account of the Transferee Company, once approved by this Hon'ble Court, will continue to show a true and fair view of the affairs of the Transferee Company. The Counsel for the Petitioner Companies further submitted that the observation of the Regional Director is not relevant to what is being sought to be achieved in paragraph 17(b) of the Scheme.

12. The Counsel for the Petitioner Companies further submitted that, in any event, there would not be any change in the total reserves and surplus of the Transferee

Company post the adjustment of the debit balance against the Securities Premium Account of the Transferee Company and the total net worth of the Transferee Company will remain unchanged, post the aforesaid adjustment. The Counsel further submitted that the adjustment of the debit balance in the Profit & Loss Account of the Transferee Company, including the debit balance in the Profit & Loss Account of the Transferor Company, against the Securities Premium Account of the Transferee Company and consequent reduction of the Securities Premium Account of the Transferee Company, as provided in the Scheme, should be allowed.

13. The only submission made by the learned counsel for the Regional Director at the hearing was that the purpose for which the Securities Premium Account is sought to be utilized does not fall in any of the categories provided under Section 52 (2) and as such the same cannot be done.

14. In response, the Counsel for the Petitioner Companies relied upon the reading of Section 52 (2) and also the judgment of the Delhi High Court in the case of Nestle India Ltd., *[2009] 147 Comp Cas 712 (Delhi),* and in particular the following passage there from *"At the outset, I consider it appropriate to analyse the relevant provisions of the Act on my own. The aspect of issue of shares at a premium or at a discount is dealt with in the Act in sections 78, 79 and 79A. I am only concerned with section 78 for the present. Section 78(1) states that the premium collected by the company while issuing shares shall be transferred to a separate account called the "securities premium account". The manner in which the amount lying in the "securities premium account"' can be utilised*

and the purposes for which it can be utilised is also provided for by section 78. Section 78(1) states that the "securities premium account" would be regulated by the provisions of the Act, which deal with the aspect of reduction in the securities capital of a company. However, the provisions of the Act relating to the reduction of the securities capital would not apply to the "securities premium account", when the same is utilised as provided in the section itself. Section 78(2) enumerates four specific purposes for which the amount lying in the "securities premium account" may be applied "notwithstanding anything in sub-section (1)". This means, that the provisions of the Act relating to the reduction of the securities capital are not applicable where the application of the "securities premium account" is for one or more of the four specific purposes enumerated in section 78(2). A con-joint reading of section 78(1) and (2) of the Act, therefore, leads to the inference that the amounts lying in the "securities premium account", for their application, must comply with the provisions in the Act relating to the reduction of the securities capital of a company, except when the application of the "securities premium account" is for one or more or the four specific instances enumerated in sub-section (2) of section 78. When the application of the "securities premium account" is for one or more of the four specific purposes enumerated in section 78(2), no further compliance with any of the provisions of the Act relating to the reduction of the securities capital of a company is necessary and the amount lying in the "securities premium account" can be straightaway be applied for all or any of the said four specific purposes."

15. In light of the aforesaid submission wherein Section 52(2) is read , it is apparent that Section 52 of the Companies Act, 2013, deals with application of the Securities Premium Account. The same has to be read in its entirety. The utilization of the Securities Premium Account is not restricted only for the purposes set out in Section 52 (2). Section 52 when read in its entirety makes it apparent that the procedure provided for reduction of share capital also has to be followed for utilization of the Securities Premium Account. However if the utilization is for any of the purposes set out in Section 52(2), the procedure for reduction of share capital need not be followed and the company can straightaway reduce the Securities Premium Account for any one of the purposes set out in Section 52(2), the procedure for reduction of share capital would have to be followed. Therefore the submission of the learned counsel for the Regional Director that the Securities Premium Account cannot be utilized for a purpose other than those set out in Section 52(2) is contrary to the plain reading of the Section itself.

16. In the present case, the Transferee Company has undertaken the reduction of the Securities Premium Account, as a part of the Scheme under Sections 391 to 394 read with Section 52 of the Companies Act, 2013, Sections 78, 100 to 104, of the Companies Act, 1956 and in compliance with the procedure laid down in Sections 100- 102 of the Companies Act, 1956 and Rule 85 of the Companies (Court) Rules, 1985. The shareholders have approved the Scheme with the requisite majority at the court convened meeting held on 4th May, 2016 and have also approved the reduction by passing special resolution in its general meeting held on 4th May, 2016 with more than the requisite majority. The Transferee

Company is thus entitled to adjust the amount lying in Securities Premium Account of the Transferee Company in terms of Section 52 (1) of the Companies Act, 2013.

17. As regards the observation set out in paragraph 6 (d), of the Affidavit of the Regional Director, the Counsel for the Petitioner Company submits through its Advocate that Clause 14 of the Scheme of Amalgamation deals with cancellation of shares of the Transferor Company and not with any surplus or deficit arising out of the said Scheme. For an amalgamation in the nature of a merger accounted in accordance with AS-14 by using the pooling of interests method, the difference between the amount recorded as Investment in shares of the Transferor Company in the books of account of the Transferee Company and the amount reflected as Share Capital in the books of account of the Transferor Company is required to be adjusted in the reserves in the financial statements of the Transferee Company. Counsel for the Petitioner further submits that under the pooling of interests method of accounting for amalgamation, no surplus requiring credit to the Capital Reserve Account and no deficit requiring debit to the Goodwill Account would arise. The Petitioner Company through its Counsel in any event undertakes to account for the surplus / deficit, if any, on amalgamation in accordance with AS 14 as stipulated under Section 133 of the Companies Act 2013.

18. As regards the observation set out in paragraph 6 (e), of the Affidavit of the Regional Director, the Petitioner Company through its Counsel submits that the Petitioner Company shall comply with all applicable provisions of the Income

Tax Act and all tax issues arising out of the Scheme will be answered in accordance with law.

19. The Court perused the affidavit of the Transferee Company and heard Counsel appearing for the Petitioner Companies and satisfied with the explanation given and the undertaking submitted to the Court.

20. The Official Liquidator has filed his Report dated 30th September, 2016 in this court 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.

21. 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. None of the parties concerned have come forward to oppose the Scheme.

22. Since all requisite statutory compliance have been fulfilled, Company Scheme Petition No. 380 of 2016 filed by the Transferor Company is made absolute in terms of prayer clauses (a) to (c) and Company Scheme Petition No. 381 of 2016 filed by the Transferee Company is made absolute in terms of prayer clause (a) to (e).

23. 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 Collector of Stamps, for the purpose of adjudication of stamp duty payable, if any, within 60 days from the date of the order.

24. The Petitioner Companies are directed to file a copy of this order along with a copy of the Scheme and Form of Minute (Exhibit O to the Company Scheme Petition No. 381 of 2016) attached thereto, duly authenticated by the Company Registrar, High Court [O.S.], Bombay, with the concerned Registrar of Companies, electronically, along with e-form INC 28 and also the physical copy of the same as per the provisions of Companies Act, 1956/2013, whichever is applicable.

25. 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. 380 of 2016 to pay a sum of Rs. 10,000/- to the Official Liquidator, High Court, Bombay. Costs to be paid within four weeks from today.

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

27. All concerned authorities to act on a copy of this order along with the Scheme, and Form of Minute (Exhibit O to the Company Scheme Petition No. 381 of 2016) attached thereto, duly authenticated by the Company Registrar, High Court [O.S.], Bombay.

(A. K. Menon, J.)

CERTIFICATE

I certify that the order uploaded is a true and correct copy of original signed order.

Uploaded by: S. Gawde
Stenographer