(2019) 04 NCLT CK 0001

In the National Company Law Tribunal

Case No : Company Petition No. (CAA) 72, 56 PB Of 2018

Aashish Constructions Private Limited APPELLANT

Vs

Experience Infraprojects Private Limited RESPONDENT

Date of Decision : 04-04-2019

Acts Referred:

Companies Act, 2013 — Section 68, 133, 209(5), 211(7), 230, 230(2), 230(10), 231, 232, 232(B)(i)

Citation : (2019) 04 NCLT CK 0001

Hon'ble Judges : M.M. Kumar, J;S.K. Mohapatra, Member (Technical)

Bench : Division Bench

Advocate : Abhishek Nahta

Final Decision : Disposed Of

Judgement

M.M. Kumar, J

1. This Joint application has been filed by the Petitioner Companies under Sections 230 to 232 of the Companies Act, 2013 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and the National Company Law Tribunal Rules, 2016, for the purpose of the approval of the Scheme of Amalgamation. The copy of the Scheme has been placed on record.

2. A perusal of the petition discloses that initially the First Motion application seeking dispensation from convening the meeting of Shareholders and Creditors was filed before this Bench and based on such joint application moved under Sections 230-232 of the Companies Act, 2013, this Tribunal vide its order dated 04.06.2018 issued directions to dispense with convening the meetings of secured and unsecured creditors of the companies. On 21.05.2018 the Petitioners were directed to carry out publication in the newspapers English Daily 'Business Standard' (Delhi edition) as well as in Hindi Daily 'Business Standard' (Delhi edition). In addition to the public notice, notices were directed to be served on to the Regional Director (Northern Region), Registrar of Companies, NCT of Delhi

and Haryana, Official Liquidator, the Income Tax Department and to the other relevant sectoral regulators.

3. It is seen from the records that the Petitioners have filed an affidavit dated 23.07.2018 affirming compliance of the order passed by the Tribunal dated 04.06.2018. A perusal of the affidavit discloses that the petitioners have effected the newspaper publication as directed in English Daily 'Business Standard' (Delhi Edition) as well as in Hindi Daily 'Business Standard' (Delhi Edition) on 18.06.2018 in relation to the date of hearing of the petition. Further, the affidavit also discloses that copies of petition were duly served to the Registrar of Companies, Regional Director, Northern Region and Income Tax Department in compliance of the order and in proof of the same acknowledgement made by the respective offices have also been placed on record.

4. The Regional Director has filed its representation dated 06.08.2018 and has observed that, firstly, as per paragraph 2 of the repot of RoC, it is seen that "Technical Scrutiny of the balance sheet of Transferor Company No.2 was conducted in the year2012-2013. Follow up sanction received in this matter is under-process. Second observation is that the company should undertake to pay the fees on its authorized capital subsequent to the amalgamation. Thirdly, the RoC has observed that the Scheme is not in consonance with 230(10) of the Companies Act, 2013. Lastly, that the Transferor Company No. 2 i.e. DKB Infrastructure Private Limited in its financial statement as on 31.03.2016 has stated that there is a proceeding before CIT (Appeal) for Rs. 3,98,305/- however, no disclosure about the proceeding is made in the Scheme contrary to the provisions of Section 230(2)(a) of the Companies Act,2013.

In response to the aforesaid observations of the Regional Director, the petitioner companies filed their rejoinder affidavit dated10.09.2018 and submitted that firstly, the actions under section 209(5) and 211 (7) lie against the directors of the transferor company and not against the transferor company. The directors of the transferor company would still be in existence after the merger. Further, it was submitted that In any event as per clause 6 of the Scheme, all the legal proceedings by or against the transferor companies shall continue by or against the transferee company. Secondly, it has been undertaken by the Petitioner Companies that as per the Section 232(B)(i) the Transferee Company will pay the applicable fee, if any, on its authorized capital subsequent to the amalgamation. Thirdly, on the issue of violation of Section 230(10) of the Companies Act, 2013, it is submitted that Para 10.4.1 of the scheme reads, "As a result of the allotment in the manner specified herein above, if an Equity Shareholder of the Transferor Companies become entitled to any fractional coupan/s of equity share of the Transferee Company then such shareholder will not be allotted any fractional shares instead the

Transferee Company will pay such shareholders amount in cash at a price of equity share of Transferor Companies as determined while arriving at the Swap Ratio. Accordingly, on the basis of Share Valuation Report if any equity shareholder of the Transferor Company is entitled to any fractional shares in the Transferee Company, such shareholder will not be allotted any share but shall only receive the net sale proceeds in respect of its fractional entitlement as determined above."

Section 68 of the Companies Act, 2013 provides for the power of the Company to purchase its own securities (buy-back). Payment of cash for fractional shares would not in any way amount to purchase of its own shares by the Company. Thus, it is submitted by the companies that there is no violation of Section 230(10).

5. The Official Liquidator has filed a report on 06.08.2018 wherein it has been stated that he has not received any complaint against the proposed Scheme from any person/ party interested in the scheme in any manner and that the affairs of the Applicant Companies do not appear to have been conducted in a manner prejudicial to the interest of its members, creditors or public interest.

6. In the joint petition it has also been affirmed that no proceedings for inspection, inquiry or investigation under the provisions of the Companies Act, 2013 or under provisions of Companies Act, 1956 are pending against the Petitioner Companies.

7. Certificates of respective Statutory auditors of both the petitioner companies have been placed on record to the effect that Accounting Treatment proposed in the Scheme of Amalgamation is in conformity with the Accounting Standard notified by the Central Government as specified under the provisions of Section 133 of the Companies Act, 2013.

8. In view of the foregoing, upon considering the approval accorded by the members and creditors of the Petitioner companies to the proposed Scheme, and the affidavits filed by the Regional Director, Northern Region, Ministry of Corporate Affairs and the report of official liquidator, there appears to be no impediment in sanctioning the present Scheme. Consequently, sanction is hereby granted to the Scheme under Section 230 & 232 of the Companies Act, 2013. The Petitioners shall however remain bound to comply with the statutory requirements in accordance with law.

9. Notwithstanding the above, if there is any deficiency found or, violation committed qua any enactment, statutory rule or regulation, the sanction granted by this court to the scheme will not come in the way of action being taken, albeit, in accordance with law, against the concerned persons, directors and officials of the petitioners.

While approving the Scheme as above, we further clarify that this order should not be construed as an order in any granting exemption from payment of stamp duty, taxes including income tax, GST etc or any other charges, if any, and payment in accordance with law or in respect with any permission/compliance with any other requirement which may be specifically required under any law.

12. THIS TRIBUNAL DO FURTHER ORDER(S):

(A) WITH RESPECT TO TRANSFEROR COMPANIES AND TRANSFEREE COMPANY

1. That the Transferor Companies stand dissolved without being wound-up; and

2. That all the property, rights and powers of all the Transferor Companies, be transferred without further act or deed, to the Transferee Company and accordingly the same shall pursuant to Section 232 of the Act, be transferred to and vest in the Transferee Company for all the estate and interests of the Transferor Companies therein but subject nevertheless to all changes now affecting the same; and

3. That all the liabilities and duties of the Transferor Companies be transferred without further act or deed, to Transferee Company and accordingly the same shall, pursuant to Section 232 of the Act, be transferred to and become the liabilities and duties of the Transferee Company; and

4. That all proceedings now pending by or against the Transferor Companies be continued by or against the Transferee Company;

and

5. That all the employees of the Transferor Companies in service, if any, on the date immediately preceding the date on which the scheme takes effect, i.e. the effective date shall become the employees of the Transferee Company on such date without any break or interruption in service and upon terms and conditions not less favourable than those subsisting in concerned Transferor Companies on the said date.

6. That Petitioner companies shall within thirty days of the date of the receipt of this order cause a certified copy of this order to be delivered to the Registrar of Company for registration and on such certified copy being so delivered the Transferor Companies shall be dissolved and the Registrar of Company shall place all documents relating to the Transferor Companies registered with him on the file kept by him in relation to the Transferee Company and the files relating to all the petitioner companies shall be consolidated accordingly.

Any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary.

The petition stands disposed of in the above terms.

