(2021) 03 NCLT CK 0047

In the National Company Law Tribunal

Case No : Company Petition No. 3097/66/MB Of 2019

BBM Heavy Machinery Private Limited Vs

Date of Decision : 17-03-2021

Acts Referred:

Companies Act, 2013 — Section 66, 210, 211, 212, 213, 214, 215, 216, 217219, 220, 223, 224, 225, 226, 227

Citation : (2021) 03 NCLT CK 0047

Hon'ble Judges : H. V. Subba Rao, J;Shyam Babu Gautam, Member (Technical)

Bench : Division Bench

Advocate : Hemant Sethi, Rupa Sutar

Final Decision : Allowed

Judgement

1. Heard the Learned Counsel for the Petitioner Company. No objector has come before the Tribunal to oppose the Petition nor any party has controverted any averments made in the Petition.

2. The Counsel for the Petitioner Company submits that, the Article 8 of the Articles of Association of the Petitioner Company empowers the Petitioner Company to reduce its share capital in any manner permitted by law by passing a Special Resolution.

3. The Authorized Share Capital of the Petitioner Company is Rs. 29,00,00,000 (Rupees Twenty Nine Crores only) divided into 2,65,00,000 (Rupees Two Crores Sixty Five Lakhs Only), Equity Shares of Rs. 10 (Rupees Ten only) each and Preference Share of Rs. 10 (Rupees Ten Only) each. Out of the above, 2,64,81,370 Equity Shares and 22,70,000 Preference Shares of the Petitioner Company have been issued as fully paid-up.

4. The Counsel for the Petitioner Company submitted that the Board of Directors of the Petitioner Company, at their meeting held on 18.06.2019, have passed a resolution approving reduction of equity share capital. The Board of Directors have also sent a Notice and Explanatory Statement dated 19.06.2019 for convening an Extra Ordinary General Meeting of the Equity Shareholders of the

Petitioner Company on Friday 21.06.2019. It was resolved as under:

RESOLVED THAT pursuant to the provisions of Section 66 and other applicable provisions, of the Companies Act, 2013 and the National Company Law Tribunal (Procedure for Reduction of Share Capital of Company) Rules, 2016 and Article 8 of the Articles of Association of the Company and subject to the confirmation by the National Company Law Tribunal and applicable regulatory authorities, as may be required, the consent of the members be and is hereby accorded to reorganize the Equity Share capital so as to accurately and fairly reflect the liabilities and assets of the Company by reduction and cancellation of the issued, subscribed and paid-up of Equity Shares held by Mr. Nikhil Bhatia in the company to the extent of Rs.20,12,79,900/- (Rupees Twenty Crores Twelve Lakhs Seventy Nine Thousand and Nine Hundred Only) divided into 2,01,27,990 (Two Crores One Lakh Twenty-Seven Thousand Nine Hundred and Ninety) Equity Shares of Rs.10/- each by writing off the entire accumulated losses of the Company as at March 31, 2019 to the extent of Rs.20,12,79,900/- (Rupees Twenty Crores Twelve Lakhs Seventy-Nine Thousand and Nine Hundred Only).

RESOLVED FURTHER THAT subject to the approval of the National Company Law Tribunal, the Equity Shares of Rs.10/- each so reduced, shall stand cancelled, extinguished and rendered invalid, without any further act or deed by the shareholders of the Company.

RESOLVED FURTHER THAT for the purpose of giving effect to the aforesaid resolution, Mr. Nikhil Bhatia and/or Mr. Dhaivat Kora, Directors of the Company, be and are hereby authorized to do all such acts, deeds, matters and things, as may be necessary, proper or expedient to do so without being required to seek any further consent or approval of the Company or otherwise and that he shall be deemed to have been given approval thereto expressly by the authority of this resolution."

5. All the shareholders in aggregate, representing 100% of the equity share capital have voted by way of poll and unanimously passed the resolution as a special resolution, with affirmative written consent. Thus, the resolution was duly passed as a Special Resolution without any amendments.

Both members have voted in favor of the resolution.

Name of Member

Number of

Equity Shares held

Percentage

shareholding/voting power

Officine Meccaniche BBM

S.P.A.

21,00,000

7.93

Nikhil Pradip

Bhatia

2,43,81,370

92.07

2,64,81,370

100

6. The Counsel for the Petitioner Company has clarified that there is no inspection/inquiry/proceeding/investigation pending against the petitioner company under Sections 210-217, 219, 220, 223, 224, 225, 226 and 227 of the Companies Act, 2013. He has further clarified that the proposed reduction is not likely to cause any prejudice to the creditors of the Petitioner Company. The proposed adjustment would not in any way adversely affect the ordinary operations of the petitioner company or the ability of the petitioner company to abide by its commitments or to pay its debts in the ordinary course of business. The creditors of the Petitioner Company are not adversely affected by the proposed reduction of equity capital as there is no reduction in the amount payable to any of the creditors and no compromise or arrangement is contemplated with the Creditors, although there are no secured creditors but only unsecured creditors.

7. The Counsel for the Petitioner has further stated the rationale for reduction of share capital under paragraph 7 of the Petition which is as under:

"7.1 the Company has accumulated losses of Rs.20,12,79,927/- as on 31st March, 2019. The continued losses have resulted in substantial erosion of the Petitioner Company's share capital and the co-existence of share capital and accumulated losses in the Petitioner Company's financial statements do not reflect the correct picture of the financial health of the Petitioner Company.

7.2 Mere infusion of further funds into the Petitioner Company will not benefit any existing shareholder, even if the Petitioner Company were to register profits in the coming years, particularly since no dividend can be paid out of profits unless all the accumulated losses are wiped out.

7.3 As the accumulated losses are becoming an obstacle for raising further funds and for the growth of the Petitioner Company and its shareholders, the Petitioner Company is now proposing to undertake a scheme of capital reduction exercise whereby the Petitioner Company would write off the loses against the Equity Share Capital.

7.4 The reduction of capital in the manner proposed would enable the Petitioner

Company to have a rational structure which is commensurate with its remaining business and assets.

7.5 The proposed reduction will be for the benefit of the Petitioner Company and its shareholders, creditors and all other stakeholders."

8. The observations of the Regional Director in Paragraph 8 of the report on proposed reduction of capital are as under:

(a) Applicant to submit an Affidavit to the effect that the interest of the creditors and all stakeholders and Government Revenue are protected as well as statutory dues are paid off.

(b) The tax implication if any arising out of the proposal for reduction is subject to final decision of Income Tax Authorities. The approval of the Company Petition by this Hon'ble Court may not deter the Income Tax Authority to scrutinize the tax return filed by the Company after giving effect to the proposed reduction. The decision of the Income Tax Authority is binding on the petitioner Company.

(c) In view of the observation raised by the ROC, Mumbai as mentioned at para 6 above, Hon'ble Bench may kindly pass appropriate order/orders as deem fit and proper.

(d) The proposed reduction of share capital is selective reduction, hence unjust and unfair to the rest of shareholders/members holding equity share capital of the company.

Subject to the Observation made in para 6 and 7 (a) to (d) above. Hon'ble NCLT may pass appropriate orders/order as deem fit and proper on merits.

9. In so far as observations made in paragraph 7 of the Report of Regional Director is concerned, the Petitioner Company through its Counsel has submitted an affidavit stating and accepting the observations of the Regional Director. He further accepted the observations of the Regional Director in toto and thereby solemly accepted the position of the relevant Income Tax Authorities to scrutinize tax return filed by the Company after giving effect to the proposed reduction 7(c). He further stated that in view of the observations of the ROC, Mumbai the petitioner company would like to state on record that a submission in response to these specific observations were filed with the office of the ROC, Mumbai.

10. In reply to the paragraph 6 of the Report of the Regional Director, the petitioner stated the company's position as under:

"(i) Due to liquidity constraints (as it is evident from the financial position of the Company), the Company has been unable to pay off its creditors on time.

(ii) The aforesaid amount payable pertains to services procured from Officine Meccaniche BBM, who is a Joint Venture Partner in the Company.

(iii) As explained earlier, the Company was finding it difficult to raise funds or obtain favorable credit terms from its creditors for day-to-day working capital requirements. Under the circumstances, in order to tide over the liquidity constraints, the Company was left with no option, but to delay the payment for services procured from the joint venture partner. This was necessary in order to enable the company to meet working capital requirements on pending orders, else it would have been virtually impossible to meet its obligations, which would have put the Company in further financial difficulty.

11. The Counsel appearing on behalf of the Petitioner Company submitted that the Petitioner Company has complied with all the statutory requirements and the directions of the Tribunal and they have filed the necessary Affidavit of compliance with the Tribunal. Moreover, the Petitioner Company also undertakes to comply with statutory requirements, if any, under the Companies Act, 2013 and the Rules made thereunder, as may be applicable.

12. The petitioner has undertaken to publish Notice of Registration of Order confirming reduction of share capital and Minutes thereof in two local newspapers in which notice of hearing of Petition is published, within 14 days of its registration.

13. Since the requisite statutory procedure has been fulfilled, the Company Petition is made absolute in terms of the prayer clause of the Petition.

14. The form of minutes set forth herewith be and is hereby approved.

15. All concerned regulatory authorities to act on certified copy of the order and the form of minutes forming part of the Petition, duly certified by the designated Registrar, National Company Law Tribunal. The Petitioner Company undertakes to file the same with the Registrar within 30 days from the date of the receipt of the certified copy of the order.

FORM OF MINUTES

"The issued, subscribed and paid-up equity share capital of BBM Heavy Machinery Private Limited (post-capital reduction) shall be Rs.6,35,33,800/- (Rupees Six Crore Thirty Five Lakhs Thirty Three Thousand Eight Hundred and Seventy Only) divided into 63,53,380 (Sixty Three Lakh Fifty Three Thousand Three Hundred and Eighty Only) equity shares of Rs 10 each"

