(2021) 07 NCLT CK 0044

In the National Company Law Tribunal

Case No : CP (CAA) No.15/Chd/HP/2020

A.B.Tools Private Limited APPELLANT

Vs

Edificio Infrastructures Private Limited And Ors RESPONDENT

Date of Decision : 28-07-2021

Acts Referred:

Companies Act, 2013 — Section 66, 133, 203, 230, 230(4), 232, 441
Companies Act, 1956 — Section 383A
Income Tax Act, 1961 — Section 143(3), 281
Direct Tax Vivad se Vishvas Act, 2020 — Section 5(1)
Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 — Rule 8A, 15, 16

Citation : (2021) 07 NCLT CK 0044

Hon'ble Judges : Ajay Kumar Vatsavayi, Member (J);Raghu Nayyar, Member (T)

Bench : Division Bench

Advocate : G.S. Sarin

Judgement

Ajay Kumar Vatsavayi, Member (Judicial)

1. This is a joint Second Motion Company Petition filed by the petitioner-companies, namely, A.B.TOOLS PRIVATE LIMITE D(Demerged

Company/ Petitioner Company No-1), EDIFICIO INFRASTRUCTURES PRIVATE LIMIT (REeDsulting Company No. 1/Petitioner Company

No-2), SOLSTICE HOSPITALITY PRIVATE LIMIT E(RDesulting Company No. 2/ Petitioner Company No-3) andN ARANJANDASS

KARAMCHAND PRIVATE LIMITE (DResulting Company No. 3/Petitioner Company No-4) for sanction of the Scheme of Arrangement and

for fixing a date of hearing of the main Company Petition as well as for a direction in relation to publication in press to be effected and notices to be

issued to the authorities concerned in relation to date of hearing of the petition and calling for the objections, if any, to the Scheme of Arrangement (here-in-after for brevity, referred to as the â??Schemeâ??) contemplated between the petitioner-companies. The petition has been filed in terms of

Sections 230, 232 and 66 of the Companies Act, 2013 read with Rule 16 of the Companies (Compromises, Arrangements and Amalgamations), Rules

2016.

2. The First Motion Application seeking directions for dispensing with the requirement of convening the meetings of equity shareholders of all the

Applicant Companies and for convening the meetings of secured and unsecured creditors in Applicant Company No.1/Demerged Company was filed

before this Tribunal vide Company Application No.CA (CAA) No.8/CHD/HP/2020 and based on such joint application moved under Sections 230-232

of the Companies Act, 2013, (for brevity, the â??Actâ??) necessary directions were issued on 18.05.2020 for convening the meetings of the secured

and unsecured creditors of the Applicant CompanyNo.1/Demerged Company and the meetings of equity shareholders of all the Applicant Companies

were dispensed with as consent affidavits had been obtained from them. Since there was no secured creditor in Applicant Companies No.2, 3 and 4,

there was nothing to convene their meetings.Also, since there was no unsecured creditor in Applicant Companies No.2, 3 and 4, therefore, there was

nothing to convene their meetings. The First Motion Petition bearing CA (CAA) No. 8/CHD/HP/2020 was disposed of by the Tribunal on 18.05.2020.

The Board of Directors of the Applicant Companies have unanimously approved the ""Scheme"" by passing the respective Board Resolutions dated

15.10.2019, subject to sanctioning of the same by this Tribunal. Copies of these Board Resolutions are A 10, A 11, A 12, and Annexure A 13

respectively. The Applicant Companies have authorized Mr. Rajan Jain, Managing Director/Director, of the companies to sign, file, submit or present

necessary applications, petitions, supplementary applications/petitions, etc. and to swear affidavits or execute bonds for the Scheme and to do such

acts and deeds as are necessary and incidental concerning the scheme.

3. Report dated 28.07.2020 of the Chairperson along with the report of Scrutinizer in respect of the meetings of Secured and unsecured creditors of

the Demerged Company has been attached as Annexure-I of the petition. The Chairperson has reported that the secured and unsecured creditors of

the Demerged Company have unanimously approved the Scheme Thereupon the instant petition was filed for approval of the Scheme in terms of Rule

15 of the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016 on 07.08.2020.

4. When the matter was listed on 09.10.2020, the following Order was passed:

â??4. The Petition be listed for hearing on 19.11.2020. Notice of hearing be advertised in Business Standardâ? (English), all edition and â??Jansattaâ?

(Hindi), Solan Edition not less than 10 days before the aforesaid date fixed for hearing.

5. Notice be also served upon the Objector(s) or their representatives as contemplated under sub-section (4) of Section 230 of the Act who may have made

representation and who have desired to be heard in their representation along with a copy of the Petition and the annexures filed therewith at least 15 days

before the date fixed for hearing. It is specified in the notices that the objections, if any, to the Scheme contemplated by the authorities to whom notice has been

given on or before the date of hearing fixed herein may be filed within thirty days from the date of receipt of the notice, failing which it will be considered that

there is no objection to the approval of the Scheme on the part of the authorities by this Tribunal and subject to other conditions being satisfied as may be

applicable under the Companies Act, 2013 and relevant rules framed thereunder.

6. In addition to the above public notice, each of the petitioner companies shall serve the notice of the petition on the following Authorities namely,

(a) Central Government through Regional Director (Northern Region), Ministry of Corporate Affairs, New Delh

Â (b) Registrar of Companies at Himachal Pradesh

(c) Income Tax Department through the Nodal Officer - Principal Chief Commissioner of Income Tax, NWR, Aaykar Bhawan, Sector 17-E, Chandigarh by

mentioning the PAN of the companies

(d) Official Liquidator along with a copy of this petition by speed post/hand delivery immediately and to such other sectoral Regulators who may govern the

working of the respective companies involved in the Scheme.

7. The Petitioner Companies are directed to file specific affidavits of the authorized representative, if needed, to the effect that there is no other sectoral

regulator(s) governing the business of the petitioner companies and the petitioner companies shall also file the affidavit at least two days before the date fixed to

the effect that no objections to the scheme have been received by the petitioner Companies.

8. Registry shall also report before the date fixed as to whether any objection has been received to the proposed Scheme.â??

5. The learned authorised representative for the Petitioner Companies filed an affidavit of compliance vide Diary No.00818/3 dated 09.11.2020,

wherein it has been stated that notice of hearing of Petition was advertised in newspapers namely â??Business Standardâ?? (English, All Editions)

and â??Jansattaâ? (Hindi, Solan Edition) on 19.10.2020 seeking representation or objection from the public on the Scheme. The original copies of the

newspapers are attached as Annexure 2 of Diary No. 00818/3. It has also been stated in the affidavit that the notices as directed by this Tribunal

were also sent to the statutory authorities vide speed post on 16.10.2020 and the same are attached at Annexure 3 of Diary No. 00818/3.

6. It is deposed that no objection have been received by the Petitioner Companies from any objector to date. The Registry has also reported that no

objections have been received in view of the order dated 09.10.2020.

7. Annexure B4, B5, B6, and B7 are the certificates of the respective Statutory Auditors of the Petitioner companies, respectively certifying that the

accounting treatment proposed in the Scheme conforms to the applicable accounting provisions of the Act, Accounting Standards prescribed under

Section 133 of the Act and Generally Accepted Accounting Principles in India, as the case may be.

8. The main objects, authorised and paid-up share capital and rationale of the Scheme have been discussed in detail in the Order disposing of the First

Motion Application on 18.05.2020 with the amended Order dated 23.06.2020.

9. It is deposed that the Petitioner Companies are not registered Non- Banking Financial Institutions and hence, RBI is not a sectoral regulator in these

Petitioner Companies. It is also deposed that the Petitioner Companies are not listed with any Stock Exchange in India or outside India and hence, no

notice to SEBI is not required. It is further stated that the Applicant Companies have no other specific sectoral regulator other than the Central

Government through Regional Director, Registrar of Companies, Official Liquidator and Income Tax Authorities (Diary No.00818/4 dated

09.11.2020).

10. We have heard the learned authorised representative for the Petitioners and learned Counsel for the statutory authorities and perused the records.

11. As per the Scheme, the appointed date means 01.04.2019 or such other date as the relevant Adjudicating Authority Body may direct or fix, for the

purpose of this Scheme. The Petitioner Companies have also attached a Valuation Report dated 17.09.2019 along with the First Motion Application

for which a detailed reference has been made in Para 37 of the Order disposing of the first motion Application dated 18.05.2020.

12. The Regional Director (Northern Region), Ministry of Corporate Affairs has filed its report vide Diary No. 00818/7 dated 11.03.2021 and have

made the following observation in Para 11 of its report :-

â??(i) It is observed from the record of the Demerged Company (A.B.TOOLS PRIVATE LIMITED) available on MCA Portal that the Company increased its share

capital from Rs 4.5 Crore to Rs 5 Crore in the Financial Year 2007-2008, but Company appointed Company Secretary on 14-06-2019 in FY 2019-2020 thus,

there is a violation of Section 383A of Companies Act, 1956/ Section 203 read with Rule 8A of Companies Act,2013 for non- appointment of Company Secretary

from FY 2007-2008 to 2018- 19, therefore the demerged Company should compound the violation before approval of Scheme of Demerger.â??

13. The Petitioner Company No 1 has filed its response vide Diary No. 0818/8 dated 13.04.2021. It is submitted that keeping in view the sincere

efforts made by the Company for recruitment of a Company Secretary on whole Time basis it is prayed that the demerger scheme of the company

may kindly be approved and the non-compliance of section 383 A read with 203 be pardoned/ condoned which was beyond the control of the

management an unintentional. It is also undertaken by the management of the Petitioner Company 1 to file the compounding Application under Section

441/203 of the Companies Act 2013 immediately after the approval of the Demerger Scheme by this Tribunal.

14. The Income Tax Department has filed its report vide Diary No. 00818/5 dated 19.11.2020 and have made the following observation in respect of

Petitioner Company 1:

â??(i) The Assessee Company was incorporated on 02.01.1981. As per the record on ITBA and AST System of the department, the Assessee Company has filed its return of Income for the Assessment year(s) 2003-04to 2019-20. The record reveals that a demand of Rs. 4,46,311/- for the Assessment Year 2013-14 is outstanding

against the Assessee Company out of total Demand of Rs. 7,86,400/- created on completion of dated 29.02.2016 under Section 143(3) of the Income-tax Act, 1961

is pending before the Ld. Commissioner of Income Tax(Appeals). It is relevant to mention here that the proposed Scheme of arrangement would involve the

transfer of assets of the Assessee, the Demerged Company to the Resulting Company. The reliance in this regard is placed on the provision of Section 281 of

Incometax Act, 1961 which makes certain â??certain Transfers to be void.â? The Provision of section 281 of the Income Tax Act, 1961 is there to ensure that the

interest of Revenue is not adversely affected. These provisions intend to protect even the tax demand which may arise during the scheme of amalgamation.â??

15. With respect to Petitioner Companies 2, 3 & 4, it is reported that as per the record on ITBA and AST System of the Department, no return of

income has been filed and as of now, there is no outstanding demand nor any proceedings are pending.

16. Learned Authorized representative have referred to Para 5.14 of the Scheme and the same is reproduced as follows:

â??All existing and future incentives, un availed credits and exemptions and other statutory benefits, including in respect of Income Tax, Excise (including

CENVAT), Customs, VAT, Sales Tax, Service Tax, etc to which A B Tools Private Limited (â??the Demerged Companyâ?) is entitled concerning the Demerged

Undertakings in terms of the various statutes/schemes/policies, etc of Union and State Governments shall be available to and vest in Edificio Infrastructures

Private Limited (â??t he Resulting Company No.1â?), Solstice Hospitality Private Limited (â??the Resulting Company No.2â?) and Naranjandass Karamchand

Private Limited (â??the Resulting Company No.3â??) upon this Scheme becoming effective.â??

17. In response to the Income Tax Report, the Applicant Companies have filed their reply vide Diary No. 00818/10 dated 14.07.2021.It is submitted

that the Applicant Companies undertake that all tax Assessment Proceedings and Appeals of whatsoever nature by or against the Demerged

Company, pending or arising as at the Effective Date shall be continued and/ or enforced by or against the Demerged Company. It is also stated that the aforementioned proceedings shall neither abate nor be discontinued nor any way prejudicially affected because of the arrangement. Form 3 for

Certificate under sub-section (1) of Section 5 of the Direct Tax Vivad se Vishvas Act, 2020 and Copy of the order passed by Principal Commissioner

of Income Tax, Chandigarh dated 28.05.2021 are attached as Annexures 1 & 2 of Diary No. 00818/10.

18. The Official Liquidator has filed its report vide Diary No. 0818/6 dated 16.02.2021 and have not made any adverse observations with respect to

the Proposed Scheme.

19. It is stated in para 31 of the Petition that no investigation or proceedings under the provisions of the Act, pending against any of the Petitioner

Companies. It is also stated in para 32 of the Petition that the Scheme does not provide for any Corporate Debt Restructuring with any of the Secured

and Unsecured Creditors of the Petitioner Companies and Reduction of Capital.

20. It is submitted that the Petitioner Companies have also attached Audited Financials as on 31.03.2019 along with the Provisional Statements as on

30.06.2019 and the same are attached as Annexure B-2, C- 4, C-5 respectively.

21. It could be seen that the present Scheme has been formulated for approval of demerger of AB Tools Private Limited as under:

(i) Foundry Division shall remain with AB Tools Private Limited, the demerged company/applicant No 1.

(ii) Construction Division will be shifted to EDIFICIO INFRASTRUCTURES PRIVATE LIMITED (Resulting company No.1/ Applicant Company No.2),

(iii) Hotel Division to SOLSTICE HOSPITALITY PRIVATE LIMITED (Resulting Company No.2/ Applicant company No.3) and

(iv) Nagloi Land will go to NARANJANDASS KARAMCHAND PRIVATE LIMITED (Resulting Company No.3/ Applicant Company No.4.) of the Demerged

Company (â??Demerged Undertakingâ?) with and into the Resulting Companies and their respective shareholders and creditors for the transfer and vesting of all

the properties, assets, and liabilities of the Demerged Undertaking into Resulting Companies.

22. In view of the above, there is no impediment in the approval of the â?? Schemeâ??. The Scheme (Annexure A1) is hereby approved. While

approving the Scheme, it is clarified that this Order should not be construed as an Order in any way granting exemption from payment of any stamp duty, taxes or any other charges, if any, and payment in accordance with law or in respect of any permission /compliance with any other requirement

which may be specifically required under any law.It is directed that the Petitioner Companies shall comply with the provisions of the FEMA/RBI Act.

Notwithstanding the above, if there is any deficiency found, or violation committed qua any enactment, statutory rule, or regulation, the sanction

granted by this Tribunal will not come in the way of action being taken, albeit, as per law, against the concerned persons, directors and officials of the

petitioners as well as the petitioners.

AND THIS TRIBUNAL DOES FURTHER ORDERS:

1) That all the property, rights and powers of the Demerged Undertakings of the Demerged Company be transferred, without further act or deed, to the Resulting

Companies and accordingly, the same shall according to sections 230, 232 & 66 of the Act, be transferred to and vested in the Resulting Companies for all the estate

and interest of the Demerged Undertakings of the Demerged Company but subject nevertheless to all charges now affecting the same;

2) That all the liabilities and duties of the Demerged Undertakings of the Demerged Company be transferred, without further act or deed, to the Resulting Companies

and accordingly the same shall according to Sections 230, 232 & 66 of the Act, be transferred to and become the liabilities and duties of the Resulting Companies;

3) That all the proceedings now pending by or against the Demerged Undertakings of the Demerged Company be continued by or against the Resulting Companies;

4) That the employees of the Demerged Undertakings of the Demerged Company shall be transferred to the Resulting Companies in terms of the â??Schemeâ??;

5) That the Resulting Companies shall, without further application, allot to the existing members of the Demerged Undertakings of the Demerged Company shares of

Resulting Companies to which they are entitled under the said Scheme;

6) That the Petitioner Companies do, within 30 days after the date of receipt of this Order, cause a certified copy of this Order to be delivered to the Registrar of

Companies for registration;

7) That the Resulting Companies shall deposit an amount of ☐ 75,000/- with the

Pay & Accounts Office in respect of the Regional Director, Northern Region, Ministry

of Corporate Affairs, New Delhi, and ☐ 25,000/- in favour of â??The Company Law Bar Associationâ?, Chandigarh within a period of four weeks from the date of

receipt of certified copy of this Order; and

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

Copy of this Order is communicated to the authorized representative for the Petitioner Companies.

