(2021) 02 NCLT CK 0096

In the National Company Law Tribunal

Case No : Company Petition (CAA) No. 574/MB Of 2020 In Company Application (CAA) No. 3751/MB Of 2019

Baroda Asset Management India) Limited And Ors. Vs

Date of Decision : 12-02-2021

Acts Referred:

Companies Act, 2013 — Section 230, 230(1), 230(3), 230(4), 230(5), 231, 232, 232(6), 232(3)(i)

Citation : (2021) 02 NCLT CK 0096

Hon'ble Judges : Suchitra Kanuparthi, J;Chandra Bhan Singh, Member (Technical)

Bench : Division Bench

Advocate : Rohan Rajadhyaksha, Himanshoo Tembe, Priya Patwa, Rupa Sutar

Judgement

1. The court convened via video conferencing today.

2. Heard the Ld. Counsel appearing for the Petitioner Companies and the Officer of the Regional Director, Western Region, Mumbai ("Regional Director"). No objector has come before this Tribunal to oppose the present Company Scheme Petition and nor has any party controverted any averments made in the Petition.

3. The Ld. Counsel for the Petitioner Companies submits that the present Company Scheme Petition has been filed to seek sanction to the Composite Scheme of Amalgamation of Baroda Asset Management India Limited with BNP Paribas Asset Management India Private Limited and BNP Paribas Trustee India Private Limited with Baroda Trustee India Private Limited and their respective shareholders ("Scheme") pursuant to the provisions of Section 230-232 of the Companies Act, 2013.

4. The background, circumstances, rationale and benefits of the Scheme are as under:

(a) The Scheme provides for the amalgamation of: (i) the Petitioner Company 1 with the Petitioner Company 2; and (ii) the Petitioner Company 3 with the Petitioner Company 4 and will have the following benefits:

(i) Operational efficiencies and scale to grow the business;

(ii) Consolidation of operations within the Petitioner Company 2 and the Petitioner Company 1 and that of the Petitioner Company 4 and the Petitioner Company 3 leading to greater synergies;

(iii) Leverage on both BNP Paribas Asset Management know-how and Bank of Baroda's access to retail investors to further grow the business;

(iv) Consolidation of schemes of Baroda Mutual Fund and BNP Paribas Mutual Fund, creating a more complete range of schemes as well as larger sized schemes;

(v) Consolidation of trusteeship services in relation to the said Mutual Funds;

(vi) Stronger balance sheet and net worth to meet capital needs for future growth and expansion;

and

(vii) Distribution relationships with different types of intermediaries to widen the coverage and outreach to customers.

(b) Thus, the amalgamation is in the interest of the shareholders, creditors and all other stakeholders of the Petitioner Companies and is not prejudicial to the interests of the concerned shareholders, creditors or the public at large.

5. The Board of Directors of the Petitioner Companies have approved the Scheme by passing necessary board resolutions, which are annexed to the Company Scheme Petition.

6. The Ld. Counsel for the Petitioner Companies states that the Appointed Date of the Scheme is 01.04.2019.

7. The Ld. Counsel for the Petitioner Companies submits that the Petition has been filed in consonance with the Order dated 03.12.2019 passed by this Hon'ble Tribunal in Company Scheme Application CA (CAA) 3751/MB/2019.

8. The Ld. Counsel for the Petitioner Companies submit that the Petitioner Companies have complied with all the requirements as per the directions of this Tribunal and have filed necessary compliance reports with this Tribunal. Moreover, the Petitioner Companies undertake to comply with all statutory requirements, if any, as required under the Companies Act, 2013 and the rules made thereunder. The said undertakings are accepted.

9. THE Regional Director has filed his report dated 18.05.2020 ("Report") with this Tribunal, inter alia, stating therein that this Tribunal may consider the observations made at serial no. IV (a) to (h) of the Report are, for sake of ready reference, reproduced hereunder:

"IV. The observation of the Regional Director on the proposed scheme to be considered by the Hon'ble NCLT are as under:

(a) In compliance of AS - 14 (IND AS - 103), the Petitioner Companies shall pass such accounting entries which are necessary in connection with the scheme to comply with the other applicable Accounting Standards such as AS - 5 (IND AS-8) etc.;

(b) As per Definition of the Scheme, "Appointed Date" means 01.04.2019;

"Effective Date" means the last of the dates on which the conditions specified in Clause 31 of this Scheme are complied with or are waived by the Boards of the Transferor Companies and the Transferee Companies. Reference in this Scheme to the date of "coming into effect of this Scheme" or "upon the Scheme becoming effective" shall mean the Effective Date;

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 a date subsequent to the appointed date. However, this aspect may be decided by the Hon'ble Tribunal taking into account its inherent powers.

Further, the Petitioners may be asked to comply with the requirements as clarified vide circular No. F. No. 7/12/2019/CL- I dated 21.08.2019 issued by the Ministry of Corporate Affairs.

(c) Petitioner Company have to undertake to comply with Section 232 (30)(i) of the Companies Act, 2013, where the transferor company is dissolved, the fee if any, paid by the transferor company on its authorized capital shall be set-off against any fees payable by the transferee company on its authorized capital subsequent to the amalgamation and therefore, Petitioners to affirm that they comply the provisions of the section.

(d) As the shares sought to be issued to the Foreign Shareholders of the Transferor Company, the Share Exchange price and price per share arrived should be minimum of fair price determined as per FEMA guidelines. Hence, valuer should certify that the price per share is as per FEMA guidelines.

(e) The Transferor Company - 2 have foreign shareholders, therefore, the Share Exchange price and price per share arrived should be minimum of fair price determined as per FEMA guidelines. Hence, valuer should certify that the price per share is as per FEMA guidelines and issue of shares by Transferee Company is subject to the compliance of RBI guidelines.

(f) The Transferor Company- 2 is registered under Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, hence it may be directed to submit No Objection of Reserve Bank of India.

(g) The Petitioner Companies are registered under SEBI (Mutual Funds) Regulations, 1996, therefore Petitioner Companies may be directed to submit No

Objection of Security Exchange Board of India.

(h) 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 meeting duly held in terms of Section 230(1) read with sub-section (3) to (5) of Section 230 of the Act and the Minutes thereof are duly placed before the tribunal."

10. In response to the observations made by the Regional Director in its Report, the LD. Counsel for the Petitioner Companies submit that the Petitioner Companies have filed an affidavit dated 03.10.2020 ("Affidavit") with this Tribunal on 05.10.2020 and a copy of the Affidavit has been served on the Regional Director on 05.10.2020. the response of the Petitioner Companies to the observations made by the Regional Director in its Report in their Affidavit are as under.

11. So far as the observation in sub paragraph (a) of the Report is concerned, the Petitioner Companies submit that in addition to compliance of AS 14 (IND AS - 103), the Petitioner Company 2 and Petitioner Company 4 undertake to pass such accounting entries as may be necessary in connection with the Scheme to comply with other applicable accounting standards such as AS - 5 (IND AS - 8).

12. So far as the observation in sub paragraph (b) of the Report is concerned, the Petitioner Companies submit that the Appointed Date for the Scheme shall be 01.04.2019. the Petitioner Companies confirms that the Scheme will take effect from the Appointed Date as per Section 232(6) of the Companies Act, 2013 ("Act"). The Petitioner Companies undertake to comply with the requirements of Circular No. F. No. 7/12/2019/CL-1 dated 21.08.2019 issued by Ministry of Corporate Affairs.

13. So far as the observation in sub paragraph (c) of the Report is concerned the Petitioner Company 2 (i.e. Transferee Company 1) and Petitioner Company 4 (i.e. Transferee Company 2) undertake to comply with provision of section 232(3)(i) of the Act where the Petitioner Company 1 (i.e. Transferor Company 1) and Petitioner Company 3 (i.e. Transferor Company 2) are dissolved, the fee, if any, paid by the Petitioner Company 1 and Petitioner Company 3 on their authorized capital respectively be set off against any fees payable by the Petitioner Company 2 and Petitioner Company 4 on their respective authorized capital subsequent to the amalgamation.

14. So far as observation in sub paragraph (d) and (e) of the Report is concerned, the Petitioner Companies state that the Petitioner Company 1 (i.e. Transferor Company 1) is a wholly owned subsidiary of an Indian company whereas the Petitioner Company 2 (i.e. Transferee Company 1) is a wholly owned subsidiary of a foreign company. Accordingly, pursuant to the provisions of the Scheme, the Petitioner Company 2 (i.e. Transferee Company 1) shall issue shares to the shareholders of Petitioner Company 1 (i.e. Transferor Company 1) being an Indian company and that the Petitioner Company 4 (i.e. Transferee

Company 2) shall issue shares to the shareholders of Petitioner Company 3 (i.e. Transferor Company 2) being a foreign company. The Petitioner Company 4 (i.e. Transferee Company 2) has annexed to the Affidavit at Exhibit A, a certificate from the valuer who is a registered valuer (and chartered accountant) which states that the fair value of equity shares of the Petitioner Company 4 has been computed in compliance with the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 framed under Foreign Exchange Management Act, 1999. Further, Petitioner Company 4 (i.e. Transferee Company 2) undertakes to comply with applicable law for issuance of shares to the foreign shareholder of Petitioner Company 3 (i.e. Transferor Company 2).

15. So far as the observation in sub paragraph (f) of the Report is concerned, the Petitioner Companies submit that the Petitioner Company 3 (i.e. Transferor Company 2) is not registered under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and accordingly 'no objection' from Reserve Bank of India will neither be applicable nor required.

16. So far as the observation in sub paragraph (g) of the Report is concerned, each of the Petitioner Companies have served a notice upon the Securities and Exchange Board of India ("SEBI") under Section 230(5) of the Act pursuant to directions of the Hon'ble Tribunal vide its order dated 03.12.2019, and an affidavit of service confirming the same has been filed by the Petitioner Companies with the Hon'ble Tribunal on 21.01.2020. SEBI has informed that their approval shall be issued only after they receive a copy of all the requisite regulatory approvals for the Scheme.

17. So far as the observation in sub paragraph (h) of the Report is concerned, the Petitioner Companies submit that pursuant to the directions of the Hon'ble Tribunal vide its order dated 03.12.2019 ("December NCLT Order"):

(i) The Petitioner Company 1 and Petitioner Company 4 convened meetings of their respective shareholders on 28.01.2020 where the Scheme was approved with requisite majority and filed chairpersons reports with this Hon'ble Tribunal on 06.02.2020;

(ii) The convening of meetings of shareholders of Petitioner Company 2 and Petitioner Company 3 was dispensed with, in view of consent affidavits of their respective shareholders approving the Scheme which were filed with the Hon'ble Tribunal in the company scheme application CA (CAA) 3751/MB/2019 at Exhibits N-1 to N-3 and O-1 to O-3;

(iii) The meetings of secured and unsecured creditors of Petitioner Company 3 and Petitioner Company 4 were not required as these companies did not have any secured and unsecured creditors;

(iv) The meetings of unsecured creditors of Petitioner Company 1 and Petitioner Company 2 were not required and these companies were directed to issue notices to the unsecured creditors. Affidavits of service confirming issuance of notices to unsecured creditors by Petitioner Company 1 and Petitioner Company 2 were filed with the Hon'ble Tribunal on 21.01.2020.

18. Upon perusal of the response of the Petitioner Companies, as stated hereinabove, the office of Regional Director filed a Supplementary Report dated 27.01.2021 with this Tribunal. The Supplementary Report inter alia records that the replies submitted by way of the Affidavit are satisfactory, except the response to paragraph VI. (g) of the Report. As regards paragraph VI. (g) of the Report, the Supplementary Report states that the issue, may be decided on merits.

19. The Official Liquidator, High Court, Bombay has filed his report dated 30.04.2020 inter alia, stating that the affairs of the Petitioner Company 1 and Petitioner Company 3 ("Transferor Companies") have been conducted in a proper manner and not prejudicial to the interest of the shareholders of the Transferor Companies and that the Transferor Companies may be ordered to be dissolved by this Tribunal.

20. The Ld. Counsel for the Petitioner Companies submits that the Petitioner Company 4 is required to issue and allot equity shares to the shareholders of Petitioner Company 3 as a consideration for the merger of Petitioner Company 3 with Petitioner Company 4 as per Clause 22 of the Scheme. Petitioner Company 3 is a wholly owned subsidiary of BNP Paribas Asset Management Asia Limited, a company registered under the laws of Hong Kong and located in Hong Kong. As per the Press Note 3 of 2020 dated 17.04.2020 issued by Government of India ("Press Note 3"), an amendment was made to the existing Foreign Direct Investment policy to curb opportunistic takeovers/ acquisitions of Indian companies due to current COVID-19 pandemic. As per the amendment introduced by Press Note 3, all investments by entities incorporated in a "country which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country" will require prior approval of the Government of India. Corresponding amendment in this regard was made to the Foreign Exchange Management (Non - Debt Instruments) Rules, 2019 ("FEMA NDI Rules"). Accordingly, an application was made by Petitioner Company 4 with the Department of Economic Affairs, Ministry of Finance, Government of India ("DEA") to seek approval under Press Note 3 online on 19.08.2020 followed by a physical application on 27.08.2020. While the FDI Application was pending, Government of India ("GOI") issued a standard operating procedure for processing foreign direct investment ("FDI") proposals on 09.11.2020 ("SOP 2020") to expedite the process of clearances of FDI proposals and to align erstwhile standard operating procedure with FEMA NDI Rules, Press Note 3 and FDI Policy 2020. The 2020 SOP provides further clarity, mentions the documents required, timelines for processing the FDI proposals requiring government approval, including for cases covered under Press Note 3. Para 11(c) of page 8 of the 2020 SOP states as follows:

"11(c) Wherein NCLT/competent authority is yet to approve the scheme in respect of acquisition of shares under Scheme of Merger/Demerger/ Amalgamation and concurrence of DPIIT is being sought to reject the application: From the foreign investment regulatory perspective, the acquisition of shares under scheme of mergers/demergers/ amalgamations of companies in India are laid down in Para 4 of Annexure-4 under the FDI Policy and Rule 19 of FEM Non-Debt Instrument Rules 2019. It may be noted that approval of NCLT/competent authority, as applicable, is a necessary pre-condition for issuance of shares consequent to a merger or amalgamation of two or more Indian companies or a reconstruction by way of demerger or otherwise of an Indian company.

Therefore, with regard to proposals involving mergers/demergers/amalgamations of companies in India, approval(s) of NCLT/competent authority as applicable and required under Companies Act, 2013 and rules thereunder and/or any other rules/regulations, needs to be obtained before the grant of FDI approval in such cases. In case the relevant approval(s) of NCLT/competent authority is not available, the applicant may be advised to resubmit the application along with requisite approval(s), when available. Till then, the application may be treated as closed."

(emphasis supplied)

The Learned Counsel submits that in view of the above provision in 2020 SOP, Petitioner Company 4 will need to approach GOI for approval to issue shares to shareholders of Petitioner Company 3 ("FDI Approval") only upon receipt of sanction of this Hon'ble Tribunal to the Scheme.

21. The Learned Counsel submits that while FDI Approval is required pursuant to the Press Note 3 requirement, the amalgamation/ merger of Petitioner Companies is also dependent upon certain regulatory approvals and pre-conditions as mentioned in Clause 31.4 of the Scheme which are: approval from Reserve Bank of India, SEBI and Competition Commission of India ("CCI"). Approval from CCI has already been received on 14.11.2019. As such, approval from RBI and SEBI are pending. The Learned Counsel further submits that in view of the provisions of Section 231 of the Companies Act, 2013, the time required for obtaining FDI Approval, approval from RBI and SEBI and that FDI Approval and SEBI approval being dependent on receipt of certified copy of the order of this Tribunal and the formalities required to be completed by the Petitioner Companies post receipt of the SEBI approval, the Petitioner Companies be allowed to file certified copy of this order within 75 days of receipt of the receipt of last of the following approvals: (i) FDI approval (ii) SEBI approval, and/ or (iii) RBI approval. This Tribunal hereby permits the Petitioner Companies to file certified copy of this order within 75 days from last of the dates of receipt of (i) FDI approval (ii) SEBI approval, or (iii) RBI approval and that the Registrar of Companies shall take note of this time period of filing.

22. From the material on record and after perusing the clarifications and submissions of the Petitioner Companies to the Report filed by the Regional

Director, the Scheme appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy.

23. Since all the requisite statutory compliances have been fulfilled, the Company Scheme Petition CP (CAA) 4051/MB/2019 filed by the Petitioner Companies is made absolute in terms of prayer clauses (a), (c) and (d) of the Company Scheme Petition. The Scheme is hereby sanctioned with the 'Appointed Date' as 01.04.2019.

24. The Petitioner Companies to lodge certified copy of this order along with a copy of the sanctioned Scheme attached thereto, with the concerned Collector of Stamps, for the purpose of adjudication of stamp duty payable, if any, within 75 days from last of the dates of receipt of (i) FDI approval (ii) SEBI approval, or (iii) RBI approval.

25. All concerned authorities to act on certified copy of this order along with the sanctioned Scheme, duly certified by Deputy/ Assistant Registrar of the National Company Law Tribunal, Mumbai Bench.

26. Any person interested is at liberty to apply to this Tribunal in these matters for any directions or modifications that may be necessary.