(2023) 06 NCLT CK 0057

In the National Company Law Tribunal

Case No : C.A.(CAA)/287/MB/2022

Agile Real Estate Dev Private Limited Vs

Date of Decision : 23-06-2023

Acts Referred:

Companies Act, 2013 — Section 230, 230(1)(a), 230(1)(b), 230(5), 232

Citation : (2023) 06 NCLT CK 0057

Hon'ble Judges : Kuldip Kumar Kareer, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Hemant Sethi

Final Decision : Disposed Of

Judgement

Shyam Babu Gautam, Member Technical

1. The Learned Counsel for the Applicant Companies states that the present Scheme is a Scheme of Arrangement between Agile Real Estate Private Limited and Agile Real Estate Dev Private Limited and their respective Shareholders ('the Scheme' or 'this Scheme'), under the provisions of Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 and Rules framed thereunder.

2. The Learned Counsel for the Applicant Companies states that the resolutions passed by the Board of Directors of the respective Demerged Company and

Resulting Company at their respective meetings held on 9th November, 2022 approved the Scheme. The Appointed Date fixed under the Scheme is 1st April, 2022 or any other date as may be decided by the National Company Law Tribunal ('NCLT'). The Board Resolutions approving the Scheme for the Applicant Companies are annexed as Annexures D1 and D2, respectively to the Company Scheme Application.

3. The Share Capital of the Applicant Companies as on 31st March, 2022 are as under:

i. The Authorised Share Capital of the First Applicant Company is Rs.

500,00,00,000 divided into 50,00,00,000 Equity Shares of Rs. 10/- each. Issued, subscribed and paid-up capital of the First Applicant Company is Rs. 480,50,00,000 divided into 48,05,00,000 Equity Shares of Rs. 10/- each, fully paid up.

ii. The Authorised Share Capital of the Second Applicant Company is Rs. 5,00,000 divided into 50,000 Equity Shares of Rs. 10/- each. Issued, subscribed and paid-up capital of the Second Applicant Company is Rs. 1,00,000 divided into 10,000 Equity Shares of Rs. 10/- each, fully paid up.

5. The Learned Counsel for the Applicant Companies further submits the introduction and rationale for the Scheme:-

The Demerged Company / The First Applicant Company

The First Applicant Company is primarily engaged in the business of real estate development including residential development.

The Resulting Company / The Second Applicant Company

The Second Applicant Company is authorized to undertake and engage in residential and commercial real estate development and construction business.

Rationale of the Scheme:

The demerger of the Demerged Undertaking (as defined in the Scheme) of the Demerged Company into the Resulting Company would have the following benefits:

• It is a customary industry practice in the real estate sector to incorporate project-wise companies in order to facilitate funding / refinancing from any prospective investor/lender in a project specific special purpose vehicle. Accordingly, it is envisaged to segregate the Demerged Undertaking comprising of Project ’Parklands’ at Thane (as defined in the Scheme), by way of demerger into the Resulting Company.

• Demerging the Demerged Undertaking from the Demerged Company into the Resulting Company will enable the Demerged Company to channelize its focus more on its other ongoing projects based in Thane.

• Further, such segregation of businesses shall enable focus on each project separately and bring efficacy in management of Project ’Parklands’ and other real estate projects undertaken/to be undertaken by the Demerged Company.

• The proposed demerger of the Demerged Undertaking would (i) facilitate the management to efficiently exploit opportunities for core business of the Demerged Undertaking independently in the Resulting Company; and (ii) enable cost optimization, better management control and flexibility in operations.

• Accordingly, the Scheme is proposed to demerge the Demerged Undertaking of the Demerged Company on a going concern basis into the Resulting Company.

• The proposed demerger shall also benefit all the shareholders, creditors, employees and all other stakeholders and shall enable the companies to achieve and fulfil its objectives more efficiently and economically.

6. The Learned Counsel for the Applicant Companies further submits that, in consideration of the Scheme, as determined by the Share Entitlement Ratio Report dated 9th November, 2022, issued by Mr. Vishal Laheri, Independent Registered Valuer, and annexed and marked as Annexure Q to the Company Scheme Application is as follows:

Upon the Scheme coming into effect and in consideration of the transfer and vesting of the Demerged Undertaking of the Demerged Company into the Resulting Company in terms of Part B of the Scheme, the Board of Directors of the Resulting Company shall, without any further act or deed, issue and allot to the equity shareholders of the Demerged Company, whose names are recorded in the register of members of the Demerged Company, on the Effective Date;

1 (one) equity share of INR 10/- (Rupees Ten only) each of the Resulting Company credited as fully paid for every 7,543 (Seven Thousand Five Hundred and Forty-Three) equity shares of INR 10/- (Rupees Ten only) each, fully paid-up, held by such equity shareholders of the Demerged Company ("New Equity Shares") as per the report obtained from the registered valuers.

7. The Learned Counsel for the First Applicant Company submits that there are 7 (Seven) Equity Shareholders in the First Applicant Company and all the Equity Shareholders have given their consent in writing to the proposed Scheme. In view of the consent affidavits filed by all the Equity Shareholders of the First Applicant Company, the meeting of the Equity Shareholders of the First Applicant Company, for the purpose of considering and, if thought fit, approving the proposed Scheme with or without modification(s) is hereby dispensed with. The consent affidavits are annexed as Annexure J1 to the Company Scheme Application. The Chartered Accountant's Certificate verifying the list of Equity Shareholders of the First Applicant Company as on 30th September, 2022 is annexed and marked as Annexure M1 to the Company Scheme Application.

8. The Learned Counsel for the Second Applicant Company submits that there are 7 (Seven) Equity Shareholders in the Second Applicant Company and all the Equity Shareholders have given their consent in writing to the proposed Scheme. In view of the consent affidavits filed by all the Equity Shareholders of the Second Applicant Company, the meeting of the Equity Shareholders of the Second Applicant Company, for the purpose of considering and, if thought fit, approving the proposed Scheme with or without modification(s) is hereby dispensed with. The consent affidavits are annexed as Annexure J2 to the Company Scheme Application. The Chartered Accountant's Certificate verifying the list of Equity Shareholders of the Second Applicant Company as on 30th September, 2022 is annexed and marked as Annexure M2 to the Company Scheme Application.

9. The Learned Counsel for the First Applicant Company submits that as on 30th June, 2022, there are 2 (Two) Secured Creditors in the First Applicant Company of the aggregate value of Rs. 23,13,75,42,433/- (Rupees Two Thousand Three Hundred and Thirteen Crores Seventy- Five Lakhs Forty-Two Thousand Four Hundred and Thirty-Three only). The present Scheme is an arrangement between the First Applicant Company and its shareholders as contemplated in Section 230(1)(b) and not in accordance with the provisions of Section 230(1)(a) of the Companies Act, 2013, as there is no compromise of arrangement with creditors as it does not affect the rights and interests of the Creditors of the First Applicant Company. Further there is no diminution of liability of any of the Creditors of the First Applicant Company who will be paid off in the ordinary course of business. As far as the rights of Secured Creditors of the First Applicant Company are concerned, they will not be affected by the proposed Scheme since post sanctioning of Scheme, there will not be any dilution in the security of the secured creditors, and they will continue to hold charge on the security on an as is basis. Further, the First Applicant Company has obtained consent affidavits from both of its Secured Creditors. In view of above, no meeting of Secured Creditors of the First Applicant Company is required to be convened. Hence, the meeting of the Secured Creditors of the First Applicant Company for the purpose of considering and, if thought fit, approving the proposed Scheme with or without modification(s) is hereby dispensed with. However, the consent affidavit received from one of the Secured Creditors of the First Applicant Company aggregating to Rs. 6,49,33,43,304 representing ~28.06% in value is annexed as Annexure K to the Company Scheme Application. The consent affidavit from the other Secured Creditor of the First Applicant Company aggregating to Rs. 16,64,41,99,129 representing ~71.84% in value has been submitted by way of an additional affidavit on 12th January, 2023. The Chartered Accountant’s Certificate verifying the list of Secured Creditors of the First Applicant Company as on 30th June, 2022, is annexed and marked as Annexure N1 to the Company Scheme Application. Further, the First Applicant Company has new Debenture Holders who are the Secured creditors having an outstanding amount of Rs. 560,00,00,000 (Rupees Five Hundred and Sixty Crores) as on 1st March 2023. The consent affidavit of the Debenture Trustee acting on behalf of the Debenture Holders has been submitted by way of an additional affidavit on 13th April, 2023.

10. There are no Secured Creditors in the Second Applicant Company, therefore, the question of conveying and holding the meeting and issue of notices to the Secured Creditors of Second Applicant Company does not arise. The Chartered Accountant’s Certificate verifying that there are no Secured Creditors in the Second Applicant Company as on 30th June, 2022, is annexed and marked as Annexure N2 to the Company Scheme Application.

11. The Learned Counsel for the Applicant Companies submits that as on 30th June, 2022, there are 483 (Four Hundred and Eighty Three) Unsecured Creditors of the aggregate value of Rs. 26,24,99,57,510/- (Rupees Two Thousand Six Hundred and Twenty Four Crores Ninety Nine Lakhs Fifty Seven Thousand Five

Hundred and Ten only) in the First Applicant Company and 6 (Six) Unsecured Creditors of the aggregate value of Rs. 39,580/- (Rupees Thirty Nine Thousand Five Hundred and Eighty only) in the Second Applicant Company. The First Applicant Company has obtained consent affidavits from its Unsecured Creditors aggregating to Rs. 25,79,56,92,932 representing ~98.27% in value of the Unsecured Creditors of the First Applicant Company and the Second Applicant Company has obtained consent affidavits from its Unsecured Creditors aggregating to Rs 37,200 representing ~94% in value of the Unsecured Creditors of the Second Applicant Company. The consent affidavits received from the Unsecured Creditors are marked and annexed as Annexures L1 and L2 respectively to the Company Scheme Application. The Learned Counsel for the Applicant Companies further submits that the present Scheme is an arrangement between the Applicant Companies and its shareholders as contemplated in Section 230(1)(b) and not in accordance with the provisions of Section 230(1)(a) of the Companies Act, 2013, as there is no compromise of arrangement with creditors as it does not affect the rights and interests of the Creditors of the Applicant Companies. Further there is no diminution of liability of any of the Unsecured Creditors of the Applicant Companies who will be paid off in the ordinary course of business. The Chartered Accountant’s Certificates verifying the list of Unsecured Creditors of the Applicant Companies as on 30th June, 2022, are annexed and marked as Annexure O1 and O2, respectively, to the Company Scheme Application. In view of the consent affidavits, meetings of Unsecured Creditors of the Applicant Companies are hereby dispensed with.

12. The Applicant Companies are accordingly directed to serve notices along with copy of Scheme upon:- (i) concerned Income Tax Authorities within whose jurisdiction the Applicant Companies’ assessments are made i.e. for the First Applicant Company / Demerged Company, Circle 14(1)(1), Mumbai, having PAN No. AAGCA7403G, for the Second Applicant Company / Resulting Company, Ward 14(1)(1), Mumbai having PAN No. AAGCA5301H (ii) the Central Government through the office of Regional Director, Western Region, Mumbai, (iii) Registrar of Companies, Maharashtra, Mumbai, and (iv) GST Authority within whose jurisdiction the First Applicant Company / Demerged Company bearing GSTIN 27AAGCA7403G1ZV; pursuant to Section 230(5) of the Companies Act, 2013 and Rule 8 of the Companies (Compromises Arrangements and Amalgamations) Rules, 2016, through R.P.A.D or by Email or by speed post or by courier or hand delivery with a direction that they may submit their representations, if any, within a period of 30 (thirty) days from the date of receipt of such notice to the NCLT with copy of such representations simultaneously be served upon the respective Applicant Company, failing which, it shall be presumed that the authorities have no representations to make on the proposed Scheme. The Second Applicant Company/ Resulting Company does not have a GSTIN and therefore, the need to issue notice to the GST Authority does not arise. Further, the Demerged Undertaking has not yet been registered with MAHARERA and therefore, the need to issue notice to the MAHARERA Authority does not arise.

13. The Applicant Companies to file affidavit of service in the Registry proving dispatch of notices to the Regulatory Authorities and to report to this NCLT that the directions regarding the issue of notices have been duly complied with.

