(2023) 03 NCLT CK 0034

In the National Company Law Tribunal

Case No : CA Nos. 240/2022 & 21/2023 And CP (CAA) No. 44/Chd/Hry/2022

Adsila Builders & Developers Private Limited Vs

Date of Decision : 09-03-2023

Acts Referred:
Companies Act, 2013 — Section 133, 230, 232, 232(3)(i)
Income Tax Act, 1961 — Section 170(2A)

Citation : (2023) 03 NCLT CK 0034

Hon'ble Judges : Harnam Singh Thakur, Member (J);Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Abhinav Sood, Anmol Gupta, Yogesh Putney

Final Decision : Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

CA No.240 of 2022 and CA No.21 of 2023

1. The present applications have been filed for placing on record the Financial Statements for the year ending on 31.03.2022 and provisional financial statements as on 30.09.2022. The same are taken on record and CA No.240 of 2022 and CA No.21 of 2023 are allowed and disposed of accordingly.

CP (CAA) No. 44/Chd/Hry/2022

This is a joint second motion application filed by Petitioner Companies namely; Adsila Builders & Developers Private Limited (Transferor Company No.1/Petitioner Company No.1); Alana Builders & Developers Private Limited (Transferor Company No.2/Petitioner Company No.2); Beyla Builders & Developers Private Limited (Transferor Company No.3/Petitioner Company No.3); Hansel Builders & Developers Private Limited (Transferor Company No.4/Petitioner Company No.4); Seamless Constructions Private Limited (Transferor Company No.5/Petitioner Company No.5); with Milda Buildwell Private Limited (Transferee Company/ Petitioner Company No.6) in relation to the Scheme of Amalgamation between the petitioner companies under Section 230-232 Companies Act, 2013 (the Act) and Rule 15 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (the Rules) and other applicable provisions of Compromises, Arrangements and Amalgamations) Rules, 2016.

2. The Petitioner Companies have prayed for sanctioning of the Scheme of Amalgamation between the respective companies. The said Scheme is attached as Annexure P-1 of the petition.

3. The Petitioner Companies have filed the first motion application bearing CA (CAA) No.6/Chd/Hry/2022 before this Tribunal for seeking directions for dispensing/convening with the meetings of Equity Shareholders, Secured and Unsecured Creditors of the Applicant Companies and of Debenture Holders of Applicant Company Nos.1, 2, 4, 5 and 6. The first motion application was disposed of by order dated 20.05.2022 wherein the meetings of Equity Shareholders Secured and Unsecured Creditors of all the applicant companies and of Debenture Holders of Applicant Company Nos.1, 2, 4, 5 and 6. were dispensed with for the reasons mentioned in the aforesaid order.

4. The main objectives, date of incorporation, authorized and paid-up share capital, and the rationale of the Scheme had been discussed in detail in the order dated 30.09.2021.

5. In the second motion proceedings, certain directions were issued by this Tribunal by order dated 12.07.2022 and the same were complied by filing an affidavit by Diary No. 01179/01 dated 12.10.2022. The notice of hearing was published in "Business Standard" (English) and "Jansatta" (Hindi) all India Edition on 22.09.2022. The original copies of the newspapers are attached as Annexure A-1 of the aforesaid affidavit. It has also stated in the affidavit that copies of notices were served upon the (a) Central Government through Regional Director (Northern Region), Ministry of Corporate Affairs, New Delhi; (b) Registrar of Companies, NCT of Delhi and Haryana; (c) the Official Liquidator (attached to Punjab and Haryana High Court); (d) Jurisdictional Income Tax Department through the Nodal Officer by mentioning the PAN of the Company by way of speed post/hand delivery. Original postal receipts along with the tracking report evidencing the delivery of notices are attached as Annexure A-2 of the aforesaid affidavits.

6. It is deposed by the counsel of the petitioner companies that neither the Petitioner Companies nor their counsel have received any objection relating to the present scheme from any stakeholder or general public till date The aforesaid affidavit is filed by Diary No. 01179/01 dated 12.10.2022.

7. In response to the abovementioned notices, the statutory authorities have furnished their replies.

7.1 Registrar of Companies (RoC)/Regional Director (RD)

7.1.1 The Registrar of Companies (RoC) has filed its report along with the report of the Regional Director (RD), by Diary No.01173/4 dated 15.12..2022. Para 10 of the report of the Regional Director sets out certain observations based on a report of RoC dated 14.11.2022 (Annexure B of RD Report) stating that transferee company may be directed to comply with the provisions of Section 232 (3) (i) of the Companies Act, 2013. In Note 22 of Financial Statements of Transferor Company no.1 as on 31.03.2021, mentions uncertainties and management's assessment of impact of COVID-19. It is also stated that a demand pertaining to Rs.51.12 lakh for A.Y. 2017-18 is pending in respect of Transferor Company No.3. It is further pointed out that Transferor Company Nos.4 and 5 had entered into development agreement with developers who are required to obtain approval/licence from appropriate authority and land measuring 4.24 acre has been compulsorily acquired by Government of Haryana for which company has filed FRA petition in High Court. The companies are having nil income from operations from the past three years and no application is filed u/s 455 of the Companies Act.

7.1.2 As per para 12 of the RD’s Report, the petitioner companies have replied to the observations raised by the Registrar of Companies, Delhi & Haryana by letter dated 14.11.2022 (Annexure C of RD Report) clarifying that as per clause 20.1.1 of the Scheme of Amalgamation, Transferee company will comply with the provisions of Section 232 (3) (i) of the Companies Act, 2013 in regard to the fees payable on its revised share capitals. In view of the advisory issued by Security and Exchange Board of India (SEBI) on 20.05.2020, the Transferor Company has added a clarification note, wherein the impact of COVID-19 has been taken into account. It is further mentioned that the demand of Rs.51,03,704/- was raised in respect of Transferor Company No.3 and the aforesaid demand has been settled under Vivad-se-Vishwas Scheme and the required payment was made by the assessee and a letter is also submitted to delete the demand in Income Portal as well. The developers of the Companies have taken necessary approval from appropriate authorities entering into a development agreement. It is confirmed that FRA has been pending before the Hon’ble High Court of Punjab & Haryana pertaining to the compulsory acquisition of the land at Villlage Maidawas. The companies have land parcels which have future potential for development and they have filed all returns with the Office of Registrar of Companies, hence, petitioner Companies are not dormant companies u/s 455 of the Companies Act.

7.1.3. Thus, in view of the reply filed by the petitioner Companies, no adverse observations can be inferred from the report of the Regional Director against the petitioner companies.

7.2. Income Tax Department

7.2.1 The Income Tax Department has filed its reports vide Dairy No. 01173/5 dated 05.12.2022, 01173/7 dated 04.01.2023 and 01173/6 dated 06.12.2022, stating that there is no demand outstanding against the Petitioner Company Nos.1, 2, 4, 5 and 6 and a demand amounting to Rs.12,59,068/- for A.Y. 2017-18 is pending in respect of Petitioner Company No.3. It is further stated that the Department has no objection to the proposed Scheme of Amalgamation.

7.2.2. In this context, we are of the view that this Tribunal is not shutting out the legitimate interest of the income-tax authorities to recover the lawful dues payable by the petitioner companies, as the scheme provides the savings in relation to the liabilities as well, the rights of the tax authorities remain intact, and they can proceed against the Transferee Company in accordance with the law, if any amount is found due and payable.

7.2.3. Thus, no adverse observation can be inferred from the report of the Income Tax Department.

7.3 Official Liquidator

7.3.1 The Official Liquidator has filed his report vide Diary No.01173/3 dated 17.10.2022. The Official Liquidator in its report has reproduced the information on the incorporation of the Petitioner Companies, their capital structures, financial highlights, shareholdings, etc. It is further stated that the Transferor Companies will be dissolved without going through the process of winding up or liquidation.

7.3.2. Thus, no adverse observation can be inferred from the report of the Official Liquidator.

8. The certificate of the Statutory Auditors with respect to the Scheme between Petitioner Companies to the effect that the accounting treatment proposed in the Scheme is in compliance with applicable Indian Accounting Standards (Ind AS) as specified in Section 133 of the Act, read with rules thereunder and other Generally Accepted Accounting Principles was filed as Annexure P-27 of the petition.

9. We have heard the learned counsel for petitioner companies, learned Senior Standing Counsel for the Income Tax Department and perused the record carefully.

10. In the context of the above discussion, the Scheme contemplated between the petitioner companies, appears to be prima facie in compliance with all the requirements stipulated under the relevant Sections of the Companies Act, 2013. As the objections from the Statutory Authorities have been duly addressed by the Petitioner Companies and since all the requisite statutory compliance have been fulfilled, this Tribunal sanctions the Scheme of Amalgamation appended as

11. Notwithstanding the submission that no investigation is pending against the petitioner companies, 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, in accordance with law, against the concerned persons, directors and officials of the petitioners.

12. While approving the scheme as above, it is clarified that this order should not be construed as an order in any way granting exemption from payment of stamp duty, taxes or any other charges, if any, payment is due or required in

accordance with law or in respect to any permission/compliance with any other requirement which may be specifically required under any law.

THIS TRIBUNAL DO FURTHER ORDER:

i. That all the property, rights and powers of the Transferor Companies be transferred, without further act or deed, to the Transferee Company and accordingly, the same shall pursuant to Sections 230 & 232 of the Companies Act, 2013, be transferred to and vested in the Transferee Company for all the estate and interest of the Transferor Companies but subject nevertheless to all charges now affecting the same; and

ii. That all the liabilities and duties of the Transferor Companies be transferred, without further act or deed, to the Transferee Company and accordingly the same shall pursuant to Sections 230 to 232 of the Companies Act, 2013, be transferred to and become the liabilities and duties of the Transferee Company;

iii. All benefits, entitlements, incentives and concessions under incentive schemes and policies that the Transferor Companies are entitled to include under Customs, Excise, Service Tax, VAT, Sales Tax, GST and Entry Tax and Income Tax laws, subsidy receivables from Government, grant from any governmental authorities, direct tax benefit/exemptions/deductions, shall, to the extent statutorily available and along with associated obligations, stand transferred to and be available to the Transferee Company as if the Transferee Company was originally entitled to all such benefits, entitlements, incentives and concessions;

iv. All contracts of the Transferor Companies which are subsisting or having effect immediately before the Effective Date, shall stand transferred to and vested in the Transferee Company and be in full force and effect in favour of the Transferee Company and may be enforced by or against it as fully and effectually as if, instead of the Transferor Companies, the Transferee Company had been a party or beneficiary or obliged thereto;

v. All the employees of the Transferor Companies shall be deemed to have become the employees and the staff of the Transferee Company with effect from the Appointed Date, and shall stand transferred to the Transferee Company without any interruption of service and on the terms and conditions no less favourable than those on which they are engaged by the Transferor Companies, as on the Effective Date, including in relation to the level of remuneration and contractual and statutory benefits, incentive plans, terminal benefits, gratuity plans, provident plans and any other retirement benefits;

vi. That the Appointed Date for the scheme shall be 01.04.2021 as specified in the Scheme;

vii. That the proceedings, if any, now pending by or against the Transferor Companies be continued by or against the Transferee Company;

viii. That the Transferee Company shall, without further application, allot to the existing members of the Transferor Companies shares of Transferee Company to which they are entitled under the said Scheme;

ix. That the fee, if any, paid by the Transferor Companies on their authorized capital shall be set off against any fees payable by the Transferee Company on its authorized capital subsequent to the sanction of the 'Scheme';

x. That the assessment under the Income Tax Act will be in accordance with the provisions of the Section 170 (2A) of the Income Tax Act, 1961.

xi. That the Transferee Company shall file the revised memorandum and articles of association with the concerned Registrar of Companies and further make the requisite payments of the differential fee (if any) for the enhancement of authorized capital of the Transferee Company; after setting off the fees paid by the Transferor Companies;

xii. That the Petitioner Companies shall, within 30 days after the date of receipt of this order, cause a certified copy of this order to be delivered to the concerned Registrar of Companies for registration and on such certified copy being so delivered, the Transferor Companies shall be dissolved without undergoing the process of winding up. The concerned Registrar of Companies shall place all documents relating to the Transferor Companies registered with him on the file relating to the said Transferee Company, and the files relating to the Companies and Transferee Company shall be consolidated accordingly, as the case may be; And

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

13. As per the aforesaid directions, formal orders in Form No. CAA-7 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 be issued after the filing of the Schedule of Properties within three weeks from the date of receiving a certified copy of this order by the petitioners.

14. All the concerned Regulatory Authorities to act on a copy of this order annexed with the Scheme duly authenticated by the Registrar of this Bench.

15. The Company Petition CP (CAA) No.44/Chd/Hry/2022 is allowed and disposed of accordingly.

