IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY SCHEME PETITION NO 908 OF 2015
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO 797 OF 2015

FUTURE RETAIL LIMITED

…… First Petitioner Company

AND

COMPANY SCHEME PETITION NO 909 OF 2015
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO 798 OF 2015

BHARTI RETAIL LIMITED

….. Second Petitioner Company

In the matter of the Companies Act, 1956;

AND

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

AND

In the matter of the Composite Scheme of Arrangement under Sections 391 to 394 read with Sections 100 to 104 of the Companies Act, 1956 and Section 52 of Companies Act 2013 and the applicable provisions of the Companies Act, 1956 and/or Companies Act, 2013, as may be applicable between Future Retail Limited and Bharti Retail Limited and their respective Shareholders and Creditors

<u>Called for hearing</u>

Mr. Janak Dwarkadas, Senior Counsel with Mr. Hemant Sethi and Mr. Ajit Singh Tawar i/b. Hemant Sethi & Co., Advocates for the Petitioners in all Petitions.

Mr. Udyan Shah with Mr. A. A. Ansari, for Regional Director in both the Petitions.

Mr. Prashant Mishra and Ms. Pallavi Marathe for M/s Ozone Overseas Private Limited and M/s Sree Rajkondal Export Enterprises, the Objecting Creditors

CORAM: K. R. Shriram, J.

DATE: 4th March, 2016

PC:

1. Heard the learned counsel for the Petitioner Companies and the objecting creditors.
2. The sanction of the Court is sought to the Composite Scheme of Arrangement between Future Retail Limited and Bharti Retail Limited and their respective Shareholders and Creditors.
3. The learned Counsel for the Petitioners states that in so far as objections filed by the Objecting creditors are concerned, their rights are not affected as there is no compromise or arrangement with any of the creditors. Further, M/s Ozone Overseas Private Limited will become creditor of the Second Petitioner Company pursuant to the Scheme.
4. The learned Counsel for the Petitioners states that the First Petitioner Company is currently engaged in the business of

operating multiple retail formats in the Indian consumer market under different brand names including Big Bazaar, FBB, Food Bazaar, Foodhall, Home Town and eZone. The retail business of First Petitioner Company inter-alia includes retail operations and retail infrastructure operations. The Second Petitioner Company is currently engaged in the business of operating retail business formats under the brand name 'easyday'. The retail business of Second Petitioner Company inter-alia includes the retail operations and the retail infrastructure operations.

5. That the rationale for the Scheme is consolidation of the retail operations and retail infrastructure operations of the Petitioner Companies under separate entities. The transfer and vesting of the Retail Business Undertaking of the First Petitioner Company into the Second Petitioner Company would enable consolidation of the retail operations of the Petitioner Companies under the Second Petitioner Company and the transfer and vesting of the Retail Infrastructure Business Undertaking of the Second Petitioner Company into the First Petitioner Company would enable consolidation of the retail infrastructure operations of the Petitioner Companies under the First Petitioner Company. The management of the First Petitioner Company and the Second Petitioner Company believe that the Scheme would benefit the respective companies and the stake holders, creditors and employees of respective companies and would reflect the real value of the business of the Petitioner Companies and unlock value.

6. The First Petitioner Company and the Second Petitioner Company have approved the Scheme by passing the Board

Resolutions which are annexed to the respective Company Scheme Petitions.

7. The Counsel for the Petitioners further states that the Petitioner Companies have complied with all the directions passed in Company Summons for Direction and that the Company Scheme Petition have been filed in consonance with the orders passed in respective Company Summons for Direction.

8. The Counsel for the Petitioners further states that the Petitioner Companies have complied with all requirements as per the directions of this Court and they have filed necessary Affidavits of compliance in the Court. Moreover, the Petitioner Companies through their Counsel undertakes to comply with all statutory requirements, if any, as required under the Companies Act, 1956 or Companies Act 2013, as may be applicable and the rules made there under. The said undertaking is accepted.

9. The Regional Director has filed an Affidavit on 2nd March, 2016 stating therein that save and except as stated in paragraph 6 (a) to (d) of the said Affidavit, it appears that the Scheme is not prejudicial to the interest of shareholders and public.

In paragraph 6(a) to 6(d), of the said affidavit it is stated that:

(a) *Clause No.4 of the scheme provides for reduction of paid up equity capital of BRL. It is stated that "the issued subscribed and paid up equity share capital of BRL shall be reduced appropriately by reducing the face value of equity shares to Rs. 8,69,56,522/- divided into 4,34,78,261* *equity share of Rs. 2/- each fully paid up". It has been observed as on 4th May 2015 when the Board of Directors approved the scheme the paid up capital of BRL was only Rs. 1,531.66 crores whereas, the list of shareholders provided by the company reveals that as on 31.10.2015 the capital of the company was Rs.1,719.75 crores. It is not clear as to from which paid up capital the shareholders of the company/board of directors of the company have considered the reduction of capital and to what extent the reduction was proposed in each share of the company. On enquiry made by the deponent, the petitioner i.e. BRL vide letter dated 29.1.2016 through their Advocate M/s. Hemant Sethi & Company, copy of said letter is annexed hereto and marked as Exhibit `D', clarifies that:*

> *"Pursuant to the scheme becoming effective, existing paid up share capital of Bharti Retail Limited aggregating to Rs. 1719,75,00,000/- comprising of 171,97,50,000 equity shares of Rs. 10/- each fully paid up shall be reduced to Rs. 8,69,56,522/- comprising of 4,34,78,261 equity shares of Rs. 2/- each fully paid up. Said reduction and reorganization shall be carried out by first reducing the face value of equity shares to Rs.0.05 each and thereafter reconsolidating the said shares into 4,34,78,261 equity shares of. 2/- each fully paid up."*

The above clarification provided by the company clearly indicates that the no. of shares required to be reduced are different from what has been provided in the scheme. The existing clause No.4 of the scheme is silent as to how many no. of shares will be reduced and to what extent the paid up capital of each shares will be reduced. Therefore, it is necessary on the part of the petitioner to obtain fresh consent from shareholders/ board of directors of BRL on the line of clarification given by the petitioner company. Accordingly the petitioner may be directed to comply with the same, by passing a special resolution and file necessary returns with the Registrar of

Companies. Thereafter, suitable corrections has to be made in para No.4 of the scheme by the petitioner company.

(b) *As per clause No. 7.1.4 of the scheme, the surplus if any arising out of scheme will be transferred to general reserve account of BRL and deficit if any will be debited to goodwill of BRL. Similarly as per clause No. 17.1.4 of the scheme the surplus if any arising shall be credited to general reserve account of FRL. In this regard, it is submitted that general reserve are created by transferring the profit of the company. In the present case the surplus is arising due to transfer of capital assets from one company to other company. Such reserve is not a free reserve and hence cannot be construed as general reserve of the petitioner companies. It is, therefore, suggested that such reserve arising out of the scheme shall be credited to capital reserve account of respective petitioner company. In this regard, the company has clarified vide its letter dated 22/02/2015 (copy of the said letter is annexed hereto and marked as Exhibit 'E') that the reserve arising out of this scheme will be transferred to Capital Reserve Account of respective petitioner companies. Petition Company further submitted that the words "General Reserve Account" appearing in clause 17.2.2 of the scheme be deleted and substituted by "Capital Reserve Account".*

(c) *With reference to clause 7.1.5 and 17.1.5 of the scheme it is submitted that in addition to compliance of AS-14, both petitioner companies 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.*

(d) *That the Deponent further submits that the Tax issue 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.*

10. Learned Advocate for Petitioner Companies submits that as per observation raised by the Regional Director in paragraph 6(a) of his Affidavit, the Second Petitioner Company has filed an additional Affidavit dated 3rd March, 2016 annexing therewith a copy of fresh consent obtained from its Board of Directors and shareholders by passing a special resolution in its Extra Ordinary General Meeting of its shareholders held on 18th February, 2016. Copy of Special Resolution is annexed as Exhibit-B to the said additional Affidavit. The Counsel for the Petitioners state that Clause 4.1 and 4.2 of the Scheme is required to be amended and hence the Petitioner Company seeks leave of this Court to delete the said Clauses and substitute Clauses 4.1 and 4.2 with the following:

"4.1 Before giving effect to the demerger in Part III and Part IV below and as a part of reorganization of share capital of BRL, the issued, subscribed and paid-up share capital of BRL shall be reduced and reorganized as a part of the Scheme. Accordingly, as an integral part of the Scheme, and, upon the coming into effect of the Scheme, the issued, subscribed and paid-up equity share capital of BRL aggregating to Rs. 1719,75,00,000/- (Rupees One Thousand Seven Hundred Nineteen Crores Seventy Five Lakhs only) comprising of 171,97,50,000 (One Hundred Seventy One Crores Ninety Seven Lakhs Fifty Thousand only) equity shares of Rs 10/- each, fully paid up shall be reduced to Rs. 8,69,56,522/- (Rupees Eight Crores Sixty Nine Lakhs Fifty Six Thousand Five Hundred Twenty Two only) divided into 4,34,78,261 (Four Crores Thirty Four Lakhs Seventy Eight Thousand Two Hundred Sixty One) equity shares of Rs. 2/- (Rupees Two only) each, fully paid-up, without any further act or deed.

4.2 The above reorganization and reduction of capital would be carried out by reducing the face value of each equity share of Rs. 10/- each to Rs. 0.05/- each and thereafter reconsolidating the said shares into 4,34,78,261 (Four Crores Thirty Four Lakhs Seventy Eight Thousand Two Hundred Sixty One) equity shares of Rs. 2/- (Rupees Two only) each, fully paid-up, without any further act or deed."

11. Learned Advocate for Petitioner Companies submits that as per observation raised by the Regional Director in paragraph 6(b) of his Affidavit, Clause 7.1.4, 17.1.4 and 17.2.2 of the Scheme is required to be amended and hence the Petitioner Companies seek leave of this Court to delete the said Clauses and substitute Clauses 7.1.4, 17.1.4 and 17.2.2 with the following:

"7.1.4 The difference between the net assets of Retail Business Undertaking of FRL acquired and recorded by BRL as reduced by the face value of equity shares issued by BRL pursuant to Clause 6.1 of this Scheme and after making adjustments in terms of Clause 7.1.3 above, if surplus, shall be credited to

Capital Reserve Account. In case of a deficit, the same shall be debited to Goodwill Account.

17.1.4 The difference between the net assets of Retail Infrastructure Business Undertaking of BRL acquired and recorded by FRL after making adjustments in terms of Clause 17.1.3 above as reduced by the face value of equity shares issued by FRL to the shareholders of BRL in terms of Clause 16.1, if surplus, shall be credited to Capital Reserve Account. In case of a deficit, the same shall be debited to Goodwill Account.

17.2.2 The book values, as on the Appointed Date, of net assets (assets minus liabilities) comprised in the Retail Infrastructure Business Undertaking transferred to FRL shall be adjusted against the following, in the order specified:

(i) Capital Reserve Account, if any, arising in terms of Part III of this Scheme; and the balance, if any, against;

(ii) Profit and Loss Account."

12. In view of above, leave to amend the Scheme and all consequential amendments are granted. Amendments to be carried out within three weeks from today.

13. In so far as observations made in paragraph 6(c) of the Affidavit of Regional Director is concerned, the Petitioner Companies through their Counsel submits that the Petitioner Companies shall pass necessary accounting

entries in connection with the Scheme to comply with the applicable Accounting Standards.

14. In so far as observations made in paragraph 6(d) of the Affidavit of Regional Director is concerned, the Petitioner Companies through their Counsel submits that the Petitioner Companies are bound to comply with all applicable provisions of Income Tax Act, and all tax issues arising out of Scheme will be met and answered in accordance with applicable income tax provisions.

15. The Learned Counsel for Regional Director on instructions of Mr. M. Chandanamuthu, Joint Director (Legal) in the Office of the Regional Director, Ministry of Corporate Affairs, Western Region, Mumbai, states that he is satisfied with the undertakings given by the Petitioner Companies and agrees with the amendments sought. The said undertakings given by the Petitioner Companies are accepted.

16. 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 has come forward to oppose the Scheme.

17. Since all the requisite statutory compliances have been fulfilled, Company Scheme Petition No. 908 of 2015 and 909 of 2015 filed by the First Petitioner Company and the Second Petitioner Company are made absolute in terms of prayer clauses (a) of the respective Petitions.

18. The Petitioner Companies to lodge a copy of this order, alongwith the form of minutes duly authenticated by the Company Registrar, High Court, Bombay 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 receipt of Order.

19. Petitioner Companies are directed to file a copy of this order along with a copy of the amended Scheme and the form of minutes duly authenticated by the Company Registrar, High Court, Bombay with the concerned Registrar of Companies, electronically, along with E-Form 21 / E-Form INC 28 in addition to physical copy as per the provisions of the Companies Act 1956 / 2013, whichever is applicable.

20. The Petitioner Companies to pay costs of Rs. 10,000/- each to the Regional Director, Western Region, Mumbai. Costs to be paid within four weeks from the date of the order.

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

22. All concerned authorities to act on a copy of this order, the form of minutes annexed as 'Exhibit C' to the additional affidavit dated 3rd March, 2016 in support of Company Scheme Petition No. 909 of 2015 and the form of minutes annexed as 'Exhibit I' in support of Company Scheme Petition No. 908 of 2015 along with amended Scheme duly authenticated by the Company Registrar, High Court (O. S.), Bombay.

(K.R.Shriram, J)

CERTIFICATE

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