(2020) 06 NCLT CK 0020

In the National Company Law Appellate Tribunal

Case No : CAA- 6/230-232ND Of 2020

Corteco India Private Limited — APPELLANT

Vs

Freudenberg-NoK Private Limited — RESPONDENT

Date of Decision : 29-06-2020

Acts Referred:

Income-Tax Act, 1961 — Section 74(A)
Companies Act, 2013 — Section 133, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 230, 231, 232

Citation : (2020) 06 NCLT CK 0020

Hon'ble Judges : P.S.N. Prasad, J;Sumita Purkayastha, Member (Technical)

Bench : Division Bench

Advocate : Rupesh Agarwal, Easha Kadian

Final Decision : Disposed Of

Judgement

P.S.N. Prasad, J

1. This Joint application has been filed by the Petitioner Companies under Section 230 to 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 the Transferor Company with the Transferee Company.

2. The "Transferor Company", Corteco India Private Limited was incorporated on 22.11.2012 under the provisions of Companies Act, 1956, having its registered office at KH. No. 965 & 966 FI5/2, First Floor, Satbari, Delhi, South West Delhi 110074.

3. The "Transferee Company", Freudenberg-NOK Private Limited (formerly known as Sigma Freudenberg NOK Private Limited) was incorporated on 04.09.2000 under the provisions of Companies Act, 1956 having its registered office at KH. No. 965 & 966 F15/2, First Floor, Satbari, Delhi, South West Delhi 110074.

4. A perusal of the petition discloses that initially the First Motion joint

application seeking directions for convening or dispensing the meeting of Shareholders, Secured Creditors and Unsecured Creditors of both the petitioner companies was filed before the this bench vide Company Application CA(CAA)-147/230/232/ND/2019 and based on such joint application moved under Sections 230-232 of the Companies Act, 2013, directions were issued by this Tribunal, vide order dated 9th Day of December, 2019 wherein the meetings of the of Equity Shareholders, Secured Creditors of the Transferor Company and the transferee Company were dispensed with, as consent affidavits of all the respective shareholders and creditors have been obtained for the approval of the Scheme.

5. On 13th Day of January, 2020, the Petitioners were directed to carry out publication in the newspaper 'Business Standard' English Delhi edition as well as in 'Business Standard' Hindi Delhi edition. In addition to the public notice, notices were directed to be served on to the Regional Director (Northern Region), Registrar of Companies, NCT of Delhi and Haryana, Official Liquidator, the Income Tax Department and to the other relevant sectoral regulators.

6. It is seen from the records that the Petitioners have filed an affidavit dated 24th February, 2020 affirming compliance of the order passed by the Tribunal dated 13th Day of January, 2020. A perusal of the affidavit discloses that the petitioners have affected the newspaper publication as directed in one issue of the 'Business Standard 'English Delhi edition on 22nd Day of January, 2020 as well as in 'Business Standard' Hindi Delhi edition again on 22nd Day of January, 2020 inviting objection in respect of the Scheme, also in relation to the date of hearing of the petition. Further, the affidavit also discloses that copies of the petition have been duly served to the Registrar of the Companies, Regional Director, Northern Region, Official Liquidator and Income Tax Department in compliance of the order and in proof of the same acknowledgement made by the respective offices have also been enclosed.

7. The Regional Directors has filed its representation dated February 12, 2020 in which it has been submitted that as per report of Registrar of Companies, the petitioner companies have filed their statutory returns and no prosecution, inspection or investigation has been conducted in respect of petitioner companies. It is evident from the report of the regional director that no specific objection has been raised against the proposed Scheme.

8. The Official Liquidator has also filed its report dated January 30, 2020 wherein it is submitted in the report that the official liquidator has not received any complaint against the proposed Scheme from any person/party interested in the Scheme in any manner and that the affairs of the transferor company do not appear to have been conducted in a manner prejudicial to the interest of its members or to public interest.

9. The department of Income Tax has filed its report in which there is no objection to be transferred to the transferee company. The department has

raised following observations regarding the Sanction of the Scheme. Those are as follows:

a. Losses incurred by the transferor company may not be allowed to be set off with the profits of Transferee Company reducing tax payment to the revenue department. Further, Individual liabilities/dues of directors/shareholders may not be allowed to be borne by the transferee company.

b. The Income Tax Department must be permitted to retain its recourse for recovery in respect of any existing or future tax libilities of the company or the transferee company, and that this protection must be made explicit by this Court in its final order. There should be no limitation on the power of the Income Tax Department for recovery, including imposition of penalties etc.

c. That without prejudice to the above, the approval of the revision should in no manner affect the tax treatments of the transactions under the Income Tax Act, 1961 oer any other applicable taxing statue, nor would sanction of the revision or the effect thereof serve as a defense for the companies concerned against tax treatment under the aforementioned statues.

10. In response to the remark made by Income Tax Department of its report, the Transferee Company undertakes that it would make appropriate treatment in its books of accounts with respect to the losses incurred by the Transferor Company as per the applicable provisions of Section 72A of Income Tax Act, 1961 and procedures of Income Tax Act and rules made thereunder, circulars, clarifications, notifications, amendment issued thereunder from time to time with respect to set off of losses incurred by the Transferor Company.

11. It is also being submitted that as per para 8 of the Scheme of Amalgamation, Upon the Scheme becoming effective, the tax liability or obligation of Transferor Company shall be borne by Transferee Company.

12. It is also being submitted by the applicant companies that the demand of Income Tax department, if any, arises in future in respect of assessment proceedings of Transferor Company, the same would be borne by transferee company after complying with procedure of Income Tax Act and rules made thereunder without jeopardizing the right of the Transferor Company and Transferee company to appeal to a higher authority and requesting for a stay on demand raised, as the case may be, in line the provisions of Income Tax Act and rules made thereunder.

13. In addition to the undertaking of the petitioner companies, it is clarified that there shall be no limitation on the power of the Income tax Department for recovery of pending Income Tax dues, including imposition of penalties etc. as provided in law.

14. Apart from the aforesaid reports, the petitioner companies have also filed affidavit dated 26.02.2020 affirming that neither petitioner companies nor M/s. Chandrasekaran Associates, Company secretaries, or authorized representative

of petitioner companies have received any other objection against the Scheme.

15. It has been affirmed in the Joint petition that no proceedings under Section 210 to 227 of the Companies Act, 2013 are pending against the Petitioner Companies.

16. Besides certificates of respective Statutory auditors of both the petitioner companies have been placed on record to the effect that the 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.

17. It is stated that upon the Scheme becoming effective the transferee company will issue and allot equity shares to the shareholders of the transferor company in the following ratio: 38 (Thirty Eight) Equity shares of the face value of Rs. 10/- each fully paid up, for every 16 (Sixteen) equity share of Rs. 10/- each fully paidup held by shareholders in the Transferor Company.

18. Be that as it may it is seen that the scheme is not detrimental to the applicant companies, its shareholders and creditors. The applicants, its members and creditors are the best judge to protect their interest. In the absence that the scheme is not fair, just and reasonable or that it is in contravention of statutory portions and for public interest, the decision of the shareholders and creditors, who have overwhelmingly voted in the favour of the scheme should be up held.

19. In the case of Hindustan Lever Employees Union Vs. Hindustan Lever Limited (1995) 5 SCC 4913 the three judges bench of Hon'ble Supreme Court has held as follows:

"that a company court does not exercise appellate jurisdiction over a scheme and its jurisdiction is limited to ascertaining fairness, justness and reasonableness of the Scheme and to ensure that neither any law has been violated or public interest compromised in the process."

20. 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, Northern Region, Ministry of Corporate Affairs, the report of official liquidator and Department of Income Tax, there appears to be no impediment in sanctioning the present Scheme. Consequently, sanction is hereby granted to the 'Scheme undersection 230 & 232 of the Companies Act, 2013.

21. The Petitioners shall however remain bound to comply with the statutory requirements in accordance with law.

22. 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 the concerned persons, directors and

officials of the petitioners.

23. 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 or any other charges, if any, and payment in accordance with law or in respect to any permission/compliance with another requirement which may be specifically required under any law.

24. THIS TRIBUNAL DO FURTHER ORDER

1. That the Transferor Company shall stand dissolved without following the process of winding-up; and

2. That all the property, rights and powers of the Transferor Company, 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.

3. That all the liabilities and duties of the Transferor Company, 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

4. That all proceedings now pending by or against all the Transferor Company, be continued by or against the transferee company; and

5. That all the employees of the Transferor Company 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 condition not less favorable than those subsisting in the concerned Transferor Company on the said date.

6. 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 Companies for registration and on such certified copy being so delivered to the Transferor Company shall be dissolved and the Registrar of Companies shall place all documents relating to 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; and

7. That any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary.

The petition stands disposed of in the above terms.

Let copy of the order be served to the parties.