

(2022) 04 NCLT CK 0034

In the National Company Law Tribunal

Case No : CP(CAA)/90/MB Of 2021 In CA(CAA)/1150 Of MB/2020

Cear Lifespaces Private Limited Vs

Date of Decision : 11-04-2022

Acts Referred:

Companies Act, 2013 — Section 230, 230(3), 230(5), 230(7), 232, 232(3)(i), 232(6)
Income Tax Act, 1961 — Section 2(1B)
Insolvency and Bankruptcy Code, 2016 — Section 7

Citation : (2022) 04 NCLT CK 0034

Hon'ble Judges : Kishore Vemulapalli, Member (J);Rajesh Sharma, Member (T)

Bench : Division Bench

Advocate : Hemant Sethi, Vidisha Poonja, Hemant Sethi, Rupa Sutar

Final Decision : ?Disposed

Judgement

Rajesh Sharma, Member (Technical)

1. The Bench is convened through video conferencing today.
2. Heard Learned Counsel for the Petitioner Companies. No objector has come before the Tribunal to oppose the petition and nor has any party controverted any averments made in the petition.
3. The sanction of this Tribunal is sought under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 ('Act') and in the matter of Scheme of Amalgamation of Cear Lifespaces Private Limited ('the Transferor Company') with Godrej Properties Limited ('the Transferee Company') and their respective shareholders (hereinafter referred to as 'Scheme').
4. The Learned Counsel for the Petitioner Companies submits that the Petitioner Companies were formed with an objective of carrying on the business of development of real estate projects.
5. The Counsel for the Petitioner Companies further submits that the rationale for the Scheme is as under:
 - a) Consolidation of real estate business

- b) Elimination of multiple entities
- c) Reducing the multiplicities of legal and regulatory compliances
- d) Reducing time and efforts for coordination of financials at group level
- e) Elimination of duplicative communication and coordination efforts
- f) Rationalisation of administrative and compliance costs

6. The Petitioner Companies have approved the Scheme by passing their respective Board Resolutions dated November 03, 2021 and have approached the Tribunal for sanction of the Scheme.

7. Learned Counsel for the Petitioner Companies submits that the Petition has been filed in consonance with sections 230 to 232 of the Act along with the order dated February 16, 2021 passed by this Tribunal in CA(CAA)/1150/MB/2020.

8. Learned Counsel for the Petitioner Companies states that the Petitioner Companies have complied with all the requirements as per the directions of this Tribunal.

9. The Learned Counsel for the Petitioner Companies states that the shares of the First Petitioner Company are not listed on any stock exchanges. The shares of the Second Petitioner Company are listed on BSE Limited and National Stock Exchange of India Limited.

10. The Regional Director has filed his report dated July 29, 2021 ('Report') praying that this Tribunal may pass such orders as it thinks fit, save and except as stated in paragraphs IV (a) to (j). In response to the observations made by the Regional Director, the Petitioner Companies have also given necessary clarifications and undertakings vide their rejoinder affidavit dated August 26, 2021. In response to the rejoinder affidavit, the Regional Director has filed his Supplementary Report dated September 09, 2021. The observations made by the Regional Director and the clarifications and undertakings given by the Petitioner Companies and the observations of the Regional Director in the Supplementary Report are summarized in the table below:

Sr.

No. Para No.

(IV

RD Report/ Observations Dated July 29, 2021

Response of the Petitioner Companies

Observation of Regional director in Supplementary Report dated

September 09, 2021.

(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 other applicable Accounting Standards such as AS-5(IND AS-8) etc.

As far as the observation of the Regional Director, as stated in IV(a) of the report and reproduced hereinabove is concerned, the Second Petitioner Company undertakes that it shall pass such accounting entries as may be necessary in connection with the Scheme to comply with all the applicable Indian Accounting Standards (IND AS).

On the basis of observations made by the Regional Director and reply submitted by the petitioner Company

thereon, Hon'ble Tribunal may decide the matter on its merit.
The

Authorised Representative from the Regional Director was present and has confirmed their satisfaction for the same

(b)

As per Definition of the Scheme,

"Appointed Date" means April 1, 2020 ;

"Effective Date" or "coming into effect of this Scheme" or "upon the scheme becoming effective" or "effectiveness of the scheme" means the date on which the certified copies of the order of the National Company Law Tribunal sanctioning this Scheme, is filed by CLPL

and GPL with

jurisdictional 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.

As far as the observation of the Regional Director, as stated in IV(b) of the report and reproduced hereinabove is concerned, the Petitioner Companies undertakes that the Appointed Date would be April

1, 2020 as mentioned in Clause 1.2 under the Definition Clause of the Scheme which is in compliance with Section 232(6) of the Companies Act, 2013 and the Scheme shall take effect from such Appointed Date.

Further, the Petitioner Companies undertakes that the aforesaid Appointed Date complies with the requirements specified in the Ministry of Corporate Affairs ('MCA') Circular F.No.7II2/2019/CL -I ('Circular') dated August 21, 2019.

On the basis of observations made by the Regional Director and reply submitted by the petitioner Company thereon, Hon'ble Tribunal may decide the matter on its merit. The

Authorised Representative from the Regional Director was present and has confirmed their satisfaction for the same

Further, 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.

(c)

Petitioner Company have to undertake to comply with section 232(3)(i) of Companies Act, 2013, where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation and therefore, petitioners to affirm that they comply the provisions of the section.

As far as the observation of the Regional Director, as stated in IV(c) of the report and reproduced hereinabove is concerned, the Second Petitioner states that the Scheme does not provide for combination of Authorised Share capital and accordingly, no additional fees would be payable.

On the basis of observations made by the Regional Director and reply submitted by the petitioner Company thereon, Hon'ble Tribunal may decide the matter on its merit. The

Authorised Representative from the Regional Director was present and has confirmed their satisfaction for the same

(d)

ROC, Mumbai Report dated 23.04.2021 inter alia mention that Given in para

3.2 of the Scheme As per MCA Master data the Authorized and paid up

Share Capital of the

Transferee company is Rs. 6,69,00,00,000/- and Rs.

1,26,04,04,915/-

respectively. However, the paid-up capital mentioned in the Scheme is Rs. 1,26,01,19,555/- which is not tallying with master data and there is no investigation/inspection/inquiry proceedings and complaint against the present scheme are pending. Further, the ROC Mumbai report made following observations:

1. Interest of the Creditors should be protected.
2. One Compliant relating to non-payment of fixed deposited and Interest on maturity has been received against the Transferee Company and the complaint is taken up with company for reply.

In this regard, it is submitted that the Transferee company may be directed to submit the reason for difference in Paid up share capital of the company and if required may be directed to do the necessary filing. Further, the petitioner companies may be directed to resolve all pending complaints before consideration of the present Scheme.

As far as the observation of the Regional Director, as stated in IV(d) of the report and the report of ROC dated April 23, 2021 is concerned, it is stated that

(i) the Second Petitioner

Company submits that the paid-up share capital of the Second Petitioner Company mentioned in Clause 3.2 of the Scheme relates to the paid-up share capital of the Second Petitioner Company as on date March 31, 2020

i.e., INR 1,26,01,19,555.

After March 31, 2020, the Second Petitioner Company has allotted 56,829 equity shares, 243 equity shares and 30,442 equity shares on June 22, 2020, December

14, 2020 and May 28, 2021

respectively pursuant to Godrej Properties Limited Employees Stock Grant Scheme, 2011. Further, the Second Petitioner Company issued 2,58,62,068 equity shares on March 16, 2021 to qualified institutional buyers. After considering the said allotment, the paid-up capital of the Second Petitioner Company is matching with MCA Master

Data. A reconciliation of the paid-up capital of the Second Petitioner Company is summarized below: Particulars Amount in Rs. Share Capital as on 31.03.2020 1,26,01,19,555 Share Capital as on 30.09.2020 1,26,04,03,700 Share Capital as on 14.12.2020 1,26,04,04,915 Share Capital as on 16.03.2021 1,38,97,15,255 Share Capital as on 28.05.2021 1,38,98,67,465 A copy of the forms filed with the ROC pursuant to the allotment of such shares was enclosed as 'Annexure B' to the Affidavit-in-Rejoinder. Details reflected on the MCA portal for the share capital of the Second Petitioner Company as on date was enclosed herewith as 'Annexure C' to the Affidavit-in-Rejoinder.. (ii) The Second Petitioner Company submits that the rights of creditors of the Petitioner Companies will not be affected as there is no compromise or arrangement with the creditors of the Petitioner companies pursuant to the Scheme. Further, the assets of the Second Petitioner Company, post the Scheme, will be more than its liabilities and as such sufficient to discharge the liabilities in the normal course of business and the creditors would be paid off in the ordinary course of business by the Second Petitioner Company. Hence the rights of the creditors will not be jeopardized pursuant to the Scheme. (iii) The complaint against the Second Petitioner Company relates to a matter unconnected with the Scheme. Also, the Scheme does not envisage any compromise with the depositors of the Second Petitioner Company and hence the interest of the depositors would not be adversely affected pursuant to the Scheme. Further, the Petitioner Companies respectfully submit that the Second Petitioner Company shall continue to remain in existence post the approval of the Scheme and the complainant shall continue to have his rights of redressal and claims, if any, against the Second Petitioner Company in the appropriate forum and hence, the rights of the investor will not be jeopardized pursuant to the Scheme.

On the basis of observations made by the Regional Director and reply submitted by the petitioner Company

thereon, Hon'ble Tribunal may decide the matter on its merit. The Authorised Representative from the Regional Director was present and has confirmed their satisfaction for the same

(e)

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(7) read with 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 IV(e) of the report and reproduced hereinabove is concerned, the Petitioner Companies submit that the meetings of the equity shareholders and creditors of the First Petitioner Company and the Second Petitioner Company was dispensed with by this Hon'ble Tribunal vide Order dated February 16, 2021. The Order of Hon'ble

Tribunal dated February 16, 2021 was enclosed as 'Annexure D' to the Affidavit-in-Rejoinder. Hence, the requirement of conducting the meeting of equity shareholders and creditors of the Petitioner Companies and submission of the minutes of such meeting does not arise.

On the basis of observations made by the Regional Director and reply submitted by the petitioner Company thereon, Hon'ble Tribunal may decide the matter on its merit. The Authorised Representative from the Regional Director was present and has confirmed their satisfaction for the same

(f)

As per Clause 11.1. (e) of the Scheme, stated that the difference, if any, being excess/deficit arising pursuant to the Scheme shall be accounted based on the accounting principles prescribed under the Ind AS-103. In this regard it is submitted that as per Accounting Standard 14, such surplus if any arising out of the scheme should be credited to the Capital Reserve arising out of amalgamation and deficit if any arising out of the same shall be debited to Goodwill Account of the Transferee Company. Such Capital Reserve, arising out of the amalgamation shall not be considered as free reserve and not available for distribution of dividend.

As far as the observation of the Regional Director, as stated in IV(f) of the report and reproduced hereinabove is concerned, the Second Petitioner states that the surplus or deficit arising on account of the merger shall be accounted as per Appendix C of Ind AS 103. Further, the Transferee Company undertakes that Reserve arising on amalgamation will not be utilized for distribution of dividend.

On the basis of observations made by the Regional Director and reply submitted by the petitioner Company thereon, Hon'ble Tribunal may decide the matter on its merit. The Authorised Representative from the Regional Director was present and has confirmed their satisfaction for the same

(g)

The Petitioner Company states that the Transferee Company shall be in compliance with provisions of Section 2(1B) of the Income Tax Act, 1961. In this regard, the petitioner 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 IV(g) of the report and reproduced hereinabove is concerned, the Petitioner Companies undertakes to comply with all the provisions of Income Tax Act and rules thereunder.

On the basis of observations made by the Regional Director and reply submitted by the petitioner Company thereon, Hon'ble Tribunal may decide the matter on its merit. The Authorised Representative from the Regional Director was present and has confirmed their satisfaction for the same

(h)

It is observed that the Transferor Company have non-residential shareholders, therefore, the petitioner company may be directed to comply with the FEMA provisions and may also be directed to submit approval of RBI if any.

As far as the observation of the Regional Director, as stated in IV(h) of the report and reproduced hereinabove is concerned, the Petitioner Companies submits that there are no non-resident shareholders in the Transferor Company. The Petitioner Companies submits that the present scheme involves merger of wholly owned subsidiary with its holding company, and no shares would be issued or allotted as consideration pursuant to the merger. Hence, approval of the Reserve Bank of India and compliance with the provisions of Foreign Exchange Management Act (or Regulations) is not required.

On the basis of observations made by the Regional Director and reply submitted by the petitioner Company thereon, Hon'ble Tribunal may decide the matter on its merit. The Authorised Representative from the Regional Director was present and has confirmed their satisfaction for the same

(i)

Transferee Company is a listed company, therefore, transferee Company may be directed to submit NOC of the respective stock exchange and SEBI, if any.

As far as the observation of the Regional Director, as stated in IV(i) of the report and reproduced hereinabove is concerned, it is stated that pursuant to said SEBI circular CFD/DIL3/CIR/2017/21 dated March 10, 2017, prior approval or no objection certificate of stock exchanges and SEBI is not required for scheme of amalgamation of a wholly owned subsidiary company into its holding company. Further, the Second Petitioner Company has intimated BSE Limited ('BSE') and National Stock Exchange Limited ('NSE') on November 09, 2020 about the Scheme in compliance with circular issued by Securities and Exchange Board of India ('SEBI') (circular CFD/DIL3/CIR/2017/21 dated March 10, 2017). The acknowledged copy of the intimation sent to BSE and NSE was enclosed as 'Annexure E' to the Affidavit-in-Rejoinder.

On the basis of observations made by the Regional Director and reply submitted by the petitioner Company thereon, Hon'ble Tribunal may decide the matter on its merit. The Authorised Representative from the Regional Director was present and has confirmed their satisfaction for the same

(j)

Income Tax Department vide letter No. ITBA/COM/F/17/2020-21/1031307941(1) dated 08.03.2021 (Copy enclosed), has informed that I.T. Department vide letter dated 03.03.2021 had requested to the petitioner company to file clarification/evidence/documents with regards to the certain aspects of the Scheme, however, petitioner company has not provided the same.

Therefore, petitioner company may be directed to submit relevant documents with the Income Tax Authority and submit NOC of I.T. Department.

As far as the observation of the Regional Director, as stated in IV(j) of the report and reproduced hereinabove is concerned, the Second Petitioner Company states that the Petitioner Companies have served the notices upon concerned Income Tax authorities on February 26, 2021 as required under sub-section (5) of Section 230 of the Companies Act, 2013 with a direction that they may submit their representations, if any, within a period of 30 days from the date of receipt of such notice. The Company was in receipt of the letter of the Income Tax Department dated March 11, 2021 (copy of letter was enclosed as 'Annexure F' to the Affidavit-in-Rejoinder) seeking certain information and clarifications. In reply to the same, the Second Petitioner Company has submitted the clarifications and information sought by the Income Tax Department vide their email dated March 17, 2021. Copy of the mail sent along with the detailed submission by the Company and the delivery report acknowledging receipt of the mail was attached as 'Annexure G' and 'Annexure H' respectively to the Affidavit-in-Rejoinder. There after no representation / communication has been received from Income Tax Department till date. Further, Section 230(5) of the Companies Act, 2013 provides that in case no representation is made within a period of 30 days from receipt of notice by the tax authorities, then it shall be presumed that they have no representations to make on the proposals. Petitioner Companies further submits that the tax implications, if any, arising out the Scheme shall be decided in accordance with the Income Tax Law.

On the basis of observations made by the Regional Director and reply submitted by the petitioner Company thereon, Hon'ble Tribunal may decide the matter on it's merit.

The Petitioner Companies have filed further affidavit dated February 11, 2022 and confirmed that no representation has been received from the IT Department post submission of reply dated December 15, 2021.

11. The Observations made by the Regional Director have been explained and the clarifications and undertakings given by the Petitioner Companies have been explained in above table. The clarifications and undertakings given by the Petitioner Companies in response to the said Report are accepted by this Tribunal.

12. The Official Liquidator, High Court, Bombay, has filed his report dated September 28, 2021 inter alia, stating therein that the affairs of the Transferor Company have been conducted in proper manner.

13. As submitted by the Transferee Company through its Additional Affidavit dated 14.02.2022, the Income Tax Litigation for the A.Y. 2014-15 to 2018-19 involving an amount of Rs.36,93,41,647/- are pending with Commissioner of Income Tax Appeals. Further, Indirect Taxes Litigation of disputed amount of Rs.1,00,44,89,852/- are pending before various Forums, as per details provided

by the Transferee Company through its Additional Affidavit dated 14.02.2022.

14. In addition to that, there two NCLT cases pending against the Transferee Company (i) under section 7 of IBC for initiation of CIRP against the Transferee Company and; (ii) Oppression & Mismanagement against some other Company in NCLT, New Delhi, where the Transferee Company has been impleaded by the Petitioner. The details of which are annexed at pp 34 & 41 of the Additional Affidavit dated 14.02.2022. A total list of 245 pending litigations in various Courts of Law has been provided by the Transferee Company vide its Additional Affidavit dated 14.02.2022.

15. From the material on record and after perusing the clarifications and submissions of the Petitioner Companies to the Report, the Supplementary Report of the RD and the Report of the Official Liquidator, the Scheme appears to be fair and reasonable and does not violate any provisions of law and is not contrary to public policy.

16. The Learned Counsel for the Petitioner Companies states that The Transferor Company is a wholly owned subsidiary of the Transferee Company and thus no shares will be issued pursuant to the Scheme of Amalgamation.

17. Since all the requisite statutory compliances have been fulfilled CP(CAA)/90/MB /2021 is made absolute in terms of the prayer clauses of the said Company Scheme Petition.

18. The Scheme is hereby sanctioned with the Appointed Date of 1st April 2020.

19. Any person interested is at liberty to apply to this Tribunal in the above matters for any directions that may be necessary.

20. The Petitioner Companies are directed to file a copy of this Order along with a copy of the Scheme with the concerned Registrar of Companies, within 30 days from the date of receipt of the certified copy of this Order by the Petitioner Companies.

21. The Transferee Company to lodge a copy of this Order along with the Scheme duly authenticated/certified by the Joint Registrar or Deputy Registrar of this Tribunal, 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 Order from the Registry of this Tribunal.

22. All concerned regulatory authorities to act on a copy of this Order along with Scheme duly certified by the Deputy Director or the Assistant Registrar, National Company Law Tribunal, Mumbai Bench.

23. Any person interested is at liberty to apply to this Tribunal in the above matters for any directions that may be necessary.

24. Any concerned Authorities are at liberty to approach this Tribunal for any further clarification as may be necessary.

25. Ordered accordingly. File to be consigned to records.