
(2023) 06 NCLT CK 0038

In the National Company Law Tribunal

Case No : Company Petition No. 254 Of 2022

Godhra Expressways Private Limited Vs

Date of Decision : 12-06-2023

Acts Referred:

Companies Act, 2013 — Section 52, 66, 66(1)(b)(ii), 66(6), 68, 90, 133
Income Tax Act, 1961 — Section 2(22), 56(2)(viib)

Citation : (2023) 06 NCLT CK 0038

Hon'ble Judges : Kuldeep Kumar Kareer, Member (J); Anuradha Sanjay Bhatia, Member (T)

Bench : Division Bench

Advocate : Hemant Sethi, Devanshi Sethi, Rupa Sutar

Final Decision : Disposed Of

Judgement

Kuldeep Kumar Kareer, Hon'ble Member (J)

1. This Bench is convened by video conference.

2. Heard Learned Counsel for the Petitioner Company and the representative from the Regional Director (WR). No objector has come before the Tribunal to oppose the Petition and nor any party has controverted any averments made in the Petition.

3. The Learned Counsel for the Petitioner Company submits that this petition is for confirmation of a special resolution passed by the equity shareholders of the Petitioner Company in its Extraordinary General Meeting held on 19th October 2022, which is reproduced herein below:

"RESOLVED THAT pursuant to the provisions of Section 66 read with Section 52 of the Companies Act, 2013 and National Company Law Tribunal (Procedure for reduction of share capital of Company) Rules, 2016 and other applicable provisions, if any, of the Companies Act, 2013, and as provided under Article 5 & 43 of Articles of Association of the Company and subject to obtaining such approvals, consents, permissions and sanctions and / or including any modification(s) or re-enactment thereof, if any and other applicable provisions

for time being in force, and the sanction of the Hon'ble National Company Law Tribunal, Mumbai Bench ('NCLT'), and any other statutory / regulatory authorities, as the case may be, the consent of the members be and are hereby accorded to cancel 32,25,807 equity shares of INR 10 each, fully paid up held by the shareholders, out of total existing paid up equity share capital of the Company of INR 23,38,08,400 divided into 2,33,80,840 equity shares of INR 10 each, fully paid up that such reduction shall be effected by returning to the shareholders INR 475 per equity share, aggregating to an amount of INR 153,22,58,325/-, which shall be kept outstanding as a loan to the Company on the following terms:"

Particulars

Terms

Coupon rate

14% p.a. or such other rate as may be mutually agreed between the Petitioner Company and its shareholders from time to time

Payment of coupon

Annually or at such other interval as may be mutually agreed between the Petitioner Company and its shareholders

Tenure

At any time within a period of 5 years from the date of order of the NCLT, approving the said Petition; or at an extended period as may be mutually agreed between the Petitioner Company and its shareholders

Security

Unsecured

"RESOLVED FURTHER THAT the difference between the face value of the shares so cancelled and the amount to be paid to the members shall be adjusted against the balance in Securities Premium leading to reduction of Securities Premium Account of the Company by INR 150,00,00,255/-"

"RESOLVED FURTHER THAT the valuation report dated 18th October, 2022 issued by CA Harsh Chandrakant Ruparelia, Registered Valuer, as placed before the Board, be and is hereby noted and accepted"

"RESOLVED FURTHER THAT for the purpose of giving effect to the above resolution and for removal of any difficulties or doubts, any one of the Director or Company Secretary or Mr. Narayanan Doraiswamy or Ms. Meghana Singh or Mr. Amit Rane or Mr. Sushant Ambike, Authorised signatory of the Company be and are hereby authorized to do all such acts, deeds, matters and things as it may, in its absolute discretion, deem necessary, expedient, usual or proper and/ or make such adjustments in the books of account as are considered necessary to give

effect to the above resolution or to carry out such modifications/ directions as may be ordered by NCLT to implement the aforesaid resolution;”

“RESOLVED FURTHER THAT any one of the Director or Company Secretary or Mr. Narayanan Doraiswamy or Ms. Meghana Singh or Mr. Amit Rane or Mr. Sushant Ambike, Authorised signatory of the Company be and are hereby severally authorized to take all necessary steps for:

(a) obtaining approval from the equity shareholders of the Company in the extraordinary general meeting as may be required under the requisite provisions of the Companies Act, 2013;

(b) file necessary forms with the Registrar of Companies;

(c) signing and filing of application /petition/ affidavits and any other necessary documents with NCLT and/or any other regulatory authorities for getting its approval;

(d) engaging advocates and signing Vakalatnama wherever necessary, declare and file all pleadings, reports, and sign and issue public advertisements and notices;

(e) making any alterations/changes in the application/petition and any other necessary documents as may be expedient or necessary which does not materially change the substance of the reduction;

(f) passing such accounting entries and/or making such other adjustments in the books of accounts, as are considered necessary to give effect to the above resolution;

(g) obtaining approval and complying with the provisions of the applicable laws and parties including the shareholders, creditors, lenders as may be considered necessary;

(h) to sign any other document relating to the capital reduction or delegate such authority to another person by a valid power of attorney; and

(i) doing such acts, deeds, matters and things as may be deemed necessary, expedient, usual or proper and to settle any question or difficulty that may arise.

“RESOLVED FURTHER THAT any director of the Company or the Authorized Signatory be and is hereby authorized to sign the copy of this resolution as a certified true copy thereof and furnish the same to whomsoever concerned.”

4. That Article 5 & 43 of the Articles of Association of the Petitioner Company authorizes the Petitioner Company to reduce its share capital in any manner as authorized by law. The relevant extract of the said article is produced as under:

“SHARE CAPITAL AND VARIATION OF RIGHTS

5.

i. The Authorised Share Capital of the Company shall be of such amounts and be divided into shares as may, from time to time, be provided in Clause V of the Memorandum of Association with the power to increase or reduce the capital in accordance with the Company's regulations and legislative provisions for the time being in force in that behalf with the powers to divide the share capital, whether original increased or decreased into several classes and attach thereto respectively such ordinary, preferential or special rights and conditions in such a manner as may for the time being be provided by the Regulations of the Company and allowed by law.

ii. The rights of the holders of any class of shares forming part of capital for the time being for the Company may be notified, affected, varied, extended, surrendered or Abrogated in such manner as is or may be provided by the Articles of Association of the Company as originally registered or as altered from time to time.

iii. The business of the Company may be commenced soon after the incorporation of the Company as and when the Directors shall think fit notwithstanding that part of the shares have been allotted.

iv. The Company in general meeting may decide to issue fully paid up bonus share to the member if so recommended by the Board of Directors.

v. The certificate to share registered in the name of two or more persons shall be delivered to first named person in the register and this shall be a sufficient delivery to all such holders.

43. The Company may, by special resolution, reduce in any manner and with, and subject to, any incident authorized and consent required by law, -

a. Its share capital;

b. Any capital redemption reserve account; or

c. Any share premium account."

5. The Learned Counsel for the Petitioner Company states that the rationale for reduction of equity share capital of the Petitioner Company is:

- "The Petitioner Company operates, a four-lane highway on DBFOT (toll) model. The said highway has been operational since 2013. In the initial years of operations, the traffic on the project was lower than the target traffic leading to the Petitioner Company earning lower revenue and consequently incurring losses. As a result, the Petitioner Company has huge accumulated losses thereby impacting its ability to distribute surplus cash to its shareholders by way of dividend. Currently, the Petitioner Company is witnessing increase in traffic and expects the traffic growth to further increase in the years to come. Consequently, the Petitioner Company with the sustained growth anticipates sufficient cash flows to pay off its liabilities and expenses and thereby wishes to reward its shareholders by returning the surplus cash from its operations.

- The Petitioner Company currently generates surplus cash from its operations and also anticipates a higher cash surplus in the future years basis the business projections. Based on the steady and regular cash flow streams of the Company and with due regards to the future projections of the business, the proposed capital reduction shall enable optimal utilisation of the surplus cash balances available with the Company for the benefit of all stakeholders.

- It is worthwhile to note that it is a general practice in the industry to which the Petitioner Company belongs to, to set up each highway projects under separate special purpose vehicles based on the requirement posed under the Concession Agreement. Essentially, the growth prospects of such kind of business model from the perspective of each special purpose vehicle are limited to the extent of toll collection of a previously constructed highway project and post the completion of requisite project, the special purpose vehicle is wound up. Accordingly, the major expenses viz. construction of the highway was carried out during the initial period by the Petitioner Company and during the subsequent years it is to expend only for maintenance and financing expenses to keep its business floating. Consequently, the Petitioner Company is not left with any avenues to utilize its surplus cash, over and above the maintenance and financing expenses. A capital reduction of the existing equity share capital of the Petitioner Company shall offer an avenue to the Petitioner Company to repatriate surplus cash to the shareholders in a timely manner.

- The reduction shall also lead to utilisation of balance in the Securities Premium account in an effective manner for the benefit of the Company.”

6. The Petitioner Company submits that it has not availed any deposits and therefore, there has been no default in repayment of any deposits or interest thereon. A declaration by a director of the Petitioner Company along with a certificate from the statutory auditors of the Petitioner Company certifying the same is annexed to the Company Petition.

7. The issued, subscribed, and paid-up share capital of the Petitioner Company as on September 30, 2022 is as under:

Share Capital

Amount (INR in lakhs)

AUTHORISED SHARE CAPITAL

2,90,50,000 Equity Shares of INR 10 each

2,905.00

TOTAL

2,905.00

ISSUED, SUBSCRIBED AND FULLY PAID- UP CAPITAL

2,33,80,840 Equity Shares of INR 10 each, fully paid up

2,338.08

TOTAL

2,338.08

Subsequent to September 30, 2022, there has been no change in the issued, subscribed and fully paid-up share capital of the Petitioner Company.

8. The shareholding pattern of the Petitioner Company pre and post the reduction of equity share capital as aforesaid will be as follows:

Name of the shareholders

Pre Capital Reduction

Post Capital Reduction

Number of Shares

%

Number of Shares

%

Equity Shareholders

Highways Infrastructure Trust

2,33,80,839

99.999

%

2,01,55,032

99.999

%

Mr. GVM Kiran Babu (Nominee of Highways Infrastructure Trust)

1

0.001%

1

0.001%

Total

2,33,80,840

100%

2,01,55,033

100%

9. The proposed reduction is not likely to cause any prejudice to the creditors of the Petitioner Company. The creditors of the Petitioner Company are not adversely affected by the proposed reduction of equity capital, as there is no reduction in the amount payable to the creditors and no compromise or arrangement is contemplated with the creditors and they will be paid off in the ordinary course of business.

10. As on 20th October 2022, there is 1 (One) Secured Creditor of the Petitioner Company amounting to INR 4,09,04,21,102/- (Indian Rupees Four Hundred Nine Crores Four Lakhs Twenty One Thousand One Hundred and Two Only). Annexed to the Company Petition and marked as Annexure K is the list of Secured Creditors as on 20th October 2022 of the Petitioner Company duly certified by two directors of the Petitioner Company.

11. As on 20th October 2022 there are 25 (Twenty Five) Unsecured Creditors of the Petitioner Company amounting to INR 5,26,14,60,388/- (Indian Rupees Five Hundred and Twenty Six Crores Fourteen Lakhs Sixty Thousand Three Hundred and Eighty Eight Only). Annexed to the Company Petition and marked as Annexure K is the list of Unsecured Creditors as on 20th October 2022 of the Petitioner Company, duly certified by two directors of the Petitioner Company.

12. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai on behalf of the Central Government, has filed its report dated 23rd March 2023, inter alia, making the following observations which are produced hereunder to which the Petitioner Company has filed its responses by way of an Affidavit in reply dated 30th March 2023 and served upon the Regional Director on 31st March 2023.

Para No.

Observation of the report of the Regional Director dated 23rd March 2023

Response / Undertaking / Submission of the Petitioner Company

6.

ROC, Mumbai in his Report No. ROC/JTA/301565/Sec.66(2)/620 dated 13.02.2023 inter-alia mentioned that there is no complaint against the Company/ Scheme. Further the ROC, Mumbai has made his observation in para no. 23 of his report and stated that,

"Interest of the creditors and minor shareholders should be protected.

May be decided on its merits."

So far as the observation in paragraph 23 in connection with Registrar of Companies report dated 13.02.2023 [also re-iterated in para 6 of the Report of Regional Director] and paragraph 7(C) of the Report of the Regional Director is concerned, the Petitioner Company submits that the proposed reduction is for the benefit of the Petitioner Company and its shareholders and the interest of the creditors of the Petitioner Company is not adversely affected by the present Company Petition. Further, there is no compromise or arrangement with the creditors of the Petitioner Company and there is no reduction in amount payable to any of the creditors of the Petitioner Company, as their respective dues will be paid in the ordinary course of business. The Petitioner Company further submits that, pursuant to the instant Company Petition statutory dues will be paid by the Petitioner Company in the ordinary course, as per law and Government revenue shall stay protected.

Response to para 23 of ROC Report dated 13.02.2023 has been clubbed with the response to para 7(C) of RD Report dated 23.03.2023 in the Rejoinder Affidavit filed with Regional Director.

7(A)

Provisions of section 52 of the Companies Act, 2013 is reproduced as below-
"Application of premiums received on issue of shares –

(1) Where a company issues shares at premium, whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be transferred to a securities premium account and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the securities premium account were the paid-up share capital of the company.

(2) Notwithstanding anything contained in sub-section (1), the securities premium account may be applied by the company –

(a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;

(b) in writing off the preliminary expenses of the company;

(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;

(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company, or

(e) for the purchase of its own shares or other securities under section 68

(3) The securities premium account may, notwithstanding anything contained in sub-sections (1) and (2), be applied by such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133,-

- (a) in paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; or
- (b) in writing off the expenses of or the commission paid or discount allowed on any issue of equity shares of the company; or
- (c) for the purchase of its own shares or other securities under section 68.

In view of the provisions of this section 52 of the Companies Act, 2013 the Petitioner shall satisfy the Hon'ble NCLT that the reduction of capital application is also fulfilling the requirements of section 52 of the Companies Act, 2013."

So far as the observation in paragraph 7(A) of the Report of the Regional Director is concerned, the Petitioner Company submits that provisions of Section 52 of the Companies Act, 2013 ('the Act') have been complied with. Section 52 of the Act, 2013 provides that "where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of premium received on those shares shall be transferred to a "securities premium" account and the provisions of the Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the securities premium account were the paid up share capital of the company". Therefore, as can be seen, if the securities premium is used for purposes other than those specified in sub section 2 of section 52, it is deemed to be a capital reduction. In the instant case since the company is utilizing the securities premium for items other than those mentioned in sub section 2 of section 52, it is treated as a capital reduction of the Petitioner Company and all the relevant provisions of Capital reduction under section 66 of the Act have been complied with.

7(C)

It is observed that in the proposed scheme the applicant proposes to pay off Rs. 475/- per share to the shareholders, which is a nature of buyback. Therefore, Petitioner may be directed to comply with the provisions of Section 68 along with Section 66 of the Companies Act, 2013.

So far as the observation in paragraph 7(B) of the Report of the Regional Director is concerned, the Petitioner Company submits that the proposed capital reduction falls within the purview of Section 66 of the Act, as thereunder a company is allowed to reduce its share capital in any manner whatsoever. The Petitioner Company further submits that, the proposed reduction of its share capital has been unanimously approved by its shareholders. Further, the provisions of Section 66(1)(b)(ii) of the Act, permit the Petitioner Company to pay off any paid-up share capital which is in excess of the wants of the Petitioner Company, with or without extinguishing or reducing liability on any of its shares. It may be further noted that Section 66(6) of the Act also states that "nothing in this section shall apply to buy back of its own securities by company under section 68" as the objective of both the provisions is to provide an option to the Petitioner Company. Further, it is a well settled position of law that a

company has freedom to choose amongst the procedures laid down in the law as it deems fit. The Petitioner Company has accordingly undertaken Capital Reduction under Section 66 of the Act. Therefore, the said reduction of share capital of the Petitioner Company, as contemplated hereby, ought to be sanctioned, since it is expressly permitted as per the provisions of the Act after following due process of law.

7(C)

Applicant to submit an Affidavit to the effect that the interest of the creditors and all stakeholders and Government Revenue are protected as well as statutory dues are paid off.

So far as the observation in paragraph 23 in connection with Registrar of Companies report dated 05.01.2023 [also re-iterated in para 6 of the Report of Regional Director] and paragraph 7(C) of the Report of the Regional Director is concerned, the Petitioner Company submits that the proposed reduction is for the benefit of the Petitioner Company and its shareholders and the interest of the creditors of the Petitioner Company is not adversely affected by the present Company Petition. Further, there is no compromise or arrangement with the creditors of the Petitioner Company and there is no reduction in amount payable to any of the creditors of the Petitioner Company, as their respective dues will be paid in the ordinary course of business. The Petitioner Company further submits that, pursuant to the instant Company Petition statutory dues will be paid by the Petitioner Company in the ordinary course, as per law and the Government Revenue shall stay protected.

7(D)

The tax implication if any arising out of the proposal for reduction is subject to final decision of Income Tax Authorities. The approval of the Company Petition by this Hon'ble Court may not deter the Income Tax Authority to scrutinize the tax return filed by the Company after giving effect to the proposed reduction. The decision of the Income Tax Authority is binding on the Petitioner Company and recipient shareholders.

So far as the observation in paragraph 7(D) of the Report of the Regional Director is concerned, the Petitioner Company submits that it shall comply with all the applicable provisions of the Income-tax Act, 1961. It is further submitted that the Petitioner Company will be subject to all tax issues (if any) arising out of the Company Petition and all such issues will be dealt with in accordance with the provisions of the Income-tax Act, 1961. It is further submitted that the capital gain tax, if any, or tax arising out of provisions of Section 2(22) of Income-tax Act, 1961, if any, in the hands of the shareholders or the Company shall be paid by the respective parties as applicable, subject to such reliefs as may be available under the provisions of the Income-tax Act, 1961.

7(E)

It is observed the company has corporate body shareholder namely Galaxy Investment II Pte Limited having shareholding of 100% as on 31.03.2022 and Highways Infrastructure Trust and its nominees having shareholding of 100% as per the Provisional Financial Statement as at 30.09.2022, but the Company has not filed form BEN-2 disclosing the name of beneficial owner of the shareholder as its shareholders on 31.03.2022 and 30.09.2022 in compliance of section 90 of the CA, 2013, thus the Petitioner Company shall undertake to comply with the requirements of Section 90 of the CA, 2013 and Companies (Significant Beneficial owners) Rules, 2018.

So far as the observation in paragraph 7(E) of the Report of the Regional Director is concerned, the Petitioner Company submits that there is no individual (i.e., natural person) who satisfies the definition of a 'Significant Beneficial Owner' set out in the Companies (Significant Beneficial owners) Rules, 2018, in relation to Galaxy Investment II Pte Limited's 100% shareholding in the Petitioner Company as on 31.03.2022. Further, Highways Infrastructure Trust ('the Trust') along with its nominees, which is the significant beneficial owner of the equity shares of the Company as at 30.09.2022, is registered as an infrastructure investment trust under the Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014, as amended having registration number IN/InvIT/21- 22/0019. Accordingly pursuant to the Companies (Significant Beneficial Owners) Rules, 2018, it is exempted from making declaration of significant beneficial ownership under Section 90 of the Companies Act, 2013. The said certificate of registration is attached as Exhibit 'A'.

7(F)

The Petitioner Company has allotted the equity shares at premium of Rs.190/- per share, as per the balance sheet as on 31.03.2022 the company has collected total premium of Rs. 2,016.19 (amount in millions) and therefore Petitioner Company may satisfy to the Hon'ble NCLT that shares were originally issued at par price or/and transfer to existing shareholders at fair valuation or not and whether Petitioner Company have paid income tax, if any arising on issue of shares / transfer of shares as per the provisions of Income Tax, 1961.

So far as the observation in paragraph 7(F) of the Report of the Regional Director is concerned, the Petitioner Company submits that at the time of allotment of shares in the year 2010, the provisions of Section 56(2)(viib) of the Income-tax Act, 1961 were not in force and therefore the Petitioner Company was not liable to tax on issue of shares at premium. Further, the assessment proceedings for the relevant previous year have been completed without any scrutiny from the Income Tax Authorities. The Petitioner Company submits that with regards to transfer of its shares by its shareholders, the Petitioner Company is not per se a party to the transaction for such transfer of shares and hence, the Petitioner Company is not liable to pay tax on transfer of shares by the Shareholders of the Petitioner Company. The Petitioner Company further submits that any taxes arising on transfer of shares have been borne and paid

by the Transferor / Transferee Shareholder of the shares of the Petitioner Company, as may be applicable in accordance with provisions of the Income-tax Act, 1961.

13. The observations made by the Regional Director on behalf of the Central Government have been explained by the Petitioner Company in Para 12 above. Further heard, Ms. Rupa Sutar, Authorised Representative of the Regional Director, MCA (WR) Mumbai, is present at the time of final hearing and reported no objections for approving the scheme by this Tribunal.

14. Considering the entire facts and circumstances of the case, report filed by Regional Director, Rejoinder affidavit filed by the Petitioner Company in response to Regional Director's observations and on perusal of the documents produced on record, the Company Petition is allowed.

15. The Petitioner Company undertakes to file the certified copy of the order and form of minutes duly certified by the Deputy Registrar / Assistant Registrar of this Tribunal with the Registrar of Companies within 30 days from the date of receipt of the certified Order from the Registry of this Tribunal.

16. The Petitioner Company shall publish notices about registration of order and minutes by the concerned Registrar of Companies, Mumbai, Maharashtra in two newspapers namely "Business Standard" in English Language and translation thereof in "Navshakti" in Marathi Language both having circulation in the State of Maharashtra, within 30 days of registration of the Order.

17. All concerned regulatory authorities to act on production of certified copy of the order duly signed by designated Registrar of this Tribunal.

18. Ordered accordingly.

ORDER

"The existing issued, subscribed and paid-up equity share capital of Godhra Expressways Private Limited, the Petitioner Company, of INR 23,38,08,400 (Indian Rupees Twenty Three Crores Thirty Eight Lakhs Eight Thousand and Four Hundred Only) divided into 2,33,80,840 (Two Crores Thirty Three Lakhs Eighty Thousand Eight Hundred and Forty) equity shares of INR 10 each fully paid-up equity shall be reduced to INR 20,15,50,330 (Indian Rupees Twenty Crores Fifteen Lakhs Fifty Thousand Three Hundred and Thirty Only) divided into 2,01,55,033 (Two Crores One Lakh Fifty Five Thousand and Thirty Three) equity shares of INR 10 each, fully paid up."