

(2024) 03 NCLT CK 0050

In the National Company Law Tribunal

Case No : C.P.(CAA)/291/MB /2023 Connected With C.A. (CAA) No. 142/MB/C-III/2023

Ashwa Agri Properties Private Limited Vs

Date of Decision : 21-03-2024

Acts Referred:

Companies Act, 2013 — Section 133, 230, 230(1), 230(6), 230(7), 232, 232(3)(i), 232(6)

Income Tax Act, 1961 — Section 21(B)

Citation : (2024) 03 NCLT CK 0050

Hon'ble Judges : Lakshmi Gurung, Member (J); Charanjeet Singh Gulati, Member (T)

Bench : Division Bench

Advocate : Harsh C Ruparelia, Bhagwati Prasad,

Final Decision : Disposed Of

Judgement

Lakshmi Gurung, Member (Judicial)

1. The sanction of this Tribunal is sought under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 and the Rules framed thereunder for sanction of the Scheme of amalgamation of Ashwa Agri Properties Private Limited (?Transferor Company 1 or ?First Petitioner Company?) and Aries Agri Properties Private Limited (?Transferor Company 2? or ?Second Petitioner Company?) and Rockwill Land Developers Private Limited (?Transferor Company 3? or ?Third Petitioner Company?) and Navnetra Trading Private Limited (?Transferor Company 4? or ?Fourth Petitioner Company?) and Nandi Agri Realtors Private Limited (?Transferor Company 5? or ?Fifth Petitioner Company?) and Pet Fibers Private Limited (?Transferor Company 6? or ?Sixth Petitioner Company?) with Mega Pipes Private Limited (?Transferee Company? or ?Seventh Petitioner Company?) and their respective shareholders (?Scheme?)

2. The Boards of the Petitioner Companies approved the Scheme of Amalgamation by passing their respective Resolutions on 11.05.2023 which are annexed to the Joint Company Scheme Petition (?Petition?).

3. The Appointed Date is 31.01.2023.

4. The registered offices of the Petitioner Companies are situated in Mumbai, Maharashtra and hence the subject matter of the Petition is within the jurisdiction of this Bench.

5. Learned Counsel submits that the Company Scheme Petition No. C.P. (CAA)/291/MB /2023 has been filed in consonance with the Order of the Tribunal dated 18.10.2023 passed in the Company Scheme Application No C.A.(CAA)/142/MB /2023.

6. It is submitted that the Petitioner Companies have complied with all the requirements as per the directions of this Tribunal.

7. The nature of business of the Petitioner Companies as under: -

7.1 First Petitioner Company

The First Petitioner Company is incorporated with the main object to carry on the business of investment in real estate properties.

7.2 Second Petitioner Company

The Second Petitioner Company is incorporated with the main object to carry on the business of investment in real estate properties.

7.3 Third Petitioner Company

The Third Petitioner Company is incorporated with the main object to carry on the business of investment in shares and securities.

7.4 Fourth Petitioner Company

The Fourth Petitioner Company is incorporated with the main object to carry on the business of investment in shares and securities.

7.5 Fifth Petitioner Company

The Fifth Petitioner Company is incorporated with the main object to carry on the business of investment in real estate properties and securities.

7.6 Sixth Petitioner Company

The Sixth Petitioner Company is incorporated with the main object to carry on the business of investing activities.

7.7 Seventh Petitioner Company

The Seventh Petitioner Company is principally engaged in the business of manufacture, supply and export of steel pipes and tubes.

8. The Learned Counsel submitted the Rationale for the Scheme as under:

?The objective of this Scheme is to ensure consolidation of businesses,

simplification of group structure by elimination of multiple entities and to achieve greater administrative efficiency, elimination of multiple record keeping, thus resulting in reduced expenditure and significant reduction in the multiplicity of regulatory compliances. The Scheme would also result in improved organizational capability and leadership.?

9. Consideration:

?Upon this Scheme becoming effective and in consideration for amalgamation of the Transferor Companies with the Transferee Company, the Transferee Company shall without any further application or deed, issue and allot to the shareholders of the Transferor Companies, holding fully paid up shares in the Transferor Companies and whose names appears in the Register of Members of the Transferor Companies as on the Record Date or his/her/its heirs, executors, administrators or the successors in title, as may be recognised by the Board of Directors of the Transferee Company, fully paid up equity shares in the following fair share swap ratio:

To the equity shareholders of Ashwa:

?19 (Nineteen only) Equity Shares having face value of Rs. 10/-(Rupees Ten only) each, fully paid up of Mega Pipes for every 100 (One hundred only) equity shares of Ashwa.?

To the equity shareholders of Aries:

?19 (Nineteen only) Equity Shares having face value of Rs. 10/-(Rupees Ten only) each, fully paid up of Mega Pipes for every 100 (One hundred only) equity shares of Aries.?

To the equity shareholders of Rockwill:

?19 (Nineteen only) Equity Shares having face value of Rs. 10/-(Rupees Ten only) each, fully paid up of Mega Pipes for every 100 (One hundred only) equity shares of Rockwill.?

To the equity shareholders of Navnetra:

?296 (Two hundred and ninety six only) Equity Shares having face value of Rs. 10/- (Rupees Ten only) each, fully paid up of Mega Pipes for every 1 (One only) equity shares of Navnetra.?

To the equity shareholders of Nandi:

?19 (Nineteen only) Equity Shares having face value of Rs. 10/-(Rupees Ten only) each, fully paid up of Mega Pipes for every 100 (One hundred only) equity shares of Nandi.?

To the equity shareholders of Pet Fibers:

?63 (Sixty three only) Equity Shares having face value of Rs. 10/-(Rupees Ten

only) each, fully paid up of Mega Pipes for every 1 (One only) equity shares of Pet Fibers.?

10. The Tribunal vide Order dated 18.10.2023 admitted the Company Scheme Application bearing no. CA(CAA)/142/MB/2023 and inter-alia, gave the following order/directions:

a) Dispensation of convening the meetings of equity shareholders of all the Petitioner Companies in view of consent affidavits obtained from all equity shareholders of all the Petitioner Companies;

b) Transferor Companies have no secured creditors, therefore, the question of convening meetings of secured creditors of Transferor Companies did not arise.

c) Dispensation of convening the meetings of secured creditors of the Transferee Company subject to the condition that the Consent Affidavits of the Secured Creditors of the Transferee Company be submitted at the time of filing the Second Motion Petition;

d) Dispensation of convening the meetings of Unsecured creditors of all the Petitioner Companies, in view of consent affidavits obtained from all unsecured creditors of the Transferor Companies, and consent affidavits obtained from 9 (amounting to 96.70% in value) out of 192 unsecured creditors of the Transferee Company.

11. In compliance to this Tribunal's order dated 18.10.2023 in CA(CAA)/142/MB/2023, consent affidavits have been obtained from all the secured creditors of the Transferee Company. The consent affidavits are annexed to the Petition. Further, individual notices have also been issued to all the unsecured creditors of the Transferee Company by email and speed post.

12. The Regional Director has filed Report dated 19th December 2023.

Relevant extract from the Regional Director's report and the response of the Petitioner Companies thereto are reproduced below:

Para No. 2

Observations as per the Report

Response of the Petitioner Companies

a)

In compliance of AS-14 (IND AS-103), the Transferor companies 1, 2, 3, 4, 5, 6 and Transferee company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5 (IND AS-8) etc.

As far as the observation of the Regional Director, as stated in paragraph 2(a) of the

report is concerned, the Petitioner Companies submit that it shall give effect to the accounting treatment in its books of accounts in accordance with the method as prescribed under applicable Indian Accounting Standards read with Section 133 of the Companies Act, 2013, Companies (Indian Accounting Standards) Rules, 2015 and Companies (Indian Accounting Standards) Amendment Rules, 2016.

(b)

As per Definition of the Scheme,

"Appointed Date" means 31st January 2023, or such other date as may be fixed or approved by the National Company Law Tribunal at Mumbai, or such other date as may be determined by the Board of Directors of the Transferor Companies and the Transferee Company with approval of NCLT or such other date as the NCLT may direct.

"Effective Date" means the date on which the certified or authenticated copies of the order sanctioning this Scheme, passed by the National Company Law Tribunal at Mumbai are filed with the Registrar of Companies.

In this regard, it is submitted that Section 232 (6) of the Companies Act, 2013 states that the scheme under this section shall

clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date. However, this aspect

may be decided by the Hon'ble Tribunal taking into account its inherent powers.

The Petitioners may be asked to comply with the requirements and clarified

vide circular no. F. No. 7/12/2019/CL-I dated 21.08.2019 issued by the Ministry of Corporate Affairs.

As far as the observation of the Regional Director, as stated in paragraph 2(b) of the report is concerned, the Petitioner Companies submit that the Appointed Date i.e. 31st January, 2023 has been clearly indicated in the Scheme in accordance with provisions of section 232(6) of the Companies Act, 2013 and the Scheme shall be effective from the Appointed Date. Hence, the Petitioner Companies undertake that it is in compliance with the applicable requirements of the Circular no. F. No. 7/12/2019/CL-1 dated 21- 08-2019 issued by the Ministry of Corporate Affairs.

(c)

The Transferor companies 1, 2, 3, 4, 5, 6 and Transferee company have to

undertake to comply with section 232(3)(i) of Companies Act, 2013, where the transferor company is dissolved, the fee and stamp duty paid by the transferor company on its authorised capital shall be set-off against fees and stamp duty payable by the transferee company on its authorised capital subsequent to the amalgamation and therefore, petitioners to undertake that the transferee company shall pay the difference of fees and stamp duty.

As far as the observation of the Regional Director, as stated in 2(c) of the report is concerned, the Petitioner Companies undertakes that it would comply with the provisions set out in Section 232(3)(i) of the Companies Act, 2013 and that the fee, if any, paid by the Transferor Companies on its authorized share capital shall be set off against any fees payable by the Transferee Company on its authorized share capital subsequent to the amalgamation, if applicable. Also, the Transferee Company shall pay the balance / difference amount of the fees, as applicable, at the time of increasing the authorised share capital.

(d)

The Hon'ble Tribunal may kindly seek the undertaking that this Scheme is approved by the requisite majority of members and

creditors as per Section 230(6) of the Act in meetings duly held in terms of Section

230(1) read with 7 subsection (3) to (5) of

Section 230 of the Act and the Minutes thereof are duly placed before the Tribunal.

As far as the observation of the Regional Director, as stated in 2(d) of the report and

reproduced hereinabove is concerned, the Petitioner Companies undertakes that the meeting of the Equity Shareholders of the respective Petitioner Companies was

dispensed, in view of the consent affidavits provided by its respective shareholders of

the Petitioner Companies.

There were no Preference Shareholders in the any of the Petitioner Companies and

hence, the question of convening the meeting did not arise. There were no Secured Creditors in the Transferor Companies and hence, the question of convening the meeting did not arise. The

Secured Creditors of the Seventh Petitioner Company had submitted consent letters

from the Secured Creditors along with C.A. (CAA) / 142 (MB) / 2023 and further provided consent affidavits to the Scheme, which are annexed to the Company Scheme Petition for which the Seventh Petitioner Company had given an undertaking to obtain the consent affidavits

from all the Secured Creditors and hence, the question of convening the meeting did not

arise. The Unsecured Creditors of the Transferor Companies had provided consent affidavits to the Scheme and hence, the question of convening the meeting did not arise. Further, the meeting of the Unsecured Creditors of the Seventh Petitioner Company was also dispensed, and notices were sent to the Unsecured Creditors of the Seventh Petitioner Company as per the directions passed by this Hon?ble Tribunal in its order dated 18th October, 2023.

(e)

The Directorate has received letter dated 14.11.2023 (copy is enclosed as Annexure- A-1) and same is placed on record to protect the interest of Income Tax

department in the matter.

The Transferee Company shall be in compliance with the provisions of Section 2(1B) of the Income Tax Act, 1961. In this regard, the Transferor companies 1, 2, 3, 4, 5, 6 and Transferee company shall ensure compliance of all the provisions of Income Tax Act and Rules thereunder.

As far as the observation of the Regional Director, as stated in 2(e) of the report and

reproduced hereinabove is concerned, the Seventh Petitioner Company has filed an Affidavit in response to the Income Tax letter with the Hon?ble Tribunal on 20th December 2023. The copy of the aforesaid affidavit is annexed and marked hereto as Annexure A. The Seventh Petitioner Company was acquired under liquidation in

accordance with the provisions of the Insolvency and Bankruptcy Code, 2016

(?IBC?). Hon?ble Tribunal vide its order dated 9th March 2021 passed in the Interlocutory Application No. 2264 of 2020

in C.P. (IB) No.1239/MB/2018 (?NCLT

Order?) confirmed that as on the date of the NCLT Order, all the liabilities of the Corporate Debtor shall stand extinguished and the Seventh Petitioner Company (in its new avatar) shall not be held responsible /liable for any past liabilities of the Corporate Debtor in inquiries, investigations, assessments, notices, causes

of action, suits, claims, disputes, litigations, arbitration or other judicial, regulatory or

administrator proceedings against or in relation to, or in connection with the Corporate Debtor as on the date of the

NCLT Order. Further the Transferee Company and Transferor Companies shall ensure compliance of all the provisions of Income Tax Act and Rules thereunder.

(f)

The Transferor companies 1, 2, 3 & 5 are engaged in the business of real estate therefore the Hon'ble NCLT may kindly direct the Petitioner companies to comply with the guidelines of the RERA.

As far as the observation of the Regional Director, as stated in 2(f) of the report is

concerned, the Petitioner Company 1, 2, 3 & 5 undertakes to comply with the directions of the concerned regulatory authorities.

Further the Petitioner Company 1, 2, 3 & 5 submits that (i) there are no ongoing real estate projects (ii) no real estate projects have been developed so far (iii) no registration is required with RERA. Hence, no approval /directions / observations are

required to be obtained from RERA.

(g)

That on examination of the report of the Registrar of Companies, Mumbai dated 24.11.2023 (Annexed as Annexure A-2)) that all the Transferor companies 1, 2, 3, 4, 5, 6 and Transferee company fall within the jurisdiction of ROC, Mumbai. It is submitted that no complaint and /or representation regarding the proposed scheme of Amalgamation has been received against the Transferor companies 1, 2, 3, 4, 5, 6 and Transferee company. Further, the Transferor companies 1, 2, 3, 4, 5, 6 and Transferee company have filed

Financial Statements up to 31.03.2023 further observations in ROC report are as under:-

i. Necessary Stamp Duty on transfer of property/Assets is to be paid to the respective Authorities before implementation of the Scheme.

ii. It is submitted that as per the provisions of Section 232(3)(1) of the Companies

Act, 2013, where the transferor company is

dissolved, the fee, if any, paid by the transferor company 011 its authorized

capital shall be set-off against any fees payable by the Transferee company on its authorized capital subsequent to the amalgamation. Therefore, the remaining fee, if any after setting off the fees already paid by the transferor company on its authorized capital, has to be paid by the transferee Company on the increased authorized capital subsequent to the amalgamation.

iii. Interest of the creditors should be protected.

iv. May be decided on its merits.

Our Reply 2(g)(i): As far as the observation of the Regional Director, as stated in 2(g)(i) of the report and reproduced hereinabove is concerned the Petitioner Companies undertake that it would pay necessary stamp duty on transfer of property/assets

with relevant authorities once the scheme is sanctioned by the Hon'ble Tribunal and it is

made effective with the Jurisdictional Registrar of Companies.

Our Reply 2(g)(ii): As far as the observation of the Regional Director, as stated in 2(g)(ii) of the report and reproduced hereinabove is concerned, the

Petitioner Companies undertake that it would comply with the provisions set out in

Section 232(3)(i) of the Companies Act, 2013 and that the fee, if any, paid by the

Transferor Companies on its authorized share capital shall be set off against any fees

payable by the Transferee Company on its authorized share capital subsequent to the

amalgamation, if applicable. Also, the Transferee Company shall pay the balance /

difference amount of the fees, as applicable, at the time of increasing the authorised

share capital.

Our Reply 2(g)(iii): As far as the observation of the Regional Director, as stated in paragraph 2(g)(iii) of the report

and reproduced hereinabove is concerned, the Petitioner Companies undertake that

the interest of all the creditors of the Petitioner Companies shall be protected.

Our Reply 2(g)(iv): As far as the observation of the Regional Director, as stated in paragraph 2(g)(iv) of the report and reproduced hereinabove is concerned,

the contents being statements of fact does not require any comments.

13. Mr. Bhagwati Prasad, representing the Regional Director's Office, submitted that the explanations and undertakings given by the Petitioner Companies are found satisfactory and that the Regional Director has no objections to the Scheme. However, it is made clear that mere sanctioning of this Scheme will not prevent the Registrar of Companies from taking any action against the Transferee Company, in accordance with applicable law.

14. The Transferee Company undertakes that all the duties, direct and indirect taxes (including any advance taxes), GST liabilities, liabilities under the erstwhile provisions of the VAT Act, Sales Tax Act, customs duty, excise duty and any other tax obligations or litigations thereunder for any tax laws for the Transferor Companies shall be transferred to Seventh Petitioner Company, as a result of the Scheme. Further, upon effectiveness of the Scheme the Seventh Petitioner Company i.e., Transferee Company undertakes to have all legal or other proceedings initiated by or against the Transferor Companies, transferred into its name and to have the same continued, prosecuted and enforced by or against the Seventh Petitioner Company to the exclusion of the Transferor Companies. The undertaking is accepted.

15. Further, effectiveness of this Scheme shall not deter any regulatory authorities to initiate action, proceedings, prosecution, investigation or any regulatory action against the Transferor Companies and Seventh Petitioner Company undertakes all such proceedings shall continue in its own name.

16. The Official Liquidator, High Court, Bombay has filed its report dated 12th December 2023 stating that the affairs of the Transferor Companies have not been conducted in the manner prejudicial to the interests of stakeholders.

17. The Reports of the Regional Director and the Official Liquidator and the submissions/undertakings of the Petitioner Companies thereto are taken on record. The Transferee Company shall be bound by the undertakings given by it in Affidavits.

18. This Tribunal has received representation dated 20.11.2023 from the Office of the Deputy Commissioner of Income Tax (Central) ? 2, Raipur stating that the present outstanding demand against the Transferee Company is Rs. 572,42,90,184. It is further stated that all tax demands, dues, obligations, claims and liabilities irrespective of their finality and contingency, and all ongoing disputes and legal proceedings involving the Transferee Company shall remain unaffected after the implementation of the Scheme of Amalgamation. It is to be noted that only the Transferee Company is under the jurisdiction of the above-stated Income Tax office. The Transferee Company filed an additional affidavit dated 19.12.2023 on 21.12.2023 objecting the contentions of the Income Tax Department. It is submitted that the alleged claims pertain to period preceding

the date of NCLT order dated 09.03.2021 passed in IA No. 2264/2020 in CP(IB)/1239/2018 and the said claims are also a subject matter in Writ Petitions No. 1420/2022 and 2864/2022 wherein the Hon?ble Bombay High Court passed interim order in favour of the Transferee Company.

19. No further objections have been received by the Tribunal opposing the Company Scheme Petition and nor has any party controverted any averments made in the Company Scheme Petition.

20. It has been submitted that no investigation proceedings are pending against the Petitioner Companies under the Companies Act.

21. The Statutory Auditors of the Transferee Company have examined the Scheme in terms of provisions of Sections 230-232 and certified that the accounting treatment contained in the Scheme is in compliance with the applicable accounting standards notified by the Central Government under the Companies Act, 2013.

22. The shareholders and Creditors of the Petitioner Companies are the best judges of their interest. Their decision should not be ordinarily interfered with by the Tribunal as per the decision of Hon?ble Supreme Court in *Miheer H. Mafatlal vs. Mafatlal Industries Ltd* [JT 1996 (8) 205] wherein it was held as follows:

?It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the usefulness and propriety of the scheme by supporting it by the requisite majority vote.?

23. From the material on record, the Scheme to the Company Scheme Petition appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy.

24. 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, the rejoinder and undertakings of the Petitioner Companies and the report of the Official Liquidator, there appears to be no impediment in sanctioning the present Scheme.

25. Consequently, sanction is hereby granted to the Scheme under Sections 230 to 232 of the Companies Act, 2013 with the following directions:

- a) All the Transferor Companies shall be dissolved without winding up.
- b) While approving the Scheme, we clarify that this Order should not, in any way, be construed as an Order granting exemption from payment of stamp duty, taxes or other charges, if any, and payment in accordance with law or in respect of any permission or compliance with other requirements which may be specifically required under any law.

- c) All the employees of the Transferor Companies in service, 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 the concerned Transferor Companies on the said date.
- d) Any proceedings now pending by or against the Transferor Companies be continued by or against the Transferee Company.
- e) All the properties, rights, liabilities, duties and powers of 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 Companies Act, 2013, be transferred to and vest in the Transferee Company.
- f) The Income Tax Department will be at liberty to examine the aspect of any tax payable because of this scheme and it shall be open to the income tax authorities to take necessary action as permissible under the Income Tax Law.
- g) The Registrar of Companies is entitled to proceed against the Transferee Company for violation/offences committed by Transferor Companies, if any.
- h) The Petitioner Companies are directed to file a copy of this Order along with a copy of the Scheme of Amalgamation with the concerned Registrar of Companies, electronically, along with E-Form INC-28, in addition to physical copy, within 30 days from the date of receipt of the Certified copy of the Order from the Registry, in accordance with the provisions of the Companies Act, 2013 and applicable Rules.
- i) Certified copy of this Order be also submitted to all statutory authorities.
- j) The Petitioner Companies to lodge a copy of this Order and the Scheme duly authenticated by the Deputy Registrar or Assistant Registrar, National Company Law Tribunal, Mumbai Bench, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, within 60 days from the date of receipt of the Certified copy of the Order from the Registry.
- k) All authorities concerned to act on a copy of this Order along with Scheme duly authenticated by the Deputy Director or Assistant Registrar, National Company Law Tribunal, Mumbai.
- l) Any person interested shall be at liberty to apply to this Tribunal in the above matter for any directions that may be necessary.
- m) Any concerned authorities are at liberty to approach this Tribunal for any further clarification as may be necessary.
26. Accordingly, Company Scheme Petition No. CP(CAA)/291/MB/2023 connected with CA(CAA)/142/MB/2023 is allowed and disposed of.