(2023) 03 NCLT CK 0008

In the National Company Law Tribunal

Case No : C.P. (CAA)/219/MB/2022 in C.A. (CAA)/217/MB/2022

HDFC Property Ventures Limited Vs

Date of Decision : 03-03-2023

Acts Referred:
Companies Act, 2013 — Section 90, 230, 230(5), 232, 232(3)(i), 232(6)

Citation : (2023) 03 NCLT CK 0008

Hon'ble Judges : Kuldip Kumar Kareer, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Sandeep Singhi, Rupa Sutar

Final Decision : Disposed Of

Judgement

Shyam Babu Gautam, Member Technical

1. The Bench is convened by videoconferencing.

2. Heard Learned Counsel appearing for the Petitioners and the representative of the Regional Director (Western Region). No objector has come before this Tribunal to oppose the Scheme, nor has any party controverted any averments made in the Petition.

3. This sanction is sought under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 by HDFC Property Ventures Limited (hereinafter referred to as the "First Transferor Company" or the "Petitioner No. 1", as the context may admit), HDFC Venture Capital Limited (hereinafter referred to as the "Second Transferor Company" or the "Petitioner No. 2", as the context may admit), HDFC Capital Advisors Limited (hereinafter referred to as the "Transferee Company" or the "Petitioner No. 3", as the context may admit) for sanctioning the Scheme of Amalgamation of the First Transferor Company and the Second Transferor Company (hereinafter together referred to as the "Transferor Companies") with the Transferee Company (hereinafter referred to as the "Scheme") pursuant to the provisions of Sections 230-232, and other relevant provisions of the Companies Act, 2013 (hereinafter referred to as the

“Act”).

4. The Learned Counsel for the Petitioners states that the Scheme, inter alia, provides for the (a) amalgamation of the Transferor Companies with the Transferee Company and the consequent dissolution of the Transferor Companies without being wound up; (b) issuance of new Equity Shares (as defined in the Scheme) by the Transferee Company to the respective equity shareholder(s) of the Transferor Companies as on the Record Date (as defined in the Scheme) in accordance with the respective Share Exchange Ratios (as defined in the Scheme); and (c) merger of the authorised share capital of the Transferor Companies with the authorised share capital of the Transferee Company, pursuant to Sections 230-232, and other applicable provisions of the Act, in the manner provided for in the Scheme and in compliance with the provisions of the Income Tax Act, 1961.

5. The Learned Counsel for the Petitioners states that the Transferor Companies are wholly-owned subsidiaries of Housing Development Finance Corporation Limited. The entire paid-up share capital of the respective Transferor Companies is held by Housing Development Finance Corporation Limited. The Transferee Company is subsidiary of Housing Development Finance Corporation Limited. Housing Development Finance Corporation Limited holds 88.23 per cent (as on December 31, 2022) of the paid-up share capital of the Transferee Company.

6. The Learned Counsel for the Petitioners states that First Transferor Company is registered with Securities and Exchange Board of India (hereinafter referred to as “SEBI”) as an investment advisor under the provisions of the Securities and Exchange Board of India (Investment Advisors) Regulations, 2013 (“IA Regulations”). The First Transferor Company provides investment advisory services, inter alios, to overseas asset management companies (“AMCs”). Such AMCs in turn manage off shore private equity funds that invest in companies engaged in the construction and development sector in India. The First Transferor Company also provides investment advisory services to HDFC Investment Trust and HDFC Investment Trust II, which are domestic trusts. The said trusts also make investments in companies engaged in construction and development sector in India. Further, the First Transferor Company is the investment manager of HDFC India Real Estate Fund III (“HIREF III”), which is a Category II Alternative Investment Fund registered with SEBI under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 (“AIF Regulations”). HIREF III has not raised any funds. Since, HIREF III is not undertaking activities as an AIF, has been wound-up and consequently, an application was submitted to SEBI for surrendering the registration of HIREF III, under the AIF Regulations. Subsequently, with effect from November 24, 2022, SEBI has cancelled the registration certificate of HIREF III.

7. The Second Transferor Company is the investment manager to HDFC Property Fund (“HPF”). HPF is registered as a venture capital fund with the SEBI. HPF had

two schemes, viz. (a) HDFC India Real Estate Fund; and (b) HDFC IT Corridor Fund. Both the Schemes of HPF have been closed and the units of the Investors have been redeemed. HPF is no longer undertaking activities as a venture capital and the same has been intimated to SEBI.

8. The Transferee Company is the investment manager, inter alia, of

(a) HDFC Capital Affordable Real Estate Fund 1 ("HCARE 1");

(b) HDFC Capital Affordable Real Estate Fund 2 ("HCARE 2");

(c) HDFC Capital Affordable Real Estate Fund 3, the first scheme of HDFC Capital AIF-3 ("HDFC Capital AIF-3"); and (d) HDFC Build Tech Fund ("HBT Fund"). HCARE 1, HCARE 2, HDFC Capital AIF-3 and HBT Fund are registered with SEBI as Category II Alternative Investments Funds under the provisions of the AIF Regulations. The fund objective of HCARE 1, HCARE 2 and HDFC Capital AIF-3 is to invest in affordable and mid-income residential projects in India. The fund objective of HBT Fund is to invest in entities engaged in or proposing to engage in technology related interventions in real estate and allied sectors and having technology solutions in certain identified areas. The Transferee Company has also launched HDFC Affordable Real Estate and Technology Program ("H@ART"), aimed at creating efficiencies and lowering costs in each part of the development cycle for the real estate project. H@ART seeks to monitor, partner and invest in real estate technology companies that drive innovation and efficiencies within the affordable housing ecosystem.

9. The Learned Counsel for the Petitioners states that the Board of Directors of the First Transferor Company, Second Transferor Company and the Transferee Company in their respective meetings all held on August 25, 2022 have approved the proposed Scheme.

10. The Learned Counsel has stated that the Petitioners would obtain/cause to be obtained all such other approvals from the Governmental Authority as may be required under applicable law.

11. The Learned Counsel for the Petitioners states that the rationale and benefits of the Scheme are as under:

a. The amalgamation of the Transferor Companies with the Transferee Company will result in simplification, streamlining and optimization of the group structure and efficient administration.

b. The amalgamation will result in enhancement of shareholder value accruing from consolidation of business operations resulting in economies of scales, reduction in overheads including administrative, managerial and other expenditure, operational rationalization, organizational efficiency and optimal utilization of resources.

c. Synergy of operations will be achieved, resulting in optimisation of the common facilities such as manpower, office space, etc. Other infrastructure could also be better utilized and duplication of facilities could be avoided resulting in optimum use of facilities.

d. The amalgamation will result in a significant reduction in multiplicity of legal and regulatory compliances required at present to be carried out by the Transferor Companies and the Transferee Company.

e. The amalgamation will result in greater efficiency in cash management and unfettered access to cash flow generated by the combined business, which can be deployed more efficiently, to maximize shareholder value.

12. The Petitioners had filed the Joint Company Application before this Tribunal being C.A. (CAA)/217/MB/2022 for the following:

FIRST TRANSFEROR COMPANY

(a) Dispensation of the meeting of the Equity Shareholders of the First Transferor Company;

(b) Dispensation of the meeting of the sole Secured Creditor of the First Transferor Company;

SECOND TRANSFEROR COMPANY

(c) Dispensation of the meeting of the Equity Shareholders of the Second Transferor Company; and

TRANSFEREE COMPANY

(d) Dispensation of the meeting of the Equity Shareholders of the Transferee Company.

13. This Tribunal by its order dated October 14, 2022, inter alia:

(a) Dispensed with the meeting of the Equity Shareholders of the First Transferor Company;

(b) Dispensed with the meeting of the sole Secured Creditor of the First Transferor Company;

(c) Dispensed with the meeting of the Equity Shareholders of the Second Transferor Company; and

(d) Dispensed with the meeting of the Equity Shareholders of the Transferee Company.

14. This Tribunal further directed the said Petitioners to send notices under Section 230(5) of the Act to:

FIRST TRANSFEROR COMPANY:

(i) Central Government through the Regional Director, Western Region, Ministry of Corporate Affairs;

(ii) Registrar of Companies, Mumbai;

(iii) concerned Income-Tax Authorities;

(iv) GST Authorities;

(v) Official Liquidator; and

(vi) SEBI

SECOND TRANSFEROR COMPANY:

(i) Central Government through the Regional Director, Western Region, Ministry of Corporate Affairs;

(ii) Registrar of Companies, Mumbai;

(iii) concerned Income-Tax Authorities;

(iv) GST Authorities;

(v) Official Liquidator; and

(vi) SEBI

TRANSFEREE COMPANY:

(i) Central Government through the Regional Director, Western Region, Ministry of Corporate Affairs;

(ii) Registrar of Companies, Mumbai;

(iii) concerned Income-Tax Authorities;

(iv) GST Authorities; and

(v) SEBI

15. The Learned Counsel for the Petitioners states that the Petitioners have complied with all the requirements as per the directions of this Tribunal and have filed the necessary affidavits of compliance with this Tribunal all dated October 19, 2022.

16. Thereafter, the Company Petition is filed on October 22, 2022 in consonance with Sections 230 to 232 of the Act.

17. In compliance with the directions of this Tribunal dated December 16, 2022, the Petitioner Companies have filed the affidavits of compliance all dated December 26, 2022.

18. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, has filed its report dated December 2, 2022 setting out his observations on the Scheme as stated in Paragraph 2 (a) to 2 (l) of the Report. In response to the observations made by the Regional Director, the Petitioner Companies have given necessary clarifications and undertakings by way of an Affidavit dated

December 9, 2022. The observations made by the Regional Director and the clarifications and undertakings given by the Petitioner Companies are summarised in the table below:

No. of Para

Observations in the Report

Response of the Petitioner Companies

2 a)

That on examination of the Report of the Registrar of the Companies, Mumbai dated 16.11.2022 for Petitioner Companies (Annexed as Annexure A-1) that the Petitioner Companies falls within the jurisdiction of ROC, Mumbai. It is submitted that no representation regarding the proposed scheme of Amalgamation has been received against the Petitioner Companies. Further, the Petitioner Companies has filed Financial Statements upto 31.03.2021.

The contents of Paragraph 2 a) are matter of record. (paragraph 3)

2 a) 1.

That the ROC Mumbai in his report dated 16.11.2022 has stated that No Inquiry, Investigations, Inspections, Prosecutions, Technical Scrutiny, Complaints are pending against the Petitioner Companies.

The contents of Paragraph 2 a) 1. are matter of record. (paragraph 3)

2 a) 2.

Interest of the Creditor should be protected.

The Scheme does not contemplate any

compromise or arrangement with the

creditors of any of the Petitioner Companies. The liability towards the creditors of any of the Petitioner Companies, if any, are neither being reduced nor being extinguished. In the circumstances, it is submitted that

interest of the creditors of each of the Petitioner Companies, if any, would in no way be affected by the Scheme. (paragraph 4)

2 a) 3.

2 c)

It is submitted that as per the provisions of 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 Authorized capital subsequent to the amalgamation. Therefore, remaining fee, if any after setting-off the fees already paid by the transferee company on the increased authorized capital subsequent to the amalgamation.

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

No fees would be payable on the enhanced authorized share capital of Petitioner No. 3. However, the Petitioner No. 3 shall comply with the provisions of Section 232(3)(i) of the Act and undertakes to pay necessary fees, if so required, in accordance with law. (paragraph 5)

2 d)

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

Petitioner No. 3 shall comply with IND AS 103 and IND AS 8 to the extent applicable to it.

(paragraph 6)

2 e)

The Hon'ble Tribunal may kindly direct the Petitioner Companies 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 no discrepancy, or no change is made.

Scheme annexed to C.A. (CAA)/217/MB/2022

and C.P.

(CAA)/219/MB/2022

are one and the same and there is no discrepancy or any change being made to the Scheme. (paragraph 7)

2 f)

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

Amalgamation or arrangement. Further, the approval 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.

Petitioner Companies have served Section 230(5) of the Act notices to the concerned

authorities as

directed by this Hon'ble Tribunal by its order dated October 14, 2022 passed in C.A. (CAA)/217/MB/2022.

Each of the Petitioner Companies have filed their respective Affidavit of Service showing compliance of directions issued by this Hon'ble Tribunal. The said Affidavits of Service by Petitioner No. 1, Petitioner No. 2 and Petitioner No. 3 are annexed to the Joint Company Scheme Petition at Exhibit "Y", Exhibit "Z" and Exhibit "AA", respectively. (paragraph 8)

2 g)

As per the Definition of the Scheme, "Appointed Date" means the Effective Date.

"Effective Date" means the date on which certified copies of the order of the Competent Authority are filed with the ROC after the last of the approvals or events specified under Clause 8 of Part III of the Scheme are satisfied or obtained or have occurred or

the requirement of which has

been waived (in writing) in accordance with the Scheme. References in the Scheme to "upon the Scheme becoming effective" or "coming into effect of the Scheme" or the "Scheme becoming effective" or "Scheme becomes effective" or "effectiveness of this Scheme" or likewise, means and refers to the Effective Date.

"Record Date" means to the date to be fixed by the Board of Directors of the Transferee Company, for the purpose of determining the shareholders of the respective Transferor Companies to whom the New Equity Shares will be allotted pursuant to this Scheme.

It is submitted that 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.

The Scheme is in compliance with Section 232(6) of the Act read with Circular August 21,

2019 under reference no.

F.No.7/12/2019/CL-

I, issued by the Ministry of

Corporate Affairs. (paragraph 9)

2 h)

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

Petitioner Companies shall comply with the directions, if any, issued by the concerned sectoral regulatory in accordance with law. (paragraph 10)

2 i)

Petitioner Companies shall undertake to comply with the directions of Income tax department, if any.

Petitioner Companies shall comply with the directions of the Income-Tax Department, if any, and in accordance with law.

(paragraph 11)

2 j)

The Petitioner Company No. 1 is engaged in the business of construction. The Hon'ble NCLT may kindly direct the Petitioner Company to obtain NOC from RERA, if applicable.

Petitioner No. 1 is not engaged in the business of

construction and

therefore the question of obtaining any approval or no- objection certificate from Real Estate Regulatory Authority under the provisions of The Real Estate (Regulation and Development) Act, 2016 does not arise. (paragraph 12)

2 k)

The Petitioner Companies have not filed Form BEN-2 for declaring the name of the significant beneficial owner for its following Corporate shareholder holding more than 10% shares in the Petitioner Companies, hence Petitioner Companies shall undertake to comply with the provisions of section 90 of the Companies

Act, 2013 read with Petitioner Companies, 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 file Form BEN-

2 for declaring name of the significant beneficial owner with concerned ROC:-

In BEN-2 form required to be filed us. 90 of the Companies Act, 2013, it is mandatory for each subsidiary company to file BEN-2 declaring name of holding company under Para No. 3 in 1s option of E form of Form BEN-2 which can be complied by reporting company (subsidiary company) without any objection/ exception.

Or/And,

Reporting company i.e. petitioner companies are also required to file declaration of significant beneficial owner in respect of its shareholders holding not less than 10% of the shares or voting rights or participants receiving not less than 10% of total distributable dividend or exercises significant influence or control or together with any direct holding as prescribed in the Rule 2(h) of Companies (Significant Beneficial Owners)

Rules, 2018" under para 3 of (2nd option) of BEN-2 e form.

As per MCA 21 record and financial statements Shareholding pattern of Petitioner Companies are as under: -

1. HDFC Property Ventures Limited

(a) Name of Shareholder

– Housing

Development Finance Corporation Limited

(b) % of Shareholding – 99.99%

(c) Remark – Form BEN- 2 has not filed by any of the applicant Companies

Housing Development Finance Corporation Limited (hereinafter referred to as "HDFC”) is the holding company of each of the Petitioner Companies. The equity shares issued by HDFC are widely

held and no individual holds 10%

or more of the issued shares or voting rights in HDFC. Further, no individual has the right to receive or participate in 10% or more of the total distributable dividend or any other distribution and that no individual exercises significant influence or control over HDFC. Thus, no individual can be termed as the significant beneficial owner of HDFC. It is further stated that none of the Petitioner Companies have

received any

declaration on beneficial ownership from any person in Form BEN-1. Accordingly, the requirement of filing Form BEN-2 is not applicable to the Petitioner Companies under the provisions of Section

90 of the Act read with the rules made thereunder. However, as an abundant caution, the Petitioner

Companies have filed

the requisite forms with the concerned Registrar of Companies. Annexed hereto and marked as Exhibit "A (Colly)" are the copies of the forms filed by the Petitioner Companies with the Registrar of

Companies along with the respective challans.

(paragraph 13)

2. HDFC Venture Capital Limited

(a) Name of Shareholder

– Housing

Development Finance Corporation Limited

(b) % of Shareholding – 99.99%

(c) Remark - Form BEN- 2 has not filed by any of the applicant Companies

3. HDFC Capital Advisors Limited

(a) Name of Shareholder

– Housing

Development Finance Corporation Limited

(b) % of Shareholding – 99.99%

(c) Remark - Form BEN- 2 has not filed by any of the applicant Companies

Thus, the above applicant Petitioner Companies may satisfy to Hon’ble NCLT on compliance of Section 90 of the Companies Act, 2013 read with the Rules made hereunder.

19. The Learned Representative for the Regional Director, on instructions from the office of the Regional Director, Ministry of Corporate Affairs, Western Region, Mumbai states that the Regional Director is satisfied with the undertakings given

by the Petitioners and states that the Scheme is otherwise not prejudicial to the interests of the shareholders/creditors and the public. The said undertakings are accepted.

20. The Official Liquidator, Mumbai, has filed its report dated December 29, 2022 setting out his observations on the Scheme as stated in Paragraph 1 to 6 of the Report. In response to the observations made by the Official Liquidator, the Petitioner Companies have given necessary clarifications by way of an Affidavit dated January 10, 2023. In the said Report it is, inter alia, mentioned that:

(i) the office of the Official Liquidator vide letter dated 2/12/2022 has called for certain information/documents from Transferor Companies and same was provided to the Official Liquidator vide letter dated 12/12/2022. On perusal of the reply received from the transferor companies in response to the aforesaid letter it appears that the affairs of the Transferor Companies have been conducted in proper manner. However, the first transferor company vide its reply dated 14/12/2022 has stated that an FIR has been filed against Mr. Naresh Nadkarni and others questioning the mortgage created by Gigaplex in favour of HDFC Limited. In this respect, applicant may satisfy the Hon be Tribunal that the registration of said FIR shall have no bearing upon dissolution of Transferor Companies without winding up under Section. 230 of Companies Act, 2013.

The Learned Counsel states and submits that the Scheme nowhere seeks to absolve any of the Petitioner Companies or their directors from any of their past obligations/liabilities much less absolve them from any proceedings including criminal proceedings, if any, pending against any of them. The proceedings including criminal proceedings if pending against any of the directors of the Petitioner No. 1 and/or the Petitioner No. 2, would continue against them even after the sanctioning of the Scheme by this Hon'ble Tribunal and the said proceedings, even after the sanction of the Scheme, would be adjudicated by the appropriate court as per the requirement of the prescribed law. Learned Counsel for the Petitioners stated that the registration of an FIR against one of the directors of the Petitioner No. 1 and the Petitioner No. 2 would have no bearing on the dissolution of the Petitioner No. 1 and the Petitioner No. 2, without winding-up, upon the Scheme becoming effective. The proceedings pursuant to the registration of the said FIR would continue against the said director of the Petitioner No. 1 and the Petitioner No. 2 even after the sanctioning of the Scheme and that the said director would have all the recourse in law, as may be available to him, to defend the same including for quashing of the said FIR.

21. From the material on record, the Scheme annexed as Exhibit M to the Company Scheme Petition appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy.

22. Since all the requisite statutory compliances have been fulfilled, C.P. (CAA) 219/MB/2022 is made absolute in terms of prayer made therein. Hence ordered.

23. The Petitioners are directed to lodge a copy of this Order and Scheme duly

certified by the Deputy Registrar, National Company Law Tribunal, Mumbai Bench, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable on the same, if any, within 60 (sixty) days from the date of the Scheme becoming effective in terms of the definition of "Effective Date" as defined under Clause 1 of Part I of the Scheme.

24. The Learned Counsel for the Petitioner Companies submits that Section 232(5) of the Act requires each of the Petitioner Companies to file a certified copy of the order with the Registrar of Companies for registration within 30 (thirty) days of the receipt of the certified copy of the order.

25. Parties are at liberty to apply to this Tribunal for any directions that may be necessary, including for an extension of the period for filing the certified copy of the order with the Registrar of Companies for registration.

26. All concerned regulatory authorities to act on a copy of this Order alongwith the Scheme duly authenticated by the Deputy Registrar, National Company Law Tribunal, Mumbai Bench.

