

**THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – I**

C.P. No. 271 of 2022

*In the matter of
Section 66 and other applicable
provisions of
The Companies Act, 2013 and the
rules framed thereunder
&
In the matter of
Reduction of Equity Share Capital
of
Ulundurpet Expressways Private
Limited*

Ulundurpet Expressways Private Limited

CIN: U45203MH2006PTC265580

... Petitioner Company

Order delivered on 19.12.2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice V.G. Bisht (Retd.)
Hon'ble Member (Judicial)

Appearances (through)

For the Petitioner(s) : Mr. Hemant Sethi a/w Ms.
Devanshi Sethi, i/b Hemant Sethi &
Co., Advocates
For the Regional Director: Mr. Tushar Wagh, Deputy Director

ORDER

1. 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, unless otherwise stated hereunder.
2. 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 29th November 2022 to cancel 16,76,96,382 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 2,64,55,23,650 divided into 26,45,52,365 equity shares of INR 10 each, fully paid up and that such reduction shall be effected by returning to the shareholders INR 11.33 per equity share, aggregating to an amount of INR 190,00,00,008/-, which shall be kept outstanding as a loan to the Company on the following terms:

<i>Particulars</i>	<i>Terms</i>
<i>Coupon rate</i>	<i>14% p.a. or such other rate as may be mutually agreed between the Company and its shareholders from time to time</i>
<i>Payment of coupon</i>	<i>Annually or at such other interval as may be mutually agreed between the Company and its shareholders</i>
<i>Tenure</i>	<i>At any time within a period of 5 years from the date of order of the NCLT</i>

	<i>approving the said Petition; or at an extended period as may be mutually agreed between the Company and its shareholders</i>
<i>Security</i>	<i>Unsecured</i>

3. That Article 6 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.
4. The Learned Counsel for the Petitioner Company states that the rationale for reduction of equity share capital of the Petitioner Company is:
 - i. *The Petitioner Company operates, a four-lane highway on BOT (toll) model. The said highway has been operational since July 2009. 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 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 revenue because of the toll rates revision and traffic growth. Petitioner Company expects the overall revenue 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.

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

iii. *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.”

5. The Petitioner Company have complied with all the requirements as per the directions of the Tribunal vide Order dated 09.02.2023 and have filed necessary Affidavits of Compliance before the Tribunal. Moreover, the Petitioner Companies through their Counsel undertake to comply with all the statutory requirements, if any, as required under the Act and the Rules made there under as applicable.
6. The Petitioner Company 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 provided as under:

Share Capital	Amount (INR)
Authorized Capital	
35,00,00,000 Equity Shares of INR10 each	3,500,000,000
TOTAL	3,500,000,000
Issued, subscribed and fully paid-up	
26,45,52,365 Equity Shares of INR 10 each, fully paid up	2,64,55,23,650
TOTAL	26,45,523,650

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	26,45,52,364	99.999%	96,855,982	99.999%
Mr. Vidyadhar S Dabholkar (Nominee of Highways Infrastructure Trust)	1	0.001%	1	0.001%
Total	26,45,52,365	100%	96,855,983	100%

9. The Regional Director has filed his Report dated 12.05.2023 making certain observations and the Petitioner Companies have undertaken/made following submission that :

- i. 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;

ii. The provisions of Section 66(1)(b)(ii) of the CA, 2013, 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 CA, 2013 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.

iii. The Petitioner Company submits that it acknowledges and agrees to the fact that Highways Infrastructure Trust and its nominees own 100% of the share capital of the Petitioner Company as per the Provisional Financial Statement as at 30.09.2022 and owing to the said trust being registered with SEBI as InvIT, it is exempted from the requirement to comply

with the provisions of Section 90 read with Rule 8 of the Companies (Significant Beneficial Owners) Rules, 2018.

iv. 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 Investments II Pte Limited's 100% shareholding in the Petitioner Company as on 31.03.2022. Accordingly, the Petitioner Company was not required to make declaration of significant beneficial ownership under Section 90 of the Companies Act, 2013 for Galaxy Investments II Pte Limited.

10. Mr. Tushar Wagh, Deputy Director, Office of Regional Director (WR), Mumbai appeared on the date of hearing and submits that the explanations and clarifications given by the Petitioner Companies in rejoinder are satisfactory and they have no further objection to the Scheme.
11. From the material on record, the Petitioner Company has sought reduction of its share capital by conversion of such reduced share capital into the interest bearing unsecured loans, to be repaid out of future cash accruals. It is admitted fact that the Petitioner company does not have sufficient cash accruals as on date of passing of special resolution, accordingly the proposed scheme has been devised for gradual repayment of such reduced

share capital by converting the same into interest bearing unsecured loans.

12. We find that Section 66(1)(b)(ii) of the Companies Act, 2013 empowers a company *to pay off any paid-up share capital which is in excess of the wants of the company*. It is case of the Petitioner Company that *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 proposed scheme of reduction by way of conversion of existing share capital into unsecured loans is based on the premise that *The Petitioner Company currently generates surplus cash from its operations and also anticipates a higher cash surplus in the future year basis the business projections*. This clearly indicates that the proposed buy back shall take place out of future cash flows, which are anticipated based on the projections. Accordingly, it can not be said that the proposed share capital sought to be reduced is in excess of the wants of the company in presenti and is based on future cash flows. Since, the converted portion of reduced share capital into unsecured loans shall be interest bearing, it has propensity to impact the operating as well as financial ratios of the petitioner company.

13. We are of considered view that the scheme of section 66(1)(b)(ii) of the Companies Act, 2013 only enables a company to pay off excess capital to its shareholders, which is considered in excess of wants of the company. The facts of the case clearly shows that such reduced share capital can not be said to be in excess of wants of the company on the date of passing of special resolution. Accordingly, such reduction is not permissible under the terms of Section 66(1)(b)(ii) of the Companies Act, 2013. Further, the effect of such conversion shall be indirect lending by the overseas shareholders, which is allowed in terms of External Commercial Borrowings guidelines in accordance with provisions of Foreign Exchange Management Act and such guidelines permit borrowings by a resident subject to terms and conditions provided in such guidelines in case such borrowings is under automatic route.
14. In view of the aforesaid discussion, we are of considered view that the proposed scheme of reduction of share capital in terms of section 66(1)(b)(ii) of the Companies Act, 2013 is not in accordance with mandate of the provisions. Accordingly we decline to confirm the Special Resolution dated 29th November 2022 and **dismiss CP 271/2022.**

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)