
(2022) 02 NCLT CK 0083

In the National Company Law Tribunal

Case No : I.A. (IB) No.73 of 2022 in C.P. (IB) No.1348/KB/2019

Dekon Enterprises Private Limited

APPELLANT

Vs

Anil Anchalia

RESPONDENT

Date of Decision : 25-02-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 60(5)
Central Goods and Service Tax Act, 2017 — Section 81
Income Tax Act, 1961 — Section 28, 41, 43B, 79, 115JB, 170, 281

Citation : (2022) 02 NCLT CK 0083

Hon'ble Judges : Rohit Kapoor, Member J; Balraj Joshi, Member, T

Bench : Division Bench

Advocate : Manju Bhuteria, Shreya Choudhary, Anil Anchalia

Final Decision : Disposed Of

Judgement

Rohit Kapoor, Member (Judicial)

1. The instant petition has been filed under Section 230(6) read with Section 232(3) of the Companies Act, 2013 ("Act") for sanction of the Scheme of Amalgamation of Prominent Tradecomm Private Limited, being the Petitioner No. 2 above named ("Transferor Company No. 1" or "Petitioner No.2") and Golf Enclave Private Limited, being the Petitioner No. 3 above named ("Transferor Company No. 2" or "Petitioner No.3") with Amarnath Vanijya Private Limited, being the Petitioner No. 1 above named ("Transferee Company" or "Petitioner No.1") whereby and whereunder the Transferors Companies are proposed to be amalgamated with the Transferee Company from the Appointed Date, viz 01.04.2019 in the manner and on the terms and conditions stated in the said Scheme of Amalgamation ("Scheme").

2. The Petition has now come up for final hearing. Counsel for the Applicants submits as follows:-

(a) The Scheme was approved unanimously by the respective Board of Directors

of the Petitioner Nos. 1, 2 and 3 at their meetings held on 08.07.2019 further on 21.02.2020.

(b) The circumstances which justify and/or have necessitated the Scheme and the benefits of the same are, inter alia, as follows:-

I. In order to integrate the fields of activities of the companies and for improving overall business efficiency, to streamline administration of the Companies and in the overall interest of future growth and diversification of the business of the Companies the present Scheme is proposed to amalgamate the Transferors Companies with the Transferee Company. The Scheme will be complimentary to the companies for their mutual benefit and interest.

II. The proposed Scheme will result in economies of scale, reduction in overheads and other expenses, and reduction in administrative procedural work, elimination of duplication of work, better and more productive and effective utilization of the combined resources of all the companies and will enable the amalgamated companies to effect internal economies and optimize productivity.

III. The said Scheme will result in optimum growth and development of the business of the companies concerned and exploration of the potential thereof. The said Scheme will enable the undertaking and business of all the Companies to contain greater facilities for raising capital, securing and conducting trade on favorable terms and other benefits.

IV. The said Scheme will enable the companies concerned to rationalize and streamline their management, business and finances and will pave way for better, more productive and economical control of the running of the operations.

V. The business of all the companies will be carried on more economically and profitably under the Scheme.

VI. The said Scheme will contribute in furthering and fulfilling the objects of all the companies and in the growth, expansion and development of their business.

VII. The said Scheme will have beneficial results for the companies their shareholders, employees and all concerned.

(c) The Statutory Auditors of the Petitioner Nos.1, 2 and 3 have by their certificates dated 24.08.2019 confirmed that the accounting treatment in the Scheme is in conformity with the accounting standards prescribed under Section 133 of the Companies Act, 2013.

(d) No proceedings are pending under Sections 210 to 227 of the Companies Act, 2013 against the Petitioner(s).

(e) The exchange ratio of shares in consideration of the Amalgamation has been fixed on a fair and reasonable basis and on the basis of the Report thereon of Mr. Surendra Kumar Agarwal, Registered Valuer.

(f) The shares of the Petitioner Nos. 1, 2 and 3 are not listed in any stock

exchanges.

(g) By an order dated 05.01.2021 in Company Application (CAA) No. 348/KB/2020, this Tribunal made the following directions with regard to meeting(s) of shareholders and creditors under Section 230(1) read with Section 232(1) of the Act:-

(i) Meeting(s) dispensed: Meeting(s) of the Equity Shareholders of the Petitioner Nos. 1, 2 and 3, were dispensed with in view of all such shareholders having respectively given their consent to the Scheme by way of affidavits. There are no secured and unsecured creditors in any of the petitioner companies.

(ii) Meeting directed to be held: NIL

(h) Consequently, the Petitioner(s) presented the instant petition for sanction of the Scheme. By an order dated 05.04.2021 the instant petition was admitted by this Tribunal and fixed for hearing on 21.05.2021 upon issuance of notices to the Statutory / Sectoral Authorities and advertisement of date of hearing. Upon application by the petitioners being CA No. 122/KB/2021 this Tribunal by an order dated 21.09.2021 provided extension to the petitioners to comply with the order dated 05.04.2021 and fixed for hearing on 18.11.2021 upon issuance of notices to the Statutory / Sectoral Authorities and advertisement of date of hearing. In compliance with the said order dated 21.09.2021, the Petitioner(s) have duly served such notices on the Regional Director, Eastern Region, Ministry of Corporate Affairs, Kolkata, the Registrar of Companies, West Bengal, the Income Tax Authorities, and the Official Liquidator, High Court, Calcutta on 01.11.2021. The Petitioner(s) have also published such advertisements once each in the "Business Standard", English newspaper and "Aajkal", Bengali newspaper, in their respective issues dated 01.11.2021. An affidavit of compliance in this regard has also been filed by them on 01.11.2021.

(i) All statutory formalities requisite for obtaining sanction of the Scheme have been duly complied with by the Petitioners. The Scheme has been made bona fide and is in the interest of all concerned.

3. Pursuant to the said advertisements and notices the Regional Director, Ministry of Corporate Affairs, Kolkata ("RD") and the Official Liquidator, High Court, Calcutta, have filed their representations before this Tribunal.

4. The Official Liquidator has filed his report dated 11.11.2021 and concluded as under:-

"That the Official Liquidator on the basis of information submitted by the Petitioner Companies is of the view that the affairs of the aforesaid Transferors Companies do not appear to have been conducted in a manner prejudicial to the interest of its members or to public interest as per the provisions of the Companies Act, 1956/the Companies Act, 2013 whichever is applicable."

5. The RD has filed his reply affidavit dated 23.12.2021 ("RD affidavit") which

has been dealt with by the Petitioner(s) by their Rejoinder affidavit dated 27.12.2021 ("Rejoinder"). The observations of the RD and responses of the Petitioner(s) are summarized as under:-

(a) Paragraph No. 2(a) of RD Affidavit:

".....that on examination of the report of the Registrar of Companies, West Bengal it appears that no complaint and/or representation has been received against the proposed Scheme of Amalgamation. The petitioner companies are also up-dated in filing their statutory returns."

Paragraph No. 4 of Rejoinder:

".....the petitioners have no comments to offer."

(b) Paragraph No. 2(b) of RD Affidavit:

"Appointed Date is 1st April 2019. In terms of the Circular no. 09/2019 dated 21.08.2019 of the Ministry of Corporate Affairs, "where the 'appointed date' is chosen as a specific calendar date, it may precede the date of filing of the application for scheme of merger/ amalgamation in NCLT. However, if the appointed date is significantly ante dated beyond a year from the date of filing. The justification for the same would have to be specifically brought out in the scheme and it should not be against public interest" It is not ascertainable from the documents provided by the Applicant whether the application for the scheme was filed before Hon'ble Tribunal within a year from 1st April 2019. If the application for the scheme was filed with Hon'ble Tribunal after more than one year from the appointed date, Hon'ble Tribunal may kindly direct the Applicant to bring out the justification for the appointed date being more than one year before date of filling of the application for the scheme, in the scheme according to the Circular."

Paragraph No. 5 of Rejoinder:

".....the Company Application being CA (CAA) No. 348/KB/2020 was filed on 30.09.2019 which is within one year from appointed date 01.04.2019. A copy of the forwarding letter bearing acknowledgement receipt of the Hon'ble NCLT, Kolkata Bench is annexed hereto....."

(c) Paragraph No. 2(c), 2(d) and 2(e) of RD Affidavit:

"(c) Petitioner company should undertake to comply with the provisions of section 232(3)(i) of the Companies Act, 2013 through appropriate affirmation.

(d) That the Transferee Company should be directed to pay applicable stamp duty⁷ on the transfer of the immovable properties from the Transferor Companies to it."

(e) In compliance of Accounting Standard-14 or IND-AS 103, as may be applicable, 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 or IND-AS-8 etc.”

Paragraph No. 6 of Rejoinder:

“.....the petitioners are providing an affidavit of undertaking regarding the said objections, which is annexed hereto.....”

(d) Paragraph No. 2(f) of RD Affidavit:

“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 Companies Act 2013 in meeting duly held in terms of section 230(1) read with sub-section (3) to (5) of section 230 of the said Act and the Minutes thereof are duly placed on record.”

Paragraph No. 7 of Rejoinder:

“.....the meetings of members have been dispensed with by this Hon’ble Tribunal by order dated 05.01.2021 in view of affidavit of consents provided by all the members of all the petitioner companies. There are no secured or unsecured creditors in the petitioner companies.”

(e) Paragraph No. 2(g) of RD Affidavit:

“The Hon’ble Tribunal may kindly direct the Petitioners to file an affidavit to the extent that Scheme enclosed to the Company Application and Company Petition are one and same and there is no discrepancy or no change is made.”

Paragraph No. 8 of Rejoinder:

“.....it is pertinent to mention that the Petitioners inadvertently filed a copy of the scheme having some typographical error with the application and petition which was later on rectified by an order dated 21.09.2021 in CA No. 122/KB/2021. A copy of the said order dated 21.09.2021 is annexed hereto.....”

(f) Paragraph No. 2(h) of RD Affidavit:

“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 the amalgamation or arrangement. Further, the approval of the scheme by the Hon’ble Tribunal may not deter such authorities shall be binding on the Petitioner Company (s) concerned.”

Paragraph No. 9 of Rejoinder:

“.....the petitioners have already served notices under Section 230(5) to the statutory authorities as directed by this Hon’ble Tribunal in order dated 05.01.2021 and 05.04.2021 further extended by order dated 21.09.2021.”

(g) Paragraph No. 2(i) of RD Affidavit:

“It is submitted that as per instructions to the Ministry of Companies Affairs, New

Delhi, a copy of the scheme was forwarded to the Income Tax Department on 09/02/2021 for their views/ observation in the matter. However the same is still awaited."

Paragraph No. 11 of Rejoinder:

".....the petitioners have no comments to offer."

6. Heard submissions made by the Ld. Counsel appearing for the Petitioner and RD. Upon perusing the records and documents in the instant proceedings and considering the submissions, we allow the petition and make the following orders:-

(a) the Scheme of Amalgamation mentioned in paragraph 1 of the petition, being Annexure "A-1" hereto, read with Annexure "A-2" of Company Application No. 122/KB/2021, be and is hereby sanctioned by this Tribunal to be binding with effect from 1st day of April, 2019 ("Appointed Date") on Prominent Tradecomm Private Limited("Transferor Company No. 1") and Golf Enclave Private Limited("Transferor Company No. 2") are going to merge into Amarnath Vanijya Private Limited("Transferee Company"), their respective shareholders and all concerned;

(b) all the properties, rights and interest of the 'Transferors Companies' be transferred to and be vested without further act or deed in Transferee Company and accordingly the same shall pursuant to Section 232 of the Companies Act, 2013 be transferred to and be vested in Transferee Company for all the estate and interest of 'Transferors Companies' but subject nevertheless to all Charges now affecting the same;

(c) all the liabilities and duties of 'Transferors Companies' 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 become the liabilities and duties of 'Transferee Company';

(d) all proceedings and/or suits and/or appeals now pending by or against 'Transferors Companies' be continued by or against 'Transferee Company';

(e) leave is granted to the Petitioner(s) to file the Schedule of Assets of the 'Transferors Companies' within sixty (60) days from the date of receiving a copy of this order;

(f) Leave is given to the 'Transferee Company' to allot without further application to such members of the 'Transferors Companies' as have not given such notice of dissent as is required by Clause 11 of the scheme of amalgamation herein the shares in the transferee company to which they are entitled under the said scheme of amalgamation;

(g) The 'Transferors Companies' and 'Transferee Company' within 30 days of the date of receipt of this order shall cause a certified copy of this order to be delivered to the Registrar of Companies, West Bengal for registration and on such

certified copy being so delivered the 'Transferors Companies' shall be dissolved and the Registrar of Companies, West Bengal shall place all documents relating to the 'Transferors Companies' and registered with him on the file kept by him in relation to the Transferee Company and the files relating to the said companies shall be consolidated accordingly.

7. The Petitioner(s) shall supply legible print out of the scheme and schedule of assets in acceptable form to the department and the department will append such printout, upon verification to the certified copy of the order.

8. Company Petition (CAA) No. 35/KB/2021 is disposed of accordingly.

9. Urgent Photostat certified copy of this order, if applied or, be supplied to the parties, subject to compliance with all requisite formalities.