(2021) 03 NCLT CK 0024

In the National Company Law Appellate Tribunal

Case No : (CAA) No. 71 (ND) Of 2020, CA (CAA) No. 62(ND) Of 2020

Begonia Hotels Private Limited — APPELLANT

Vs

Fleur Hotels Private Limited — RESPONDENT

Date of Decision : 22-03-2021

Acts Referred:
Companies Act, 2013 — Section 133, 230, 230(5), 231, 232

Citation : (2021) 03 NCLT CK 0024

Hon'ble Judges : Dr. Deepti Mukesh, J;Sumita Purkayastha, Member (Technical)

Bench : Division Bench

Advocate : Saurabh Kalia, Apurava Jain, Devesh Vasisht

Final Decision : Disposed Of

Judgement

1. This Joint petition has been filed by the Petitioner Companies under Sections 230 - 232 of the Companies Act, 2013 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and the National Company Law Tribunal Rules, 2016, for the purpose of the approval of the Scheme of Amalgamation of Transferor Companies into Transferee Company.

2. A perusal of the petition discloses that initially the First Motion joint application seeking direction for dispensing/convening the meetings of the Equity Shareholders, Secured and Unsecured Creditors of the Transferor Companies and the Transferee Company was filed before this Tribunal bearing no. CA (CAA)-62(ND)2020 and based on such joint application moved under Sections 230-232 of the Companies Act, 2013, directions were issued by this Tribunal, wherein the meetings of Equity Shareholders, Secured and Unsecured Creditors of the Transferor Companies and the Transferee Company were dispensed with vide order dated 15.10.2020.

3. Thereafter 2ndmotionpetition was filed on 21.10.2020 vide (CAA) NO.-71 (ND)/ 2020 within prescribed time limit and on 08.12.2020 the Petitioners were directed to carry out publication in the newspaper 'Business Standard' (English

Delhi Edition) and "Jansatta" in (Hindi, Delhi Edition). In addition to the public notices, notices were directed to be served on to the Regional Director (Northern Region), Ministry of Corporate Affairs,Registrar of Companies, NCT of Delhi and Haryana, the Income Tax Department, Official Liquidator and to the other relevant sectoral regulators.

4. It is seen from the records that all the Petitioners have filed an affidavit dated 13.01.2021 affirming compliance of the order passed by the tribunal dated 08.12.2020. A perusal of the affidavit disclose that the Petitioners have affected the newspaper publication as directed in one issue of the 'Business Standard' (English Delhi Edition) and Jansatta in (Hindi, Delhi Edition) both on 29.01.2021 in relation to the date of hearing of the petition. Further, the Petitioners have also affirmed that the copy of petition have been duly served by hand delivery upon the MCA through Regional Director (Northern Region), Registrar of Companies, Income Tax Department (Income Tax Cell - Delhi High Court), Official Liquidator, New Delhi in compliance of the order. The acknowledgments from the respective offices have also been placed on record.

5. The Regional Director's office filed made following observations :

a) The ROC report in clause 32 mentions following:

"It appears from the petition and Annexures thereto that a foreign entity is having beneficial ownership in the Transferor Companies. Therefore, the aspect of approval of the reserve Bank of India for allotments of shares to such shareholders upon sanction of the proposed scheme may be examined in the Directorate."

In light of the above and in terms of the provisions of Section 230(5) of the companies Act, 2013 this office has no adverse observations to the extent of proposed scheme of arrangement/amalgamation.

b) On examination of the scheme and the reply submitted by the Petitioner companies, observed the following:

"The material portions of the shares are held by foreign body corporate. On approval of the scheme, the transferee company will issue shares as purchase consideration to the shareholders of transferor companies in terms of clause - 9 of the scheme which involves foreign body corporate for which necessary approval may be obtained from competent authority."

6. The petitioner companies in response to the report of the Regional Director stated that the transferee company/Petitioner No. 3 Company hereby confirms that, approval from RBI is not required under the FDI guidelines issued by RBI for allotment of shares, to foreign shareholders of the Transferor company. Further Transferee Company/Petitioner Company No.3 undertakes that it will comply with the requisite guidelines issued by RBI, as applicable for allotment of shares to foreign shareholders of the Transferor companies upon sanction of proposed scheme.

7. The Income Tax Department filed its report and stated that there is an outstanding income tax demand of the petitioner No. 1/Transferor Company No.1. This Hon'ble court may direct the applicant to pay the outstanding demand. Further relying upon the case of Department of Income Tax Vs. Vodafone Essar Gujarat Ltd. [(2015) 16 SCC 629] stated that the sanction of proposed scheme of amalgamation shall not prejudice any rights of the IT department.

8. In response of the aforesaid observations of the Ld. Commissioner of Income Tax, the petitioner companies responded as follows:

a) With respect to the petitioner No.1/Transferor Company No.1 company undertakes that as per Para No. 3 (o) of Part II of the Scheme, the pending liability of Rs. 70,220/- in AY 2017-18 shall be transferred to the transferee Company and shall be paid and honored by the transferee company.

In view of the no objection raised with respect to transferor no.2 and Transferee Company it is seen that all observations of the Income Tax Department are duly satisfied.

9. The Official Liquidatorfiled its report, wherein no specific objection has been raised against the approval of the scheme. It is submitted in the report that no complaint has been received against the proposed scheme from any person/ party interested in the scheme in any manner and that the affairs of the transferor companies do not appear to have been conducted in a manner prejudicial to the interest of its members or to public interest.

10. The petitioners vide affidavit stated that no objection from any third party or public at large have been received against the Scheme of Amalgamation.

11. The petitioners have submittedthat no proceedings for inspection, inquiry or investigation under the provisions of the Companies Act, 2013 or under the provisions of the Companies Act, 1956 are pending against the Petitioner Companies.

12. Certificates of respective statutory auditors of all the petitioner companies have been placed on record to the effect that accounting treatment proposed in the Scheme of Amalgamation is in conformity with the accounting standard notified by the Central Government as specified under the provisions of Section 133 of the Companies Act, 2013.

13. In view of the foregoing and considering the approval accorded by the members and creditors of all the petitioner companies to the proposed scheme, as well as the objections filed by the Regional Director (northern region), Income Tax Department and the Official Liquidator, being satisfied in view of affidavit of undertaking filed by the transferee company, there appears to be no impediment in sanctioning the present scheme. Consequently, sanction is hereby granted to the scheme under section 230 & 232 of the Companies Act, 2013. The petitioner however remains bound to comply with the statutory requirements in accordance

with law.

14. Notwithstanding the above, if there is any deficiency found or, violation committed qua any enactment, statutory rule or regulation, the sanction granted by this court to the scheme, will not come in the way of action being taken, albeit, in accordance with law, against any of the concerned person, director and officials of the petitioners.

15. While approving the scheme as above, we further clarify that this order should not be construed as an order in any way granting exemption from payment of stamp duty, taxes, GST, or any other charges, if any, and payment in accordance with law or in respect to any permission/ compliance with any other requirement which may be specifically required under any law.

16. THIS TRIBUNAL DO FURTHER ORDER(S):

a) That the transferor companies No. 1 & 2 shall stand dissolved without following the process of winding up and;

b) The transferee company shall allot fully paid-up equity shares to the shareholders of the Transferor companies in the following ratio:

i. 100 fully paid-up Equity Shares of Fleur Hotels Private Limited (Transferee Company) of face Value of Rs. 10/- each for every 355 fully paid-up equity shares of Rs.1/- each of Begonia Hotels Private Limited (Transferor No.1 company).

ii. 1 fully paid-up Equity Share of Fleur Hotels Private Limited (Transferee Company) of face Value of Rs. 10/- each for every 24 fully paid-up equity shares of Re. 1/- each of Nightingale Hotels Private Limited (Transferor No.2 company).

c) That all the property, rights and powers of the transferor companies No. 1 & 2, 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 vests in the transferee company.

d) That all the liabilities and duties of the transferor companies No. 1 & 2, be transferred without further act or deed, to the transferee company and accordingly the same shall, pursuant to Section 232 of the Act, be transferred to and become the liabilities and duties of the transferee company; and

e) That all proceeding now pending by or against the transferor companies No. 1 & 2, be continued by or against the transferee company; and

f) That all the employees of transferor companies No. 1 & 2 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 services and upon terms and conditions not less favorable than those subsisting in the respective transferor companies on the said date.

g) That petitioner companies shall within thirty days of the date of the receipt of this order cause a certified copy of this order to be delivered to the Registrar of Company for registration and on such certified copy being so delivered all the transferor companies shall stand dissolved and the Registrar of Company shall place all documents relating to all the transferor company registered with him on the file kept by him in relation to the transferee company and the files relating to all the petitioner companies shall be consolidated accordingly;

The Petition is allowed and disposed off in terms of above order.