

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH: C-IV

CP-151(MB)/2023

In the matter of

Under Section 66 of the Companies
Act, 2013 and the Rules framed
thereunder;

AND

In the matter of

Reduction of Share Capital of

Prima Bay Private Limited	}
a Company incorporated under the	}
provisions of the Companies Act,	}
2013, having its registered office at	}
CTS No. 117A/1D, Gate No. 5, TC-	}
II, Saki Vihar Road, Powai, Mumbai	}
- 400 072.	}
[CIN: U74999MH2017PTC302860]	}
	} Petitioner Company

Order Pronounced on : 07.02.2024

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Shri Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Petitioner Company

: Ms. Devanshi Sethi i/b Hemant Sethi &
Co., Advocate.

ORDER

1. Heard Learned Counsel for the Petitioner Company and Mr. Gaurav Jaiswal, Representative from the Regional Director (WR). No objector has come before the Tribunal to oppose the Petition and nor any party has controverted to any averments made in the Petition.
2. The Counsel for the Petitioner Company submits that Petitioner Company is authorised to undertake reduction of share capital under Article 37 of the Article of Association to undertake reduction of share capital, pursuant to which the Petitioner Company shall reduce the balance in the securities premium account from Rs.2,20,50,00,000/- (Rupees Two Hundred Twenty Crores and Fifty Lacs only) to Rs.1,98,20,00,000/- (Rupees One Hundred and Ninety Eight Crores Twenty Lacs only) and such reduction would be effected by writing off the accumulated losses i.e. the debit balance in the profit & loss account of Rs.22,30,00,000/- (Rupees Twenty Two Crores Thirty Lacs only) as per the management certified unaudited balance sheet of the company as on March 31, 2023 appearing in "Reserves and Surplus – Retained Earnings" as part of the "Other Equity". The said special resolution was approved by the Petitioner Company in its Extraordinary general meeting held on June 12, 2023 and it was resolved as under:

"RESOLVED THAT pursuant to the provisions of section 66 read with Section 52 and other applicable provisions of the Companies Act, 2013 (the 'Companies Act'), the National Company Law Tribunal (Procedure for Reduction of Share Capital) Rules, 2016 and other relevant rules made there under and in terms of

*Article 37 of the Articles of Association of the Company, and subject to the confirmation by the National Company Law Tribunal, Mumbai Bench, ('NCLT') and / or any other regulatory authority as may be prescribed under the Companies Act in this regard and such other approvals as may be required, approval of shareholders of the Company be and is hereby accorded to the utilization of the balance of the securities premium account against the accumulated losses i.e. the debit balance in the profit & loss account of Rs. 22,30,00,000/- (Rupees Twenty Two Crores Thirty Lacs only) as per the management certified unaudited balance sheet of the company as on March 31, 2023 appearing in "Reserves and Surplus – Retained Earnings" as part of the "Other Equity" (hereinafter referred to as '**Capital Reduction**').*

RESOLVED FURTHER THAT any Director of the Company or Mr. Sunil Kumar Tibra or Mr. Manish Jain, Authorized Signatory of the Company (collectively referred to as '**Authorized Signatories**') be and are hereby severally authorized to do all such acts, matters, deeds and things as may be necessary or desirable including any directions for settling any question or doubt or difficulty whatsoever that may arise, for the purpose of giving effect to the reduction of the share capital of the Company as placed before the meeting or to any modification thereof, and, without prejudice to the generality of the foregoing, in particular may:

- i) Verify, sign, swear, affirm, declare, deliver, execute, make, enter into, acknowledge, record, file and perfect all deeds, declarations, instruments, affidavits, applications, petitions, objections, notices and writings whatsoever as may be usual, necessary and proper in relation to the matter aforesaid;

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- ii) *To accept services of notices or other processes which may from time to time be issued in connection with the matter aforesaid;*
 - iii) *To produce all documents, matters or other evidence in connection with the matters aforesaid and all and any of other proceedings incidental thereto or arising thereat;*
 - iv) *To make or prepare any applications, petitions, appeals and judges summons before any court, tribunal, or all relevant authorities and respond to the appropriate authorities;*
 - v) *To file applications, petitions, affidavits and / or other legal documents as may be required for confirmation of reduction of the share capital of the Company by the NCLT and to make such alterations, modification or amendments therein as may be expedient or necessary for complying with the requirements or conditions imposed by the NCLT and /or any other appropriate authorities;*
 - vi) *To appoint advocate(s) to file the application, petition, affidavits and such other documents as may be necessary for the Capital Reduction and represent the Company before the NCLT and / or any other regulatory authorities and to apply and obtain certified copies of the orders, decrees, directions, etc. that may be passed by the NCLT and / or any other regulatory authorities;*
 - vii) *To appoint and retain services of such professionals as may be necessary and authorize them to do all such acts, deeds, matters and things as may be required to bring the Capital Reduction into effect;*

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- viii) *To authenticate all the necessary documents as 'Certified Copies' or in any other manner as may be required; or*
- ix) *To comply with all the necessary formalities, compliances and disclosures in this regard and to file the necessary forms or documents with the Registrar of Companies, the Reserve Bank of India and any other authorities as may be necessary and to do and perform all such other acts, matters, deeds and things as may be necessary or required to give effect to this resolution;*

RESOLVED FURTHER THAT *any Director or Mr. Sunil Kumar Tibra, the Authorized Signatories of the Company be and are hereby severally authorized to issue a certified copy of this resolution to such persons / NCLT / departments / authorities."*

3. Nature of Business:

The main objects of the Petitioner Company as per Clause III (A) of the Memorandum of Association (MOA) of the Petitioner Company is to acquire by purchase, let out, exchange or otherwise land including residential buildings, commercial buildings, structures of description in India or abroad and estate or interest therein and rights over or connected with land, building and structures for constructing, developing, reconstructing, altering, improving, decorating, furnishing and maintaining, operating and maintaining, townships, markets, industrial estate, industrial parks, offices, flats, apartments, factories, ware-house, hotels, motels, holiday resorts, club house, recreational centres, roads, bridges, other infrastructural projects, or other buildings residential and

commercial of all kinds and / or conveniences thereon, and / or sell the same on ownership basis, instalment basis, hire purchase basis, lease basis, or otherwise transfer such building to co-operative society, or association of persons or individuals as the case may be, to equip the same or part thereof.

4. The issued, subscribed, and paid-up share capital of the Petitioner Company as on March 31, 2023 is as under:

Authorised Share Capital	Amount in Rs.
2,50,00,000 equity shares of Rs.10/- each	25,00,00,000
Total	25,00,00,000
Issued, Subscribed & Paid-Up Capital	
2,45,10,000 equity shares of Rs.10/- each	24,51,00,000
Total	24,51,00,000

Subsequent to March 31, 2023, there has been no change in the issued, subscribed and fully paid-up share capital of the Petitioner Company.

5. Rationale: The Counsel for the Petitioner Company states that the rationale for reduction of Share Capital of the Petitioner Company is:
- a) The Petitioner Company has been incurring losses since the financial year 2018. As at March 31, 2023, the Petitioner Company has accumulated losses of Rs.22,30,00,000/- (Rupees Twenty-Two Crores Thirty Lacs only) as per management certified unaudited balance sheet as on March 31, 2023. The accumulated losses are reflected as a

debit balance under “Reserves and Surplus – Retained Earnings” as a part of “Other Equity”.

- b) As against the accumulated losses, the balance sheet of the Petitioner Company also reflects an amount of Rs.2,20,50,00,000/- (Rupees Two Hundred Twenty Crores and Fifty Lacs only) standing to the credit of securities premium account as part of the “Other Equity” as on March 31, 2023.
 - c) The Petitioner Company believes that utilization of the securities premium account to set off the accumulated losses of the Petitioner Company would result in a fairer reflection of the “Other Equity” in the balance sheet and also enable the Petitioner Company to reward its shareholders, if so considered necessary, earlier that it would otherwise be possible.
 - d) The right-sizing of the balance sheet is also likely to facilitate the efforts of the Petitioner Company while raising funds.
 - e) Utilization of the securities premium account in the manner indicated above would be deemed to be a reduction of share capital of the Petitioner Company, which would therefore require compliance with section 66 read with section 52 of the Act.
6. The Petitioner states that the Article 37 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:

“The Company may, by special resolution, reduce in any manner and with, and subject to, any incident authorised and consent required by law:

- (i) its share capital;*
- (ii) any capital redemption reserve account; or*
- (iii) any share premium account”*

7. Creditors:

The Counsel submits that as on May 31, 2023, there is 1 (One) secured creditor of the Petitioner Company having value of Rs.9,81,60,00,000/- (Rupees Nine Hundred Eighty-one Crores and Sixty Lacs only) and 51 (Fifty One) unsecured creditors of the Petitioner Company having value of Rs.66,42,23,854/- (Rupees Sixty Six Crores Forty Two Lacs Twenty Three Thousand Eight Hundred and Fifty Four only). List of secured and unsecured creditors of the Petitioner Company as on May 31, 2023 along with a certificate from the statutory auditors of the Petitioner Company certifying the same are part of the Petition.

8. The Counsel submits that the Petitioner Company has not obtained any deposits as defined under Section 73 of the Act read with the rules thereunder and therefore, the requirement under Rule 2(2)(c) of the NCLT (Procedure for Reduction of Share Capital of Company) Rules, 2016 is not applicable to the Petitioner Company. A declaration from the directors of

the Petitioner Company along with a certificate from the statutory auditors of the Petitioner Company certifying the same are part of the Petition.

9. The Counsel submits that there would be no change in the shareholding pattern of the Petitioner Company pre and post reduction of equity share capital.
10. The Counsel submits that the proposed reduction of capital does not involve the extinction, reduction or diminution of any liability in respect of unpaid share capital, if any nor does it involve cancellation of any paid-up share capital which is lost. Further, the proposed reduction of share capital would not in any way adversely affect the ability of the Petitioner Company to honor its commitments or prejudicially affect the rights of the creditors of the Petitioner Company 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.
11. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, has filed a report dated November 17, 2023 *inter alia* making the following observations which are reproduced hereunder to which the Petitioner has filed its responses by way of an Affidavit in rejoinder dated November 18, 2023 and served upon the Regional Director on November 20, 2023.

Para No	Observations of the report of the	Response / Undertaking / Submission of the Petitioner	Observation of the
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	Regional Director dated November 17, 2023	Company	supplementary report of the Regional Director dated December 19, 2023
6	That the report of the Registrar of Companies, Mumbai in relation to the reduction of share capital of the Company u/s 66 of the Companies Act, 2013 has not been received by the Directorate till date. Therefore ROC, Mumbai has been advised to file his report separately before Hon'ble NCLT u/s 66 of the Companies Act, 2013 along with his observations on the scheme including the status of inquiry	As per Sub-section (2) of Section 66 of the Act, notice of every petition is required to be made to the (i) Central Government, (ii) Registrar of Companies, (iii) Securities and Exchange Board of India, in the case of listed companies, and (iv) Creditors of the company ('Relevant Persons'). It is also stated that the Hon'ble Tribunal shall take into consideration the representations from Relevant Persons, if any within a period of three months from the date of receipt of the notice by the Relevant Persons. It is further stated that where no representation are received from Relevant Persons within	Thereafter, the Regional Director has filed Supplementary Report dated December 19, 2023 and has reiterated the observations of the Registrar of Companies, Mumbai in para 2 of its Supplementary Report that, (i) The Petitioner Company falls within the jurisdiction of ROC, Mumbai. It is submitted that no complaint

	<p>/ inspection / investigation / follow up action, complaints, and prosecution if any pending against the Petitioner Company before deciding the present scheme. However, the Directorate reserves the right to file affidavit / report on receipt of ROC, Mumbai report in the matter.</p>	<p>the said period, it shall be presumed that they have no objection to the capital reduction. The Petitioner Company has served notice in Form RSC-2 along with a copy of the company petition to Registrar of Companies, Mumbai on August 7, 2023 in accordance with sub-rule (1) and sub-rule (2) of rule 3 of the Companies (Procedure for Reduction of Share Capital of Company) Rules, 2016 as directed by the Hon'ble Tribunal vide its order dated August 2, 2023. An affidavit on dispatch and publication of notice in Form RSC-5 to this effect was duly filed by the Petitioner Company with the Hon'ble Tribunal on August 9, 2023. It is humbly submitted that it has been more than three</p>	<p>and / or representation regarding the proposed reduction has been received against the Petitioner Company. Further, the Petitioner Company has filed financial statements up to 31.03.2023. (ii) Further the ROC Mumbai in its report dated 17.11.2023 has stated that No inquiry, inspection, investigation, prosecutions, technical scrutiny or</p>
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		<p>months (approx. 103 days) since the notice has been served upon Registrar of Companies, Mumbai. Since, no representations has been received till date from the Registrar of Companies, Mumbai it shall all be presumed that they have no objection to the reduction.</p>	<p>complaints under the Companies Act, 2013 are pending against the Petitioner Company; and (iii) May be decided on its merits.</p>
7(A)	<p>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 issue shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the premium</p>	<p>The Petitioner Company submits that it is a settled position in law that the proposed utilization of securities premium account amounts to reduction of share capital of the Petitioner Company by virtue of the provisions of sections 52 and 66 of the Act. As section 52 of the Act expressly provides that provisions of the said Act relating to the reduction of share capital of a company shall, except as provided in section 52(2) of the Act apply</p>	

	<p>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.</p> <p>(2) Notwithstanding anything contained in sub-section (1), the securities premium account may be applied</p>	<p>even for adjustment of securities premium account as if it were the paid-up share capital of the company.</p> <p>As per section 52(1) of the Act, where a company issues shares at a 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.</p> <p>Accordingly, if the securities premium account is applied / utilized for any of the purpose(s) other than those mentioned in sub-section 2 of section 52 of the Act, then</p>	
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	<p>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</p>	<p>utilization would be treated as reduction of share capital in accordance with the provisions of the Act. The Petitioner, in such a case, is required to follow the provisions of section 66 of the Act. Hence, the Petitioner Company is fulfilling the applicable provisions of section 52. In support of the above contention, the Petitioner Company relies upon the following judicial decisions of the NCLT / High Court which are relevant. i) Decision of NCLT, Mumbai Bench in CP No. 1188 / MB-1 / 2020 in the matter of Earnest Towers Private Limited. (Shri Bhaskara Pantula Mohan and Shri Narender Kumar Bhola). ii) Decision of NCLT, Mumbai Bench in CP No 3047 / MB /</p>
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	<p>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.</p> <p>(3) The securities premium account may,</p>	<p>C-II / 2019 in the matter of Vikhroli Corporate Park Private Limited. (Shri Ashok Kumar Borah and Shri Shyam Babu Gautam).</p> <p>iii) Decision of NCLT, Mumbai Bench in case of Embassy Office Parks Private Limited in CP No 999 of 2020. (Shri H. V Subba Rao and Shri Shyam Babu Gautam)</p> <p>iv) Division Bench Judgement of the Andhra Pradesh High Court in the matter Hyderabad Industries Limited in OSA No 35 of 2004.</p> <p>v) Decision of Madras High Court in the matter of Parrys Confectionery limited in CP No 262 of 2013.</p>	
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	<p>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, —</p> <p>(a) in paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; or</p> <p>(b) in writing off</p>	
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	<p>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.”</p> <p>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,</p>	
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	2013.		
7(B)	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.	<p>The reduction of capital does not call for sacrifice on the part of any creditor and would not in any way adversely affect the ability of the Petitioner Company to honor its commitments or prejudicially affect the rights of the creditors of the Petitioner Company. Further, the reduction of capital will not have any adverse impact on the ability of the Petitioner Company to pay its statutory dues regularly in accordance with the relevant regulations and will also not affect prejudicially interests of Governmental Revenue or any other stakeholders.</p> <p>The Petitioner Company has in compliance of the order dated 2nd August, 2023, passed by this Bench served</p>	

		<p>notice to its sole secured creditor and 51 (Fifty-One) unsecured creditors via Registered Post. The Petitioners have filed Affidavit dated 9th August, 2023 evidencing dispatch of notices to creditors. Further an Additional Affidavit dated 15th January, 2024 has been filed by the Petitioner wherein proof of dispatch along with tracking report evidencing service to the sole secured creditor and 44 unsecured creditors out of 51 unsecured creditors has been annexed. The Petitioner states that the debt of the residuary 7 unsecured creditor as on date has been repaid which is annexed to the Additional Affidavit dated 15th January, 2024 along with the Chartered Account certificate certifying that the debt of</p>	
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		<p>residuary 7 unsecured creditors has been paid by the Petitioner Company. Accordingly, the Petitioner Company submits that the stipulation as contained in sub-para (B) above stands fulfilled.</p>	
7(C)	<p>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.</p>	<p>The Petitioner Company submits that the tax implications, if any, arising out of the proposal for reduction is subject to final decision of the Income Tax Authorities. The approval of the company petition by this Hon'ble Tribunal may not deter the Income Tax Authority to scrutinize the tax return filed by the Petitioner Company after giving effect to the proposed reduction.</p>	

	<p>The decision of the Income Tax Authority is binding on the petitioner Company.</p>		
7(D)	<p>It is respectfully submits that the petitioner company is having foreign shareholder, therefore petitioner company may be directed to comply with the FERA/FEMA regulation and provide approval from the RBI before approval of the scheme as the shareholders is foreign entity.</p>	<p>The Petitioner Company submits that the proposed reduction of share capital under Section 66 read with Section 52 of the Companies Act, 2013 is for adjustment / set off of accumulated losses against the balance available in the securities premium account and does not envisage cash payout to any shareholder. Also, there is no impact on the shareholding pattern or the capital structure of the Petitioner Company and therefore, approval of Reserve Bank of India is not required. In any case, the Petitioner Company undertakes to comply with the provisions of the Foreign</p>	

		Exchange Management Act, 1999 and the relevant guidelines issued by the Reserve Bank of India to the extent applicable.	
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12. The observations made by the Regional Director on behalf of the Central Government have been explained by the Petitioner Company in Para 11 above. Further heard, Mr. Gaurav Jaiswal, Representative of the Regional Director, MCA (WR) Mumbai, who is present at the time of final hearing. He submitted that above explanations are satisfactory and the RD has no objection in approving the reduction of Share Capital of the Petitioner Company.
13. Considering the entire facts and circumstances of the case, report and supplementary report filed by Regional Director, affidavit in rejoinder filed by the Petitioner Company in response to Regional Director's observations and on perusal of the documents produced on record, the Company Petition deserves to be allowed.
14. The Bench directs that the Petitioner Company to publish the 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 wide circulation in the State of Maharashtra within 30 days of registration of the Order.

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15. All concerned regulatory authorities to act on production of certified copy of this order duly signed by designated Registrar of this Tribunal.
16. The minutes set forth hereto is hereby approved.

Form of Minutes

“The balance in the securities premium account of Prima Bay Private Limited shall henceforth be Rs.1,98,20,00,000/- (Rupees One Hundred and Ninety-Eight Crores Twenty Lacs only), reduced by Rs. 22,30,00,000/- (Rupees Twenty-Two Crores Thirty Lacs only) from Rs 2,20,50,00,000/- (Rupees Two Hundred Twenty Crores and Fifty Lacs only).”

17. The Petitioner Company undertakes to file the certified copy of the order and form of minutes duly certified by the Designated 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.
18. Accordingly, CP-151(MB)/2023 is **allowed**. File to be consigned to records.

Sd/-
Anu Jagmohan Singh
Member (Technical)

Sd/-
Kishore Vemulapalli,
Member (Judicial)

07.02.2024/pvs/kb