

(2016) 02 DEL CK 0142
In the Delhi High Court
Case No : Co. Pet. 342/2015

In Re: Betterways Finance and Leasing Private Limited and Others

Date of Decision : 24-02-2016

Acts Referred:

Citation : (2016) 02 DEL CK 0142

Hon'ble Judges : Rajiv Shakdher, J.

Bench : Single Bench

Advocate : Shally Bhasin and Rajeev Kumar, Advocates, for the Appellant;

Final Decision : Allowed

Judgement

Rajiv Shakdher, J.—1. This is a second motion petition filed jointly by Betterways Finance & Leasing Private Limited(i.e. petitioner no. 1/transferor company no. 1) and Lotte Trading & Allied Services Private Limited (i.e. petitioner no. 2/ transferor company no. 2) and Lotus Finance & Investments Private Limited (i.e. petitioner no. 3/ transferor company no. 3) and Nidopa Holdings Private Limited (i.e. petitioner no. 4/ transferor company no. 4) and Pantagon Holdings Private Limited (i.e. petitioner no. 5/ transferor company no. 5) and Utkrist Leasing Private Limited (i.e. petitioner no. 6/ transferor company no. 6) and Xenix Enterprises Private Limited (i.e. petitioner no. 7/ transferor company no. 7) alongwith Aggressor Leasing & Finance Private Limited (i.e. petitioner no. 8/ transferee company), under Section 391 and 394 of the Companies Act, 1956 (hereafter referred to as the Act) for approval of the scheme of amalgamation (hereafter referred to as the scheme).

2. The transferor companies and the transferee company, will hereafter, collectively be referred to as the petitioners. Furthermore, transferor company nos 1 to 7 will be conjointly referred as transferor companies.

3. The registered office of the petitioners are located within the territorial jurisdiction of this court.

4. The details with respect to petitioners" authorised, issued, subscribed and paid up capital have been set out in the petition.

5. The copies of Memorandum and Articles of Association as well as the profit and loss account and the balance sheet as on 31.03.2014 have been filed by the petitioners. Furthermore, transferor company nos. 1 to 7 will be conjointly referred to as transferor companies.

6. Copies of Board of Directors" (BOD) resolution of even date i.e. 10.03.2015, concerning the petitioners, whereby, the scheme has been approved, are filed with the petition.

7. The petitioners have averred that the amalgamation of the transferor companies with transferee company would create synergies of business and would give access to better financial resources, coupled with, concomitant enhancement in managerial efficiencies.

8. In terms of clause 4.2 of the scheme, the share exchange ratio will be:

i) 100 equity shares of Rs. 100/- each of the transferee company, credited as fully paid up, for every 490 fully paid up equity shares of Rs. 10/- each held in transferor company no. 1.

ii) 100 equity shares of Rs. 100/- each of the transferee company, credited as fully paid up, for every 181 fully paid up equity shares of Rs. 10/- each held in transferor company no. 2.

iii) 100 equity shares of Rs. 100/- each of the transferee company, credited as fully paid up, for every 199 fully paid up equity shares of Rs. 10/- each held in transferor company no. 3.

iv) 100 equity shares of Rs. 100/- each of the transferee company, credited as fully paid up, for every 220 fully paid up equity shares of Rs. 10/- each held in transferor company no. 4.

v) 100 equity shares of Rs. 100/- each of the transferee company, credited as fully paid up, for every 2,45,750 fully paid up equity shares of Rs. 10/- each held in transferor company no. 5.

vi) 100 equity shares of Rs. 100/- each of the transferee company, credited as fully paid up, for every 2,45,750 fully paid up equity shares of Rs. 100/- each held in transferor company no. 6.

vii) 100 equity shares of Rs. 100/- each of the transferee company, credited as fully paid up, for every 84 fully paid up equity shares of Rs. 100/- each held in transferor company no. 7.

8.1 Further, the non cumulative redeemable preference shares of all the transferor companies shall stand cancelled, upon the scheme becoming effective.

9. The petitioners have averred that there are no proceedings pending against them, under Sections 235 to 251 of the Act.

10. To recapitulate, the petitioners had, in the earlier round filed a petition (i.e.

the first motion), being: CA(M) No. 82/2015, whereby, a prayer had been made for dispensing with, the requirement of convening meetings of the equity shareholders, preference shareholders and unsecured creditors of the transferor companies no. 1 to 7 and the transferee company.

11. The court vide order dated 25.05.2015, having regard to the facts mentioned in the table below, dispensed with the requirement of convening meetings, as prayed.

11.1 The court, also noted, that since, all the petitioners did not have any secured creditors; therefore, there was no requirement to convene meetings with respect to that class of persons/entities.

12. The petitioners, thereafter, filed the instant petition (i.e. the second motion). Notice in this petition was issued on 16.07.2015. Notices were accepted on behalf of both the Regional Director (RD) and the Official Liquidator (OL).

12.1 Furthermore, citations were ordered to be published.

13. Citations were published in the Delhi Editions of Business Standard (English) and Business Standard (Hindi), on 17.09.2015. An affidavit dated 26.09.2015 demonstrating service of the petition on the OL and the RD and establishing publication of citation along with the newspaper extracts, was filed by the petitioners.

13.1 Further, the petitioners filed an affidavit dated 30.11.2015 wherein they have averred that subsequent to the publication of notice in the petition, they have not received any objection or complaint qua the scheme.

14. Pursuant thereto, the RD filed its affidavit/report under Section 394 A of the Act. In the affidavit/report, the RD relied upon the general circular bearing no. 53/2011, dated 26.07.2011 and, the circular bearing no. 1/2014, dated 15.01.2014.

14.1. Based on the aforementioned circulars, the RD, sent communication to the Registrar of Companies (ROC), and the Income Tax Department (I.T. Department) seeking their response to the scheme.

14.2. However, no comment/response of the I.T. Department has, apparently, been received in the matter.

14.3 A perusal of the affidavit of the RD would show that it has articulated, in nutshell, the following concerns:

(i) That the equity stake of the transferor companies and the transferee company is not the same. This objection is based on the communication received by the RD from the ROC.

(ii) That though the transferor company no. 1, 2, 3, 4 & 7 are carrying on business of a NBFC, there is no information given as to whether these entities are registered with the Reserve bank of India (in short the RBI) for the said

purpose. In this connection, it is also averred that there is no indication as to whether or not a no-objection has been received from the RBI with respect to the scheme propounded by the petitioners.

14.4 The petitioners, on the other hand, in their response to the concerns articulated by the RD have given the following answers. It is stated by the petitioners that all transferor companies save and except transferor company no. 5 (i.e. Pentagon Holdings Pvt. Ltd.), are primarily engaged in the business of acquisition and controlling equity stake in group companies. It is thus averred that the main source of income of these companies is the dividend received from such investors. The petitioners have further averred that in so far as transferor company no. 5 i.e. Pentagon Holdings Pvt. Ltd. is concerned, it is primarily engaged in the real estate business and, therefore, derives its income largely from the brokerage and/or commission etc. the petitioners have thus indicated that, as provided in clause 4.8 of the scheme, that w.e.f. the appended date i.e. 01.04.2014, the main objection clause of MOA of the transferee company would be altered and/or mandated to include the main objects of transferor company no. 5 i.e. Pentagon Holdings Pvt. Ltd. This amendment would thus enable the transferee company to continue with the business for which transferor company no. 5 was incorporated.

14.5 As regards the other objection, the petitioners have averred that the transferee company is registered as a NBFC with the RBI. For this purpose, the petitioners have alluded to a certificate of registration bearing no. 14.00543 dated 24.03.1998. Furthermore, it is averred that the RBI vide letter dated 16.01.2015 has granted its no-objection to the proposed amalgamation of the petitioners.

14.6 Having regard to the above, I am of the view that the concerns of the RD/ROC have been adequately taken care of by the petitioners.

15. The OL, in his report, inter alia, stated that he has not received any complaint qua the scheme from any interested person or party. The OL has also averred that on the basis of information supplied by the petitioners, it appears, the affairs of the transferor companies have been conducted in a manner which could not be construed as being prejudicial to either the interest of their members or the public at large. In other words, affairs of the transferor companies, according to the OL, do not fall foul of the provisions of the second proviso to Section 394(1) of the Act.

15.1 Thus, the OL, in effect, has conveyed that he has no objection to the scheme being sanctioned.

16. To be noted, the scheme in clause 3.2 (viii) provides that all employees of the transferor companies in service on the effective date, shall become the employees of the transferee company on such date without any break or interruption in service and on the basis of continuity of service, and on terms and conditions as to employment, not less favorable than those subsisting in the

transferor companies, as on the said date.

17. Accordingly, in view of the approval accorded to the scheme by the shareholders and creditors (i.e. unsecured) of the petitioners and, given the fact, that the RD and the OL, have not articulated any objections to the scheme, (save and except some concerns which have been adverted to hereinabove) in my opinion, there appears to be no impediment in the grant of sanction to the scheme. Consequently, sanction is granted to the scheme in terms of Section 391 and 394 of the Act. The petitioners will, however, comply with all statutory requirements, as mandated in law.

17.1 A certified copy of the order, sanctioning the scheme, will be filed with the ROC, within thirty (30) days of its receipt.

18. It is further directed that the petitioners will comply with the all provisions of the scheme and, in particular, those which are referred to hereinabove.

19. In any event, notwithstanding what is stated by the petitioners, the transferee company will file an undertaking with this court, within two weeks from today, stating therein, that it will take over and defray all liabilities of the transferor companies. It is also made clear, that the concerned statutory authority will be entitled to proceed against the transferee company qua any liability which it would have fastened on to the transferor companies for the relevant period, and that, which may arise on account of the scheme being sanctioned.

20. Notwithstanding the above, if there is any deficiency found or, any violation committed qua any enactment, statutory rule or regulation the sanction granted by this court to the scheme will not come in the way of any action being taken, albeit, in accordance with law, against the concerned persons, directors and officials of the petitioners.

21. In terms of the provisions of Section 391 and 394 of the Act, and in terms of clause 3.2(i,ii,iii) of the scheme, the entire undertaking, properties, rights and powers of the transferor companies will stand transferred to and / or vest in the transferor company without any further act or deed. Similarly, in terms of the scheme, all debts, liabilities, duties and obligations of the transferor companies shall stand transferred to the transferor company without any further act or deed.

22. More particularly, upon the scheme coming into effect, the transferor companies shall stand dissolved without having to follow the process of winding up.

23. It is made clear, that this order will not be construed as an order granting exemption, inter alia, from: payment of stamp duty or, taxes or, other penalties / charges, if any, payable, as per the relevant provisions of law.

24. Consequently, the petition is allowed and disposed of in the aforesaid terms.