(2023) 12 NCLT CK 0033

In the National Company Law Tribunal

Case No : C.P. (CAA) 21/(MB)/2023

Essel Airport Infrastructure Privatelimited Vs

Date of Decision : 14-12-2023

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16
Companies Act, 2013 — Section 90, 230, 230(1)(b), 230(5), 232, 232(3)(i)

Citation : (2023) 12 NCLT CK 0033

Hon'ble Judges : K.R. Saji Kumar: Member (J);Madhu Sinha: Member (T)

Bench : Division Bench

Advocate : Hemant Sethi, Devanshi Sethi, Gaurav Jaiswal

Final Decision : Allowed

Judgement

Madhu Sinha Member (Technical)

1. Heard the learned counsel for the Petitioners. Neither any objector has come before the Tribunal to oppose the Petition and nor any party has controverted any averments made in the Petition.

2. CA No. 282 OF 2023 has been taken out by the Petitioners for amendment to the scheme. Post filing of the Petition, the Petitioners noticed that clause regarding treatment of Preference Shareholders of the Transferor Company No. 4 in the Scheme (which is within the jurisdiction of NCLT Hyderabad Bench) was missed out. Accordingly, the present Company Application has been taken out for amendment to the scheme by inserting the following clause:-

By inserting the following as clause No. 11A.

11.A ISSUE OF PREFERENCE SHARES

The Transferee Company shall issue to the Preference share-holder of Transferor Company No. 4, One (1) Preference share of Rs 10/- each fully paid up for One (1) Preference shares held in the Transferor Company No. 4 on the same terms and conditions.

3. Amendment is allowed as prayed. The revised amended Scheme is attached as

Annexure- A to the additional Affidavit dated 12th September 2023.

4. 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 In the matter of Scheme of Merger by Absorption of Essel Airport Infrastructure Private Limited, ("Transferor Company No.1" or "First Petitioner Company") and Raipur Water Supply Private Limited, the ("Transferor Company No.2" or "Second Petitioner Company") and Agrani Infrastructure Works Private Limited, the ("Transferor Company No.3") (within the jurisdiction of NCLT New Delhi Bench) and Dakshin Utilities Works Limited, ("Transferor Company No.4") (having jurisdiction with NCLT Hyderabad Bench) with Edisons Infrapower & Multiventures Private Limited, ("Transferee Company" or "Third Petitioner Company") and their respective shareholders ("the Scheme" or "this Scheme").

5. The Learned Counsel for the Petitioner Companies submits that the Petitioner Companies are having their registered offices situated in the State of Maharashtra, the jurisdiction for presenting the Petition falls within the jurisdiction of this Tribunal and the Transferor Company No.3 is having its Registered office in New Delhi and Transferor Company No.4 is having its Registered office in the State of Telangana , the jurisdiction for presenting the Petition falls withing the jurisdiction of NCLT New Delhi and Hyderabad respectively.

6. Petitioner Company No.1 and Petitioner Company No.2 (Transferor Companies) are wholly owned subsidiary of the Petitioner Company No.3 (Transferee Company)

7. The amalgamation is expected to yield the following benefits:

Rationale for the Scheme:

All the Petitioner Companies are under the same management. The management is of the opinion that the merger will lead to synergies of operations and more particularly the following benefits:

(a) The Transferors Companies are wholly owned subsidiaries of Transferee Company. With view to maintain simple corporate structure and climate duplicate corporate procedure it is desirable to merge and amalgamate all the undertakings of Transferor Companies with Transferee Company. Further the amalgamation would create economies in administrative and managerial costs.

(b) Since Transferor Companies are wholly owned subsidiary company of the Transferee Company and are owned managed and controlled by the same set of shareholders and belonging to the same Group, Scheme will not adversely affect the rights and interests of the shareholders. Further the creditors of the Transferee Companies will also not be affected by the Scheme as no compromise or arrangement with the creditors is envisaged in the Scheme.

8. The Petitioner Companies have approved the Scheme by passing Board Resolutions dated November 3, 2021 and have approached this Tribunal for sanctioning of the Scheme of Amalgamation.

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

10. The Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai has filed its Report dated 4th April 2023, inter alia, stating therein the observations on the Scheme as stated in paragraphs 2 (a) to (l) of the said Report. In response to the observations made by the Regional Director, the Petitioner Companies have filed reply affidavit-cum-rejoinder on 20th Octo-ber 2023. The observations made by the Regional Director and the clarifi-cations and undertakings given by the Petitioners are summarized in the table below:

Sr. No.

2(a)(i)

RD Report/Observations

That on examination of the report of the Registrar of Companies, Mumbai dated 28/11/2022 for Petitioner Companies (Annexed as Annexure A-1) that the Petitioner Companies fall within the jurisdiction of ROC, Mumbai. It is submitted that no complaint and /or representation regarding the proposed scheme of Amalgamation has been received against the Petitioner Companies. Further, the Petitioner Companies have filed Financial Statements up to 31/03/2021 The ROC has further submitted that in his report dated 12.01.2023 which are as under :-

That the ROC Mumbai in his report dated 12.01.2023 has also stated that No inquiry, inspection, investigations, prosecutions and complaint under CA, 2013 have been pending against the Petitioner Companies.

Response of the Peti-

tioner Companies

As regards the observation made in Paragraph 2

(a)(i) of the said Report is

concerned, it is submitted

that the observation

made by the ROC is

merely factual in nature

and no further response

is required to that extent.

2(a)(ii) (a)

Further ROC has mentioned as follows:-

a. Form GNL-1 has not filed by any of the Pe- titioner Company.

In so far as observations made in paragraph 2(a)

(ii) of the Report of the Regional Director is con- cerned, the Petitioners have filed Form GNL-1.

2(a)(ii) (b)

b. As per provisions of section 232(3)(i) of CA, 2013 where the transferor company is dis- solved, the fee, if any, paid by the trans- feror company on its authorized capital shall be set off against any fees payable by the transferee company on its author- ized capital shall be set off against any fees payable by the transferee company on its authorized capital subsequent to the amalgamation. Therefore, remaining fee, if any after setting off the fees already paid by the transferor company on its authorized capital, must be paid by the trans- feree company on the increased authorized capital subsequent to amalgamation.

In so far as observations made in paragraph 2(b)(ii) of the Report of the Regional Director is concerned, As per provi- sions of section 232(3)(i) of the Companies Act, 2013, the Transferee Company confirms that on dissolution of the transferor companies, the fee, if any, paid by the transferor company on its authorized capital

shall be set off against any fees payable by the transferee company on its authorized capital subsequent to the amal- gamation. Further, post-merger and addition of Authorized Share Capital of the Transferor Compa- nies with the Transferee Company there won’t be further increase in the authorized share capital.

2(a)(ii)(c)

(c) Interest of creditors should be protected.

The Scheme does not en- visage any compromise or arrangement with Creditors as the present Scheme is under section 230(1)(b). of the Compa- nies Act 2013 and there- fore interest of the Credi- tors is protected.

2(b)

Transferee company should undertake to comply with the provisions of section 232(3)(i) of the Companies Act, 2013 through appropri- ate affirmation in respect of fees payable by Transferee Company for increase of share capital on account of merger of transfer of companies.

In so far as observations made in paragraph 2(b) of the Report of the Regional Director is con- cerned, the Transferee

Company undertakes to comply with the provi- sions of section 232(3)(i) of the Companies Act, 2013.

2(c)

In compliance of Accounting Standard-14 or IND-AS 103, as may be applicable, the trans- feree company shall pass such accounting en- tries which are necessary in connection with the scheme to comply with other applicable Accounting Standards including AS-5 or IND AS-8 etc.

In so far as observation made in paragraph 2(c) of the Report of the Re- gional Director is con- cerned, the Transferee Company undertakes to comply with relevant Ac- counting Standard-14 or IND-AS 103, as may be applicable, and that the transferee company shall pass such accounting entries which are neces- sary in connection with the scheme to comply with other applicable Ac- counting Standards in- cluding AS-5 or IND AS- 8 etc.

2(d)

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

In so far as observations made in paragraph 2(d) of the Report of the Re- gional Director is con- cerned, the Petitioners confirm that the Scheme attached to the company application and petition is same and that there is no deviation.

2(e)

The Petitioner Companies 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 Amal- gamation or arrangement. Further, the ap- proval of the scheme by the Hon'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 shall be binding on the petitioner companies concerned.

The Petitioners confirm that the Petitioners have given notices to all the applicable Regulatory authorities and have filed necessary affidavit of compliance.

2(f)

As per Definition of the Scheme,

"Appointed Date" means October 1, 2021 or such other date as the National Company Law Tribunal (Tribunal) or other competent author- ity may otherwise direct/ fix.

“The Effective Date” means the last of the date on which certified copies of the Order(s) of the NCLT under section 230-232 of the Act sanc- tioning the Scheme are filed by the Transferor Companies and Transferee Company with the respective jurisdictional of Registrar of Com- panies. Any references in this Scheme to the “words” date of “coming into effect of this Scheme” or “upon the Scheme becoming effec- tive” or “upon the Scheme coming into effect” shall mean the Effective Date.

The Petitioners may be asked to comply with the requirements as clarified vide circular no. F.No. 7/12/2019/CL-I dated 21.08.2019 issued by the Ministry of Corporate Affairs.

So far as observations made in paragraph 2(f) of the Report of the Re- gional Director is con- cerned, Petitioners con- firm that the Appointed date fixed under the scheme is 1st October 2021 which is in compli- ance of Circular no. F. No. 7/12/2019/CL-I dated 21.08.2019 issued by the Ministry of Corpo- rate Affairs.

2(g)

Petitioner Companies shall undertake to com- ply with the directions of Income tax depart- ment, if any.

The Transferee Company undertakes to comply with the direction of the Income tax department and all tax issues arising out of Scheme will be met and answered in accord- ance with law.

2(h)

Petitioner Companies shall undertake to comply with the directions of the concerned sectoral Regulatory, if any.

Petitioners undertake to comply with the direc- tions of the concerned sectoral Regulatory, if any to the extent applica- ble.

2(i)

Petitioner Companies engaged in the business of development of Infrastructure Projects; hence Petitioner Companies shall undertake to comply with rules, regulations, guidelines of RERA.

So far as the observation in paragraph 2(i), the Pe- titioner Companies sub- mit that currently there are no projects which re- quire registration with RERA therefore provi- sions of RERA are not applicable.

2(j)

Transferor Company No. 3 is registered with ROC Delhi, and Transferor Company No. 4 is registered with ROC Telangana, hence ap- proval from Hon’ble

NCLT Delhi Bench and Telangana Bench shall be obtained.

So far as the observation in paragraph 2(j), the Pe- titioner Companies con- firm that approval of the Scheme by this Hon'ble Tribunal shall be subject to obtaining similar ap- proval from the Hon'ble Tribunal of Delhi and Telangana.

2(k)

As per shareholding pattern as on 31.03.2022 submitted by the Petitioner company, details of shareholding is as follows:-

In so far as observations made in paragraph 2(k) of the Report of the Re- gional Director is con- cerned, the Petitioners have filed Form BEN-2.

Sr. No

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Peti- tioner Company

Name of Share-

holder

% of shares held

Re- mark

1

Essel Air- port In-

frastruc-

Edi- sons

99.99

%

No Form

BEN-2

ture Pri-

vate Lim- ited

In- frapow er & Multi- ven- tures Private

Lim- ited

has been filed by any of the Peti- tioner Com- panies as per rec- ords avail- able at MCA2

1 Por- tal

2

Raipur Water Supply Private Limited

3

Edisons In- frapower & Multi- ventures Private Limited

Essel Media Ven- tures Private Lim-

ited

20%

Adilin k Infra & Mul- tiven- tures Private Lim-

ited

16%

Agrani Utility Works Private Lim-

ited

16%

Essel Realty Devel- opers Private Lim-

ited

16%

Konti In- frapow

er &

16%

Multi- ven- tures Private Lim-

ited

Essel Inter- na- tional Lim-

ited

16%

No Form BEN-2 has been filed by any of the Petitioner Companies as per records available at MCA21 Portal, hence Petitioner Companies shall undertake to comply with the provisions of section 90 of Companies Act, 2013 r/w. Companies (Significant Beneficial Owners) Amendment Rules, 2019, thereunder and to file Form BEN-2 for declaring name of the significant beneficial owner with concerned ROC.

2(l)

The Auditor in his report for FY2021 in respect of transferee company namely EDISONS IN- FRAPOWER & MULTIVENTURES PRIVATE

LIMITED stated that as per information and explanations given by the management, rec- ords produce, to the best of knowledge and belief, I state that there are no loans taken from Financial institutions or banks during the year under audit. The company has not defaulted in repayment of dues to debenture holders. However, the dispute with Religare Finvest Ltd, as referred in Note no 23A & B of the financial statements and the Arbitration proceedings filed against the company by ZEE Entertainment Enterprises Ltd, continues, pending hearing and disposal. The Company had filed an application under Section 16 of Arbitration and Conciliation Act.1996, on which the Hon'ble Arbitral Tribunal adjudi- cated the matter vide its order dated 22.10.2020. RFL has filed an appeal against the order of the Hon'ble Tribunal in the Hon'ble Delhi High Court. The appeal is pend- ing for hearing and hence the matter is sub- judice.

Therefore, the Hon'ble NCLT may take note of the same by referring Para No 216 and 232 of the Petition to protect the interest of creditors in the matter.

Petitioners submit that all legal proceedings against the Transferee Company will continue post sanctioning of scheme and will be de- cided in accordance with law.

11. Mr. Tushar Wagh, Deputy Director, Office of Regional Director (WR), Mumbai appeared on the date of hearing and submits that above explanations and clarifications given by the Petitioners in rejoinder are satisfactory and they have no further objection to the Scheme.

12. The Official Liquidator has filed his report dated. 23rd June 2023, wherein the Official Liquidator has stated that the company's net worth is negative and the company in its explanation to its auditor qualification has stated that the Holding Company Jayneer Infrapower & Multiventures Private Limited (Holding Company during FY 2019-20 & 2020-21 whereas Edisons Infrapower & Multiventures Private Limited is holding company from FY 2021-22 onwards) has indicated its intention to extend the required financial support to maintain the Company as going concern. The Transferor Companies are going to be dissolved without winding up and merge with the Transferee Company. The Official Liquidator submits that the company to explain the rational for merging loss making company with that of a Transferee Company.

13. In response to the observation made by the Official liquidator, the Petitioners have filed reply dated 20th October 2023 to the Report of Official Liquidator and stated that the Petitioners have in pursuance of order dated 17th October 2022 passed in CA No 14 of 2022 convened meeting of the unsecured creditors of the second Petitioner Company. The scheme was approved by 100% of the unsecured creditors present and voted in favour of the scheme. Further there are no secured creditors in the Petitioner Companies. The Scheme was approved by

more than 90% of the unsecured creditors of the First Petitioner Company and state that there is nothing in the Companies Act 2013 envisaging only Companies with positive net worth can undertake merger and in the absence of express prohibition the Companies with negative net worth can undertake merger.

14. The clarifications and undertaking given by the Petitioners are found to be acceptable to this Tribunal. Further the First Petitioner Company, Second Petitioner Company be ordered to be dissolved without winding up by the Tribunal.

15. From the material on record, the Scheme appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy considering that no objection has so far been received from any authority or creditors or members or any other stakeholders.

16. The Learned Counsel for the Petitioner Companies submits that as the Transferor Company 1 and Transferor Company 2 are the Wholly owned Subsidiary of the Transferee Company, no Consideration shall be payable pursuant to the Merger by Absorption of Transferor Company 1 and Transferor Company 2 with Transferee Company and the shares held by Transferee Company in the Transferor Company 1 and Transferor Company 2 shall stand cancelled without any further act, application or deed.

17. Since all the requisite statutory compliances have been fulfilled, C.P. (CAA) / 21 (MB) / 2023 filed by the Petitioner Companies is made absolute in terms of prayer clauses of the said Company Scheme Petition.

18. The Scheme is sanctioned hereby, and the Appointed Date of the scheme is opening business hours of 1st October, 2021.

19. The Petitioner Companies are directed to file a certified copy of this Order along with the copy of Scheme annexed to the additional affidavit dated 12th September 2023 with the concerned Registrar of Companies, electronically in e-form INC-28 within 90 days from the date of receipt of the Order duly certified by the designated Registrar of this Tribunal. The Scheme will become effective on filing of the copy of this order with the concerned Registrar of Companies.

20. The Petitioner Companies shall lodge a copy of this Order along with the copy of Scheme annexed to the additional affidavit dated 12th September 2023 duly certified by the Designated Registrar, of this Tribunal, with the concerned Superintendent of Stamps for the purpose of adjudication of stamp duty payable, if any, within a period of 60 working days from the date of the receipt of the certified Order from the Registry of this Tribunal.

21. All concerned regulatory authorities to act on a copy of this Order along with Scheme duly certified by the Designated Registrar of this Tribunal, Mumbai Bench.

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

23. Ordered accordingly.

24. In conclusion, C.P. (CAA) /21/(MB)/2023 is allowed.