(2021) 01 NCLT CK 0047

In the National Company Law Tribunal

Case No : Company Petition (CAA) No. 994, 997/MB.IV Of 2020

Cybage Software Pvt. Ltd. Vs

Date of Decision : 25-01-2021

Acts Referred:
Companies Act, 2013 — Section 13, 230, 230(1), 230(3), 230(4), 230(5), 230(6), 231, 232, 232(6)

Citation : (2021) 01 NCLT CK 0047

Hon'ble Judges : Suchitra Kanuparthi, J;Rajesh Sharma, Member (Technical)

Bench : Division Bench

Advocate : Ajit Singh Tawari

Judgement

1. This Court convened through videoconference today(02.12.2020).

2. Heard the Learned Counsel for the Petitioner Companies and the representative of the Regional Director (Western Region), Ministry of Corporate

Affairs, Mumbai. No objector has come before the Tribunal to oppose the Scheme and nor any party has controverted any averments made in the

Petition.

3. The sanction of this Tribunal is sought under Sections 230 to 232 of the Companies Act, 2013, to Scheme of Arrangement of Giftease Technologies

Private Limited (Demerged Company) and Cybage Software Private Limited (Resulting Company) and their respective shareholders.

4. The Petitioner Companies have approved the Scheme by passing a Board Resolution at their respective Board meetings held on 20th March, which

is annexed at Annexure G to the Joint Company Scheme Petition and that thereafter they have approached the Tribunal for sanction of the Scheme.

5. The Demerged Company is engaged in the business of selling gift articles to individuals and corporate clients through various channels including its

online website, store and direct sales. It is also engaged in the business of providing food and confectionaries. The Resulting Company is engaged in

the business of software development services.

6. Learned Counsel appearing on behalf of the Petitioner Companies states that the Petition is filed in consonance with the Order dated 10th June,

2020 passed in Company Application bearingC.A.(CAA)/994/MB.IV/2020 of this Tribunal.

7. The Learned Counsel for the Petitioner Companies further submits the rationale for the proposed Scheme of Arrangement between Giftease

Technologies Private Limited and Cybage Software Private Limited and their respective shareholders is as under:

â?¢ Presently, Demerged Company has two separate businesses i.e. businesses of Ecommerce and Retail Sales and Sale of Food and Confectionary.

â?¢ Demerged Company proposes to demerge its Ecommerce and Retail Sales Business into the Resulting Company. The transfer and vesting by

way of a demerger shall achieve the following benefits for the Demerged Company and the Resulting Company:

o Each of the business activities carried out by the Demerged Company is distinct and diverse in its business characteristics.

o The business models and market of the Ecommerce and Retail Sales Business is at different stage of maturity with a different risk and return profile

as well as capital and operational requirement when compared to Sale of Food and Confectionary Business. Accordingly, it is prudent to segregate the

Ecommerce and Retail Sales Business into the Resulting Company to maximize the shareholder value. The segregation is expected to enable the

Ecommerce and Retail Sales Business to be carried out with greater specialization and focus for sustained growth.

o The transfer and vesting of Ecommerce and Retail Sales Undertaking into the Resulting Company would be in the best interests of the shareholders,

creditors and the employees of the Demerged Company as it would result in enhanced value for shareholders and allow focused strategy in operation

of the Ecommerce and Retail Sales Business and Sale of Food Confectionary Business respectively.

8. The swap ratio post sanctioning of scheme as captured in the modified Scheme (Annexure B)is as follows:

â?? 14.1 Upon the effectiveness of the Scheme, in consideration of the Demerger, the transfer and vesting of the Demerged Undertaking in the

Resulting Company pursuant to this Scheme, the Resulting Company shall, without any further act or deed, issue and allot equity shares in the

Resulting Company to each equity shareholder of the Demerged Company whose name is recorded in the register of members of the Demerged

Company on the Record Date or to their respective heirs, executors, administrators or other legal representatives or the successors-in-title as the case

may be, in the following ratio (the â??Share Entitlement Ratioâ??);

â??11 (Eleven) equity shares of Cybage of INR 10/- fully paid up for every 16 (Sixteen) equity shares of Giftease of INR 10/- each fully

paid upâ??

9. The scheme entails the details of remaining business etc at clause 17, the same is extracted below:

â??17.1 The Remaining Business of the Demerged Company and all assets, liabilities, incentives, rights and obligations pertaining thereto shall

continue to be vested in and managed by the Demerged Company in the manner as provided below.

17.2 All legal and other proceedings including any insurance claims by or against the Demerged Company under any statute, whether pending on the

Appointed Date or which may be instituted in future, whether or not in respect of any matter arising before the Effective date and relating to the

Remaining Business of the Demerged Company (including those relating to any property, right, power, liability, obligation or duty, of the Demerged

Company in respect of the Remaining Business of the Demerged Company) shall be continued and enforced by or against the Demerged Company.

10. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, has filed its report dated11th August 2020 before this Tribunal

inter alia stating therein that save and except as stated in paragraph IV (a) to (g)of the said report, it appears that the Scheme is not prejudicial to the

interest of shareholders and public. In paragraph IV of the said report, the Regional Director has stated that:

a) In addition to compliance of AS-14 (IND AS-103), the Transferee Company 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.

b) As per Part-I-Definitions Clause 2(2.2, 2.8 & 2.12) of the Scheme.

â??Appointed Dateâ?? means 1st day of April 2019.

â??Effective Dateâ? means the last of the dates on which the certified copies of the orders sanctioning this Scheme, passed by the National

Company Law Tribunal at Mumbai, are filed with the Registrar of Companies, Pune by the Demerged Company and the Resulting Company

collectively.

â??Record Dateâ? means the date to be fixed by the Board of Directors of the Demerged Company, in consultation with the Resulting

Company, for the purpose of determining the members of the Demerged Company to whom new shares in the respective Resulting Company

will be allotted under the Scheme.

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 Honâ??ble Tribunal taking into account its inherent powers.

Further, the Petitioners may be asked to comply with the requirements and clarified vide circular. F. No.7/ 12/ 2019/ CL-I dated

21.08.2019 issued by the Ministry of Corporate Affairs.

c) The Honâ??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(1) read with subsection (3) to (5) of Section 230 of

the Act and the Minutes thereof are duly placed before the Tribunal.

d) Honâ??ble NCLT may kindly direct the petitioners to file an affidavit to the extent that the Scheme enclosed to Company Application &

Company Petition are one and same and there is no discrepancy / any change/ changes are made, for changes if any, liberty be given to

Central Government to file further report if any required;

e) The Petitioners under provisions of section 230(5) of the Companies Act, 2013 have to serve notices to concerned authorities which are likely to be affected by Amalgamation. Further, the approval of the scheme by this Honâ??ble Tribunal may not deter such authorities to

deal with any of the issues arising after giving effect to the scheme. The decision of such Authorities is binding on the Petitioner

Company(s).

f) As regards Part-II-Clause 16(16.1 & 16.2) of the Scheme (Amendment to Memorandum of Associations of the Resulting Company)Upon

the Scheme becoming effective, the Object Clause of Memorandum of Association of Resulting Company will be altered. In this regard it is

submitted that Honâ??ble Tribunal may kindly direct the petitioner to comply with provisions of section 13 of the Companies Act, 2013 and

to file necessary e forms with ROC Pune with requisite filing fee.

g) In view of the observation raised by the ROC Pune, mentioned at para 18 above Honâ??ble NCLT may pass appropriate orders/ orders

as deem fit

18. Status of ROC report:

Observation of the ROC, Pune as under:-

As per record available in this office, the Transferor Company and Transferee Company both are neither vanishing nor scam related

company.

Upon perusal of the Scheme filed it is observed that the companies under examination have unsecured creditors, but no details pertaining to

the meeting of unsecured creditors has been furnished by the Company.

In view of the above the matter may be decided on merits.

11. In response to the observations made by the Regional Director, the Learned Counsel on behalf of the Petitioner Companies clarifying and

undertaking as follows:

a) As far as observations made in paragraph IV (a) of the report of Regional Director is concerned, the Petitioner Companies through its Counsel

undertakes that in addition 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), to the extent applicable.

b) As far as observations made in paragraph IV (b) of the report of Regional

Director is concerned, the Petitioner Companies through its Counsel

submits that the Appointed Date of the Scheme is April 1, 2019, which is in compliance with Section 232(6) of the Companies Act, 2013 and the

Scheme shall be deemed to be effective from such Appointed Date. Further the Scheme is in compliance of Circular No. F. No.7/ 12/ 2019/ CL-I

dated 21.08.2019 of the Ministry of Corporate Affairs as the justification for filing the scheme beyond a period of a year from the Appointed Date is

mentioned under Clause 2.2 of the Scheme and thesame is not against Public Interest.

c) As far as observations made in paragraph IV (c) of the report of Regional Director is concerned, the Petitioner Companies through its Counsel

states that, as per the order of thisTribunal, the meetings of the equity shareholders of the Petitioner Companies were held on Friday, 31st July

2020and the scheme was approved unanimously by the members as per Section 230(6) of the Act in meetings duly held in terms of Section 230(1)

read with sub section (3) to (5) of Section 230 of the Act. Further, the Petitioner Companies through its Counsel states that there are no secured

creditors in the Petitioner Companies and therefore the question of sending notices to secured creditors does not arise. Further, the Scheme is an

arrangement between the Petitioner Companies and their respective shareholders and there is no diminution of any liability towards any unsecured

creditor of the Petitioner Companies. Accordingly, the Tribunalhad granted dispensation from conducting meeting of creditors of Petitioner Companies

and had directed to send notices to the unsecured creditors of the Petitioner Companies.

d) As far as observations made in paragraph IV (d) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel

confirm and undertake that the Scheme enclosed to the Company Application and Company Petition is one and the same and there is no discrepancy

or deviationin the said Scheme.

e) As far as observations made in paragraph IV (e) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel

states that as per the order of this Tribunal the Petitioner Companies have served notices under section 230(5) of the Companies Act 2013 upon all the

regulatory authorities which are likely to be affected by said the Scheme of

Arrangement. The approval of the Scheme by this Tribunal may not deter

such authorities to deal with any issues arising after giving effect to the Scheme. The decision of such authorities is binding on the Petitioner

Companies.

f) As far as observations made in paragraph IV (f) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel

undertakes to comply with the provisions of Section 13 of the Companies Act 2013 and file necessary e-forms with ROC Pune with requisite filing

fees.

g) As far as observations made in paragraph IV (g) of the Report of Regional Director is concerned, the Petitioner Companiesthrough its Counsel

states thatthe Scheme is an arrangement between the Petitioner Companies and their respective shareholders and there is no diminution of any liability

towards any unsecured creditor of the Petitioner Companies. Accordingly, the Tribunal had granted dispensation from conducting meeting of creditors

of Petitioner Companies and had directed to send notices to the unsecured creditors of the Petitioner Companies. The Petitioner Companies through

its Counsel submits that copy of compliance report in lieu of affidavit of service along with proof of notice sent to unsecured creditors was filed with

the Tribunal on 22nd July 2020. Further, none of the unsecured creditors have come forward with any representation.

12. The observations made by the Regional Director have been reproduced in Para10 above. The clarifications and undertakings given by the Learned

Counsel on behalf of the Petitioner Companies have been explained at para 11 above. The clarification and undertaking of the Petitioner Companies is

accepted by this Tribunal.

13. Learned Counsel appearing on behalf of the Petitioner Companies further states that the Petitioner Companies have complied with all

requirements as per directions of this Tribunal and they have filed necessary affidavits of compliance. Moreover, the Petitioner Companies undertake

to comply with all statutory requirements if any, as required under the Companies Act, 2013 and the Rules made there under whichever is applicable.

The said undertakings given by the Petitioner Companies are accepted.

14. Having thus repelled the last vestiges of challenge, we notice from the material on record that the Scheme appears to be fair and reasonable and

does not violate any provisions of law and is not contrary to public policy or public interest. In the absence of anything inherently abhorrent in the

Scheme, we see no reason why the Scheme should not have the imprimatur of this Tribunal.

15. Since all the requisite statutory compliances have been fulfilled, C.P.(CAA)/997/MB.IV/2020ismade absolute interms of of the Petition mentioned

therein.

16. The Scheme is herebysanctioned, and the Appointed Date is fixed is the Opening Hours of Business on 1stApril 2019 as defined in Clause 2.2 of

the Scheme.

17. The Scheme is hereby sanctioned, and the Appointed Date is fixed is the Opening Hours of Business on 1stApril 2019 as defined in Clause 1.2 of

the Scheme. The Transferor Company be dissolved without winding up.

18. The Petitioner Companies are directed to file a certified copy of this order along with a copy of the Scheme with the concerned Registrar of

Companies, electronically in e-Form INC-28 within 30 days from the date of receipt of order duly certified by the Deputy /Assistant Registrar of this

Tribunal.

19. The Petitioner Companies are directed to lodge a certified copy of this order along with a copy of the Scheme, with the concerned Superintendent

of Stamps, for the purpose of adjudication of stamp duty payable, if any, on the same within 60 days from the date of receipt of the order.

20. All concerned Regulatory authorities to act on a copy of this order duly certified by the Deputy/Assistant Registrar of this Tribunal along with the

copy of the Scheme.

21. Ordered accordingly. Pronounced in open court today.

