(2021) 02 NCLT CK 0123

In the National Company Law Tribunal

Case No : Company Petition (CAA) No. 968/MB-I Of 2020, Company Application (CAA) No. 3752/MB-I Of 2019

Essence Landmarks Private Limited And Ors. Vs

Date of Decision : 11-02-2021

Acts Referred:

Companies Act, 2013 — Section 68, 73, 129, 134(3)(f), 185, 230, 231, 232, 232(3)(i)
Companies (Acceptance Of Deposit) Rules, 2014 — Rule 2(1)(c)(xii)(b)

Citation : (2021) 02 NCLT CK 0123

Hon'ble Judges : Janab Mohammed Ajmal, J;V. Nallasenapathy, Member (Technical)

Bench : Division Bench

Advocate : Dr. S K Jain, Yahya Batatawala, Rupa Sutar

Final Decision : Allowed

Judgement

1. The sanction of the Tribunal is sought under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 (the Act) and the Rules framed thereunder for the Scheme of Amalgamation (the Scheme) of Essence Landmarks Private Limited, Essence Retail Ventures Private Company with Rajkumar Estate Developers Private Limited.

2. We have heard the learned counsel for the Petitioner Companies and the Deputy Director, WR, MCA, Mumbai. No objector has come before this Tribunal to oppose the Scheme and nor has any party controverted any averments made in the Petition to the Scheme.

3. The Board of Directors of the Petitioner Companies have approved the Scheme in their respective Board meetings held on dated 6th November, 2019. The Appointed date fixed under the Scheme is 1st October, 2019.

4. The learned counsel for the Petitioner Companies stated that the Petitioner Company No.1 is presently carrying on business to acquire, undertake, promote, run, manage, own, lease, convert, commercialize, handle, operate, renovate, maintain, improve, furnish, recondition, hire, let on hire, develop, consolidate,

subdivide and organize, hotels, motels, restaurants, resorts, cafes taverns, refreshment rooms, eating house, rest house, tea and coffee houses, carters, boarding and lodging. The Petitioner Company No.2 is engaged in the business of Fasts food joints, restaurants, pubs, cafes, and deal in anything related to food and entertainment, products, sales, distributer & retail network for fast foods & soda dispensing in malls, shops, stores, & public attended places, manufacture of syrups and foods and other material as required for the above products processors, refiners, importers, exporters, traders, buyers, sellers, wholesalers, indenters, preservers, bottlers, types of readymade foods, catering services consignors, concessionaries or supply all kinds of foods and food products to hotels, motels, holiday resorts, at any function otherwise deal in food, confectionary, vegetables & non vegetable foods of all types frozen vegetables fruits, dairy products, consumable provision of every description for human or animal consumption edible food color and open franchise in India and abroad Distributors & depots for Expansion of above business activity.

The Petitioner Company No.3 is engaged in the business of to acquire, undertake, promote, run, manage, own, lease, convert, commercialize, handle, operate, renovate, maintain, improve, furnish, recondition, hire, let on hire, develop, consolidate, subdivide and organize, hotels, motels, restaurants, resorts, cafes taverns, refreshment rooms, eating house, rest house, tea and coffee houses, carters, boarding and lodging.

5. The rationale for the Scheme of Amalgamation of the Petitioner Companies is that the Shareholders of the Transferee Company are holding stake directly in the Transferor Companies and as the Transferor Companies and Transferee Company's business activities are similar and complement each other, and to achieve inter-alia economies of scale and ef?ciency, the merger of the Companies is being undertaken. The Amalgamation of the Transferor Companies with the Transferee Company would inter alia have the following bene?ts:

a. Greater integration and greater ?nancial strength and ?exibility for the amalgamated entity, which would result in maximizing overall Shareholder value, and will improve the competitive position of the combined entity.

b. Greater ef?ciency in cash management of the amalgamated entity, and unfettered access to cash ?ow generated by the combined business which can be deployed more ef?ciently to fund organic and inorganic growth opportunities, to maximize Shareholder value.

c. Improved organizational capability and leadership, arising from the pooling of human capital who have the diverse skills, talent and vast experience to compete successfully in an increasingly competitive industry.

d. Greater access by the amalgamated company to different market segments in the conduct of its business.

e. Cost savings are expected to ?ow from more focused operational efforts, rationalization, standardization and simpli?cation of business processes, and the elimination of duplication, and rationalization of administrative expenses.

f. Achieving economies of scale.

6. The Company Petition is filed in consonance with sections 230 to 232 of the Act along with the Order dated 12th March, 2020 passed in the C.A.(CAA) 3752 of 2019 by the Tribunal.

7. The learned counsel for the Petitioner Companies further stated that the Petitioner Companies have complied with all the requirements as per directions of this Tribunal and have filed necessary Affidavits of compliance before the Tribunal. Moreover, the Petitioner Companies undertake to comply with all statutory/regulatory requirements, if any, as required under the Act and the Rules made thereunder. The undertaking given by the Petitioners is accepted.

8. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, has filed his Report dated 15th December 2020, inter-alia stating therein that save and except as stated in para IV (a) to (n) of the Report, the Scheme is not prejudicial to the interest of shareholders and public. In response to the observations made by the Regional Director, the Petitioner Companies have also given necessary clarifications and undertakings vide their reply dated 25th January 2021. In response to the Reply of the Petitioner Companies, the Regional Director has filed his Supplementary Report dated 1st February 2021. The observations made by the Regional Director and the clarifications and undertakings given by the Petitioner Companies and the observations of the Regional Director in the Supplementary Report and the response of the Petitioner Companies is summarized in the table below:

Sr.

No. Para No. (IV)

RD Report /Observations dated 15th December, 2020

Response of the Petitioner Companies dated 25th January, 2021

Observation of RD in Supplementary Report dated 1st

February, 2021

Response of the petitioner Companies to the Supplementary Report

(a)

In 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) etc.

So far as the observation in paragraph IV (a) of the Report of the Regional Director is concerned, the Petitioner Companies submit that in addition to

Compliance of AS-14, the Petitioner Companies shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards.

Reply of the petitioner Companies appears to be satisfactory.

(b)

As per Definition of the Scheme.

"The Appointed Date" For the purpose of this Scheme and for Income Tax Act, 1961, the "Appointed Date" means the open of business hours on 1st October, 2019; "Effective Date" mean the last of the dates on which certified or authenticated copies of the Order of the National Company Law Tribunal sanctioning the Scheme are filed with the Registrar of Company by the Transferor Company and by the Transferee Company. Any reference in the Scheme to the date of "coming into

effect of this Scheme" or "effectiveness of the

Scheme" or "Scheme taking effect" shall mean the Effective Date.

Further, the petitioners may be asked to comply with the requirements and clarified vide circular no. F. No. 7/12/2019/CL-1 dated 21.08.2019 issued by the ministry of Corporate

Affairs.

So far as the observation in paragraph IV

(b) of the Report of the Regional Director is concerned, the Petitioner Companies submit that the Appointed Date will be open of business hours on 1st October, 2019. The Petitioner Companies has complied with the requirements as envisaged in Circular No.: F.No.7/12/2019/CL -I dated 21/08/2019 issued by Ministry of Corporate Affairs.

Reply of the petitioner Companies appears to be satisfactory.

(c)

Petitioner Company have to undertake to comply with Section 232(3)(i) of the Companies Act, 2013, where the Transferor Company is dissolved, 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 Authorised Capital shall be set off against any fees payable by the Transferee Company on its Authorised Capital subsequent to the Amalgamation and therefore, Petitioners to affirm that they

comply to provisions of the Section.

So far as the observation in paragraph IV (c) of the Report of the Regional Director is concerned, Petitioner Companies hereby undertake to comply with

Section 232(3)(i) of the Companies Act, 2013, where the Transferor Company is dissolved, 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 subsequent to the Amalgamation and therefore, Petitioner Companies affirm to comply with the provisions of this Section.

Reply of the petitioner Companies appears to be satisfactory.

(d)

ROC, Mumbai Report dated 27.11.2020 has inter alia mentioned that there are no prosecution, no technical scrutiny, no inquiry, no inspection, no complaint are pending.

Further mentioned that:- Interest of the Creditor shall be protected.

Petitioner Companies have to undertake to Certify the

same.

So far as the observation in paragraph IV (d) of the Report of Regional Director is concerned, the Petitioner Companies undertake to protect the interest of the Creditors of the Transferor and Transferee Companies.

Reply of the petitioner Companies appears to be satisfactory.

(e)

As per Clause 'C'-Rational

for the Scheme- it is

mentioned that Transferee Company is holding stake directly in the Transferor Companies. However, as per Shareholding pattern of Transferor Companies under Clause 2 of Schemes Transferee Company is not shown as Shareholder of the Transferor Companies. The Scheme to that effect contains misstatement. Petitioner Company to place on record full facts.

So far as the observation in paragraph IV (e) of the Report of the Regional Director is concerned, the Petitioner Companies hereby submit that there has been inadvertent error in Clause C- Rationale for the Scheme. It is to be read as, "Shareholders of the Transferee Company is holding stake directly in the Transferor Companies." The Petitioner Companies submit that there no misstatement but mere inadvertence on the part of the Petitioner Companies in drafting the scheme. The Petitioner Companies hereby request the Hon'ble Regional Director to kindly overlook the inadvertent mistake.

Petitioner

has admitted

the error in the scheme wrt the

rationale. Hence, the petitioner may be directed to

file the modified scheme with appropriate corrections, including other observations made in this report.

It is humbly

submitted that the

Petitioner Companies are

closely held family Companies.

There are

common set of Shareholders in all three (3) Companies. Mere inadvertent error in mentioning the word

"Shareholders" in the Scheme does not in any manner cause any prejudice to the interest of shareholders or creditors. Hence, modification of the scheme with appropriate

corrections is not required.

(f)

As per Clause 10-Consideration of Amalgamation of Scheme in 4th Para of said clause, it is proposed that the Board of Directors of the Transferee Company shall consolidate all fractional entitlements to the Shareholder of Transferor Companies. This amounts to Buy Back of Shares and hence, the Applicant is required to comply with provisions of Section 68 of the Companies Act, 2013.

So far as the observation in paragraph IV (f) of the Report of the Regional Director is concerned, the Petitioner Companies hereby submit the Petitioner Companies undertake to comply with provisions of Section 68 of the Companies Act, 2013 as and when required.

Since the company has admitted, the petition needs to be made with reference to Section 68

of the

Companies Act, 2013

also. Hence, the scheme and title of the scheme

may be corrected.

It is humbly submitted that there will be no requirement of consolidation of fractional entitlements to the Shareholders of the Transferor Companies. As per Share

Exchange Ratio, Shareholders of the First

Transferor Company will be allotted Equity Shares in the

Transferee Company, Fully

Paid-Up Share in the ratio of 1 Equity Shares of Re.1/- each in the Transferee Company for every 2 Equity Shares of Rs.10/- each held as Fully Paid-Up. Accordingly, the Transferee Company will issue in aggregate 17,50,000 Equity Shares of Re. 1/- each to the Shareholders of the Transferor Company No. 1.

As per Share Exchange Ratio, Shareholders of the Second Transferor Company will be allotted Equity Shares in the Transferee Company, Fully Paid-Up in the ratio of 1 Equity Share of Re. 1/- each in the Transferee Company for every 41 Equity Shares of Re.1/- each held as Fully Paid-Up Second Transferor Company.

Accordingly, the Transferee

Company will issue in aggregate 14,63,415 Equity Shares of Re. 1/- each to the Shareholders of the Transferor Company No. 2 which will not involve issue of any fractional entitlements.

Hence, there is no requirement for correction of scheme and title

of the Company Petition.

(g)

It is observed from the financial statement of Transferor- 1 for year 2017-

18 and 2018-19 that the auditor has made qualifications in his report dated 18/08/2018 and 29/07/2019 respectively. However, Board of Directors in its report dated 18/08/2018 and 29/07/2019 for FY 2017-18 and 2018-19 respectively failed to give explanation or comments on auditor's qualification/ reservation resulting into violation of Sec 134(3)(f) of Companies Act, 2013. The Petitioner Company to undertake to get the offence

compounded.

So far as the observation in paragraph IV (g) of the Report of the Regional Director is concerned, the Petitioner Companies hereby under to get the offence compounded for failure by the Transferor Company No. 1 in the year 2017-18 and 2018-19 for not giving explanation or comments on auditor's qualification/ reservation resulting into violation of Sec 134(3)(f) of Companies Act, 2013.

Reply of the petitioner Companies appears to be satisfactory.

(h)

It is observed from the financial statement of Transferor- 2 for year 2017- 18 that the auditor has made

qualified remark. The Company has granted

unsecured loans amounting to Rs.1,66,000/- to parties covered under Section

185 of the Companies Act, 2013 and therefore there is violation of provisions of the said section. The Petitioner Company to undertake to get the offence compounded.

So far as the observation in paragraph IV

(h) of the Report of the Regional Director is concerned, the Petitioner Companies hereby undertake to get the offence compounded for violation of Section 185

of the Companies Act, 2013.

Reply of the petitioner Companies appears to be satisfactory.

(i)

It is observed from the financial statement of Transferor- 1 for the year 2018-19 filed on MCA21 portal vide SRN H85970614 that the Company has failed to describe details of related party transaction as per AS 18 resulting into violation of Section 129 of the Companies Act with AS 18. The Petitioner Company to undertake to get the offence compounded.

So far as the observation in paragraph IV (i) of the Report of the Regional Director is concerned, the Petitioner Companies submit that the Transferor Company No. 1 for the year 2018-19 has described details of related party transaction as per AS 18. Copy of the relevant page of Financial Statement for 2018-19 is enclosed herewith.

The Petitioner be directed to give undertaking with regards to compliance with Section 73 of the Companies Act, 2013 r.w. Companies (Acceptance of Deposit) Rules, 2014. The Petitioner be also directed to give undertaking regarding accepting any legal obligation, if any in this matter.

It is submitted that Transferee Company had issued an Allotment letter dated 26/12/2012 for the proposed residential buildings being developed by Transferee Company whereby the Transferee Company had taken a sum of Rs.1,25,00,000/- towards payment on allotment letter and Rs.50,00,000/- before 31/01/2012. Hence, the said advance of Rs.1,75,00,000/- comes under exempted deposit as per Rule 2(1)(c)(xii)(b) of the Companies (Acceptance of Deposit) Rules, 2014 which is quoted as under: "(b) as advance, accounted for in any manner whatsoever, received in connection with consideration for property under an agreement or arrangement, provided that such advance is adjusted against the property in accordance with the terms of agreement or arrangement;"

Since, the Transferee Company failed to developed the proposed building against which said amount was received, the Transferee Company refunded the said amount of Rs. 1,75,00,000 in the year 2018-19. Therefore, compliance of Section 73 of the Companies Act, 2013 is not required to be carried out for said transaction

(j)

It is observed from the financial statement of Transferor- 1 for the year 2018-19 filed on MCA21

portal vide SRN H85970614 that the Company has failed

to disclose significant accounting policies as per AS 1 resulting into violation of Section 129 of the Companies Act with AS 1. The Petitioner Company to undertake to get the offence

compounded.

So far as the observation in paragraph IV (j) of the Report of the Regional Director is concerned, the Petitioner Companies submit that the Transferor Company No. 1 for the year 2018- 19 has disclosed the significant accounting policies as per AS 1. Copy of the relevant page of the Financial Statement for 2018-19 is enclosed herewith.

Reply of the petitioner Companies appears to be satisfactory.

(k)

It is observed from the financial statement of Transferor- 2 for the year 2017-18 that the auditor has made qualified remark regarding granting of unsecured loan by the Company to parties covered under Section 185 of the Companies Act, 2013 and irregular deposits of statutory dues. However, Board of Directors in its report dated 18/08/2018 failed to offer any comments on these qualifications by the auditor resulting into violation of Section 134(3)(f) of Companies Act, 2013. The Board of the Petitioner Company to undertake to get

the offence compounded.

So far as the observation in paragraph IV (k) of the Report of the Regional Director is concerned, the Petitioner Companies hereby undertake to get the offence compounded for failure by the Transferor Company No. 2 in the year 2017-18 for not giving explanation or comments on auditor's qualification/ reservation resulting into violation of Sec 134(3)(f) of Companies Act, 2013.

Reply of the petitioner Companies appears to be satisfactory.

(l)

It is observed from the financial statement of transferee company for FY 2017-18 that company has accepted loan of Rs.1,75,00,000/- from Firoz Rustom Mody. Applicant to explain compliance of provision of Sec 73 of the Companies Act, 2013 and Companies (Acceptance of Deposit) Rules, 2014.

So far as the observation in paragraph IV

(l) of the Report of the Regional Director is concerned, the Petitioner Companies submit that the Transferee Company had issued an Allotment letter dated

26/12/2012 for the proposed residential buildings being developed by Transferee Company whereby the Transferee Company had taken a sum of Rs.1,25,00,000/- towards payment on allotment letter and Rs.50,00,000/- before 31/01/2012. 2(1)(c)(xii)(b) Companies (Acceptance of Deposit) Rules, 2014. However, the Transferee Company could not complete the work of residential

buildings, hence the said amount of Rs.1,75,00,000/- was duly refunded in the year 2018-19 which is evident from the Balance Sheet. Copy of the Allotment Letter dated 26/12/2012 is enclosed

herewith.

Reply of the petitioner Companies appears to be satisfactory.

(m)

It is observed from the financial statement of Transferor- 1 for the year 2017-18 that the auditor has made qualified remark regarding deposit of statutory dues by the Company in auditors report dated 06/09/2018. However, Board of Directors failed to give its comments and explanation on auditors qualification in Board Report dated 06/09/2018 resulting into violation of Section 134(3)(f) of Companies Act, 2013. Similar violation is observed in Director Report dated 09/08/2019 for FY 2018-19. The Petitioner Company to undertake to get

the offence compounded.

So far as the observation in paragraph IV

(m) of the Report of the Regional Director is concerned, the Petitioner Companies hereby undertake to get the offence compounded for failure by the Transferee Company in the year 2017-18 for not giving explanation or comments on auditor's qualification/ reservation resulting into violation of Sec 134(3)(f) of Companies Act, 2013.

Reply of the petitioner Companies appears to be satisfactory.

(n)

It is observed from the financial statement of three applicant companies for the Financial year 2017-18, 2018-19 that the auditor has made qualified remark regarding about failure by the Company in depositing income tax, TDS & Service Tax dues. In this regards, comments of income tax department and GST department may be sought as deem fit.

So far as the observation in paragraph IV (n) of the Report of the Regional Director is concerned, the Petitioner Companies undertake to make payment of Income Tax and TDS as may be finally determined on completion of Appeals filed by the Petitioner Companies in ITAT. The Petitioner Companies undertake to pay any Service Tax Liability, if any found due.

Reply of the petitioner Companies appears to be satisfactory.

9. The observations made by the Regional Director and the clarifications and undertakings given by the Petitioner Companies have been verified and accepted.

10. The Official Liquidator has filed his report on 16th September, 2020 inter alia, stating therein that the affairs of the Transferor Companies have been conducted in a proper manner not prejudicial to the interest of the Shareholders of the Transferor Companies.

11. 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.

12. Since all the requisite statutory compliances have been fulfilled, C.P.(CAA) 968/MB/2020 is made absolute in terms of prayer made in the Petition. Hence ordered.

ORDER

The Petition be and the same is allowed subject to the following.

(i) The Scheme, with the Appointed Date fixed as 1st October, 2019 placed at Page Nos. 275-314 (Annexure - G) of the Company Petition is hereby sanctioned. It shall be binding on the Petitioner Companies and all concerned including their respective Shareholders, Secured Creditors and Unsecured Creditors/Trade Creditors and Employees.

(ii) The Transferor Companies be dissolved without being wound up.

(iii) The Registrar of this Tribunal shall issue certified copy of this Order along with the Scheme forthwith. Petitioners are directed to file a 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 the Order from the Registry.

(iv) The Petitioner Companies shall lodge a copy of this Order and the Scheme duly authenticated by the Registrar of this Tribunal, with the concerned Superintendent of Stamps within 60 days from the date of receipt of the Order, for the purpose of adjudication of stamp duty, if any payable.

(v) The Petitioner Companies shall comply with the undertakings given by then.

(vi) The Petitioner Companies shall within 15 days of receipt of this order, issue newspaper publications with respect to approval of the Scheme, in the same newspapers in which previous publications were issued.

(vii) The Petitioner Companies shall take all consequential and statutory steps required under the provisions of the Act in pursuance of the Scheme.

(viii) All concerned authorities to act on a copy of this Order along with Scheme duly authenticated by the Registrar of this Tribunal

(ix) Any person interested in the above matter shall be at liberty to apply to the Tribunal for any direction that may be necessary.