(2023) 03 NCLT CK 0022

In the National Company Law Tribunal

Case No : Company Petition (CAA) No. 110/ KB /2022 Connected with Company Application (CAA) No. 30/KB/2022

Disha Paint Private Limited & Ors Vs

Date of Decision : 02-03-2023

Acts Referred:

Companies Act, 2013 — Section 133, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 230, 230(1), 230(6), 232, 232(1), 232(3), 232(3)(i), 232(4)

Citation : (2023) 03 NCLT CK 0022

Hon'ble Judges : Bidisha Banerjee, Member (J);Balraj Joshi, Member (T)

Bench : Division Bench

Advocate : Neha Somani, Harihara Sahoo

Final Decision : Disposed Of

Judgement

Balraj Joshi, Member (Technical):

1. This Court is cingregated through hybrid mode.

2. 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 Disha Paint Private Limited, being the Petitioner No. 1 ("Transferee Company"), and Berry Energy Private Limited, being the Petitioner No. 2 ("Transferor Company No. 1"), and Evergreen Stainless Private Limited, being the Petitioner No. 3 ("Transferor Company No. 2"), Ragini Merchants Private Limited, being the Petitioner No. 4 ("Transferor Company No. 3") and Royal valley Ispat India Private Limited, being the Petitioner No. 5 above named ("Transferor Company No. 4") whereby and whereunder the Transferor Companies are proposed to be amalgamated with the Transferee Company from the Appointed Date, that is 1st April, 2019 in the manner and on the terms and conditions stated in the said Scheme of Amalgamation (“Scheme”). The Transferee Company is an NBFC bearing registration number B-05.04523. The Transferor Company No. 3/ Petitioner No.4 is an NBFC bearing registration number B-05.03631.

3. The Petition has now come up for final hearing. The Ld. Authorized Representative for the Petitioners submits as follows: -

(a) The Scheme was approved unanimously by the respective Board of Directors of the Petitioner Nos. 1,2,3,4 and 5 at their meetings held on 17.12.2019, 18.12.2019 and 20.12.2019 respectively.

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

i. The Scheme envisages amalgamation of Transferor Company into Transferee Company, resulting in consolidation of the business in one entity and strengthening the position of the merged entity, by enabling it to harness and optimize the synergies of the applicant companies. Accordingly, it would be in the best interests of the shareholders of the Applicant Companies.

ii. Further, the Applicant Companies have some common shareholders therefore it would be beneficial for the Transferor Companies to merge with the Transferee Company into a single entity and thus strengthen the combined position of the merged entity.

iii. The amalgamation will result in prevention of cost duplication and the resultant operations would be substantially cost-efficient. Consequently, the Transferee Company will offer a strong financial structure and facilitate resource mobilization and achieve better cash flows. The synergies created by the amalgamation would increase the operational efficiency and integrate business functions.

iv. The amalgamation will provide an opportunity to leverage combined assets and build a stronger sustainable business. Specifically, the merger will enable optimal utilization of existing resources and provide an opportunity to fully leverage assets, capabilities, experience and infrastructure of the companies. The amalgamation will also reduce the managerial overlaps involved in operating different entities, ease and increase operational and management efficiency, integrate business functions. v. Greater efficiency in cash management of the Transferee Company and unfettered access to cash flow generated by the combined businesses which can be deployed more efficiently to fund organic and inorganic growth opportunities to maximize shareholder value.

(c) The Statutory Auditor of the Petitioner No. 1 i.e. Transferee Company has by their certificate dated 07.02.2022 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 Petitioners.

(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

Manish Gadia, Registered Valuer.

(f) The shares of the Petitioner Companies are not listed on any stock exchange.

(g) By an order dated 12.05.2022 in Company Application (CAA) No. 30/KB/ 2022, this Tribunal made the following directions with regard to meetings of shareholders and creditors under Section 230(1) read with Section 232(1) of the Act: -

(i) Meetings dispensed: Meetings of the Equity Shareholders and Creditors of the Petitioner Companies were dispensed with under Section 230 (1) read with Section 232 (1) of the Act.

(h) Consequently, the Petitioners presented the instant petition for sanction of the Scheme. By an order dated 02.09.2022 the instant petition was admitted by this Tribunal and fixed for hearing on 12.10.2022 upon issuance of notices to the Statutory Authorities and advertisement of date of hearing. In compliance with the said order dated 02.09.2022 the Petitioners have duly served such notices on the Central Government through Regional Director, Eastern Region; Registrar of Companies, West Bengal; Reserve Bank of India; Official Liquidator and Income Tax Department by way of hand delivery and Speed Post on 06.09.2022 and 07.09.2022 and have also published such advertisements once each in the “Business Standard” and “Aajkaal” in their issue dated 30.09.2022. An affidavit of compliance in this regard has also been filed by them on 10.10.2022.

SN

REGULATORY AUTHORITIES

DATE OF SERVICE

RELEVANT ANNEXURE OF THE AFFIDAVIT OF SERVICE

RELEVANT PAGE NO. OF THE AFFIDAVIT OF

SERVICE

BY HAND DELIVERY (THROUGH SPECIAL MESSENGER)

1.

Regional Director (ER) MCA Kolkata

06-09-2022

A

7

2.

Registrar of Companies

06-09-2022

A

8

3.

Income Tax Authorities

06-09-2022

A

9

4.

Official Liquidator

06-09-2022

A

16

BY POSTAL DELIVERY

3.

Income Tax Authorities

07-09-2022

A

10

5.

Reserve bank of India

07-09-2022

A

13

NEWS PAPER PUBLICATION

1.

Business Standard

30-09-2022

B

17

2.

Aajkaal

30-09-2022

B

18

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

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

5. The Official Liquidator has filed his report dated 17.10.2022 and concluded as under: -

"9. That the Official Liquidator on the basis of information submitted by the Transferor Companies is of the view that the affairs of the aforesaid Transferor 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 erstwhile Companies Act, 1956/the Companies Act, 2013, whichever is applicable.

6. The Regional Director (ER) has filed his reply affidavit dated 10.10.2022 ("RD affidavit") which has been dealt with by the Petitioners by their Rejoinder affidavit dated 10.02.2023 ("Rejoinder"). The observations of the RD and responses of the Petitioners are summarized as under: -

Para 2(a) of RD Affidavit:

That it is submitted that as per available record, it appears that no complaint and/ or representation has been received against the proposed Scheme of Amalgamation. Further, all the petitioner companies are also up-dated in filing their Financial Statements and Annual Returns for the financial year 31/03/2021.

Para 3(a) of Rejoinder:

With reference to paragraph 2(a) of the said affidavit, it is submitted that the same is a matter of record and may be considered as such by the Hon'ble Tribunal.

Para 2(b) of RD Affidavit:

It is submitted that the Valuation report for determination of fair equity share exchange ratio for the proposed Scheme obtained on 05/02/2020 from Shri Neeraj Kumar Sureka, Registered Valuer, whereas the Board of Directors of the respective petitioner companies at their meeting held on 20/12/2019 (Transferee Company) and on 17/12/2019, 18/12/2019, 18/12/2019 and 18/12/2019 (Transferor Companies) approved the said proposed Scheme. Therefore, it is not clear how the fair exchange ratio of equity shares was determined for the purpose of merger when the valuation report received on 05/02/2020 which is subsequent to the date of Board Meetings as stated above. The Registered Valuer himself while issuing valuation report dated 05/02/2020 has, inter alia, stated referring the engagement letters dated 27/01/2020. Hence the Scheme appears defective in respect of fair exchange ratio of equity shares. Hon'ble Tribunal may peruse the same and issue order as deemed fit and proper.

Para 2(c) of RD Affidavit:

The Appointed Date 1st April 2019 as stated in the Scheme was approved by the Board of Directors of the respective Petitioner Companies at their meeting held on 20/12/2019 (Transferee Company) and on 17/12/2019, 18/12/2019, 18/12/2019 and 18/12/2019 (Transferor Companies). The fair equity shares exchange ratio for the proposed Scheme with the said Appointed Date 1st April 2019 was based on the Financial Statements as at 31/03/2019 of the respective petitioner Companies as the same was also available at the time of approval of the Scheme. However, subsequently by resolution passed by the Board of Directors of the respective Petitioner companies at their meeting held on 21/12/2021 (Transferee Company) and on 22/11/2021, 20/12/2021, 24/12/2021 and 11/01/2022 (Transferor Companies), it is stated that the Appointed Date in the proposed Scheme of Amalgamation shall be 1st April, 2021 in place of 1st April, 2019. Since the approval of proposed Scheme originally was made without considering the valuation report from Registered Valuer (Date of Valuation report was 05/02/2020) as stated at para (b) above and there are lots of changes/ variation in the financial state of affairs of the respective petitioner companies since 31/03/2019, as it appears from the financial statements of the respective petitioner companies filed with Registrar of Companies, Hon'ble Tribunal may direct the Petitioner companies to obtain a fresh/revised valuation report from Registered Valuer for determining fair equity share exchange ratio for the proposed Scheme keeping in view the Appointed Dale shall be 1st April, 2021 in the Scheme and after approval the same at respective Board meeting of the Petitioner companies, file the same for further consideration.

Para 3(b) of Rejoinder:

With reference to paragraphs 2(b) and 2(c) of the said affidavit, it is stated that pursuant to the observations made by the Learned Regional Director in the said affidavit, the Petitioners have obtained a fresh valuation report dated January 20, 2023 on the exchange ratio of shares, from CA Manish Gadia, Registered Valuer, which was placed before the board of all the petitioner companies and was approved, along with the revised Scheme that had the new exchange ratio of shares and the Appointed Date being 1st April, 2021. The revised Scheme, valuation report dated January 20, 2023 and the certified copies of the board resolutions of the Petitioners approving the revised Scheme and the fresh valuation report are annexed hereto and marked as Annexure-A.

Para 2(d) of RD Affidavit:

It is submitted that the Transferor Company M/s Ragini Merchants Private Limited and Transferee Company M/s Disha Paint Private Limited are registered with RBI as NBFC. But no "NOC" from RBI has been provided in the matter.

Para 3(c) of Rejoinder:

With reference to paragraph 2(d) of the said affidavit, it is stated that the Transferor company, Ragini Merchants Private Limited and the Transferee company Disha Paint Private Limited are registered Non-Banking Financial Companies. The Petitioner Companies had submitted the Scheme of Arrangement to the Reserve Bank of India for its approval on 5th March, 2020, copy of which is annexed hereto and marked as Annexure-B, which was much before filing the Application with the Hon'ble NCLT. Thereafter, the Reserve Bank of India bad been regularly sending queries to the companies to which the companies had also replied. The Application was filed on 16th March, 2022 with the Hon'ble NCLT. Further, notice of the Application in Form CAA-3, along with the Scheme, Valuation Report and other necessary documents was served by hand to the Reserve Bank of India on 13th May, 2022 pursuant to the order of Hon'ble National Company Law Tribunal dated 12th May, 2022 in C.A. (CAA) No. 30/ KB/ 2022. Thereafter, a complete set of merger petition has been served by speed-post to the Reserve Bank of India on 7th September, 2022 pursuant to the order of Hon'ble National Company Law Tribunal dated 2nd September, 2022 in C.P. (CAA) No. 110/ KB/ 2022. However, despite service of the Petition and all relevant documents sought, the Reserve Bank of India has not made any objection to the proposed Scheme of Amalgamation.

Para 2(e) of RD Affidavit:

The Petitioner Companies should be directed to provide list/ details of Assets, if any, to be transferred from the Transferor Companies to the Transferee Company upon sanctioning of the proposed Scheme.

Para 3(d) of Rejoinder:

With reference to paragraph 2(e) of the said affidavit, it is stated that the schedule of assets shall be submitted to the Registry for obtaining the certified copy of the final order.

Para 2(f) of RD Affidavit:

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

Para 3(e) of Rejoinder:

With reference to paragraph 2(f) of the said affidavit, I undertake to comply with the provisions of 232(3)(i) of the Companies Act, 2013.

Para 2(g) of RD Affidavit:

That the Transferee Company should be directed to pay applicable stamp duty on the transfer of the immovable properties from the Transferor Companies to it.

Para 3(f) of Rejoinder:

With reference to paragraph 2(g) of the said affidavit, it is stated that the Transferee Company shall pay the applicable stamp duty, if applicable, on the transfer of immovable properties from the Transferor Company to it.

Para 2(h) of RD Affidavit:

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

Para 3(g) of Rejoinder:

With reference to Paragraph 2(h) of the said affidavit, it is stated that the Scheme of Amalgamation filed with the Company Application and the Company Petition is one and same and there is no discrepancy.

Para 2(i) of RD Affidavit:

It is submitted that as per instructions of the Ministry of Corporate Affairs, New Delhi, a copy of the scheme was forwarded to the Income Tax Department on 27/05/2022 for their views/ observation in the matter but the same is still awaited.

Para 3(h) of Rejoinder:

With reference to paragraph 2(i) of the said affidavit, it is submitted that the same is a matter of record and may be considered as such by the Hon'ble Tribunal.

7. Heard submissions made by the Ld. Authorized Representative appearing for the Petitioners and also by the authorized representative appearing on behalf of the RD(ER). Upon perusing the records and documents in the instant proceedings and considering the submissions, we allow the petition and make the following orders: -

i. The Scheme of Amalgamation mentioned in paragraph 1 of the Petition, being Annexure A, Disha Paint Private Limited, being the Petitioner No. 1 ("Transferee Company"), and Berry Energy Private Limited, being the Petitioner No. 2 ("Transferor Company No. 1"), and Evergreen Stainless Private Limited, being the Petitioner No. 3 ("Transferor Company No. 2"), Ragini Merchants Private Limited, being the Petitioner No. 4 ("Transferor Company No. 3") and Royal valley Ispat India Private Limited, being the Petitioner No. 5 above named ("Transferor Company No. 4") is hereby sanctioned by this Tribunal with Appointed Date being 1st April, 2019 and the same shall be binding on all the Equity Shareholders, Creditors of the Petitioner Companies and all concerned;

ii. All the property, rights and powers of the Transferor Company, including those described in the Schedule of Assets herein, be transferred from the said Appointed Date, without any further act or deed, to the Transferee Company, and, accordingly, the same shall pursuant to Section 232(4) of the Companies Act, 2013 be transferred to and vest in the Transferee Company for all the estate and interest of the Transferor Company therein but subject nevertheless to all charges now affecting the same, as provided in the Scheme;

iii. All the debts, liabilities and duties and obligations of the Transferor Company to be transferred from the said Appointed Date, without further act or deed, to Transferee Company and shall, the same shall pursuant to Section 232(4) of the Companies Act, 2013, be transferred to and become the debts, liabilities, duties and obligations of the Transferee Company;

iv. All the workmen and employees of the Transferor Companies shall be engaged by the Transferee Company, as provided in the Scheme. All the obligations/ liabilities of the Transferor Companies with regard to their workmen and employees shall be the responsibilities of the Transferee Company;

v. All proceedings and/or suit and/ appeals now pending by or against the Transferor Company shall be continued by or against Transferee Companies, as provided in the Scheme; and the sanctioning of the scheme by this tribunal shall not come in the way of any proceedings pending/ contemplated against any of the petitioner companies, for which the relevant records shall be preserved by the Transferee company who is any way responsible for attending to any such proceedings on behalf of the constituent companies.

vi. With effect from the Appointed Date and up to and including the Effective Date, all legal, arbitration, and tax assessment proceedings/appeals of whatsoever nature by or against the Transferor Companies pending and/or arising on or after the Appointed Date shall be continued and/or enforced by or against the Transferee Company. Any compounding/penalties/liabilities/taxes required to be done on behalf of the Transferor Companies for any violation of the Companies' Act shall be the responsibility of the Transferee Company. The Transferee Company shall also preserve the necessary records in respect of any such pending proceedings, at least till the culmination of such proceedings.

vii. The Transferee Company shall issue and allot shares to the shareholders of the Transferor Company, the shares in the Transferee Company in accordance with clause 14 of the Scheme;

viii. Upon the Scheme being effective, the Transferor Company shall stand dissolved without winding up;

ix. Leave is granted to the petitioners to file the Schedule of Assets and Liabilities of the Transferor Company within such time as this Bench may direct;

x. The Petitioners do each within thirty days of the date of the receipt of this order, cause a certified copy to be delivered to the Registrar of Companies for registration (Effective date).

8. The Petitioners shall supply legible print out of the scheme and schedule of assets in acceptable form to the Registry and the Registry will append such printout, upon verification to the certified copy of the order.

9. In case of any default, including in provisions of income tax in respect of transferred companies, the Income Tax Department, the ROC West Bengal, and all others statutory departments/authorities shall be at liberty to initiate appropriate proceedings against the transferee company which after the sanction of the scheme by this tribunal is in any case shall be responsible for the liabilities/ non-compliances of the transferee companies as well. The transferee company shall preserve the relevant records of the transferor companies in this regard.

10. Company Petition (CAA) No. 110/ KB /2022 Connected with Company Application (CAA) No. 30/KB/2022 is disposed of accordingly.

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